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No. 12-17442

United States Court of Appeals
for the Ninth Circuit

WILLIAM A. GRAVEN, named as Will Graven,

Plaintiff - Appellant,

v.

DANIEL V. ESPOSITO; et al.,

Defendants - Appellees.

On Appeal from the United States District Court for the District of Arizona, Phoenix, Cause No. 2:11-cv-01228-SRB

DEFENDANTS/APPELLEES HOWARD D. AND JANE DOE BAUM'S ANSWERING BRIEF

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INTRODUCTION*

This case is one more in a series of Plaintiff Will Graven's efforts to sue over the fallout of his involvement in the development of municipal property in Victorville, California. Graven has previously (and unsuccessfully) sued in California Superior Court, Arizona bankruptcy court, and Arizona state court. California has declared him a vexatious litigant; the bankruptcy judge dismissed his bankruptcy filing as a "bad faith" litigation tactic.

Graven now targets Defendants Howard and Jane Doe Baum in yet another forum (this brief refers to the Baums collectively as the singular "**Baum**" because all pertinent facts relate to Howard Baum only). Baum, an attorney who participated in the negotiation and drafting of the agreement at the heart of this case, is regrettably not new to Graven's litigation tactics. Shortly after Graven turned his attention to Baum, Baum obtained from a California court an injunction that prohibits Graven from contacting or coming near Baum, Baum's family, or Baum's co-workers.

All of this troubling background helps answer the question, why did Graven bring this case in Arizona? It should not be here. In a forum selection clause, the agreement at the center of this case requires litigation to be in California, as do the

* Record citations are to the ECF docket number followed by the ECF page number, with additional page designations added when necessary to clarify a record citation. For the Court's convenience, hyperlinks to Westlaw and the ECF record have been added.

constitutional principles governing personal jurisdiction. The district court correctly dismissed Graven's Amended Complaint for both reasons.

On appeal, Graven raises no argument with regard to the forum selection clause. He has therefore abandoned any challenge to enforcement of the clause. And any such challenge would be futile: the clause covers Graven's claims and longstanding Supreme Court and Ninth Circuit precedent compels its enforcement.

Graven argues primarily that the district court erred because it did not give sufficient weight to his sworn statements and verified allegations. In particular, he asserts that the district court should have believed his avowals that Baum knew Graven was an Arizona resident and that therefore jurisdiction over Baum was proper. Graven's arguments badly misapprehend the law governing jurisdiction. The reality is that Graven cannot show that Baum had sufficient contacts with Arizona to justify forcing him to litigate here.

The district court did not err in granting Baum's motion to dismiss the amended complaint and this Court should affirm.

JURISDICTION

The district court had subject matter jurisdiction over the action pursuant to 28 U.S.C. § 1332 (diversity) because Graven is an Arizona resident and Baum is a California resident, and Defendant Esposito is a New Jersey resident.[1] The district

[1] *See* ECF 23 ¶¶ 103-04, 230-33

court determined that it lacked personal jurisdiction over Baum and dismissed the original Complaint in a January 9, 2012 order.[2] Graven filed an amended complaint.[3] In a May 11, 2012 order, the district court again dismissed for lack of personal jurisdiction over Baum or, in the alternative, because "Plaintiff agreed to an enforceable forum selection clause requiring his claims be brought in California."[4] Also on May 11, the district court denied several of Graven's other motions that sought relief due to what he described as "fraud on the court."[5] The clerk entered judgment the same day.[6] The district court later dismissed claims against the other defendants for other reasons.[7] The clerk entered judgment in favor of the remaining defendants on September 25, 2012.[8]

Despite filing a premature appeal, which this Court dismissed, Graven timely filed his notice of this appeal on October 16, 2012.[9] This Court has jurisdiction under 28 U.S.C. § 1291.

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[2] ECF 16.

[3] ECF 23.

[4] ECF 53.

[5] ECF 51; ECF 52; ECF 55.

[6] ECF 54.

[7] ECF 73.

[8] ECF 74.

[9] ECF 75 (Notice of Appeal).

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ISSUES PRESENTED

Graven's "Informal Brief" (the "**Opening Brief**") purports to raise three issues on appeal. The first two relate to Baum; the third relates to other parties. Graven's description of the issues on appeal is confusing but it is evident that Graven contends that the district court erred when it concluded that it could not exercise personal jurisdiction over Baum. In light of the orders entered in this case, the issues and cross-issues on appeal related to Baum are:

1. The district court dismissed the Amended Complaint for two independent reasons: because the court lacked jurisdiction over Baum and because the Settlement Agreement contains a mandatory, enforceable forum selection clause. Graven does not raise any issue or argument on appeal regarding the forum selection clause.
    a. Should the Court affirm the dismissal of Graven's claims because he abandoned any arguments concerning the enforceability of the forum selection clause?
    b. Alternatively, did the district court correctly dismiss the action against Baum because Graven agreed to litigate his claims in California?
2. Did the district court correctly dismiss the Amended Complaint for lack of jurisdiction over Baum?

3. Did the district court abuse its discretion when it denied Graven's other motions that raised various "fraud on the court" allegations?

4. Alternatively, did the district court correctly dismiss the action against Baum because (a) Graven's claims are time-barred, and (b) Graven's claims are precluded?

STATEMENT OF FACTS AND THE CASE

Graven's Opening Brief consists primarily of excerpts of the Amended Complaint that convey Graven's view of the merits of his underlying claims. Graven includes very little regarding the facts pertinent to the district court's orders from which he appeals, other than summary assertions that lack any citation or support in the record. The facts pertinent to the district court's ruling regarding personal jurisdiction are set forth in the district court's first dismissal order (*see* ECF 16 at 1-2) and are summarized below, along with other pertinent facts.

I. Graven, His California Businesses, and Other California Entities Enter Into the Settlement Agreement to Resolve Disputes Concerning Municipal Land in California

Graven is an Arizona resident who alleges he is the majority owner of two California companies, California Building Systems, Inc., and CBS Aviation Development, LLC (the "**CBS Companies**").[10] Graven also had interests in other

[10] ECF 23 at 16-18 ¶¶ 90, 104.

businesses, including Arizona Building Systems, Inc., an Arizona corporation.[11] At the time of the events alleged in the complaint, Defendant-Appellee Daniel Esposito was the general counsel for Graven's businesses and at some point was Graven's personal attorney.[12]

Graven alleges that in July 2005, the CBS Companies entered into an agreement with the City of Victorville, California and other authorities in California to build four hangars at an airport in Victorville.[13] Defendant/Appellee Howard Baum was an attorney employed at a law firm that represented the City of Victorville.[14]

At some point after the first two hangars were substantially completed, a dispute ensued between the City of Victorville and Graven.[15] By July 2006, the parties began discussing the sale of the CBS Companies' interests in the Victorville airport property and hangar development to Jeff Kinsell and his company KND Affiliates, LLC, a California company.[16] In August 2006, the City of Victorville, the Southern California Logistics Airport Authority, KND

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[11] *Id.*

[12] *Id.* at 9 ¶ 18.

[13] *Id.* at 42 ¶ 239, 44 ¶ 248; ECF 1-1 at 2.

[14] ECF 23 at 24 ¶¶ 133, 135; ECF 8-1 at 2.

[15] ECF 23 at 44-48 ¶¶ 252-66; ECF 1-1 at 2-3.

[16] ECF 23 at 48 ¶ 266; ECF 1-1 at 3.

Affiliates, LLC, Jeff Kinsell, the CBS Companies, and Graven entered a Mutual Release and Settlement Agreement (the **"Settlement Agreement"**).[17]

The Settlement Agreement is the focus of Graven's allegations.

II. The Settlement Agreement Called for a Series of Conditional Payments and Contains a Mandatory Forum Selection Clause

Under the Settlement Agreement, Graven and his CBS Companies (called the "**CBS Parties**" in the agreement) were to be paid an up-front payment of $3,000,000 for assigning interests in the hangars to the Kinsell entity, among other things.[18] Then, escrow funds would be used to pay claims of subcontractors who the CBS Companies still owed money (some of whom had filed lawsuits in California against California Building Systems), with excess escrow (up to $3,500,000) paid to the CBS Parties. Finally, funds were to be set aside to complete the hangar project, with any excess to be "distributed to the CBS Parties."[19]

The Agreement is governed under California law and includes the following forum selection clause: "Any legal action brought to interpret or enforce this

[17] ECF 1-1 at 37-54.

[18] *Id.* at 40-41 ¶¶ 5-6.

[19] *Id.* at 41-42 ¶¶ 7-12; *id.* at 47 (Ex. A to Settlement Agreement showing lawsuits filed).

AGREEMENT shall be brought in the Superior Court of California in and for the County of San Bernardino."[20]

The versions of the Settlement Agreement that Graven alleges he saw included the same forum selection clause. Significantly, Graven alleges that he viewed and signed a version of the Settlement Agreement containing the clause:

> Esposito and I then printed a hard copy in my offices in Phoenix (of the just received emailed agreement . . .) and I signed it, as an 'individual,' and for my companies.[21]

The version of the Settlement Agreement to which Graven is referring contains the forum selection clause.[22] The same is true of another version of the Settlement Agreement that Graven preferred.[23]

III. Graven Alleges That He Is Improperly Denied a Final Payment

According to Graven's allegations, the CBS Companies received the first two installments that he expected to receive.[24] Graven alleges that he did not

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[20] *Id.* at 44-45 ¶¶ 34-35.

[21] ECF 23 at 36-37 ¶ 207.

[22] ECF 1-7 at 90 ¶ 35 (Compl. Ex. 113); *id.* at 106-07 (Compl. Ex. 114) (signed version).

[23] ECF 23 at 65 ¶ 388 and ECF 1-5 at 52 (Compl. Ex. 86 referred to in ¶ 388).

[24] The Amended Complaint expressly states that the CBS Parties received the first installment ($3 Million). Although the Amended Complaint is silent on the second payment, the only reasonable interpretation of Graven's allegations is that he received the first two installments. ECF 23 at 9 ¶ 17, 39 ¶ 222, 73 ¶ 434 (alleging received "first installment of $3,000,000" and that claims stem from failure to receive expected "Third Installment").

"receiv[e] the Third Installment of $8,400,000 due on or before November 9, 2006."[25]

Much of the Amended Complaint describes an alleged conspiracy that Kinsell, Graven's colleagues, and Defendant Esposito hatched to push Graven out of the way and drive business to a new company Graven's colleagues had formed.[26] The allegations related to Baum, however, are as follows:

- The Settlement Agreement contains language in recital "F" and an exhibit entitled "Scope of Work" meant to describe the work and cost remaining to complete the hangars.[27]
- Graven contends that he advocated for and signed this version of the Settlement Agreement because it described the remaining work in a manner that fixed the cost to complete or otherwise "included the price protection for the cost to complete" (thus ensuring the CBS Companies would receive payment of what he labels the "Third Installment").[28]

[25] *Id.* at 9 ¶ 17.

[26] *See e.g.*, *id.* at 9-10 ¶¶14-22.

[27] ECF 1-1 at 3 ¶ F; *id.* at 17-18 ("Original Scope of Work Schedule").

[28] ECF 23 at 68-70 ¶ 409.

- On August 10, 2006, a few days before the Settlement Agreement was finally executed, Baum "appear[ed] for the first time" via e-mail to work on the Settlement Agreement.[29]
- In a series of e-mails between Baum and Esposito (as counsel for CBS Companies), Baum and Esposito changed the title of the exhibit from "Scope of Work" to "Scope of Services." Then, after Graven signed it, Baum replaced the "Scope of Work" exhibit with a "Scope of Services" document that described the work remaining without including "price protection."[30]
- As a result of this alteration and other alleged conspiracies, Graven did not receive the "Third Installment" payment he was expecting in November 2006.[31]

IV. Graven Sues Multiple Times for Losses Stemming from the Settlement Agreement, Eventually Targeting the Defendants in This Case

Shortly after November 2006, Graven began suing parties involved in the Settlement Agreement to recover the monies he contends he is owed and for damages he alleges he suffered from the conspiracies of his former colleagues.

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[29] *Id.* at 68.

[30] *E.g.*, *id.* at 67-72 ¶¶ 409-26, 74 ¶¶ 438-41.

[31] *Id.* at 9 ¶ 17, 74 ¶ 444.

On November 27, 2006, the CBS Companies and Graven sued Kinsell and his company.[32] Consistent with the terms of the forum selection clause, Graven brought his action in the state court sitting in San Bernardino county.[33] The suit alleges, among other things, that Kinsell failed to pay the CBS Companies funds that were supposed to be in excess of the cost to complete the construction, focusing on the same contractual provisions as are at issue in this case.[34] In September 2009, the court dismissed "Plaintiff Will Graven with prejudice due to his abuse of the discovery process and willful failure to comply with" court orders and eventually entered a judgment against Graven for monetary damages.[35]

In 2009, Graven filed for bankruptcy, apparently for the purpose of filing multiple adversary proceedings.[36] One of Graven's bankruptcy proceedings was against Ms. Laura Welch, a non-attorney employee of the same law firm where Baum worked.[37] Graven made essentially the same allegations against Welch as he now brings against Baum. In Graven's words, he "had found evidence of what he thought was Kinsell and a paralegal at Defendant Baum's law firm, Ms. Laura

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[32] ECF 8-2 at 2 (Judgment in case showing filing date); ECF 40-1 at 13-32 (First Amended Complaint in California case).

[33] *Id*. (showing court in caption).

[34] ECF 40-1 at 24-25 ¶¶ 49-50 (describing recital "F" and "Exhibit B").

[35] ECF 8-2 at 2-5.

[36] ECF 23 at 12 ¶¶ 45-47.

[37] *Id.* at 12-13 ¶¶ 47-49; ECF 8-1 at 2.

Welch, having conspired together to alter the FORGED AGREEMENT."[38] The bankruptcy court dismissed his case upon the "Court's finding that [Graven] filed [his] case in bad faith" as part of an "improper[] attempt[] to use the bankruptcy process as a litigation tactic."[39]

Not deterred, Graven sued Welch and Kinsell again in California Superior Court immediately after the dismissal of his bankruptcy.[40] As part of that case, Graven began targeting Baum along with Welch for the supposed forgery.[41]

V. After Suing Over the Settlement Agreement Multiple Times, Graven Is Declared a Vexatious Litigant and Prohibited from Contacting or Coming Near Baum, His Family, or His Workplace

After an unsuccessful mediation, Baum (along with Welch and Kinsell) petitioned for and received a protective order against Graven in September 2009.[42] In his supporting declaration, Baum described threatening behavior from Graven

[38] ECF 23 at 12 ¶ 48; *see also* ECF 43-2 at 18 ¶ 40F (Adversary Proceeding complaint alleging that Welch and others concocted a scheme to "switch the Agreement" and that Ms. Welch "physically enacted both of these fraudulent schemes to first switch agreements, and then to insert pages that were unknown" to Graven).

[39] *See* ECF 8-2 at 9-10 (Order in *In re Graven*, No. 2:09-bk-05273-GBN (Bankr. D. Ariz. July 13, 2009)).

[40] ECF 23 at 12-13 ¶¶ 49-51.

[41] *Id.* at 13-15 ¶¶ 59-73.

[42] ECF 8-2 at 26-29 (Injunction); ECF 23 at 15 ¶¶ 74-79; ECF 1-1 at 77-83 (Baum Application for TRO and Baum Declaration in support).

immediately following the mediation.[43] Graven believes that the injunction was fabricated to prevent Graven from alerting authorities of the conduct he uncovered and that the mediation was a ruse.[44] The California Superior Court entered an order prohibiting Graven from "contacting in any way . . . Baum" or his family, and prohibited Graven from coming within 200 yards of Baum, Welch, Kinsell, their places of work, or the offices of their attorneys.[45]

Also in September 2009, the California Superior Court entered an order declaring Graven to be a vexatious litigant under California law, requiring Graven to post a bond of $90,000 before he could proceed with his case against Welch and Kinsell.[46]

VI. Having Been Declared a Vexatious Litigant in California, Graven Turns to Arizona's Courts

Graven filed the complaint in this action in June 2011.[47] A month before, Graven filed a wide-ranging complaint in Arizona superior court against Defendant-Appellee Esposito and Graven's former colleagues, alleging RICO violations and other claims in connection with the project in Victorville, including

[43] ECF 1-1 at 82-83.

[44] ECF 23 at 15 ¶¶ 73-79.

[45] ECF 8-2 at 26-29 (9/15/2009 Preliminary Injunction).

[46] *Id.* at 13-16.

[47] ECF 1.

that Esposito was part of a "scheme to alter" the Settlement Agreement.[48] There, the trial court dismissed the case with prejudice and ordered that Graven could not file any future lawsuit against any of the defendants without posting a bond and receiving approval from the presiding judge.[49]

VII. The Litigation Below

Graven's Complaint in this matter purported to set forth twelve claims: (1) forgery, (2) conspiracy to commit forgery, (3) aiding and abetting a conspiracy to commit forgery, (4) intent to deceive, (5) fraudulent inducement, (6) fraud in the execution, (7) fraudulent concealment (active and passive), (8) mail and wire fraud, (9) common law fraud, (10) intentional interference with a contract, (11) breach of the covenant of good faith and fair dealing, and (12) bad faith.[50]

A. The District Court Dismisses the Original Complaint and Allows Graven To Amend

Baum moved to dismiss on multiple grounds, including that the district court lacked personal jurisdiction over Baum.[51] In support of his motion, Baum submitted a declaration.[52] The declaration states that Baum had scant contacts with Arizona (visiting once as a tourist) and describes his "brief involvement with the

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[48] ECF 23 at 9 ¶ 14; ECF 43-1 at 7.

[49] ECF 43-1 at 12-14 (10/24/2011 order).

[50] *See* ECF 16 at 2.

[51] ECF 8.

[52] ECF 8-1.

documentation of the settlement."[53] The declaration further describes that Baum communicated with Defendant-Appellee Esposito as part of this work, and that it was possible that "Mr. Esposito was in Arizona when he received" e-mails from Baum.[54]

The district court ruled it lacked jurisdiction because Graven did not show that "the Baums have purposefully availed themselves of the privilege of conducting business in Arizona" or that "Howard Baum's conduct was expressly aimed at Arizona."[55] The district court explained that the Settlement Agreement concerned "the contractual relationship between the City of Victorville and California entities" and that "the Settlement Agreement does not identify Plaintiff's residence or personal stake in the matter." Baum's participation "bears little if any relationship to Arizona, and it does not demonstrate that Howard Baum expressly aimed any action at Arizona."[56]

The district court also noted that the Complaint "does not allege that Howard Baum knew Plaintiff was a resident of Arizona at the time of the alleged fraud."[57] But the Court noted that the materials attached to the Complaint "indicate that

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[53] *Id.* at 1 ¶ 2, 2 ¶ 5.

[54] *Id.* at 2 ¶ 6.

[55] ECF 16 at 8.

[56] *Id.* at 7.

[57] *Id.* at 7-8.

Howard Baum" knew Esposito was also counsel for Graven's other Arizona entities, that Graven was involved with other Arizona entities, and that Graven had an Arizona phone number.[58]

B. The District Court Dismisses the Amended Complaint for Lack of Jurisdiction and Because of the Forum Selection Clause

The district court allowed Graven to amend the complaint, which he did.[59] In his Amended Complaint, Graven added several new allegations apparently intended to address the district court's comment that the original Complaint had not alleged that Baum knew Graven was an Arizona resident. Graven also submitted an affidavit repeating the same allegations.[60] The amended allegations can be summarized as follows:

- Graven's "being an Arizona resident was well known" because his address was listed in various agreements and other documents (but not the Settlement Agreement).[61]
- Various agreements, which Baum may have been familiar with or worked on in his role as an attorney, noted that one of Graven's California entities had a related Arizona entity.[62]

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[58] *Id.* at 8 n.4.

[59] *Id.* at 9; ECF 23.

[60] ECF 24.

[61] ECF 23 at 18 ¶ 107, 21-22 ¶¶ 121-25.

[62] *Id.* at 20-21 ¶ 118.

- Baum had reason to know that Esposito and other employees/associates of Graven worked or lived in Arizona.[63]

Baum moved to dismiss a second time on various grounds, including that (1) the Amended Complaint still failed to establish personal jurisdiction over Baum; (2) Graven's claims were subject to the mandatory forum selection clause; (3) Graven's claims are barred by statutes of limitation; (4) Graven's claims are precluded because of his earlier dismissals; and (5) various claims failed to state a legal claim.[64]

The district court granted Baum's second motion to dismiss, agreeing that the Amended Complaint and additional exhibits "fail to show personal jurisdiction" over Baum.[65] In the alternative, the district court ruled that "[e]ven if personal jurisdiction could be shown Plaintiff agreed to an enforceable forum selection clause requiring his claims be brought in California."[66]

C. The District Court Denies Graven's Other Motions Asserting Various Forms of Fraud on the Court

While Baum's second motion to dismiss was pending, Graven filed a Rule 60(b)(3) Motion to Vacate and several other motions seeking relief for what he

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[63] *Id.* at 24-27, 33, 35-38.

[64] ECF 27.

[65] ECF 53.

[66] *Id.*

argued was fraud on the court.[67] In the motions, Graven took issue with aspects of Baum's motion to dismiss. Graven's issues on appeal seem to focus only on his contention that Baum's arguments regarding the exercise of personal jurisdiction, including Baum's Declaration (ECF 8-1), misled the court on that issue.[68] The district court denied Graven's motions.[69] In denying the Rule 60(b)(3) motion, the district court noted that it "found no personal jurisdiction over Defendants Baum."[70]

SUMMARY OF ARGUMENT

Despite the sordid history, this case presents a simple question on appeal. The district court dismissed Graven's Amended Complaint and entered judgment for the Baums for two reasons: the district court concluded it lacked jurisdiction and, even assuming jurisdiction, Graven's claims were subject to a forum selection clause.

Although the Court can affirm for either reason (among other alternatives), it need not spend additional judicial resources on this matter. Graven has not raised any issues or arguments to this Court regarding the forum selection clause and he

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[67] *See* ECF 30 (Motion to File a Separate Notice of Fraud on the Court); ECF 40 (Rule 60(b)(3) Motion).

[68] *See* Opening Br. Appeal Dkt. 10 at 60-61.

[69] ECF 51; ECF 52; ECF 55.

[70] ECF 55.

has therefore abandoned any challenge to the district court's order enforcing the forum selection clause. The Court can and should affirm on that basis alone. The fact that Graven is *pro se* does not exempt him from the rule that "[a]rguments not addressed in a brief are deemed abandoned." *Wilcox v. C.I.R.*, 848 F.2d 1007, 1008 n.2 (9th Cir. 1988).

And in any event, the district court's ruling on the forum selection clause was unquestionably correct and within its discretion. In the Ninth Circuit, forum selection clauses are presumptively valid and should be enforced unless a plaintiff can make a "strong showing . . . that enforcement would be unreasonable or unjust, or that the clause is invalid for such reasons as fraud or overreaching." *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) (internal quotation marks, alteration, and citation omitted). Graven cannot make this showing. Indeed, it would be unreasonable and unjust to allow Graven to escape the burdens of litigation in California.

The Court should also affirm the district court's ruling that it lacked jurisdiction over Baum. This case concerns Baum's involvement as a California attorney in the drafting of a settlement agreement intended to resolve a dispute regarding California municipal property between Graven and his California businesses, a California municipality, and other California entities. Under either the so-called "purposeful availment" or "purposeful direction" tests, Baum's scant

contacts with Arizona are just the sort of "random, fortuitous, or attenuated" contacts that cannot fairly establish jurisdiction consistent with due process. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985). Even assuming – as Graven belabors – Baum knew or should have known that Graven was an Arizona resident, that fact "does not confer jurisdiction, for [Baum's] express aim was local." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004) (rejecting jurisdiction even though defendant's "intentional act eventually caused harm to Schwarzenegger in California, and [defendant] may have known that Schwarzenegger lived in California").

The Court should also affirm the denial of Graven's Rule 60(b)(3) Motion to Vacate and related motions. On appeal, he makes no separate argument concerning those rulings and the Court should consider any appeal from the orders to be abandoned. In addition, Graven's fraud-on-the-court arguments amounted to nothing more than a disagreement with Baum's legal arguments or other meritless contentions. Accordingly, the district court did not abuse its discretion by denying Graven's motions.

This Court may also "affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court." *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869, 874 (9th Cir. 1987). In this case, regardless of the forum selection clause and jurisdiction issues, the Court

may affirm because (1) Graven's claims are all barred by applicable statutes of limitation and (2) Graven's claims are precluded because courts have already dismissed similar or nearly identical claims.

ARGUMENT

I. Graven Has Abandoned Any Challenge to the District Court's Order Enforcing the Forum Selection Clause as an Alternative Basis for Dismissal

In the motion to dismiss the Amended Complaint, Baum argued multiple alternative grounds for dismissal, including the existence of a mandatory, enforceable forum selection clause.[71] In ruling on the motion, the district court held that "[e]ven if personal jurisdiction could be shown Plaintiff agreed to an enforceable forum selection clause requiring his claims be brought in California."[72] Although Graven appeals from the district court's dismissal order, he does not include any argument whatsoever regarding the forum selection clause.

This Court "will not consider any claims that were not actually argued" in the opening brief. *Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997). The Court "will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim." *Id.* (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)). Arguments "not addressed

[71] ECF 27 at 8-9.

[72] ECF 53.

in a brief are deemed abandoned." *Wilcox*, 848 F.2d at 1008 n.2. This rule applies to self-represented appellants. *Id.*; *Andreas v. Cate*, 465 F. App'x 680 (9th Cir. 2012) (holding that self-represented appellant "waived any arguments that the district court erred in dismissing for nonexhaustion" when the appellant "fail[ed] to discuss the issue of exhaustion in his opening brief"); *Fox v. Richards*, 357 F. App'x 903, 904 (9th Cir. 2009) ("By failing to identify the issues he sought to appeal in his opening brief, [*pro se* appellant] has waived any arguments that the district court erred in disposing of his claims.").

Accordingly, because Graven fails to include any argument or discussion of the forum selection clause, much less identify its enforcement as an issue for appeal, Graven has "waived any argument[] that the district court erred in disposing of his claims." *Id.* The Court should affirm on this basis alone.

II. The District Court Correctly Dismissed the Amended Complaint Based on the Forum Selection Clause

Setting aside Graven's abandonment of the issue, the Court should affirm because the district court did not abuse its discretion when it ruled that the Settlement Agreement's forum selection clause should be enforced.

A. Standard of Review

In diversity cases, federal law "controls [the] enforcement" and "interpretation of forum selection clauses." *Manetti-Farrow*, 858 F.2d at 513. Because a motion to enforce a forum selection clause is governed by Fed. R. Civ.

P. 12(b)(3), the pleadings need not be accepted as true, and the court may consider facts outside the pleadings. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996). "The district court's decision to enforce a forum selection clause is reviewed for abuse of discretion." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2003).

B. The Settlement Agreement's Forum Selection Clause Applies to Graven's Claims

The Settlement Agreement's forum selection clause covers Graven's claims against Baum. The clause is very broad: "***Any legal action*** brought to ***interpret or enforce*** this AGREEMENT ***shall*** be brought in the Superior Court of California in and for the County of San Bernardino" (emphasis added).[73] Graven argued below that the clause should not apply because Baum was "not a party to the Agreement" and because "his forgery is not a contract dispute."[74] Neither point makes a difference.

First, the fact that Baum is not personally a party to the agreement is irrelevant. Graven is, and Baum seeks to enforce the clause against him. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (holding that it is "incumbent on ***the party seeking to escape his contract*** to show" that the clause

[73] ECF 1-1 at 45 ¶ 35 (emphasis added).

[74] ECF 42 at 9; ECF 40 at 9-10 (Graven made these arguments when contending that Baum's reliance on the forum selection clause was a "fraud on the court.").

should not be enforced (emphasis added)). And forum selection clauses may apply to non-parties when the "alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants," including non-parties. *Manetti-Farrow*, 858 F.2d at 514 n.5. Here, Baum was an agent of one of the signatories to the Settlement Agreement and Graven's claims concern his conduct in drafting and compiling the agreement. It is hard to imagine a more "closely related" relationship.

Second, the fact that Graven asserts tort claims is also irrelevant. A forum selection clause can apply to tort claims when "resolution of the claims relates to interpretation of the contract." *Id.* at 514. In *Manetti-Farrow*, the court considered a clause with very similar language to the one here, requiring that Italy "shall be the forum for resolving disputes regarding 'interpretation' or 'fulfillment' of the contract." *Id.* at 513-14. The court held that the clause applied to a variety of business torts because the claims could not be resolved without interpreting the parties' obligations under the contract. *Id.* at 514. *Cf. Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 724 (2d Cir. 2013) ("A contractually based forum selection clause also covers tort claims against non-signatories if the tort claims 'ultimately depend on the existence of a contractual relationship' between the signatory parties.").

Here, Graven's claims all focus on how one interprets the contract and the supposedly "forged" exhibit. Graven stresses that his claims turn in large part on the significance of the Settlement Agreement's use of the words "scope of service" and "scope of work."[75] In light of his allegations, Graven's claims plainly could not be resolved without interpretation of the contract. The forum selection clause thus covers his claims.

C. Under Supreme Court and Ninth Circuit Precedent, Forum Selection Clauses Are Prima Facie Valid and Should Be Enforced Absent Unusual Circumstances Not Present in This Case

"It is . . . clear that the Supreme Court has established a strong policy in favor of the enforcement of forum selection clauses." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 992 (9th Cir. 2006). Such clauses are "prima facie valid and should not be set aside unless the party challenging enforcement . . . can show it is 'unreasonable under the circumstances.'" *Argueta*, 87 F.3d at 325 (quoting *Bremen*, 407 U.S. at 10).

"The Supreme Court has construed this exception narrowly." *Argueta*, 87 F.3d at 325. A forum selection clause may be unreasonable only if: (1) "its incorporation into the contract was the product of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived

[75] *E.g.*, ECF 23 at 68-69 ¶ 409.

of its day in court; or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought." *Id.* (internal quotation marks and citations omitted). None of the narrow exceptions apply in this case and the clause should therefore be enforced.

1. No Unusual Circumstances Preclude Enforcing the Forum Selection Clause – A Provision Found in Versions of the Agreement Graven Admits He Examined and Signed

The district court correctly concluded that Graven agreed to litigate his claims in California. Below, Graven only raised an argument with respect to the first *Bremen* factor, that the clause is "invalid for such reasons as fraud or overreaching." *Bremen*, 407 U.S. at 15. Graven argued below that because "the Settlement Agreement has been voided by forgery, the Forum Clause is not valid."[76] Courts have squarely rejected this argument.

"For a party to escape a forum selection clause on the grounds of fraud, it must show that the *inclusion of that clause in the contract* was the product of fraud or coercion." *Richards v. Lloyd's of London*, 135 F.3d 1289, 1297 (9th Cir. 1998) (internal quotation marks omitted) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974)). "[S]imply alleging that one was duped into signing the contract is not enough." *Richards*, 135 F.3d at 1297. Courts may enforce forum

[76] ECF 40 at 10.

clauses even though the "contracts themselves are void and unenforceable." *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006).

In this case, nothing in the record shows that the forum selection clause was the product of fraud or coercion. To the contrary, the record shows that before the supposed "forgery" took place, Graven viewed, signed, and approved a version of the Settlement Agreement containing the clause.[77] The same is true of another version of the Settlement Agreement that Graven says he preferred.[78]

And Graven plainly is not contending that the Settlement Agreement as a whole is void, much less the forum selection clause. For example, he has never objected to the millions of dollars he received in payments pursuant to the agreement.[79] Regardless of the merits of Graven's other claims, these admissions gut any argument that the clause should not be enforced.

Graven did not raise any arguments with regard to the other two *Bremen* factors. Any argument would have been futile. Graven cannot show that "the

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[77] ECF 23 at 36-37 ¶¶ 207-08 (describing how Graven "printed a hard copy" of Complaint Exhibit 113 "and I signed it"). Complaint Exhibit 113 (ECF 1-7 at 90) includes the forum selection clause. According to Graven, Complaint Exhibit 114 shows the document signed. That version contains the forum selection clause (ECF 1-7 at 107).

[78] ECF 23 at 65 ¶ 388 and ECF 1-5 at 52 (Compl. Ex. 86 referred to in ¶ 388).

[79] *E.g.*, ECF 23 at 9 ¶ 17, 39 ¶ 222, 73 ¶ 434 (alleging received "first installment of $3,000,000" and that claims stem from failure to receive expected "Third Installment").

selected forum is so gravely difficult and inconvenient that . . . [he] will for all practical purposes be deprived of . . . [his] day in court." *Argueta*, 87 F.3d at 325 (internal quotation marks and citation omitted). The clause in this case required litigation to be in California, a neighboring state and the place of the subject matter of the Settlement Agreement. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (enforcing clause requiring litigation in Florida even though plaintiff was in Washington because, among other reasons, "Florida is not a 'remote alien forum'" to the claims and the dispute was not "inherently more suited to resolution" in Washington than in Florida). Graven has already sued multiple times in California state courts. The fact that he has been unsuccessful in obtaining the relief he seeks does not mean that he did not get his day in court.

Finally, Graven made no argument that enforcement "would contravene a strong public policy of the forum in which the suit is brought." *Argueta*, 87 F.3d at 325. Nor could he. If anything, a failure to enforce the clause would contravene California's interest in policing its own judicial system and protecting its citizens from abusive litigants. Graven has been declared a vexatious litigant in California and is required to post a bond before bringing claims practically identical to the claims brought here.[80] More pressing, California courts granted Baum a protective order prohibiting Graven from coming near him, his family, his workplace, or his

[80] ECF 8-2 at 13-15.

lawyers.[81] To allow Graven to escape all of these burdens and litigate without restrictions in Arizona would offend California's interest in an efficient, safe, and fair judicial system.

Thus, even if Graven had not totally abandoned this issue and waived it, he would not have been able to satisfy the "heavy burden of proof required to set aside the clause on grounds of inconvenience." *Carnival Cruise Lines*, 499 U.S. at 595 (internal quotation marks and citation omitted). The Court should affirm because the district court's enforcement of the clause was not an abuse of discretion.

III. The District Court Correctly Dismissed the Amended Complaint for Lack of Personal Jurisdiction Over Baum

Alternatively, the Court could also affirm dismissal for lack of jurisdiction.[82] Baum has essentially zero connection with Arizona and Graven's claims concern Baum's work in California on an agreement between Graven, his California businesses, and other California entities. The fact that Graven is from Arizona

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[81] *Id*. at 26-29; ECF 1-1 at 77-83 (Baum Application for TRO and Baum Declaration in support).

[82] The forum selection clause issue disposes of Graven's appeal (as to Baum at least), making a constitutional ruling unnecessary. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) (noting that because "forum-selection clause [was] dispositive," the Court "need not consider petitioner's constitutional argument as to personal jurisdiction" (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not in the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case" (internal quotation marks and citation omitted))).

creates only the most "random, fortuitous, or attenuated" of contacts. *Burger King*, 471 U.S. at 475 (internal quotation marks and citation omitted). Due process requires more before Graven may drag Baum into Arizona to re-litigate these claims and circumvent prior California court rulings.

A. Standard of Review

"The Court reviews a dismissal for lack of personal jurisdiction *de novo*." *Boschetto v. Hansing*, 539 F.3d 1011, 1015-16 (9th Cir. 2008). When opposing a motion to dismiss for lack of personal jurisdiction, "the plaintiff bears the burden of establishing that jurisdiction is proper." *Id.* When, as here, there is not an evidentiary hearing on the issue, the "plaintiff need only make a prima facie showing of the jurisdictional facts." *Id.* Courts should take the plaintiff's uncontroverted allegations as true and resolve other conflicting statements in the plaintiff's favor. *Id.*

B. Due Process Required the District Court to Have Specific Jurisdiction Over Baum

Absent a controlling federal statute, courts in Arizona may exercise "personal jurisdiction to the extent allowed by the due process clause of the United States Constitution." *Menken v. Emm*, 503 F.3d 1050, 1056 (9th Cir. 2007) (internal quotation marks and citation omitted). A plaintiff can establish jurisdiction consistent with due process by establishing that the defendant had sufficient "minimum contacts" with the forum state "such that the maintenance of

the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

In general, there are two types of personal jurisdiction: general and specific. Graven has never disputed that only "specific" jurisdiction is relevant in this case.[83]

C. The District Court Could Not Exercise Specific Jurisdiction Over Baum Because Baum Did Not Purposefully Conduct Activities in Arizona or Expressly Aim Action Into Arizona

If there is no general jurisdiction, a federal court may only exercise personal jurisdiction if the defendant's activities related to the cause of action are sufficient to give rise to "specific" jurisdiction. *Boschetto*, 539 F.3d at 1016. Courts apply a three-prong test to determine whether there is specific personal jurisdiction:

> (1) The non-resident must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting

[83] Graven has also argued that jurisdiction is proper because he has asserted conspiracy claims. That argument goes nowhere. The doctrine of "jurisdiction via conspiracy" is under a dark constitutional cloud and has been all but rejected in the Ninth Circuit. *See Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 492 (9th Cir. 1979) (rejecting the theory in analogous venue context); *Karsten Mfg. Corp. v. U.S. Golf Ass'n*, 728 F. Supp. 1429, 1434 (D. Ariz. 1990) (noting that "cases have rejected this conspiracy theory of jurisdiction" and that the Supreme Court "has held that an individual's connection with the forum state must be examined independently to determine jurisdiction" (citing *Calder v. Jones*, 465 U.S. 783, 790 (1984)).

activities in the forum, thereby invoking the benefits and protections of its laws;

(2) The claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) The exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

Schwarzenegger, 374 F.3d at 802. The plaintiff has the burden of satisfying the first two prongs. *Id.* "If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Id.* "But if the plaintiff fails at the first step, the jurisdictional inquiry ends and the case must be dismissed." *Boschetto*, 539 F.3d at 1016.

1. Graven Failed to Meet His Burden of Establishing the First Part of the Specific Jurisdiction Test, Meaning the District Court Correctly Dismissed the Amended Complaint

The Ninth Circuit has applied different tests depending on whether the underlying claims sound primarily in tort or contract. "A purposeful availment analysis is most often used in suits sounding in contract." *Schwarzenegger*, 374 F.3d at 802. "A purposeful direction analysis . . . is most often used in suits sounding in tort." *Id.* However the analysis is described, the "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state." *Burger King*, 471 U.S. at 474. Regardless which test applies, they both are intended to "ensure[] that a defendant will not be haled into a

jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Id.* at 475 (internal quotation marks and citation omitted) (citing cases from which both the "direction" and "availment" tests derive).

The "purposeful availment" analysis applies here, but regardless which test applies, the district court correctly ruled that it could not exercise jurisdiction over Baum.

a. Graven Cannot Show That Baum Purposefully Availed Himself of the Privilege of Conducting Activities in Arizona

The "purposeful availment" analysis is the more appropriate test here because the claims "aris[e] out of contractual relationships." *Travelers Cas. & Sur. Co. of Am. v. Telstar Constr. Co., Inc.*, 252 F. Supp. 2d 917, 931 (D. Ariz. 2003). Although Graven asserts a range of claims, including tort claims, the case as a whole (and the claims) exists only because of the Settlement Agreement contract. At bottom, Graven wants to hold Baum liable for harm resulting from a failure of parties to the contract to fulfill the obligations that Graven asserts they should have. Such claims sound primarily in contract even if re-purposed as tort claims. *Cf. HK China Grp., Inc. v. Beijing United Auto. & Motorcycle Mfg. Corp.*, 417 F. App'x 664, 665 (9th Cir. 2011) (suit with fraud claims analyzed using purposeful availment "when the alleged fraud is merely the representations . . . that gave rise to" a breach of contract).

Under this test, the plaintiff must show that the defendant has "taken deliberate action within the forum state or if he has created continuing obligations to forum residents." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) (emphasis added). This showing "typically consists of evidence of the defendant's actions in the forum, such as executing or performing a contract there" or otherwise "invoking the benefits and protections" of the laws of the forum state. *Schwarzenegger*, 374 F.3d at 803.

As the district court readily recognized, Graven cannot come close to making this showing here.[84] Graven's claims all center on the Settlement Agreement and Baum's role in the final documentation of it. The Settlement Agreement was intended to resolve a dispute concerning the development of California municipal property. Moreover, the Settlement Agreement is governed by California law and subject to a California forum selection clause. *See Burger King*, 471 U.S. at 482 (noting that a choice-of-law provision should not "be ignored in considering whether" a party "purposefully invoked the benefits and protections" of a state's laws).

Except for Graven, all parties to the agreement are California entities. And Graven's residence is not identified in the agreement; instead, he is referred to

[84] ECF 16 at 6.

collectively with the CBS Companies as the "CBS Parties."[85] The fact that one party with a stake in the CBS Companies happened to live in Arizona is just the sort of "random, fortuitous, or attenuated" contact that cannot support jurisdiction. *Id*. at 480 (internal quotation marks and citation omitted). In other words, the Settlement Agreement at the heart of this case has a connection with one place: California.

Furthermore, with regard to Baum specifically, the record indicates that he had taken essentially no "action within the forum state."[86] The most that can be said is that Baum exchanged e-mails with Esposito (who was representing the CBS Companies) when Esposito may have been in Arizona.[87] That plainly is not sufficient to create jurisdiction. *See id*. at 478-79 (a "contract with an out-of-state party *alone* can[not] automatically establish" purposeful availment; the court must look to the "negotiations and contemplated future consequences, along with the terms of the contract").

Finally, Baum's role in the documentation of the Settlement Agreement did not create "continuing obligations to" Graven or other forum residents. Baum was not a party to the Settlement Agreement and thus there was no obligation between Baum and Graven. And even if Baum were party to the agreement, the Settlement

[85] ECF 1-1 at 38.

[86] ECF 16 at 5; ECF 8-1 at 1-2.

[87] *Id*.

Agreement did not call for any actions to occur in Arizona. In sum, Baum's "conduct and connection with [Arizona]" cannot in any way be described "such that he should reasonably anticipate being haled into court" here. *Id.* at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)).

b. Graven Cannot Show That Baum Purposefully Directed Any Conduct Into Arizona

The district court also found that Graven failed to show that Baum "purposefully directed their activities toward" Arizona.[88] To show "purposeful direction," a plaintiff must show that the defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). "All three parts of the test must be satisfied." *Schwarzenegger*, 374 F.3d at 805.

Here, Baum concedes for purposes of this argument that Graven has alleged an "intentional act" within the meaning of the purposeful direction test.[89] As summarized by the district court, Graven alleges that "Baum intentionally altered the terms of the Settlement Agreement in order to defraud Plaintiff and interfere

[88] ECF 16 at 8.

[89] Baum, of course, contests that this alleged act ever occurred, but for the purpose of this analysis only, Baum concedes that Graven has alleged an act in his complaint, however convoluted the allegations may be.

with Plaintiff's contractual relations."[90] More specifically, Graven alleges that at some point after August 10, 2006, Baum (in concert with Esposito) changed a word in the Settlement Agreement and added pages to an exhibit after Graven had already signed a version of the agreement that lacked those pages.[91]

But, as is often the case in cases analyzing this issue, the flaw in Graven's argument is that he cannot show that Baum "expressly aimed" any act at Arizona. In finding that Graven could not show "express aiming," the district court noted that the "Complaint does not allege that Howard Baum knew Plaintiff was a resident of Arizona at the time of the alleged fraud."[92] In response, Graven argued strenuously below and again on appeal that his affidavit and allegations prove up jurisdiction because he can show that Baum would have known that Esposito and Graven lived in Arizona when the alleged "forgery" took place. Graven's arguments are wrong and the Court should affirm the district court. The mere knowledge of Graven's residence or business headquarters is simply not enough to show that Baum ***expressly aimed*** his conduct at Arizona.

The "express aiming" concept comes from the Supreme Court's opinion in *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, the Court held that a California court had jurisdiction over a reporter and an editor who worked out of Florida and

[90] ECF 16 at 7.

[91] ECF 23 at 68-70 ¶ 409.

[92] ECF 16 at 7-8.

who published an allegedly libelous story about a public figure who lived in California. *Id*. at 784-85. But the fact that the plaintiff lived in California was plainly not enough to establish jurisdiction. The Supreme Court held that the intentional acts of the reporter and editor were expressly aimed at California for several reasons: the story "concerned the California activities of a California resident"; "impugned the professionalism of an entertainer whose television career was centered in California;" the reporter relied on "California sources;" and "brunt of the harm . . . was suffered in California." "In sum," the Supreme Court explained, "California is the focal point both of the story and of the harm suffered." *Id*. at 788-89.

Under *Calder*, it is clear that merely knowing where the plaintiff lives or works is not enough to show express aiming. A defendant must do "something more than commit a foreign act with foreseeable effects in the forum state." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1157 (9th Cir. 2006) (internal quotations omitted) (holding that defendant did not expressly aim conduct at California even though defendant knew plaintiff was in California). "Where a defendant's 'express aim was local,' the fact that it caused harm to the plaintiff in the forum state, even if the defendant knew that the plaintiff lived in the forum state, is insufficient to satisfy the effects test." *Love v. Associated Newspapers*,

Ltd., 611 F.3d 601, 609 (9th Cir. 2010) (quoting *Schwarzenegger*, 374 F.3d at 807).

In *Schwarzenegger*, for example, this Court held that an Ohio car seller who allegedly misappropriated Arnold Schwarzenegger's image to advertise to potential customers in Ohio did not "expressly aim" an intentional act at California. 374 F.3d at 807. This was the result even if the act "eventually caused harm to Schwarzenegger in California, and [defendant] may have known that Schwarzenegger lived in California." *Id.*

In this case, Baum's alleged actions show that his "express aim was local" to California. *Id.* Graven alleges that Baum altered the Settlement Agreement, an agreement intended to resolve disputes between California entities and further the development of California municipal property.[93] Graven further alleges that Baum did this so that he and his California law firm would get more business in California.[94] The consequence, Graven says, is that he got paid less money from Kinsell's California entity than he otherwise would have.[95] This alleged harm did not result from the e-mails that were allegedly sent to Arizona or any other contact with Arizona; the alleged harm results from the alteration at Baum's office ***in California***.

[93] ECF 1-1 at 38-39; ECF 23 at 5-7, 67-74 ¶¶ 409-441.

[94] ECF 23 at 7.

[95] *Id.*

Accordingly, Graven's insistence that the district court failed to give proper weight to Baum's supposed knowledge of Graven's and Esposito's location is simply not relevant. This record shows that nothing was "expressly aimed" at Arizona. At most, Graven's allegations, like those in *Schwarzenegger*, show that Baum could have foreseen that harm would occur in Arizona. But the Supreme "Court has consistently held that this kind of foreseeability is not a sufficient benchmark for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (internal quotations omitted).

The recent case of *Fiore v. Walden* muddies the waters with regard to this principle. 688 F.3d 558 (9th Cir. 2012) *cert. granted* 133 S. Ct. 1493 (2013). There, the Ninth Circuit held that a Nevada court could exercise jurisdiction over a Georgia police officer who wrongly seized money from plaintiffs at the Atlanta airport while on their way to Nevada. *Id.* at 581. After the seizure, the officer allegedly filed a false probable cause affidavit which "individually targeted [plaintiffs], as he was aware of their significant connection to Nevada and of the likely impact of his defrauding actions on their property and business in Nevada." *Id.* This was enough to "satisfy the express aiming prong of the *Calder*-effects test." *Id.*

Though the case has some helpful language for Graven, it does not save his flawed jurisdictional arguments. First, the case is on highly uncertain ground. The

Supreme Court granted certiorari and heard argument this month on the case.[96] Second, the case is distinguishable on its face. In *Fiore*, the allegations were that the officer "intentionally and directly" acted to wrongfully retain money he knew was on its way to Nevada – he took actions intended to prevent it from going back to Nevada. Thus, the actions were "expressly aimed" at Nevada. *Id*. at 589-90. As explained above, the allegations here are far different: Baum allegedly took a signed version of the Settlement Agreement, changed a word, and added pages to it in a way that altered the obligations other California entities owed to the "CBS Parties" – Graven and his California businesses. Nothing about that is aimed at Arizona, even if Baum could foresee that Graven, an Arizona resident, would eventually suffer a loss.

For all these reasons, Graven cannot satisfy the purposeful direction test.

[96] The transcript of the November 4, 2013 argument is available at http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx. The Supreme Court's involvement follows Judges O'Scannlain's and McKeown's sharp dissents from denial of rehearing en banc, including Judge McKeown's criticism that the majority improperly "broadens the specific jurisdiction test from one requiring 'express aiming' to one where any attenuated foreign act with foreseeable effects upon a forum resident confers specific jurisdiction." *Id*. (McKeown, J., dissenting from denial of rehearing *en banc*). The Supreme Court's eventual opinion in *Fiore* will inevitably require supplemental briefing here.

2. In Any Event, Any Exercise of Personal Jurisdiction Over Baum Would Be Unreasonable Under the Third Part of the Specific Jurisdiction Test

Even if Graven had "establishe[d] both prongs one and two," there is a "'compelling case' that the exercise of jurisdiction [over Baum] would not be reasonable." *Boschetto*, 539 F.3d at 1016 (citation omitted). The factors the Ninth Circuit considers in connection with reasonableness weigh heavily against the exercise of jurisdiction over Baum. *See Menken*, 503 F.3d at 1060 (listing seven reasonableness factors (citation omitted)).

Factor one ("the extent of the defendants' purposeful interjection into the forum state") weighs against jurisdiction because Baum is alleged to have had only scant and incidental contacts with Arizona via e-mail and phone. In addition, even Graven's allegations acknowledge that Baum was only briefly involved in the Settlement Agreement negotiation (Graven calls it "batting clean up").

Most importantly, factors two ("the burden on the defendant of litigating in the forum"), three ("the extent of conflict with the sovereignty of the defendant's state"), four ("the forum state's interest in adjudicating the dispute"), five ("the most efficient judicial resolution of the dispute"), and seven ("the existence of an alternative forum") all weigh heavily against jurisdiction in Arizona. It is California, not Arizona, that has a strong interest in adjudicating any disputes concerning the Settlement Agreement. By including the choice of law and forum

selection clauses, the parties – including California governmental entities – specifically intended to have California adjudicate any disputes involving the Settlement Agreement. Only factor six ("the importance of the forum to plaintiff's interest in convenient and effective relief") arguably favors Graven. But even that factor should cut against jurisdiction. Arizona is only more convenient to Graven because of his desire to avoid the consequences of his vexatious litigation in California.

As described above, Graven has already harassed Baum and others in California courts, Arizona Bankruptcy courts, and Arizona state courts. Graven should not – and cannot, consistent with Baum's due process interest in fair play and substantial justice – be allowed to forum shop and drag Baum into a different state with which neither Baum nor this dispute has any meaningful connection.

IV. The District Court Correctly Dismissed Graven's Other Motions

A. Graven Has Waived Any Argument That the District Court Erred in Denying His Rule 60(b)(3) Motion and Other Fraud-Based Motions

Graven also purports to appeal from the district court's orders denying his Rule 60(b)(3) motion to vacate the order of dismissal and other motions asking for relief for Baum's supposed "fraud on the court."[97] In his Opening Brief, however, Graven only raises arguments that relate to the district court's personal jurisdiction

[97] *See* ECF 75 (Notice of Appeal); ECF 40 (Amended Rule 30(b)(6) Motion); ECF 51, ECF 52, ECF 55 (Orders denying motions).

ruling. Graven raises no separate arguments regarding these motions, and the Court should therefore deem any such arguments waived. *See Entm't Research Grp.*, 122 F.3d at 1217 (arguments not actually made in opening brief are abandoned).

B. The District Court Acted Well Within Its Discretion When It Denied Graven's Meritless Rule 60(b)(3) and Related Motions

Graven's Rule 60(b)(3) motion served as a clearinghouse for various allegations of "fraud on the court" Graven had made in his response to Baum's motion to dismiss and in other filings. If the Court considers the issue, it should easily affirm the district court's denials of Graven's various fraud-based motions. They are meritless.

Rule 60(b)(3) provides that, on "just terms, the court may relieve a party . . . from a[n] . . . order" for "fraud . . ., misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). This Court reviews "a district court's denial of a Rule 60(b)(3) motion for abuse of discretion." *United States v. Chapman*, 642 F.3d 1236, 1240 (9th Cir. 2011). The Court should "reverse only upon a clear showing of abuse of discretion." *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).

"To prevail, the moving party must prove by clear and convincing evidence that [1] the verdict [here, judgment] was obtained through fraud, misrepresentation, or other misconduct and [2] the conduct complained of prevented the losing party

from fully and fairly presenting the defense." *Id.* Rule 60(b)(3) "is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *Id.* Graven cannot come close.

First, setting aside the meritless nature of Graven's fraud-on-the-court claims, there is simply nothing in the record to indicate that any of what he calls fraud – the "conduct complained of" – did anything to prevent Graven from "fully and fairly presenting" his case. For instance, Graven takes issue principally with Baum's declaration submitted in support of the first Motion to Dismiss.[98] But the district court did not rely on Baum's declaration in concluding that it lacked jurisdiction.[99] In fact, the district court cites the declaration only once in a footnote in which the judge also adopts facts included in Graven's Complaint.[100] Given that the court's judgment was not based on any of the purported "frauds," the district court was well within its discretion to deny Graven's motions.

Second, the allegations of fraud lack any merit whatsoever. Graven argued that the following were fraudulent:

[98] *See* Opening Br. Appeal Dkt. 10 at 60-62.

[99] *See* ECF 16 at 7-8.

[100] *Id.* at 8 n.4.

- Baum's motion to dismiss (ECF 8) and supporting declaration (ECF 8-1) were "fabricated" to give the impression that Baum did not know where Graven lived or that he had other Arizona businesses;[101]
- The motion to dismiss described one of Graven's failed California lawsuits as being "premised on the very same allegations" as the current case, even though it did not raise forgery claims;[102]
- The motion to dismiss referred to Defendant Esposito as "Graven's attorney" instead of "Graven's attorney, Defendant Esposito";[103]
- The motion to dismiss argued for dismissal because of statute of limitations and the forum selection clause;[104]
- The motion to dismiss combined separate exhibits into a single exhibit.[105]

The record below shows that Graven's arguments regarding fraud are simply incorrect.[106] What Graven describes as "fraud" often depends on indulging

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[101] ECF 40 at 10-17.

[102] *Id.* at 3-5.

[103] *Id.* at 5-6.

[104] *Id.* at 7-10.

[105] *Id.* at 17-18.

[106] Baum responded in some detail to each allegation (*see* ECF 43). Because Graven failed to raise any separate argument regarding his "fraud" contentions, this brief will not labor the point.

Graven's fantastical assumptions not about what is stated, but about what was implied or what he infers. In addition, several of Graven's contentions amount to a mere disagreement over the legal significance of certain facts alleged in the complaint or its exhibits. The Court should affirm the district court's denials of the Rule 60(b)(3) and related motions.

V. Court May Affirm the Dismissal of Baum on Alternative Grounds

The district court, having dismissed the action on the basis of jurisdiction and the forum selection clause, did not reach the other grounds for dismissal that Baum pressed. This Court nevertheless "may affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court." *Charley's Taxi*, 810 F.2d at 874.

The Court may affirm because (1) Graven's claims are time-barred, and (2) Graven's claims are subject to *res judicata*/claim preclusion.

A. Graven's Claims Are Time-Barred

Graven filed this lawsuit in June 2011, asserting twelve claims (some of which are plainly not legitimate causes of action, such as a bare "intent to deceive"). Although Graven adds "Forgery" to his list of claims, most of his claims (claims 1 through 9) are plainly grounded in a "fraud or mistake" theory. Regardless of whether Arizona or California law applies, any claim for relief on

grounds of fraud or mistake must be brought within three years.[107] *See* Ariz. Rev. Stat. § 12-543(3); Cal. Civ. Proc. Code § 338(d).

Furthermore, a two-year period applies to Graven's tortious interference claim (claim 10). *See* Ariz. Rev. Stat. § 12-542; *Ranch Realty, Inc. v. DC Ranch Realty, LLC*, 614 F. Supp. 2d 983, 989 (D. Ariz. 2007) (two-year period applies to tortious interference claims); *Knoell v. Petrovich*, 90 Cal. Rptr. 2d 162, 164 (Cal. Ct. App. 1999) (same, citing Cal. Civ. Proc. Code § 339). Furthermore, a two or three-year period applies to his bad faith claims (claim 11 and 12). If those claims are construed to be re-labeled tort claims, a two-year period applies under Ariz. Rev. Stat. § 12-542 and Cal. Civ. Proc. Code § 339, if they are construed to be re-stated "fraud or mistake" claims then the term is three years.

The time for bringing an action begins to accrue upon "the discovery . . . of the facts constituting the fraud or mistake." Ariz. Rev. Stat. § 12-543(3); Cal. Civ. Proc. Code § 338(d). "Discovering the facts constituting fraud occurs with either actual knowledge or when 'plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or ***has the opportunity to obtain knowledge from sources open to his investigation***.'" *Averbach v. Vnescheconombank*, 280 F.

[107] The Settlement Agreement calls for California law but Graven may contend that Arizona law applies to his non-tort contract claims. There is no difference between the two with respect to this dispute.

Supp. 2d 945, 956 (N. D. 2003) (quoting *Gen. Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1397 (9th Cir. 1991)) (emphasis added).

The record below shows that Graven's claims come too late and should be barred. The gist of Graven's claim is that in August 2006 Defendants laid a trap for him in the Settlement Agreement. Graven alleges that he knew he was harmed when he did not receive an expected payment in November 2006 (and he promptly began filing lawsuits at that time).[108] Thus, in November 2006, Graven should have been on notice to investigate why he did not receive the money he expected. The fact that Graven sued for those payments shortly after November 2006 corroborates that he was on notice that he had been wronged. *See Coronado Dev. Corp. v. Super. Ct.*, 678 P.2d 535, 537 (Ariz. Ct. App. 1984) (limitations period begins to run when plaintiff "by reasonable diligence could have learned of the fraud, whether or not he actually learned of it"). *Averbach*, 280 F. Supp. 2d at 957 ("The running of the statute of limitations does not require awareness of all the facts necessary to establish a claim for fraud, but only constructive knowledge of wrongdoing.").

[108] ECF 23 at 8 ¶¶ 6-12; ECF 8-2 at 2 (Judgment in case showing filing date); ECF 40-1 at 13-32 (First Amended Complaint in California case) (November 2006 lawsuit against Kinsell and others).

Graven did not bring this suit until June 2011, more than four years after November 2006. Graven's claims are therefore too late. The Court should affirm dismissal of his claims on this alternative ground.

B. Graven's Claims Are Precluded

The Court can also affirm because Graven's claims are precluded under the doctrine of claim preclusion. Baum raised this as a reason to dismiss Graven's amended complaint and Graven failed to include any argument on the issue in his response.[109]

As part of his "ill advised" bankruptcy case, Graven filed an adversary proceeding against Welch, who was a paralegal at the law firm Baum worked at during the relevant time.[110] Graven made essentially the same allegations against Welch as he now brings against Baum.[111] The bankruptcy court dismissed his case upon the "Court's finding that [Graven] filed [his] case in bad faith" as part of an "improper[] attempt[] to use the bankruptcy process as a litigation tactic."[112] The adversary proceeding was dismissed after Graven failed to show why the court

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[109] *See* ECF 27 at 11; ECF 42.

[110] ECF 23 at 12-13 ¶¶ 45-49.

[111] *Id.* at 12 ¶ 48; *see also* ECF 43-2 at 18 ¶ 40F (Adversary Proceeding complaint alleging that Welch and others concocted a scheme to "switch the Agreement" and that Ms. Welch "physically enacted both of these fraudulent schemes to first switch agreements, and then to insert pages that were unknown" to Graven).

[112] *See* ECF 8-2 at 9-10.

should retain jurisdiction.[113] Graven also sued Kinsell and others on various breach of contract theories stemming from the alleged non-payment under the Settlement Agreement. After Graven repeatedly failed to comply with court orders, the court dismissed the case with prejudice, sanctioned him, and awarded judgment to the defendants.[114]

Claim preclusion (or *res judicata*) "provides that 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning*, 322 F.3d 1064, 1077 (9th Cir. 2003) (quoting *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997)). "Res judicata is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Id.* (quoting *Stratosphere Litig. LLC v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 n.3 (9th Cir. 2002)).

"Identity of claims" means that "two suits arise from the same transactional nucleus of facts." *Id.* at 1077-78 (internal quotation marks and citations omitted). "Newly articulated claims based on the same nucleus of facts may still be subject to a res judicata finding if the claims could have been brought in the earlier action." *Id.* at 1078. There is an identity of claims here. The relevant

[113] *Id.* at 11.

[114] *Id.* at 2-5.

"transactional nucleus of facts" is the negotiation, execution, and implementation of the Settlement Agreement. Graven has alleged multiple times that breaches of contract, fraud, and malfeasance of all kinds harmed him in the course of the negotiation, execution, and implementation of the Settlement Agreement. In the bankruptcy proceeding, Graven sued Baum's firm's administrative assistant Ms. Welch on essentially the same theory under which he is suing Baum.

Furthermore, there was a "final judgment on the merits." In the bankruptcy case, the court dismissed Graven's filing (over his objection) because the court determined that he had filed in "bad faith" as part of a scheme to abuse the bankruptcy process.[115] A "dismissal with prejudice," including a dismissal as a sanction, "is a determination on the merits." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962 (9th Cir. 2006) (holding element satisfied by dismissal of case as sanction for spoliation of evidence).

Finally, there is also privity of parties. Graven is the plaintiff in all of these actions. And Welch worked as an administrative assistant in the same office as Baum and assisted with the Settlement Agreement.[116] Thus, Baum and Welch were agents of the same employer and her interests were closely aligned with Baum's.

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[115] *See* ECF 8-2 at 9-11.

[116] ECF 8-1 at 2 ¶ 7.

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Consequently, the Court should affirm for this separate reason because Graven has already had his day in court (and then some).

CONCLUSION

For the above reasons, the Court should affirm.

RESPECTFULLY SUBMITTED this 14th day of November, 2013.

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STATEMENT OF RELATED CASES

Defendants/Appellees are not aware of any related cases.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 14, 2013.

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