

1 recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the
2 outrageous means of the bogus subpoenas.

3 15. Plaintiff neither authorized the FTB's aforementioned documentary and
4 pretentious forays into Nevada, nor was plaintiff ever aware that such information was being
5 sought in such a manner until well after the "quasi-subpoenas" had been issued and the
6 responses received. Similarly, plaintiff had no knowledge of the FTB and defendants'
7 excursions to Las Vegas to investigate plaintiff or the FTB's correspondence with Nevada
8 government agencies and officials until well after such contacts had taken place. Upon
9 information and belief, plaintiff alleges that all of the above-described activities were calculated
10 to enable the FTB to develop a colorable basis for assessing a huge tax against plaintiff despite
11 the obvious fact that the FTB was proceeding against a bona fide resident of Nevada.

12 Assessment for 1991

13 16. On April 23, 1996, after the FTB had completed its audit and investigation of the
14 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are
15 owed) to plaintiff in which the FTB claimed plaintiff was a resident of California — not Nevada
16 — until April 3, 1992. The FTB therefore assessed plaintiff California state income tax for the
17 period of September 26 through December 31 of 1991 in a substantial amount. Moreover, the
18 FTB also assessed a penalty against plaintiff in an amount almost equal to the assessed tax after
19 summarily concluding that plaintiff's non-payment of the assessed tax, based upon his asserted
20 residency in Nevada and non-residency in California, was fraudulent.

21 17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide
22 resident of Nevada should not be forced into a California forum to seek relief from the bad faith,
23 unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident.
24 Plaintiff avers that liability for the bad faith actions of the FTB during the audits and continuing
25 until the present in the still ongoing California tax proceedings should be determined in Nevada,
26 the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on
27 plaintiff. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that
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1 plaintiff remained a California resident until he purchased and closed escrow on a new home in
2 Las Vegas on April 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a
3 way — any way — to effectively assess additional income taxes against plaintiff after he
4 changed his residency from California to Nevada is based on governmental bad faith and greed
5 arising from the FTB's eventual awareness of the financial success plaintiff has realized since
6 leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date
7 of Nevada residency accepted by the FTB with respect to the 1991 Report was not supported by
8 the information gathered by the FTB's during its audits of plaintiff and was accepted by the
9 FTB in bad faith as it was over six months after plaintiff moved to Nevada with the intent to
10 stay and began, he thought, to enjoy all the privileges and advantages of residency in his new
11 state.

12 The FTB's Continuing Pursuit of Plaintiff in Nevada

13 18. On or about April 1, 1996, plaintiff received formal notice that the FTB had
14 commenced an investigation into the 1992 tax year and that its tentative determination was that
15 plaintiff would also be assessed California state income taxes for the period of January 1
16 through April 3 of 1992.

17 19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received
18 notices from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in
19 regard to the 1992 tax year in which it will seek back taxes from plaintiff for income earned
20 during the period of January 1 through April 2, 1992 and in addition would seek penalties for
21 plaintiff's failure to file a state income tax return for 1992.

22 20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992
23 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes
24 over such assessments by the FTB always settle at this stage as taxpayers do not want to risk
25 their personal financial information being made public. Plaintiff understood this statement to be
26 a strong suggestion by the FTB that he settle the dispute by payment of some portion of the
27 assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not
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1 been a resident of California since his move to Nevada on September 26, 1991, and it remains
2 clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties"
3 from him that he does not legally or morally owe.

4 21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed
5 Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff
6 became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of
7 Proposed Assessment that "We [the FTB] consider you to be a resident of this state [California]
8 through April 2, 1992," such notice proceeded to assess California state income taxes on
9 plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff state
10 income taxes for 1992 in an amount five times greater than that for 1991, assessed plaintiff a
11 penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada
12 resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the
13 equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of
14 California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was fourteen
15 times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was
16 "a California resident for the entire year." Without explanation the FTB ignored its earlier
17 finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3,
18 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada
19 resident.

20 22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to
21 engage in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within
22 the State of Nevada in an effort to conjure up a colorable basis for justifying its frivolous,
23 extortionate Noticed of Proposed Assessment for the 1992 tax year.

24 23. Plaintiff is informed and believes, and therefore alleges, that the FTB may
25 continue to assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996
26 and beyond since the FTB has now disregarded its own conclusion regarding plaintiff's
27 residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount
28 of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It

1 appears from its actions concerning plaintiff, that the FTB has embraced a new theory of
2 liability that in effect declares "once a California resident always a California resident" as long
3 as the victim continues to generate significant amounts of income. Thus, the FTB has raised an
4 invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing
5 jurisdiction of the FTB.

6 The FTB's Motive

7 24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no
8 credible, admissible evidence that plaintiff was a California resident at anytime after September
9 of 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has
10 acknowledged in its own reports that plaintiff sold his California home on October 1, 1991, that
11 plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that
12 plaintiff purchased a home in Las Vegas in April 1992.

13 25. Plaintiff is informed and believes, and therefore alleges, that the assessments by
14 the FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after
15 plaintiff moved from California to Nevada an FTB investigator read a magazine article about
16 plaintiff's wealth and the FTB thereafter launched its investigation in the hope of extracting a
17 significant settlement from plaintiff. Plaintiff is further informed and believes, and therefore
18 alleges, that the FTB has acted in bad faith and assessed a fraud penalty against plaintiff for the
19 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff for the entire 1992
20 tax year and a fraud penalty for the same year to intimidate plaintiff and coerce him into paying
21 some significant amount of tax for income earned after September 26, 1991, despite its
22 awareness that plaintiff actually became a Nevada resident at that time. Plaintiff alleges that the
23 FTB's efforts to coerce plaintiff into sharing his hard-earned wealth despite having no lawful
24 basis for doing so, constitutes malice and oppression.

25 Jurisdiction

26 26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-
27 arm" statute, NRS 14.065 et seq., because of the FTB's tortious extraterritorial contacts and
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1 investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to
2 undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for
3 maintaining that plaintiff continued his residency in California during the period September 26,
4 1991 to December 31, 1991 and beyond.

5 27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a
6 pattern and practice of entering into Nevada to investigate Nevada residents who were formerly
7 residents of California, and then assessing such residents California state income taxes for time
8 periods subsequent to the date when such individuals moved to and established residency in
9 Nevada.

10 FIRST CAUSE OF ACTION

11 (For Declaratory Relief)

12 28. Plaintiff realleges and incorporates herein by reference each and every allegation
13 contained in paragraphs 1 through 27 above, as though set forth herein verbatim. *This cause of*
14 *action is re-pled in this Second Amended Complaint to preserve plaintiff's right to appeal the*
15 *District Court's April 3, 1999 ruling dismissing this cause of action. This cause of action is*
16 *therefore no longer at issue in the District Court.*

17 29. Pursuant to California law, in determining whether an individual was a resident
18 of California for a certain time period thereby making such individual's income subject to
19 California state income tax during such period, the individual must have been domiciled in
20 California during such period for "other than a temporary or transitory purpose." See Cal. Rev.
21 & Tax Code § 17014. The FTB's own regulations and precedents require that it apply certain
22 factors in determining an individual's domicile and/or whether the individual's presence in
23 California (or outside of California) was more than temporary or transitory.

24 a) Domicile.

25 Domicile is determined by the individual's physical presence in California with intent to stay or
26 if absent temporarily from California an intent to return. Such intent is determined by the acts
27 and conduct of the individual such as: (1) where the individual is registered to vote and votes;
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1 (2) location of the individual's permanent home; (3) comparative size of homes maintained by
2 the individual in different states; (4) where the individual files federal income tax returns; (5)
3 comparative time spent by the individual in different states; (6) cancellation of the individual's
4 California homeowner's property tax exemption; (7) obtaining a driver's license from another
5 state; (8) registering a car in another state; (9) joining religious, business and/or social
6 organizations in another state; and (10) establishment of a successful business in another state
7 by an individual who is self employed.
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9 (b) Temporary or Transitory Purpose.

10 The following contacts which are similar although not identical to those used to determine
11 domicile are important in determining whether an individual was in California (or left
12 California) for a temporary or transitory purpose: (1) physical presence of the individual in
13 California in comparison to the other state or states; (2) establishment of a successful business in
14 another state by an individual who is self employed; (3) extensive business interest outside of
15 California and active participation in such business by the individual; (4) banking activity in
16 California by the individual is given some, although not a great deal of, weight; (5) rental of
17 property in another state by the individual; (6) cancellation of the individual's California
18 homeowner's property tax exemption; (7) hiring professionals by the individual located in
19 another state; (8) obtaining a driver's license from another state; (9) registering a car in another
20 state; (10) joining religious, business and/or social organizations in another state; and (11)
21 where the individual is registered to vote and votes.
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24 30. The FTB's assessment of taxes and a penalty for 1991 is based on the FTB's
25 conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3,
26 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such
27 a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which
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1 contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and
2 precedents require it to consider. Such facts include, but are not limited to, the following: (1)
3 plaintiff sold his California home on October 1, 1991; (2) plaintiff rented an apartment in Las
4 Vegas on or about October 7, 1991 and, after a brief period of necessary travel to the east coast,
5 took possession of said apartment on or about October 22, 1991 and maintained his residence
6 there until April of 1992; (3) plaintiff registered to vote, obtained a Nevada driver's license
7 (relinquishing his California driver's license to the Nevada Department of Motor Vehicles), and
8 joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his
9 California home owner's exemption effective October 1, 1991; (5) plaintiff began actively
10 searching for a house to buy in Las Vegas, commencing in early October 1991, and submitted
11 numerous offers on houses in Las Vegas beginning in December 1991; (6) one of plaintiff's
12 offers to purchase a home in Las Vegas was accepted in March of 1992 and escrow on the
13 transaction closed on April 3, 1992; and (7) plaintiff's new home in Las Vegas was substantially
14 larger than the home in Southern California, which he sold in October of 1991.

15 31. An actual controversy exists as to whether plaintiff was a full-time resident of
16 Nevada — not California — commencing on September 26, 1991 through December 31, 1991
17 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either
18 Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout
19 the referenced periods and down to the present, and that the FTB ignored its own regulations
20 and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax
21 obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB had no
22 authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to
23 propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the
24 cooperation of said Nevada residents and businesses through an unlawful and tortious deception,
25 to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges,
26 that the FTB contends in all respects to the contrary.

27 32. Plaintiff therefore requests judgment of this Court declaring and confirming
28 plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from

1 September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial
2 investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada
3 residents without approval from a Nevada court or governmental agency, as alleged above, to be
4 without authority and violative of Nevada's sovereignty and territorial integrity.

5 SECOND CAUSE OF ACTION

6 (For Invasion of Privacy — Unreasonable Intrusion Upon The
7 Seclusion of Another, including Intrusion Upon Informational
8 Privacy)

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10 33. Plaintiff realleges and incorporates herein by reference each and every allegation
11 contained in paragraphs 1 through 32, above, as though set forth herein verbatim.

12 34. Plaintiff is informed and believes, and therefore alleges, that neighbors,
13 businesses, government officials and others within Nevada with whom plaintiff has had and
14 would reasonably expect in the future to have social or business interactions, were approached
15 and questioned by the FTB and defendants who disclosed or implied that plaintiff was under
16 investigation in California, and otherwise acted in such a manner as to cause doubts to arise
17 concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation
18 in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential
19 information with the understanding that it would remain confidential, thereby creating a
20 confidential relationship in which the FTB was required not to disclose Hyatt's highly personal
21 and confidential information. The FTB even noted in its own internal documentation that
22 plaintiff had a significant concern in regard to the protection of his privacy in turning over such
23 information. At the time this occurred, plaintiff was still hopeful that the FTB was actually
24 operating in good faith, a proposition that, as noted throughout this complaint, proved to be
25 utterly false.

26 35. Plaintiff is informed and believes, and therefore alleges, that the FTB and
27 defendants nevertheless violated plaintiff's right to privacy in regard to such information by
28 revealing it to third parties and otherwise conducting an investigation in Nevada, and continuing

1 to conduct such an investigation, through which the FTB and defendants revealed to third
2 parties personal and confidential information, which plaintiff had every right to expect would
3 not be revealed to such parties.

4 36. Plaintiff is informed and believes, and therefore alleges, that the FTB and
5 defendants' extensive probing and investigation of plaintiff, including their actions both
6 occurring within Nevada and directed to Nevada from California, were performed, and continue
7 to be performed, with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such
8 that he would eventually enter into a settlement with the FTB concerning his residency during
9 the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB
10 and defendants did in fact, and continues to, harass, annoy, vex and embarrass Hyatt, and
11 syphon his time and energies from the productive work in which he is engaged.

12 37. Plaintiff is informed and believes, and therefore alleges, that the FTB and
13 defendants through their investigative actions, and in particular the manner in which they were
14 carried out in Nevada, intentionally intruded, and continues to intentionally intrude, into the
15 solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The
16 intrusion by the FTB and defendants was such that any reasonable person, including plaintiff,
17 would find highly offensive.

18 38. As a direct, proximate, and foreseeable result of the FTB and defendants'
19 aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential
20 damages in a total amount in excess of \$10,000.

21 39. Plaintiff is informed and believes, and therefore alleges, that said invasion of
22 plaintiff's privacy was intentional, malicious, and oppressive in that such invasion was
23 despicable conduct by the FTB and defendants entered into with a willful and conscious
24 disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is
25 therefore entitled to an award of punitive damages against the FTB and defendants in an amount
26 sufficient to satisfy the purposes for which such damages are awarded.

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Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

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2 40. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
3 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
4 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
5 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
6 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
7 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
8 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
9 significant financial and reputational destruction. The threatened (and consummated) tortious
10 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
11 publicity of private facts that were expressly extracted from plaintiff under false promises of
12 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
13 detriment.

14 41. Plaintiff was forced to disclose his private documents and information with the
15 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
16 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
17 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
18 of his hard-earned personal property and right not to have his privacy invaded by the publication
19 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
20 available, to wit: the employment of teams of legal and professional experts to vigorously
21 defend himself in the audits and the continuing California tax proceedings.

22 42. It was highly foreseeable to the FTB that, absent the success of its scheme to
23 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
24 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
25 alternative was to vigorously defend himself in the audits and the continuing California tax
26 proceedings. This required the employment of a team of attorneys and other experts. The
27 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
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1 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
2 behavior.

3 43. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
4 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
5 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
6 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
7 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,
8 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
9 thereof to be proved according to the evidence at trial.

10 THIRD CAUSE OF ACTION

11 (For Invasion of Privacy — Unreasonable Publicity Given To
12 Private Facts, Including Publicity Given to Matters Protected
13 Under the Concept of Informational Privacy)

14 44. Plaintiff realleges and incorporates herein by reference each and every allegation
15 contained in paragraphs 1 through 43, above, as though set forth herein verbatim.

16 45. As set forth above, plaintiff revealed to the FTB highly personal and confidential
17 information at the request of the FTB as an ostensible part of its audit and investigation into
18 plaintiff's residency during the disputed time periods, thereby creating a confidential
19 relationship in which the FTB was required not to disclose Hyatt's highly personal and
20 confidential information. Plaintiff had a reasonable expectation that said information would be
21 kept confidential and not revealed to third parties and the FTB and defendants knew and
22 understood that said information was to be kept confidential and not revealed to third parties.

23 46. The FTB and defendants, without necessity or justification, nevertheless
24 disclosed to third parties, and continue to disclose to third parties, in Nevada certain of
25 plaintiff's personal and confidential information which had been cooperatively disclosed to the
26 FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and
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1 investigative efforts, or which the FTB had acquired via other means but was required by its
2 own rules and regulations or state law not to disclose to third parties.

3 47. As a direct, proximate, and foreseeable result of the FTB's aforementioned
4 invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total
5 amount in excess of \$10,000.

6 48. Plaintiff is informed and believes, and therefore alleges, that said invasion of
7 plaintiff's privacy was intentional, malicious, and oppressive in that such invasion constituted
8 despicable conduct by the FTB and defendants entered into with a willful and conscious
9 disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or
10 exemplary damages in an amount sufficient to satisfy the purposes for which such damages are
11 awarded.

12 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

13 49. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
14 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
15 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
16 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
17 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
18 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
19 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
20 significant financial and reputational destruction. The threatened (and consummated) tortious
21 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
22 publicity of private facts that were expressly extracted from plaintiff under false promises of
23 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
24 detriment.

25 50. Plaintiff was forced to disclose his private documents and information with the
26 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
27 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
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1 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
2 of his hard-earned personal property and right not to have his privacy invaded by the publication
3 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
4 available, to wit: the employment of teams of legal and professional experts to vigorously
5 defend himself in the audits and the continuing California tax proceedings.

6 51. It was highly foreseeable to the FTB that, absent the success of its scheme to
7 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
8 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
9 alternative was to vigorously defend himself in the audits and the continuing California tax
10 proceedings. This required the employment of a team of attorneys and other experts. The
11 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
12 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
13 behavior.

14 52. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
15 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
16 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
17 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
18 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,
19 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
20 thereof to be proved according to the evidence at trial.

21 FOURTH CAUSE OF ACTION

22 (For Invasion of Privacy — Casting Plaintiff in a False Light)

23 53. Plaintiff realleges and incorporates herein by reference each and every allegation
24 contained in paragraphs 1 through 52, above, as if set forth herein verbatim.

25 54. By conducting interviews and interrogations of Nevada residents and by issuing
26 unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of
27 plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by stating or
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1 insinuating to said Nevada residents that plaintiff was under investigation in California, thereby
2 falsely portraying plaintiff as having engaged in illegal and immoral conduct, and decidedly
3 casting plaintiff's character in a false light.

4 55. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast
5 plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those
6 who know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature
7 and scope of his work. Such publicity of the investigation was offensive and objectionable to
8 plaintiff and was carried out for other than honorable, lawful, or reasonable purposes. Said
9 conduct by the FTB and the defendants was calculated to harm, vex, annoy and intimidate
10 plaintiff, and was not only offensive and embarrassing to plaintiff, but would have been equally
11 so to any reasonable person of ordinary sensibilities similarly situated, as the conduct could only
12 serve to damage plaintiff's reputation.

13 56. As a direct, proximate, and foreseeable result of the FTB and defendants'
14 aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential
15 damages in a total amount in excess of \$10,000.

16 57. Plaintiff is informed and believes, and therefore alleges, that said invasion of
17 plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of privacy
18 was despicable conduct by the FTB and defendants, entered into with a willful and conscious
19 disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or
20 punitive damages in an amount sufficient to satisfy the purposes for which such damages are
21 awarded.

22 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

23 58. Plaintiff was drawn into the FTB's audit without choice and as an innocent
24 party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be
25 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
26 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
27 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
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1 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
2 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
3 significant financial and reputational destruction. The threatened (and consummated) tortious
4 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
5 publicity of private facts that were expressly extracted from plaintiff under false promises of
6 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
7 detriment.

8 59. Plaintiff was forced to disclose his private documents and information with the
9 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
10 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
11 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
12 of his hard-earned personal property and right not to have his privacy invaded by the publication
13 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
14 available, to wit: the employment of teams of legal and professional experts to vigorously
15 defend himself in the audits and the continuing California tax proceedings.

16 60. It was highly foreseeable to the FTB that, absent the success of its scheme to
17 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
18 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
19 alternative was to vigorously defend himself in the audits and the continuing California tax
20 proceedings. This required the employment of a team of attorneys and other experts. The
21 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
22 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
23 behavior.

24 61. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
25 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
26 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
27 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
28 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,

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1 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
2 thereof to be proved according to the evidence at trial.

3 FIFTH CAUSE OF ACTION

4 (For the Tort of Outrage)

5 62. Plaintiff realleges and incorporates herein by reference each and every allegation
6 contained in paragraphs 1 through 61, above, as if set forth herein verbatim.

7 63. The clandestine and reprehensible manner in which the FTB and defendants
8 carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of
9 authority from the State of California, but without permission from the State of Nevada, and the
10 FTB and defendants' clear intent to continue to investigate and assess plaintiff staggeringly high
11 California state income taxes, interest, and penalties for the entire year of 1992 — and possibly
12 continuing into future years — despite the FTB's own finding that plaintiff was a Nevada
13 resident at least as of April of 1992, was, and continues to be, extreme, oppressive and
14 outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California,
15 disdaining and abandoning all reason in its reprehensible, all-out effort to extort significant
16 amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes,
17 and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for
18 the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of
19 which was, and continue to be, to so harass, annoy, embarrass, and intimidate plaintiff, and to
20 cause him such severe emotional distress and worry as to coerce him into paying significant
21 sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the
22 disputed periods. As a result of such extremely outrageous and oppressive conduct on the part
23 of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment,
24 anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel
25 if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful
26 and determined adversaries.

1 64. As a direct, proximate, and foreseeable result of the FTB and defendants'
2 aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and
3 consequential damages in a total amount in excess of \$10,000.

4 65. Plaintiff is informed and believes, and therefore alleges, that said extreme,
5 unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was
6 despicable conduct by the FTB and defendants, entered into with a willful and conscious
7 disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive
8 damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

9 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

10 66. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
11 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
12 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
13 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
14 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
15 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
16 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
17 significant financial and reputational destruction. The threatened (and consummated) tortious
18 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
19 publicity of private facts that were expressly extracted from plaintiff under false promises of
20 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
21 detriment.

22 67. Plaintiff was forced to disclose his private documents and information with the
23 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
24 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
25 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
26 of his hard-earned personal property and right not to have his privacy invaded by the publication
27 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
28

1 available, to wit: the employment of teams of legal and professional experts to vigorously
2 defend himself in the audits and the continuing California tax proceedings.

3 68. It was highly foreseeable to the FTB that, absent the success of its scheme to
4 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
5 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
6 alternative was to vigorously defend himself in the audits and the continuing California tax
7 proceedings. This required the employment of a team of attorneys and other experts. The
8 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
9 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
10 behavior.

11 69. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
12 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
13 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
14 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
15 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,
16 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
17 thereof to be proved according to the evidence at trial.

18 SIXTH CAUSE OF ACTION

19 (For Abuse of Process)

20 70. Plaintiff realleges and incorporates herein by reference each and every allegation
21 contained in paragraphs 1 through 69, above, as if set forth herein verbatim.

22 71. Despite plaintiff's ongoing effort, both personally and through his professional
23 representatives, to reasonably provide the FTB with every form of information it requested in
24 order to convince the FTB that plaintiff has been a bona fide resident of the State of Nevada
25 since September 26, 1991, the FTB has willfully sought to extort vast sums of money from
26 plaintiff through administrative proceedings unrelated to the legitimate taxing purposes for
27 which the FTB is empowered to act as an agency of the government of the State of California;
28

1 said administrative proceedings have been lawlessly and abusively directed into the State of
2 Nevada through means of administrative "quasi-subpoenas" that have been unlawfully utilized
3 in the attempt to extort money from plaintiff as aforesaid.

4 72. The FTB, without authorization from any Nevada court or governmental agency,
5 directed facially authoritative "DEMAND[S] TO FURNISH INFORMATION," also referred to
6 herein by plaintiff as "quasi-subpoenas," to various Nevada residents, professionals and
7 businesses, *requiring* specific information about plaintiff. The aforesaid "Demands" constituted
8 an actionable abuse of process with respect to plaintiff for the following reasons:

9 (a) Despite the fact that each such "Demand" was without force of law, they were
10 specifically represented to be "Authorized by California Revenue & Taxation Code Section
11 19504 (formerly 19254 (a) and 26423 (a)[])," sent out by the State of California, Franchise Tax
12 Board on behalf of "The People of the State of California" to each specific recipient, and were
13 prominently identified as relating to "*In the Matter of: Gilbert P. Hyatt;*" Plaintiff was also
14 identified by his social security number, and in certain instances by his actual home address in
15 violation of express promises of confidentiality by the FTB; although the aforesaid "Demands"
16 were not directed to plaintiff, the perversion of administrative process which they represented
17 was motivated by the intent to make plaintiff both the target and the victim of the illicit
18 documents;

19 (b) Each such "Demand" was unlawfully used in order to further the effort to extort
20 monies from plaintiff that could not be lawfully and constitutionally assessed and collected
21 because plaintiff was a bona fide resident of Nevada throughout the periods of time the FTB has
22 sought to collect taxes from him, and plaintiff has not generated any California income during
23 any of the pertinent time periods;

24 (c) Each such "Demand" was submitted to Nevada residents, professionals and
25 businesses for the ulterior purpose of coercing plaintiff into paying extortionate sums of money
26 to the FTB without factual or constitutional justification, and without the intent or prospect of
27 resolving any legal dispute; indeed, as noted above, many of the "Demands" were used as
28 vehicles for publicly violating express promises of confidentiality by the FTB, thus adding to

1 the pressure and anxiety felt by plaintiff as intended by the FTB in furtherance of its unlawful
2 scheme;

3 (d) Although the FTB was allegedly investigating plaintiff for the audit years 1991 and
4 1992, such audits were and are a "sham" asserted for the purposes of attempting to extort non-
5 owed monies from plaintiff, as demonstrated by the fact that several of the "Demands" indicated
6 that they were issued to secure information (about plaintiff) "for investigation, audit or
7 collection purposes pertaining to the above-named taxpayer for the years indicated," and then
8 proceeded to demand information pertaining to the years 1993, 1994, and 1995 "to present;"

9 (e) Sheila Cox, a tax auditor for the FTB who has invested hundreds of hours in
10 attempting to gain unlawful access to plaintiff's wallet through means of extortion, was the
11 "Authorized Representative" who issued these abusive, deceptive and outrageous "Demands;"
12 and each of the "Demands" or quasi-subpoenas constituted legal or administrative process
13 targeting plaintiff that was not proper in the regular conduct of the FTB's administrative
14 proceedings against plaintiff;

15 (f) That each "Demand" was selectively, deliberately and calculatingly issued to Nevada
16 recipients who Sheila Cox and the FTB thought would most likely respond to the authoritative
17 nature and language of the documents, as opposed to courteous letters of inquiry that tax
18 auditors and the FTB sent to certain governmental agencies and officials who were viewed as
19 potential sources of criticism or trouble if confronted with the deceptive attempt to exact
20 sensitive information from them through means of facially coercive documents purporting to
21 have extraterritorial effect based upon the authority of California law;

22 (g) In conjunction with and in addition to the issuance of the aforesaid "Demands," and
23 the personal, investigative forays into Nevada by FTB agents, as detailed above, a representative
24 of the FTB, Anna Jovanovich, stated to plaintiff's tax counsel, Eugene Cowan, Esq., that at this
25 "stage" of the proceedings, these types of disputes involving wealthy or well-known taxpayers
26 over their contested assessments almost always settle because these taxpayers do not want to
27 risk having their personal financial information being made public, thus the "suggestion" by Ms.
28 Jovanovich concerning settlement was made with the implied threat that the FTB would release

1 highly confidential financial information concerning plaintiff if he refused to settle, another
2 deceptive and improper abuse of the proceedings instigated by the FTB to coerce settlement by
3 plaintiff;

4 (h) In conjunction with and in addition to the issuance of the aforesaid "Demands" and
5 the other improper methods of exerting coercive pressure on plaintiff to pay the FTB money
6 which it has sought to secure by extortion, and without justification in law or equity, the FTB
7 compounded its abuse of its administrative powers by assessing plaintiff huge penalties based
8 on patently false and frivolous accusations, including but not limited to, the concealment of
9 assets to avoid taxes, plus the outrageous contention that plaintiff was fraudulently claiming
10 Nevada residency;

11 (i) The FTB and Sheila Cox knew that they had no authority to issue "DEMAND[S] TO
12 FURNISH INFORMATION" to any Nevada resident, business or entity, and that it was a gross
13 abuse of Section 19504 of the California Revenue and Taxation Code, under which the aforesaid
14 "Demands" were purportedly authorized; that the aforesaid section of the California Revenue
15 and Taxation Code contains no provision that remotely purports to empower or authorize the
16 FTB to issue such facially coercive documents to residents and citizens of Nevada in Nevada;
17 and despite knowing that it was highly improper and unlawful to attempt to deceive Nevada
18 citizens and businesses into believing that they were under a compulsion to respond to the
19 "Demands" under pain of some type of punitive consequences, Sheila Cox and the FTB
20 nevertheless deliberately and calculatingly abused the process authorized by the aforesaid
21 section of the California Revenue and Taxation Code in order to promote their attempts to extort
22 money from plaintiff;

23 (j) From the outset, the determination by Sheila Cox and the FTB to utilize the
24 "DEMAND[S] TO FURNISH INFORMATION" in Nevada, constituted a deliberate, unlawful,
25 and despicable decision to embark on a course of concealment in the effort to produce material,
26 information, pressure and sources of distortion that would culminate in a combination of
27 sufficient strength and adversity to force plaintiff to yield to the FTB's extortionate demands for
28 money; and the course of concealment consisted of concealing from plaintiff the fact that the

1 aforesaid "Demands" were being sent to Nevada residents, professional persons and businesses,
2 and in hiding from the recipients of the "Demands" the fact that despite their stated support in
3 California law, the documents had no such support and were deceitful and bogus documents;
4 and

5 (k) The FTB further abused its legal, administrative process by issuing the bogus quasi-
6 subpoenas to Nevada residents, professionals, and businesses without providing plaintiff with
7 notice of such discovery as required by the due process clause of Article 1, Section 8 of the
8 Nevada Constitution and the applicable Nevada Rules of Civil Procedure.

9 73. As a direct, proximate and foreseeable result of the FTB and defendants'
10 intentional and malicious abuse of the administrative processes, which the FTB initiated and
11 unrelentingly pursued against plaintiff, as aforesaid, plaintiff has suffered actual and
12 consequential damages, including but not limited to fear, anxiety, mental and emotional distress
13 in an amount in excess of \$10,000.

14 74. Plaintiff is informed and reasonably believes, and therefore alleges, that said
15 abuse of the administrative processes initiated and pursued against plaintiff was willful,
16 intentional, malicious and oppressive in that it represented a deliberate effort to unlawfully
17 extort substantial sums of money from plaintiff that could not be remotely justified by any
18 honorable effort within the purview of the powers conferred upon the FTB by the State of
19 California relating to all aspects of taxation, including the powers of investigation, assessment
20 and collection. Plaintiff is therefore entitled to an award of exemplary or punitive damages in
21 an amount sufficient to satisfy the purposes for which such damages are awarded.

22 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

23 75. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
24 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
25 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
26 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
27 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
28

1 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
2 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
3 significant financial and reputational destruction. The threatened (and consummated) tortious
4 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
5 publicity of private facts that were expressly extracted from plaintiff under false promises of
6 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
7 detriment.

8 76. Plaintiff was forced to disclose his private documents and information with the
9 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
10 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
11 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
12 of his hard-earned personal property and right not to have his privacy invaded by the publication
13 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
14 available, to wit: the employment of teams of legal and professional experts to vigorously
15 defend himself in the audits and the continuing California tax proceedings.

16 77. It was highly foreseeable to the FTB that, absent the success of its scheme to
17 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
18 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
19 alternative was to vigorously defend himself in the audits and the continuing California tax
20 proceedings. This required the employment of a team of attorneys and other experts. The
21 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
22 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
23 behavior.

24 78. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
25 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
26 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
27 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
28 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,

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1 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
2 thereof to be proved according to the evidence at trial.

3 SEVENTH CAUSE OF ACTION

4 (For Fraud)

5 79. Plaintiff realleges and incorporates herein by reference each and every allegation
6 contained in paragraphs 1 through 78, above, as if set forth herein verbatim.

7 80. Plaintiff, who prior to September 26, 1991 had been a long-standing resident and
8 taxpayer of the State of California, placed trust and confidence in the bona fides of the FTB as
9 the taxing authority of the State of California when the FTB first contacted him on or about June
10 1993 regarding the 1991 audit of his California tax obligation; by the time of this first contact,
11 plaintiff had become a recognized and prominent force in the computer electronics industry, and
12 he was vitally interested in maintaining both his personal and business security, as well as the
13 integrity of his reputation as a highly successful inventor and owner and licensor of significantly
14 valuable patents.

15 81. During the course of seeking information and documents relating to the 1991
16 "audit," and repeatedly thereafter, the FTB absolutely promised to (i) conduct an unbiased, good
17 faith audit and (ii) maintain in the strictest of confidence, various aspects of plaintiff's
18 circumstances, including, but not limited to, his personal home address and his business and
19 financial transactions and status; and plaintiff's professional representatives took special
20 measures to maintain the confidentiality of plaintiff's affairs, including and especially obtaining
21 solemn commitments from FTB agents to maintain in the strictest of confidence (assured by
22 supposedly secure arrangements) all of plaintiff's confidential information and documents; and
23 the said confidential information and documents were given to the FTB in return for its solemn
24 guarantees and assurances of confidentiality, as aforesaid, thereby creating a confidential
25 relationship in which the FTB was required not to disclose Hyatt's highly personal and
26 confidential information.

1 82. Despite the aforesaid assurances and representations of (i) an unbiased, good
2 faith audit and (ii) confidentiality by the FTB, said assurances and representations were false,
3 and the FTB knew they were false or believed they were false, or were without a sufficient basis
4 for making said assurances and representations. Even as the FTB and its agents were continuing
5 to provide assurances of confidentiality to plaintiff and his professional representatives, and
6 without notice to either, Sheila Cox and the FTB were in the process of sending the bogus
7 "DEMAND[S] TO FURNISH INFORMATION" to the utility companies in Las Vegas which
8 demonstrated that the aforesaid assurances and representations were false, as the FTB revealed
9 plaintiff's personal home address in Las Vegas, thus making this highly sensitive and
10 confidential information essentially available to the world through access to the databases
11 maintained by the utility companies. Specific representative indices of the FTB's fraud include:

12 (a) In a letter by Eugene Cowan, Esq., a tax attorney representing plaintiff, dated
13 November 1, 1993 and addressed to and received by Mr. Marc Shayer of the FTB, Mr. Cowan
14 indicated that he was enclosing a copy of plaintiff's escrow instructions concerning the purchase
15 of his Las Vegas residence, and that "[p]er our discussion, the address of the Las Vegas home
16 has been deleted." Mr. Cowan ended his letter with the following sentence: "As we discussed,
17 the enclosed materials are highly confidential and we do appreciate your utmost care in
18 maintaining their confidentiality." This letter is contained within the files of the FTB, and the
19 FTB noted in its chronological list of items, the receipt of the aforesaid escrow instructions with
20 "Address deleted;"

21 (b) In the FTB's records concerning its Residency Audit 1991 of Gilbert P. Hyatt, the
22 following pertinent excerpts of notations exist:

23 (i) 2/17/95 - "[Eugene Cowan] wants us to make as few copies as possible, as
24 he is concerned for the privacy of the taxpayer. I [the FTB agent] explained that we will need
25 copies, as the cases often take a long time to complete and that cases which go to protest can
26 take several years to resolve[;]"

27
28

1 (ii) 2/21/95 - "LETTER FROM REPRESENTATIVE MIKE KERN Earlier document
2 request was transferred to Eugene Cowan due to the sensitive and confidential nature of
3 documentation[;]"

4 (iii) 2/23/95 - "Meeting [between Sheila Cox and] . . . Eugene Cowan . . . Mr.
5 Cowan stressed that the taxpayer is very worried about his privacy and does not wish to give us
6 copies of anything. I [Sheila Cox] discussed with him our Security and Disclosure policy. He
7 said that the taxpayer is fearful of kidnapping." [sic] This latter reference to "kidnaping" is a
8 fabrication by Sheila Cox in an apparent effort to downplay in the FTB's records, the
9 importance of plaintiff's privacy concerns as those of an eccentric or paranoid; in reality, the
10 FTB, Sheila Cox and other FTB agents knew that plaintiff had genuine cause for being
11 concerned about industrial espionage and other risks associated with the magnitude of plaintiff's
12 position in the computer electronics industry;

13 (iv) On February 28, 1995, Eugene Cowan, Esq. sent a letter to Sheila Cox of
14 the FTB enclosing copies of various documents. He then stated: "As previously discussed with
15 you and other Franchise Tax Board auditors, all correspondence and materials furnished to the
16 Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you
17 will retain these materials in locked facilities with limited access[;]" and

18 (v) 8/31/95 - In a letter sent to Eugene Cowan, Esq. by Sheila Cox on
19 8/31/95 regarding the 1991 audit, Cox stated: "The FTB acknowledges that the taxpayer is a
20 private person who puts a significant effort into protecting his privacy[;]"

21 (c) Despite the meeting Sheila Cox had with Mr. Cowan on February 23, 1995, and Mr.
22 Cowan's expression of plaintiff's concern for his privacy, and the explanation by Cox of the
23 FTB's stringent Security and Disclosure policy (the violation of which may subject the
24 offending FTB employee to criminal sanctions or termination); and despite Mr. Cowan's letter
25 to Sheila Cox of February 28, 1995, discussing the highly confidential nature of "all
26 correspondence and materials furnished to the Franchise Tax Board" and his and plaintiff's
27 "understanding that you will retain these materials in locked facilities with limited access"
28 (thereby again underscoring the understanding that all information and documents provided to

1 the FTB would be confidential, including plaintiff's personal residence address), Sheila Cox
2 sent a "DEMAND TO FURNISH INFORMATION" to the Las Vegas utility companies
3 including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water
4 District, providing each such company with the plaintiff's personal home address, thereby
5 demonstrating disdain for plaintiff, his privacy concerns and the FTB's assurances of
6 confidentiality.

7 83. Plaintiff further alleges that from the very beginning of the FTB's notification to
8 plaintiff and his professional representatives of its intention to audit his 1991 California taxes,
9 express and implied assurances and representations were made to plaintiff through his
10 representatives, that the audit was to be an objective, unbiased, and good faith inquiry into the
11 status of his 1991 tax obligation; and that upon information and belief, based on the FTB's
12 subsequent actions, the aforesaid representations were untrue, as the FTB and certain of its
13 agents were determined to share in the highly successful produce of plaintiff's painstaking labor
14 through means of truth-defying extortion. Indications of this aspect of the fraud perpetrated by
15 the FTB include:

16 (a) Despite plaintiff's delivery of copies of documentary evidence of the sale of his
17 California residence on October 1, 1991 to his business associate and confidant, Grace Jeng, to
18 the FTB, the FTB has contended that the aforementioned sale was a sham, and therefore
19 evidence of plaintiff's continued California residency and his attempt to evade California
20 income tax by fraud;

21 (b) Plaintiff supplied evidence to the FTB that he declared his sale, and income and
22 interest derived from the sale of his LaPalma, California home on his 1991 income tax return,
23 factors that were ignored by the FTB as it concluded that since the grant deed on the home was
24 not recorded until June, 1993, the sale was a sham, as aforesaid, and a major basis for assessing
25 fraud penalties against plaintiff as a means of building the pressure for extortion;

1 (c) Plaintiff, aware of his own whereabouts and domicile, alleges that the FTB has no
2 credible evidence, and can indeed provide none, that would indicate that plaintiff continued to
3 own or occupy his former home in La Palma, California which he sold to his business associate
4 and confidant, Grace Jeng on October 1, 1991;

5 (d) After declaring plaintiff's sale of his California home on October 1, 1991 a "sham,"
6 the FTB later declined to compare the much less expensive California home with the home
7 plaintiff purchased in Las Vegas, Nevada (a strong indication favoring Nevada residency)
8 stating that: "Statistics (size, cost, etc.) comparing the taxpayer's La Palma home to his Las
9 Vegas home will not be weighed in the determination [of residency], as the taxpayer sold the La
10 Palma house on 10/1/91 before he purchased the house in Las Vegas during April of 1992."
11 (Emphasis added.); and

12 (e) The FTB's gamesmanship, illustrated in part, above, constituted an ongoing
13 misrepresentation of a bona fide audit of plaintiff's 1991 tax year, a factor compounded
14 egregiously by the quasi-subpoenas sent to Nevada residents, professionals and businesses
15 without prior notice to plaintiff, and concerning which a number of such official documents
16 indicated that plaintiff was being investigated from January 1995 to the present, all with the
17 intent of defrauding plaintiff into believing that he would owe an enormous tax obligation to the
18 State of California.

19 84. The FTB and its agents intended to induce plaintiff and his professional
20 representatives to act in reliance on the aforesaid false assurances and representations in order to
21 acquire highly sensitive and confidential information from plaintiff and his professional
22 representatives, and place plaintiff in a position where he would be vulnerable to the FTB's
23 plans to extort large sums of money from him. The FTB was keenly aware of the importance
24 plaintiff assigned to his privacy because of the danger of industrial espionage and other hazards
25 involving the extreme need for security in plaintiff's work and place of residence. The FTB also
26 knew that it would not be able to obtain (at least without the uncertain prospects of judicial
27 intervention) the desired information and documents with which to develop colorable, ostensible
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1 tax assessments and penalties against plaintiff, without providing plaintiff and his professional
2 representatives with solemn commitments of secure confidentiality.

3 85. Plaintiff, reasonably relying on the truthfulness of the aforesaid assurances and
4 representations by the FTB and its agents, and having no reason to believe that an agency of the
5 State of California would misrepresent its commitments and assurances, did agree both
6 personally and through his authorized professional representatives to cooperate with the FTB
7 and provide it with his highly sensitive and confidential information and documents; in fact,
8 plaintiff relied on the false representations and assurances of the FTB and its agents to his
9 extreme detriment.

10 86. Plaintiff's reasonable reliance on the misrepresentations of the FTB and its
11 agents, as aforesaid, resulted in great damage to plaintiff, including damage of an extent and
12 nature to be revealed only to the Court *in camera*, plus actual and consequential damages,
13 including but not limited to fear, anxiety, mental and emotional distress, in a total amount in
14 excess of \$10,000.

15 87. The aforesaid misrepresentations by the FTB and its agents were fraudulent,
16 oppressive and malicious. Plaintiff is therefore entitled to an award of exemplary or punitive
17 damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

18 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

19 88. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
20 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
21 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
22 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
23 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
24 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
25 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
26 significant financial and reputational destruction. The threatened (and consummated) tortious
27 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
28

1 publicity of private facts that were expressly extracted from plaintiff under false promises of
2 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
3 detriment.

4 89. Plaintiff was forced to disclose his private documents and information with the
5 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
6 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
7 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
8 of his hard-earned personal property and right not to have his privacy invaded by the publication
9 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
10 available, to wit: the employment of teams of legal and professional experts to vigorously
11 defend himself in the audits and the continuing California tax proceedings.

12 90. It was highly foreseeable to the FTB that, absent the success of its scheme to
13 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
14 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
15 alternative was to vigorously defend himself in the audits and the continuing California tax
16 proceedings. This required the employment of a team of attorneys and other experts. The
17 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
18 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
19 behavior.

20 91. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
21 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
22 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
23 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
24 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,
25 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
26 thereof to be proved according to the evidence at trial.

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1 EIGHTH CAUSE OF ACTION

2 (For Breach of Confidentiality — Including Informational
3 Privacy)

4 92. Plaintiff realleges and incorporates herein by reference each and every allegation
5 contained in paragraphs 1 through 91, above, as though set forth herein verbatim.

6 93. As represented in its own manuals and policies, to obtain voluntary compliance
7 by a taxpayer to produce information requested of the taxpayer during audits, the FTB seeks to
8 gain the trust and confidence of the taxpayer by promising confidentiality and fairness.
9 Moreover, in its position as an auditor, the FTB does gain, both voluntarily and by compulsion
10 if necessary, possession of personal and confidential information concerning the taxpayer that a
11 taxpayer would reasonably expect to be kept confidential and not disclosed to third parties. As a
12 result, a confidential relationship exists between the FTB and the taxpayer during an audit, and
13 continues to exist so long as the FTB maintains possession of the personal and confidential
14 information, that places a duty of loyalty on the FTB to not disclose the highly personal and
15 confidential information it obtains concerning the taxpayer.

16 94. As described above, in return and in response to the FTB's representations of
17 confidentiality and fairness during the audits, plaintiff did reveal to the FTB highly personal and
18 confidential information at the request of the FTB as an ostensible part of its audits and
19 investigation into plaintiff's residency during the disputed time periods. The FTB, in its
20 position as an auditor, also acquired personal and confidential information concerning plaintiff
21 via other means. Based on its duty of loyalty and confidentiality in its role as auditor, the FTB
22 was required to act in good faith and with due regard to plaintiff's interests of confidentiality
23 and thereby not disclose to third parties plaintiff's personal and confidential information. The
24 FTB, without necessity or justification, nevertheless breached its duty of loyalty and
25 confidentiality by making disclosures to third parties, and continuing to make disclosures to
26 third parties, of plaintiff's personal and confidential information that the FTB had a duty not to
27 disclose.
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1 95. As a result of such extremely outrageous and oppressive conduct on the part of
2 the FTB, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a
3 strong sense of outrage that any honest and reasonably sensitive person would feel upon breach
4 of confidentiality by a party in whom trust and confidence has been imposed based on that
5 party's position.

6 96. As a direct, proximate, and foreseeable result of the FTB's aforementioned
7 invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total
8 amount in excess of \$10,000.

9 97. Plaintiff is informed and believes, and therefore alleges, that said breach of
10 confidentiality by the FTB was intentional, malicious, and oppressive in that such breach
11 constituted despicable conduct by the FTB entered into with a willful and conscious disregard of
12 the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary
13 damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

14 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

15 98. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
16 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
17 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
18 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
19 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
20 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
21 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
22 significant financial and reputational destruction. The threatened (and consummated) tortious
23 actions included the outrageously intrusive invasion of his privacy and breach of confidentiality,
24 as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under
25 false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his
26 extreme and permanent detriment.

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1 99. Plaintiff was forced to disclose his private documents and information with the
2 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
3 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
4 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
5 of his hard-earned personal property and right not to have his privacy invaded by the publication
6 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
7 available, to wit: the employment of teams of legal and professional experts to vigorously
8 defend himself in the audits and the continuing California tax proceedings.

9 100. It was highly foreseeable to the FTB that, absent the success of its scheme to
10 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
11 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
12 alternative was to vigorously defend himself in the audits and the continuing California tax
13 proceedings. This required the employment of a team of attorneys and other experts. The
14 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
15 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
16 behavior.

17 101. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
18 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
19 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
20 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
21 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,
22 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
23 thereof to be proved according to the evidence at trial.

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1 WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants
2 as follows:

3 FIRST CAUSE OF ACTION

4 1. For judgment declaring and confirming that plaintiff is a bona fide resident of the
5 State of Nevada effective as of September 26, 1991 to the present;

6 2. For judgment declaring that the FTB has no lawful basis for continuing to
7 investigate plaintiff in Nevada concerning his residency between September 26, 1991 through
8 December 31, 1991 or any other subsequent period down to the present, and declaring that the
9 FTB had no right or authority to propound or otherwise issue a "Demand to Furnish
10 Information" or other quasi-subpoenas to Nevada residents and businesses seeking information
11 concerning plaintiff;

12 3. For costs of suit; and

13 4. For such other and further relief as the Court deems just and proper.

14 SECOND CAUSE OF ACTION

15 1. For actual and consequential damages in a total amount in excess of \$10,000;

16 2. For punitive damages in an amount sufficient to satisfy the purposes for which
17 such damages are awarded;

18 3. For costs of suit;

19 4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

20 5. For such other and further relief as the Court deems just and proper.

21 THIRD CAUSE OF ACTION

22 1. For punitive damages in an amount sufficient to satisfy the purposes for which
23 such damages are awarded;

24 2. For costs of suit;

25 3. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

26 4. For such other and further relief as the Court deems just and proper.
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1 FOURTH CAUSE OF ACTION

- 2 For actual and consequential damages in a total amount in excess of \$10,000;
3 For punitive damages in an amount sufficient to satisfy the purposes for which such damages
4 are awarded;
5 For costs of suit;
6 For provable attorneys' fees as special damages pursuant to NRCP 9(g); and
7 For such other and further relief as the Court deems just and proper.

8 FIFTH CAUSE OF ACTION

- 9 1. For actual and consequential damages in a total amount in excess of \$10,000;
10 2. For punitive damages in an amount sufficient to satisfy the purposes for which
11 such damages are awarded;
12 3. For costs of suit;
13 4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and
14 5. For such other and further relief as the Court deems just and proper.

15 SIXTH CAUSE OF ACTION

- 16 1. For actual and consequential damages in a total amount in excess of \$10,000;
17 2. For punitive damages in an amount sufficient to satisfy the purposes for which
18 such damages are awarded;
19 3. For costs of suit;
20 4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and
21 5. For such other and further relief as the Court deems just and proper.

22 SEVENTH CAUSE OF ACTION

- 23 1. For actual and consequential damages in a total amount in excess of \$10,000;
24 2. For punitive damages in an amount sufficient to satisfy the purposes for which
25 such damages are awarded;
26 3. For costs of suit;
27 4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and
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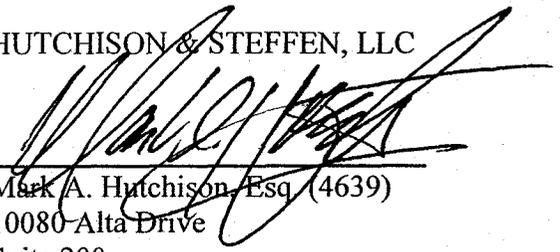
5. For such other and further relief as the Court deems just and proper.

EIGHTH CAUSE OF ACTION

- 1. For actual and consequential damages in a total amount in excess of \$10,000;
- 2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;
- 3. For costs of suit;
- 4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and
- 5. For such other and further relief as the Court deems just and proper.

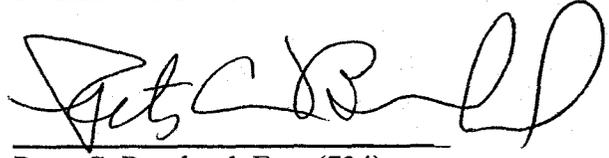
Dated this 18th day of April, 2006.

HUTCHISON & STEFFEN, LLC



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BULLIVANT HOUSER BAILEY PC



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8 *Attorneys for Plaintiff Gilbert P. Hyatt*

9
10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 GILBERT P. HYATT,
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14 Plaintiffs,
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16 v.
17 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA, and DOES 1-100 inclusive,
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19 Defendants.
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Case No.: A382999

Dept. No.: X

**CERTIFICATE OF SERVICE OF SECOND
AMENDED COMPLAINT**

(filed under seal by order of the Discovery
Commissioner dated February 22, 1999)

FILED
APR 18 3 21 PM '06
Bailey B. Houser
CLERK

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CERTIFICATE OF SERVICE

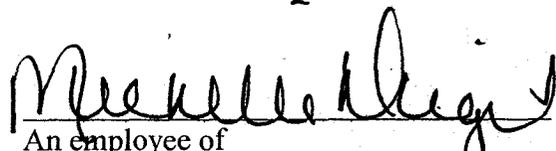
Pursuant to NRCP 5(b), I certify that I am an employee of BULLIVANT HOUSER BAILEY PC and that on this 18th day of April, 2006, I caused the above and foregoing document entitled SECOND AMENDED COMPLAINT to be served as follows:

- [X] by placing same to be deposited for mailing via federal express, in a sealed envelope upon which postage was prepaid in Las Vegas Nevada; and/or
- [X] Pursuant to EDCR 7.26, to be sent via facsimile; and/or
- [X] to be hand-delivered;

to the attorney(s) listed below at the address and/or facsimile number indicated below:

via facsimile: (775) 788-2020
James A. Bradshaw, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street
10th Floor
Reno NV 89501

via facsimile: 873-9966
Jeffrey Silvestri, Esq.
McDonald Carano Wilson LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102


An employee of
Bullivant Houser Bailey PC

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1 punitive damages when he failed to request a jury instruction on these issues during the
2 first phase of trial. Id.; see also NRS 42.005(3) (“If punitive damages are claimed pursuant to
3 this section, the trier of fact shall make a finding of whether such damages will be assessed. . . .
4 The findings required by this section, if made by a jury, **must be made by special verdict along**
5 **with any other required findings**”).

6 At this time, the parties presented some argument on these issues. At the conclusion of
7 this hearing, however, the Court indicated that it would review several pretrial filings including
8 FTB’s trial brief, the City of Newport decision, and other items before hearing any additional
9 arguments related to these issues. Rough Trial Tr., Aug. 6, 2008, 20:22-21:5; 23:13-25:19; 29:13-
10 17. The Court then ordered the parties to return on August 8, 2008 to address these issues and to
11 settle jury instructions on punitive damages, if those instructions would be required, outside the
12 presence of the jury. Id. at 39:22-40:4.

13 At the hearing on August 8, 2008, FTB intended to argue the three points raised at the
14 previous hearing, including Hyatt’s waiver.²² The Court rejected FTB’s argument that Hyatt had
15 waived or forfeited his right to present punitive damages to the jury based on his failure to offer a
16 punitive damage jury instruction at the conclusion of the first phase of trial. In short, the Court
17 indicated that it was FTB’s responsibility to alert Hyatt to this waiver and to therefore insist or
18

19 ²² First, FTB attempted to argue that the Court could not submit Hyatt’s punitive damage
20 claims to the jury because, as a matter of law, such damages could not be legally assessed against
21 a state agency. The Court, however, refused to hear these arguments. See Rough Trial Tr., Aug.
22 8, 2008, 5-7. FTB then moved to its second point that the Court was required to make a prima
23 facie determination that punitive damages could be submitted to the jury before adopting any jury
24 instructions on these points or proceeding to a second phase of trial. Id. at 6-24. The Court never
25 made any express ruling on this issue. Rather, the Court simply stated:

26 THE COURT: We heard so many pretrial motions on so many various subjects
27 and I have to think if this isn't the basis of a pretrial motion, it may be the basis of
28 a post trial motion, but I think we can move on to the next point, Ms. Lundvall.

25 Id. at 24:12-17. As a result, the Court never made a prima facie determination, as mandated by
26 Nevada law and the Bifurcation Order, that Hyatt had made the sufficient showing for an
27 imposition of punitive damages. In short, the Court abdicated its responsibility of making the
28 legal determination to the jury believing those determination to be factual.

1 "object" to Hyatt's failure to offer a punitive damage instruction. Rough Trial Tr., Aug. 8, 2008,
2 31:15.

3 Based on these exchanges, the Court determined that the trial would proceed in three
4 phases: phase one, the liability phase; phase two, the punitive liability phase; and phase three, the
5 punitive damage amount phase. The Court then moved directly to the settling of the required jury
6 instructions for the final two phases of trial.²³ The trial then proceeded to the second and third
7 phases of trial, wherein Hyatt was awarded an unprecedented, astronomical and grossly excessive
8 amount of punitive damages – \$250 million.

9 ii. By failing to Seek Punitive Damage Jury Instruction during
10 First Phase of Trial, Hyatt Waived His Right to have these
Damages Presented to the Jury

11 A "waiver" is defined as "an intentional relinquishment of a known right." State Univ. and
12 Cnty. Coll. Sys. v. Sutton, 120 Nev. 972, 987, 103 P.3d 8, 18 (2004). A waiver is effective if it
13 occurs with full knowledge of all material facts. Id. In this instance, Hyatt was fully aware that
14 he was required to request a punitive damage jury instruction at the conclusion of the liability, or
15 first phase of trial, based on NRS 42.005, the Court's Bifurcation Order, and the correspondence
16 between counsel regarding the settlement of jury instructions. Therefore, when Hyatt failed to do
17 so, Hyatt intentionally relinquished – i.e., expressly waived – his right to punitive damages in this
18 litigation.

19 NRS 42.005(3) expressly mandates that:
20 _____

21 ²³ FTB offered seven proposed punitive damage jury instructions and two proposed special
22 verdict forms. See FTB's Proposed Punitive Damage Instructions filed 8/8/2008. The Court
23 rejected all but one of FTB's proposed instructions. The Court expressly rejected FTB's
24 proposed instructions: (1) defining "fraud" for purposes of punitive damages; (2) FTB's proposed
25 instruction explaining the standards required before punitive damages could be assessed against
26 FTB for the vicarious liability of its employees; (3) FTB's proposed instruction defining a
27 "managing agent" for purposes of vicarious liability; and (4) FTB's proposed instruction
28 prohibiting the jury from considering or awarding Hyatt punitive damages for FTB's conduct to
non-parties. Id. at 1-2, 4-5, 7. The failure to adopt these instructions is yet another legal error, in
a serious of other errors which pervaded this trial. The Court did adopt two sets of instructions,
one set to be read for phase two – the punitive damage liability phase, and one set for phase three
– the punitive damage amount phase. See Court's Instructions 68, 69, 70, attached.

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1 If punitive damages are claimed pursuant to this section, the trier of fact shall make a
2 finding of whether such damages will be assessed. If such damages are to be assessed, a
3 subsequent proceeding must be conducted before the same trier of fact to determine the
4 amount of such damages to be assessed. The trier of fact shall make a finding of the
5 amount to be assessed according to the provisions of this section. **The findings required
6 by this section, if made by a jury, must be made by special verdict along with any
7 other required findings.**

8 Id. (emphasis added). Nevada law could not be clearer – **at the conclusion of the liability, or
9 first phase of trial, the jury must be provided a special interrogatory regarding whether punitive
10 damages should be assessed with ALL OTHER REQUIRED FINDINGS.** Id. If the jury answers
11 the special interrogatory in the affirmative then, and only then, can the case proceed to the second
12 (and final phase of trial). Id. Under the clear dictates of NRS 42.005(3), if a special interrogatory
13 is not given at the conclusion of first phase of trial, the question of punitive damages cannot be
14 presented to the jury – if at all.

15 Hyatt and his attorneys were well-aware of NRS 42.005(3) and its requirements as these
16 were the express issues that formed the basis for FTB’s Motion in Limine to bifurcate the
17 punitive damage phase of trial. See FTB’s Mot. In Limine re: Bifurcation of Punitive Damages
18 filed 1/7/2008. Moreover, Hyatt was fully aware of the Bifurcation Order, which expressly relied
19 on NRS 42.005(3), and required that the jury be instructed on punitive damages **at the conclusion
20 of the liability, or first phase of trial** – if the Court concluded a prima facie showing for punitive
21 damages had been made. Ct.’s Bifurcation Order filed 3/27/2008; Hr’g Tr., Feb. 28, 2008, 72:16-
22 20.

23 Hyatt was also fully aware that the Court was required to make two determinations at the
24 conclusion of the first phase of trial: (1) whether Hyatt had presented a prima facie case for
25 punitive damages; and (2) if so, what jury instruction would be provided to the jury. FTB had
26 repeatedly stated these procedures to Hyatt in both its Objections to Hyatt’s proposed jury
27 instructions and in communications with Hyatt’s counsel during the settlement of jury
28 instructions prior to Hyatt’s decision not to offer the required instructions. Based on all of these
29 facts, there is no question that Hyatt was fully and completely aware that he was required to seek

1 a punitive damage jury instruction at the conclusion of the liability phase of trial. Hence, there is
2 no argument that Hyatt was unaware of all the “material facts” related to this issue.

3 Therefore, when Hyatt informed the Court and FTB he would not seek a punitive damage
4 jury instruction at the end of the liability phase of trial and then informed the jury that it would
5 “never hear from another lawyer again,” **there is no question that Hyatt knew all the material**
6 **facts related to these issue and that he was relinquishing, i.e., waiving, his known right to**
7 **seek punitive damages during this trial.** Therefore, this case should never have proceeded past
8 the first phase of trial.

9 Hyatt’s waiver of punitive damages is further mandated and buttressed by NRCP 49(a).
10 According to the rule, if the Court omits from the special verdict form:

11 Any issue of fact raised by the pleadings or by the evidence, **each party waives**
12 **the right to a trial by jury of the issue so omitted unless before the jury retires**
13 **the party demands its submission to the jury.**

14 NRCP 49(a) (emphasis added). The special verdict form submitted to the jury at the conclusion of
15 the liability, or first phase of trial, did not include any special interrogatory related to punitive
16 damages. Hyatt pled punitive damages in his complaint. See Sec. Am. Comp. 4/18/2006.
17 Therefore, if Hyatt intended the jury to resolve the factual issue of punitive damages, he was
18 required to demand that this issue be included on the special verdict form before the jury retired
19 to deliberate. NRCP 49(a). Hyatt made no such demand. As a result, based on the clear language
20 of the rule, Hyatt waived his right to a “trial by jury” on this issue. Id.

21 At trial, the Court erroneously refused to find Hyatt “waived” his right to punitive
22 damages. The sole basis for this decision was the Court’s contention that FTB’s failure to object
23 to Hyatt’s failure to submit his punitive damage jury instruction, somehow insulated Hyatt from
24 his own waiver. Rough Trial Tr., Aug. 8, 2008, 31:15. This was erroneous. The contention or
25 belief that FTB was somehow responsible for objecting to Hyatt’s failure to submit a jury
26 instruction on punitive damages in order to ensure that Hyatt can be deemed to have “waived” his
27 right to these damages has no legal or factual basis.

28 First and foremost, it has always been FTB’s position that Hyatt cannot recover punitive
damages against FTB, a state agency. FTB has never waived from that position and requiring

1 FTB to object to Hyatt's failure to submit such an instruction on damages that FTB believes are
2 not recoverable makes no sense. Second, placing the onus on FTB to object to Hyatt's failure to
3 submit a jury instruction required FTB to act as counsel for Hyatt. This would violate any
4 number of ethical obligations. For example, this "representation" would require FTB to act with
5 a conflict of interest to its own client, FTB. The "representation" would require FTB to violate its
6 duty to act with FTB's best interests in mind, to act diligently on FTB's behalf, and to expedite
7 the litigation – just to name a few. Nev. Rules Of Prof. Conduct 1.3, 1.7, 3.2. Therefore, it was
8 completely improper and legally erroneous to deem Hyatt's failure to submit a punitive damage
9 instruction to be FTB's error, rather than what it truly was – Hyatt's express waiver of these
10 damages.

11 Finally, at the very least, Hyatt should have been estopped from seeking punitive damages
12 after failing to submit a punitive damage jury instruction at the conclusion of the first phase of
13 trial. Equitable estoppel applies with the following elements have been satisfied: "(1) the party to
14 be estopped must be apprised of the true facts, (2) that party must intend that his conduct shall be
15 acted upon or must so act that the party asserting estoppel has the right to believe it was so
16 intended, (3) the party asserting estoppel must be ignorant of the true state of the facts, and (4)
17 the party asserting estoppel must have detrimentally relied on the other party's conduct." Las
18 Vegas Convention and Visitors Auth. v. Miller, 124 Nev. Adv. Op. No. 62, 2008 WL 4097696
19 *16 (Sep. 4, 2008).

20 Here, there is no question that these elements are satisfied. First, there is no question that
21 Hyatt was "apprised of the true facts." Hyatt knew full well that he was required by the Court's
22 Bifurcation Order to submit a punitive damage jury instruction at the conclusion of the first phase
23 of trial. Hyatt knew that NRS 42.005(3) required the jury to consider this issue in conjunction
24 with all other issues in this case. Second, Hyatt knew that FTB would act upon his conduct and
25 not submit its own instructions or seek to assert punitive damages at the end of the first phase of
26 trial. Third, FTB was totally unaware that Hyatt would seek to assert a claim for punitive
27 damages at the conclusion of first phase of trial. This is particularly true in light of Hyatt's
28 express statements to the jury that they "would never hear from any lawyer again." Finally, FTB

1 relied on Hyatt's failure to seek his punitive damages at the conclusion of the first phase of trial.
2 FTB would have strenuously argued, at the time of jury instruction settlement, that no punitive
3 damages should be considered if FTB believed that Hyatt would later seek such damages.

4 Therefore, no matter how the Court looks at this issue, it is clear that this trial should
5 never have been permitted to proceed past the liability, or first phase of trial. Hyatt clearly
6 relinquished his right to seek these damages when he failed to offer a punitive damage jury
7 instruction at the conclusion of the first phase of trial. At the very least, Hyatt should have been
8 estopped from taking a contrary position on this issue after having been awarded compensatory
9 damages. As a result, the Court legally erred in permitting this trial to proceed to a second, and
10 then a third phase of trial, on punitive damages. This error was highly prejudicial to FTB and
11 mandates that FTB receive a new trial. NRCP 59(a)(7).

12 f. Change in Defendant

13 Hyatt sued FTB. FTB is an agency of the State of California but it is independent and
14 separate entity from the State of California. During pretrial motion practice, in fact, this was
15 confirmed. FTB filed a "motion to dismiss" the "doe defendants" named in Hyatt's complaint.
16 FTB's Mot. to Dismiss re: Doe Defendants filed 11/30/2007. At the hearing on this motion, the
17 parties stipulated that the Franchise Tax Board, or FTB, was the correctly named defendant. Hr'g
18 Tr, Jan. 23, 2008, 54:17-57:9. At no time was there any indication from Hyatt that he believed
19 FTB was one and the same with the State of California or that the "State of California" was also a
20 named defendant.

21 In spite of his express acknowledgement that FTB was the proper defendant, Hyatt shifted
22 his position during the punitive damage assessment phase, or third phase of trial. During this
23 phase, the only evidence that could be legally provided to the jury was evidence related to the
24 wealth of the defendant – in this case, FTB. See NRS 42.005(3). Hyatt, however, did not
25 present any evidence related to the wealth of FTB. Rather, Hyatt only presented evidence related
26 to the wealth of the State of California through his unqualified expert witness, Kurt Sjoberg. See
27 Rough Trial Tr., Aug. 11, 2008. Hyatt asserted for the first time in ten years of litigation that the
28 true defendant in this case was the State of California, not FTB. See Sec. Am. Comp. filed

4/18/2008. Worse still, Hyatt took the absurd position that it was improper for FTB to attempt to limit the evidence to be presented during this phase to only FTB's wealth – in spite of the fact that FTB was the only named defendant in this litigation.

g. Constitutional Due Process

As a corollary to NRCP 59(e), NRCP 59(a)(7) and NRCP 50, and the arguments set forth above, courts are required, as a matter of constitutional due process, to reduce damages when there is no legal basis for those damages. Johansen, 170 F.3d at 1331. This authority does not flow directly from NRCP 59; rather it is a function of the court's mandatory duty to ensure that there is a legal basis for any jury award and that the award does not violate the principles of constitutional due process. Id. at 1331-32. This reduction is unlike remittitur pursuant to NRCP 59(a)(6), because:

A constitutionally reduced verdict, therefore, is not a remittitur at all. A remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages. The court orders a remittitur when it believes the jury's award is *unreasonable* on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court and which we review for an abuse of discretion, Gasperini, 518 U.S. at 435, 116 S.Ct. at 2211, a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause. BMW, 517 U.S. at 585, 116 S.Ct. at 1589.

Id. at 1331. This rule applies not only to punitive damages, but to any award that lacks legal basis. See New York, L. E. & W.R. Co. v. Estill, 147 U.S. 591 (affirming an award of compensatory damages but reversing the award of interest because interest was not permitted in that case as a matter of law); Corpus v. Bennett, 430 F.3d 912, 917 (8th Cir. 2005) (reducing compensatory award in order to make it "conform to the law"); Holmes v. West Palm Beach Hous. Auth., 309 F.3d 752, 758 (11th Cir. 2002) (reducing a jury award on compensatory damages because the claim for lost back pay and benefits was excessive as a matter of law).

Moreover, such a reduction occurs without affording the plaintiff an opportunity to elect a new trial, as would be afforded under the remittitur rules set forth in NRCP 59. Johansen, 170 F.3d at 1331. This is because "a constitutionally reduced award is a not a traditional remittitur at all. It is not discretionary, and the court's authority does not lie in Rule 59." Id. at 1331-32. I

1 the court detects legal error, it has “the obligation and the power to correct the error by vacating
2 or reversing the jury’s verdict.” Id. at 1330.

3 For the same reasons stated above, FTB requests that this Court exercise its “mandatory
4 duty” to correct an unconstitutionally excessive verdict so that it conforms to the requirements of
5 the due process clause.” Johansen, 170 F.3d at 1331 (11th Cir. 1999).

6 h. Excessiveness

7 Chapter 42 of the Nevada Revised Statutes governs the award of punitive damages in
8 Nevada, subject to the Due Process Clause of the Fourteenth Amendment of the United States
9 Constitution. Bongiovi v. Sullivan, 138 P.3d 433, 452 (2006). In Bongiovi, the Nevada Supreme
10 Court adopted the United States Supreme Court’s standard for excessiveness of punitive damages
11 as set forth State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416-18 (2003). Id. at 452.

12 The Nevada Supreme Court now considers the following factors when determining whether an
13 award is excessive:
14

- 15 1. The degree of reprehensibility of the defendant’s conduct;
- 16 2. The ratio of the punitive damage award to the actual harm inflicted on the
17 plaintiff; and
- 18 3. How the punitive damages award compares to other civil or criminal
19 penalties that could be imposed for comparable conduct.

20 Id.

21 First, the award of \$250,000,000 in punitive damages does not comport with FTB’s
22 conduct, which was not “reprehensible” and which did not lead to any verifiable damage to Hyatt.
23 Despite acknowledging at closing that “[s]ome day, somewhere in California he may be ordered
24 to pay all [the California taxes and penalties],” Hyatt argued to the jury that he was entitled to
25 recover damages simply because he was assessed taxes and penalties and that the jury could
26 impose punitive damages on that conduct. Id. at 80:13-14. If California upholds the
27 determinations made by FTB, then Hyatt would be left with a windfall recovery from actions that
28 were admittedly not undertaken in bad faith. This highlights how excessive the jury’s award of

1 damages was in this case. The United States Supreme Court has stated that “[T]he most
2 important indicium of the reasonableness of a punitive damages award is the degree of
3 reprehensibility of the defendant's conduct.” State Farm Mutual Association v. Campbell, 538
4 U.S. 408, 419(2002) (citation omitted). The award of punitive damages must reflect “the
5 enormity of the offense.” BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1995). The
6 State Farm Court continued:

8 We have instructed courts to determine the reprehensibility of a defendant by
9 considering whether: the harm caused was physical as opposed to economic; the
10 tortious conduct evinced an indifference to or a reckless disregard of the health or
11 safety of others; the target of the conduct had financial vulnerability; the conduct
12 involved repeated actions or was an isolated incident; and the harm was the result
13 of intentional malice, trickery, or deceit, or mere accident. The existence of any
14 one of these factors weighing in favor of a plaintiff may not be sufficient to sustain
a punitive damages award; and the absence of all of them renders any award
suspect. It should be presumed a plaintiff has been made whole for his injuries by
compensatory damages, so punitive damages should only be awarded if the
defendant's culpability, after having paid compensatory damages, is so
reprehensible as to warrant the imposition of further sanctions to achieve
punishment or deterrence.

15 Id. (internal citations omitted). Based on this test, FTB's conduct cannot be considered
16 reprehensible enough to warrant such a huge punitive damage award.

17 What happened to Hyatt? He admittedly got audited and he believes that FTB came to the
18 wrong conclusion. Hyatt has multiple avenues of appealing that allegedly wrong conclusion.
19 And what happens if these multiple avenues of appeal find that, indeed, FTB did not come to the
20 wrong conclusion? If so, can FTB's conduct be deemed “reprehensible”? Hyatt also alleged that
21 FTB came to the wrong conclusion in an effort to extort a settlement from him. However, Hyatt's
22 expert testified that he saw no evidence of extortion throughout the audit or protest process, or
23 that Hyatt was ever intimidated. Thus, how could Hyatt have presented “clear and convincing”
24 evidence of his extortion allegation? Also, FTB did not evince an indifference to or reckless
25 regard to the health and safety of Hyatt or anyone else. In fact, Hyatt's expert testified that he
26 saw nothing wrong with the way FTB collected information to assess Hyatt's residency.
27 Moreover, despite explaining to the United States Supreme Court that FTB needed to be
28 prevented from beating people with rubber hoses and from “thumbscrewing” people to get

1 information from them, there was never any contention or testimony from Hyatt's experts that
2 they quarreled with the manner in which FTB gathered the evidence about Hyatt. Hyatt's experts
3 only criticized the manner in which FTB analyzed and weighed the evidence it gathered; actions
4 which were admittedly within FTB's discretion and for which Nevada affords immunity. FTB
5 conducted an audit, nothing more.²⁴ How then can Hyatt contend that FTB engaged in
6 reprehensible conduct?

7 Additionally, Hyatt was not financially vulnerable. To the contrary, the reason Hyatt
8 claimed he was audited was because he had made millions of dollars and did not report it as
9 income to the State of California. Hyatt was represented by highly skilled professionals
10 throughout the audit and throughout the litigation. Hyatt never once interfaced himself with
11 FTB's representatives.

12 Also, the conduct that Hyatt complained about was fairly isolated. Hyatt complained
13 about the way FTB "analyzed" the information it had collected, but he did not fault the way that
14 FTB collected that information. Finally, the harm (to the extent there was any) was not the result
15 of malice, trickery, or deceit. FTB was simply doing its statutorily mandated job of conducting
16 an audit and Hyatt disagreed with FTB's analytical conclusions.

17 Secondly, the ratio of punitive damages to the actual harm inflicted by Hyatt is too high.
18 While the ratio of punitive damages to compensatory damages is just over 2:1 and Nevada law
19 permits a ratio of 3:1, the United States Supreme Court has indicated that the ratio should be no
20 more than 1:1. In Exxon Shipping Co. v. Baker, 128 S.Ct. 2605 (2008), the United States
21 Supreme Court reduced a punitive damages claim pursuant to federal common law to an amount
22 equal to the compensatory damages awarded for the Exxon Valdez disaster. Id. at 2634. The
23 Court rejected the adoption of the 3:1 ratio that Nevada has. Id. at 2631. Instead, the Court chose

24 _____
25 ²⁴ See Ace Truckers v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987) (partially abrogated on other
26 grounds in Bongiovi), where the defendant committed multiple acts of intentional fraud; the court
27 held that such conduct was "not extravagant," and that the defendants' fraud "can probably be
28 said to be toward the lower end of the spectrum of malevolence found in punitive damages
cases." Id. at 511.

1 a 1:1 ratio, based on data previously cited that the median punitive damages award was slightly
2 lower than the corresponding compensatory damages award. Id. at 2633. The 2:1 ratio here is
3 too high and must be reduced.²⁵

4 Third, the punitive award is grossly overstated compared to other civil or criminal
5 penalties that could be imposed for comparable conduct. In fact, there are no penalties, i.e.,
6 punitive damages, in either state, allowed against a public entity.

7 In Ainsworth v. Combined Ins. Co. of America, 104 Nev. 587, 594, 763 P.2d 673, 677
8 (1988), the Nevada Supreme Court reinstated the jury's award of \$5,939,500 in punitive damages
9 tied to the insurance company's repeated, bad faith refusal to pay claims on two accident policies
10 for a Sparks city councilman who suffered a stroke, immediately went into a seven day coma, was
11 100% disabled after six months, and continued to have permanent and devastating events. As
12 later noted by the Court, it was the largest punitive damages award upheld at that point by a factor
13 of six. Ainsworth v. Combined Ins. Co. of America, 105 Nev. 237, 249, 774 P.2d 1003, 1012
14 (1989). As this Court is well aware, the punitive damage award in this case is more than *forty-*
15 *two times larger* than the substantial award in Ainsworth.

16 A review of Nevada reported decisions involving judgments since Ainsworth further
17 highlights the excessiveness of this punitive damage award. See, e.g., Countywide Home Loan v.
18 Thitchner, 124 Nev. Adv. Op. No. 64, at *9-10 (Sept. 11, 2008) (upholding \$968,070 punitive
19 damage award tied to the misidentification and foreclosure on a condominium while the owners
20 temporarily resided in another state and completely disposed of the owners' personal belongings,
21 including irreplaceable items like military medals, certificates, commendations, wedding gown
22 and family photos); Bongiovi v. Sullivan, 138 P.3d 433, 453 (2006) (upholding \$250,000 punitive
23 damage award where competing plastic surgeon told potential patient that plaintiff had murdered
24 a patient on the operating room); Taylor v. Thunder, 116 Nev. 968, 975, 13 P.3d 43, 46 (2000)

25 _____
26 ²⁵ Of course, should this Court reduce the excessive compensatory damages, it will need to
27 reduce the punitive damage award as well to account for Nevada statute and constitutional
28 jurisprudence.

1 (upholding \$25,000 punitive damage award for statutory sexual seduction of a fourteen year old
2 girl); Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 615, 5 P.3d 1043, 1054 (2000)
3 (upholding \$6,050,000 punitive damage award for various defalcations tied to stockbroker and
4 brokerage company against elderly couple's trust); Olivero v. Lowe, 116 Nev. 395, 404, 995 P.2d
5 1023, 1028 (2000) (upholding \$45,000 punitive damage award for brandishing and pointing
6 handgun in face, threatening life, and forcing labor under threat of life); Dillard Dept. Stores, Inc.
7 v. Beckwith, 115 Nev. 372, 376, 989 P.2d 882, 884 (1999) (upholding \$1,872,084 punitive
8 damage award for forcing employee out of work while injured, resulting in medical treatment for
9 a major depressive disorder and embarrassment); Albert H. Wohlers & Co. v. Bartgis, 114 Nev.
10 1249, 1253, 969 P.2d 949, 952 (1998) (reducing punitive damage award from \$8,000,000 to
11 \$3,900,000 for bad faith denial of insurance coverage resulting in documented distress, loss of
12 sleep, bladder infections, upper-respiratory infection, and dramatic weight loss); Powers v.
13 United Services Auto. Ass'n., 114 Nev. 690, 704, 962 P.2d 596, 605 (1998) (upholding
14 \$5,000,000 punitive damage award for insurance company's bad faith refusal to pay claim for
15 sunken boat, including instigation of criminal charges for false insurance claim); Smith's Food &
16 Drug Centers, Inc. v. Bellagarde, 11 Nev. 602, 611, 958 P.2d 1208, 1215 (1998) (upholding
17 \$65,000 punitive damage award wrongful detention and false arrest for shoplifting); Clark v.
18 Lubritz, 113 Nev. 1089, 1099, 944 P.2d 861, 867 (1997) (upholding \$200,000 punitive damages
19 award for failure for preferred provider entity to notify member of reduced payment distribution
20 in contravention of corporate charter); Hall v. SSF, Inc., 112 Nev. 1384, 1389, 930 P.2d 94, 97
21 (1996) (upholding \$5,000 punitive damage award for punching and breaking jaw and teeth of
22 club patron, requiring surgery and braces); Guaranty Nat. Ins. Co. v. Potter, 112 Nev. 199, 209,
23 912 P.2d 267, 274 (1996) (reducing punitive damage award from \$1,000,000 to \$250,000 for bad
24 faith insurance claim as excessive); Bigelow v. Bullard, 111 Nev. 1178, 1188-89, 901 P.2d 630,
25 636 (1995) (upholding \$25,000 punitive damage award for demanding payment for rent that
26 included forcing way into apartment, pulling a gun and pushing it into plaintiff's stomach, and
27 threatening to bash her face in); K-Mart Corp. v. Washington, 109 Nev. 1180, 1196, 866 P.2d
28 274, 284 (1993) (upholding \$135,154.50 punitive damage award for defamation and malicious

1 prosecution claims tied to wrongful detention and arrest for shoplifting, overruled later on other
2 grounds); Topaz Mut. Co., Inc. v. Marsh, 108 Nev. 845, 850, 839 P.2d 606, 609 (1992)
3 (upholding \$35,000 punitive damage award tied to fraudulent transaction); Kahn v. Orme, 108
4 Nev. 510, 512, 835 P.2d 790, 792 (Nev. 1992) (upholding \$50,000 punitive damage award
5 obtained via default judgment tied to unprovoked and malicious physical attack and subsequent
6 malicious prosecution); D'Angelo v. Gardner, 107 Nev. 704, 711, 819 P.2d 206, 211 (1991)
7 (upholding \$100,000 punitive damage award for wrongful discharge in conflict with procedures
8 outlined in employee handbook and in derogation of statutes); Republic Ins. Co. v. Hires, 107
9 Nev. 317, 321, 810 P.2d 790, 793 (1991) (reducing punitive damage award from \$22,500,000 to
10 \$5,000,000 for insurance company's bad faith in resolving homeowners claim, including failure
11 to pay for damaged and stolen items and conducting neighborhood wide investigation against
12 claimant implying that they were the perpetrator of the burglary); S.J. Amoroso Const. Co. v.
13 Lazovich & Lazovich, 107 Nev. 294, 299, 810 P.2d 775, 778 (1991) (reducing punitive damage
14 award from \$1,000,000 to \$500,000 for fraud where subcontractor was forced to sign documents
15 under duress from general contractor); Nev-Tex Oil & Gas v. Precision Rolled Products, 105
16 Nev. 685, 686, 782 P.2d 1311, 1312 (1989) (upholding \$5,000 punitive damage award for
17 misrepresentation connected to a gas well exploration agreement); United Fire Ins. Co. v.
18 McClelland, 105 Nev. 504, 514, 780 P.2d 193, 199 (1989) (upholding \$500,000 punitive damage
19 award for insurance company's bad faith refusal to pay claims resulting non-treatment causing
20 severe kidney infections); Ace Trucking v. Kahn, *supra* (reducing \$800,000 punitive damages
21 award to \$400,000, for defendants' repeated multiple acts of intentional fraud).

22 In short, the Nevada Supreme Court has never affirmed a punitive damage award in
23 excess of \$6,050,000. Not anywhere close. Notwithstanding the horrible circumstances faced
24 throughout these reported decisions in Nevada at the hands of powerful corporations, Hyatt has
25 been awarded a punitive damage award that is more than *forty-one times larger* than the next
26 largest ever upheld by the Nevada Supreme Court. This further highlights why this award of
27 punitive damages and this award of damages generally must be reduced or eliminated by this
28 Court.

1 VI. IN THE ALTERNATIVE, MOTION FOR NEW TRIAL PURSUANT TO NRCP 59(a)

2 A. Jury Instruction 24

3 1. The Court Improperly Permitted Hyatt to Litigate FTB's Discretionary
4 Conduct under the Guise of a Bad Faith Claim

5 As detailed above, strict jurisdictional lines were placed on this case by the Nevada
6 Supreme Court, and the United States Supreme Court pretrial. Based on these pretrial
7 jurisdictional lines, certain matters could not be tried in this case. Notwithstanding those strict
8 limitations, the Court erased them all.

9 First, the Nevada Supreme Court and United States Supreme Court could not have been
10 more clear – discretionary actions taken by FTB or its alleged negligent conduct were off limits in
11 this litigation. Hyatt v. Franchise Tax Board, 2002 Nev. LEXIS 57 (Nev. April 4, 2002);
12 Franchise Tax Board v. Hyatt, 538 U.S. 488, 123 S.Ct. 1683 (2003). Why? Because Nevada
13 governmental agencies are immune from liability concerning their discretionary conduct (even if
14 that discretion is abused) and alleged negligence, and FTB was supposed to be afforded the same
15 immunities as a Nevada governmental agency. Id. Moreover, FTB's ultimate conclusions related
16 to Hyatt's residency, the tax assessments, and the determinations to assess fraud penalties were
17 dismissed from this litigation – as determined by this Court and **repeatedly reiterated both**
18 **prior and during trial.** See Ct.'s Order dated 4/19/1999, at.2. Therefore, based on these
19 determinations, it was clear that the only issues that could be tried to the jury centered upon
20 FTB's alleged intentional conduct **gathering** evidence during the audit.²⁶

21 Although this case, and particularly this trial, were only to be centered upon FTB's
22 alleged **intentional** misconduct when **gathering evidence**, little, if any time, was spent
23 addressing this conduct at trial. Rather, Hyatt – with the Court's permission – took this case into
24 a direction never anticipated or expected. In particular, Hyatt centered this case upon FTB's
25 **discretionary** conduct, with a particular emphasis upon FTB's allegedly improper "analysis"

26
27 ²⁶ Notably, such was the only conduct discussed during oral argument before the United
28 States Supreme Court.

1 used to reach its audit conclusions. This is best exemplified by the testimony of Hyatt's lead
2 expert witness, Malcolm Jumelet, who testified:

3 Q. But on the whole are your opinions critical of the way in which the
4 information was gathered or the way in which the information was analyzed and
weighed?

5 A. It was the way the information was analyzed and weighed.

6 Rough Trial Tr., June 13, 2008, 155:10-15.²⁷ This testimony epitomizes the endless testimony
7 provided by Hyatt's key witnesses who focused entirely upon FTB's alleged improper "analysis"
8 during the audits and protests, i.e., testimony that FTB did not have sufficient evidence to
9 assess fraud penalties, that FTB improperly "weighed" evidence to reach its residency
10 conclusions, and the like. According to Hyatt, this amounted to a failure on FTB's part to be
11 "fair and impartial."²⁸ As a result, the entire trial focused upon FTB's discretionary
12 analysis which in turn attacked FTB's ultimate conclusions related to Hyatt's residency, the
13 tax assessments, and the fraud penalties – all of which were expressly off limits.

14 The Court, however, had an opportunity to remedy these improprieties by specifically
15 instructing the jury that it was prohibited from making factual determinations related the propriety
16 of FTB's analysis. Although the Court initially provided this correct instruction – Jury Instruction
17 24 – the Court later struck the instruction, parts of FTB's closing arguments related to that
18 instruction, and then, adding insult to injury, the Court expressly instructed the jury that it

21 ²⁷ Hyatt attempted to disguise the litigation of FTB's discretionary and negligent conduct as
22 "intentional" misconduct by claiming that FTB failed to act "fairly and impartially" during the
23 audit. Hyatt asserted this amounted to an intentional misrepresentation or "fraud." This disguise
24 or mere labels, however, did not change the fact that the underlying issues Hyatt was putting on
trial were FTB's allegedly negligent conduct when conducting its discretionary analysis of this
case.

25 ²⁸ For example, during trial, virtually all of Hyatt's key witnesses testified at length that FTB
26 had insufficient evidence to assess fraud penalties and engaged in an incomplete and improper
27 analysis related to Hyatt's audit and residency conclusions. See Trial Testimony Michael Kern,
Eugene Cowan, Edwin Antolin, Paul Schervish, Gilbert Hyatt, and Malcolm Jumelet.

1 could make factual determinations related to FTB's analysis and endorsed the improper
2 testimony of Malcolm Jumelet.

3 These various actions were legally improper in several respects. First, the original Jury
4 Instruction 24 was legally correct and properly comported with the law of this case. Moreover,
5 recent Nevada Supreme Court precedent expressly prohibited the jury from making **any** factual
6 determinations related to FTB's discretionary analysis. Moreover, the Court's curative instruction
7 was legally improper and virtually mandated a directed verdict in Hyatt's favor. Finally, based on
8 these errors the jury's verdict is nothing more than a decision intended to enjoin the collection or
9 assessment of taxes in California, in violation of the Tax Injunction Act. These legal errors,
10 whether taken alone or collectively, irreparably prejudiced FTB and annihilated any chance that
11 FTB could receive a fair trial. Therefore, FTB is entitled to a new trial – focused only upon those
12 issues that this Court legally can assert jurisdiction upon. See NRCP 59(a)(7).

13 a. Factual Background Related To Jury Instruction 24

14 To appreciate the errors FTB assigns to the Court's actions relative to these issues and
15 Jury Instruction 24, it is necessary to remind the Court of certain relevant factual matters.

16 i. Motion In Limine re: Bad Faith Analysis Claim

17 Pretrial, FTB brought several motions intended to confine the issues and evidence to be
18 presented at trial to the jurisdictional confines of this litigation. Of particular significance, FTB
19 filed a motion on January 30, 2008 entitled, "Motion in Limine re: Hyatt's Bad Faith Analysis
20 Claim." This motion expressly sought to preclude Hyatt from presenting evidence related to
21 FTB's alleged "bad faith analysis." (hereinafter "Bad Faith Motion"). With this Motion, FTB
22 explicitly explained the jurisdictional lines that had been drawn in this case and the manner in
23 which Hyatt was attempting to manipulate these lines with the "labels" that he had placed on his
24 claims. FTB argued that the jurisdictional limitations expressly **prohibited** the Court from
25 permitting the jury to make any factual determinations **related to FTB's analysis** because: (1)
26 FTB's analysis was purely a discretionary function; and (2) allowing the jury to evaluate these
27 factual determinations would necessarily require the jury to make factual determinations related
28

1 to the ultimate conclusions reached by FTB regarding Hyatt's residency and the validity of the tax
2 and penalty assessments. See Bad Faith Motion, 4-5; 19-22.

3 The Court indicated that these points were "well taken." Hr'g Tr. Mar, 6, 2008, 11:5-11.
4 The Court also expressed its concern over how "this case may play out in terms of weighing the
5 testimony of the various witnesses," reiterating that the jury would not be deciding the issue of
6 Hyatt's residency or the validity of the tax assessments. Id. Ultimately, however, the Court
7 denied the motion claiming that the motion "did not specify what particular evidence ought to be
8 excluded." Id.

9 ii. Trial Testimony

10 In spite of the repeated admonition that Hyatt's residency and FTB's determinations to
11 assess Hyatt taxes and fraud penalties were not at issue in this, virtually **all** of the evidence
12 presented by Hyatt's key witnesses focused squarely upon attacking and discrediting these exact
13 determinations.

14 For example, Hyatt's first witness, Michael Kern, Hyatt's tax accountant, testified almost
15 exclusively upon two primary issues: (1) whether or not Kern "cooperated" with FTB during the
16 tax and residency audits; and (2) whether or not Kern attempted to intimidate FTB during the
17 audit. See Rough Trial Tr., Apr. 24-28, 2008. This testimony was elicited because Hyatt's
18 "failure to cooperate" and "intimidation tactics" were each identified as "indices" of fraud relied
19 upon by FTB when it assessed fraud penalties. See Pl's Tr. Ex. 245, 31-40. In effect, Kern
20 testified that FTB had improperly analyzed the facts gathered during Hyatt's audit and Hyatt's
21 tender of those facts, and as a result improperly assessed a fraud penalty.

22 The testimony of Eugene Cowan, Hyatt's tax attorney, was virtually the same. Like Kern,
23 Cowan's testimony largely focused upon whether Cowan "cooperated" with FTB during the
24 audit, in an attempt to undermine the fraud penalty determination. Rough Trial Tr., April 28 -
25 May 5, 2008.

26 In additional attempts to attack FTB's analysis, Hyatt called a series of expert witnesses to
27 undermine FTB's ultimate audit conclusions. Hyatt's first expert witness in this regard was
28 Edwin Antolin. Mr. Antolin was a tax attorney whose "expert" testimony, like Kern and Cowan,

1 was based solely upon the issue of Hyatt and his representatives “cooperation” during the audits.
2 See Rough Trial Tr., May 6-7, 2008. The only purpose of this testimony was to undermine the
3 propriety of FTB’s discretionary analysis and determination to assess fraud penalties.

4 Next, Hyatt called Paul Schervish, a professor of sociology at Boston College, as an
5 expert. Rough Trial. Tr., June 12, 2008. Mr. Schervish is the director of the “Center on Wealth
6 and Philanthropy” at Boston College. Id. The only expert opinion that Mr. Schervish offered was
7 that wealthy people do not necessarily live opulent lifestyles. Id. This testimony was presented
8 to undermine another indicia of fraud identified by FTB – “implausible behavior” – which was
9 based, in part, upon FTB’s fraud analysis questioning why Hyatt, a millionaire, would live in a
10 low-income HUD apartment which had no security gates or systems. See Pl’s Tr. Ex. 245, 34.

11 The testimony of Hyatt was particularly centered upon taking issue with the analysis
12 conducted by FTB. In Hyatt’s opinion, nothing FTB analyzed was correct and all the evidence
13 FTB relied upon for its analysis was nothing but “lies” created by the auditor. See Rough Trial
14 Tr., May 8-20, 2008. According to Hyatt, this included FTB’s improper consideration of
15 affidavits given by his “estranged” relatives, FTB’s improper consideration of Hyatt’s living
16 arrangements at the low-income apartment, FTB’s failure to properly “weigh” Hyatt’s voter
17 registration and driver’s licenses information, and other like failures in FTB’s analysis. Id.

18 Finally, Hyatt called Malcolm Jumelet, his primary expert witness. Jumelet’s expert
19 testimony focused exclusively upon, “the way the information was analyzed and weighed” by
20 FTB, not the way it was gathered. Rough Trial Tr., June 13, 2008, 155:10-15. To this end,
21 Jumelet opined that FTB did not give proper consideration to or properly “weigh” the following
22 evidence in its analysis: Hyatt’s home/property insurance, Hyatt’s driver’s license and voter’s
23 registration, Hyatt’s Nevada bank accounts, Hyatt’s Nevada contacts, the lack of analysis
24 comparing Hyatt’s California and Nevada homes, failing to consider Hyatt’s home purchase
25 offers, Hyatt’s membership with Nevada synagogue, and the like. See Rough Trial Tr., June 12,

26
27
28

1 2008. In short, according to Jumelet, FTB weighed and analyzed the evidence in its favor, and
2 against Hyatt. Id. at 157-:10-15.²⁹

3 iii. Jury Instruction Proposals

4 Prior to trial, the parties simultaneously filed their proposed jury instructions. See FTB's
5 Proposed Jury Instructions filed 3/17/2008; Hyatt's Proposed Jury Instructions filed 3/17/2008.
6 Consistent with the jurisdictional boundaries placed on this case, FTB offered the following
7 proposed instruction:

8 You will hear evidence during the course of this trial that may be related to the
9 determinations and conclusions reached by FTB regarding Mr. Hyatt's residency.
10 You may also hear evidence related to the determinations reached by FTB to
11 assess Mr. Hyatt taxes and penalties in the State of California. In this case,
12 however, you are not permitted to determine or make any factual determinations
13 regarding Mr. Hyatt's residency, such as when he became or did not become a
14 resident of Nevada. **You are also not permitted to determine or make any
15 factual determination related to the appropriateness of the analysis conducted
16 by FTB employees in reaching its residency determinations and conclusions.**

17 Likewise, you are not permitted to determine or to make any factual
18 determinations related to the propriety of the tax assessments issued by FTB
19 against Mr. Hyatt, including but not limited to, the correctness of the amount of
20 taxes assessed, the determinations of FTB to assess Mr. Hyatt penalties and/or
21 interest on the tax assessments, **or the correctness of the analysis conducted by
22 FTB in reaching these conclusions.** These determinations and factual issues are
23 the subject matter of separate litigation between Mr. Hyatt and FTB in the State of
24 California and will be resolved in that litigation.

25 FTB's Proposed Jury Instructions, Exhibit B, 26 (emphasis added) (hereinafter "Jury Instruction
26 24"). The instruction was expressly intended to prohibit the jury from substituting its analysis for
27 that of FTB.

28

29 Worse still, Jumelet's testimony related to FTB's analysis regarding the fraud penalty was
30 entirely inadmissible. Jumelet's pretrial expert report opined that FTB had not collected
31 sufficient evidence support the required "clear and convincing evidence" standard for imposing a
32 fraud penalty. See Pl's Tr. Ex. 509. The Court determined pretrial that Jumelet was prohibited
33 from providing this testimony because it went to the heart of the tax assessments. See Rough
34 Trial Tr., Apr. 21, 2008, 15:14-19:4. In spite of this, Jumelet was then permitted, over FTB's
35 objection, to testify that FTB's assessment of the fraud penalty was not "fair and impartial"
36 simply substituting this opinion testimony for the "clear and convincing evidence" opinion
37 contained in his expert report. Rough Trial Tr., June 12, 2008, 124:19-126:1.

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1 On March 31, 2008, the parties filed written objections to the opposing party's proposed
2 instructions. See FTB's Objections to Hyatt's Proposed Jury Instructions filed 3/31/2008; Hyatt's
3 Objections to FTB's Proposed Jury Instructions filed 3/31/2008. Hyatt objected to FTB's
4 proposed Jury Instruction 24 as follows:

- 5 1. Incorrect statement of the case. Nevada Supreme Court opinion dated
6 April 4, 2002 opinion states on page 2, "[W]e grant the petition in
7 Docket No. 36390 with respect to the negligence claim, and deny it with
8 respect to the intentional tort claims. We also deny the alternate petition
9 to limit the scope of trial."
- 10 2. Overly broad.
- 11 3. Argumentative.
- 12 4. If a summary instruction of what the jury is prohibited from determining
13 is permitted, a summary instruction of what the jury is permitted to
14 determine is necessary.

15 Hyatt's Objections, Exhibit 1, at 26. Hyatt did not make any specific objection directed at the
16 language used in the instruction explicitly stating that the jury would not be permitted to
17 determine or make any factual determinations "related to the appropriateness of the analysis
18 conducted by FTB employees". Id.

19 iv. Proposed Introductory Statement

20 FTB also submitted a proposed "Introductory Statement." Id. at Exhibit 4. This proposed
21 "Introductory Statement" was intended to be read to the jury before opening statements in order
22 to provide the jury with a brief factual overview of the case and to advise the jury of the issues it
23 would **not** be asked to decide during trial, i.e., Hyatt's residency or the propriety of the tax
24 assessments and fraud penalties. Id. This proposed "Introductory Statement" was expressly
25 modeled after Jury Instruction 24, above.

26 In response to FTB's proposed statement, Hyatt submitted his own proposed
27 "Introductory Statement." See Exhibit 5, Letter Peter C. Bernhard to James C. Bradshaw dated
28 3/28/2008. On April 3, 2008, the parties appeared before the Court for a scheduled pre-trial
conference and the issue of the preliminary statement was addressed. See Hr'g Tr. Apr. 3, 2008,
11:4-16:5. FTB offered the Court a "merged" introductory statement as an alternative to the

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1 previous proposals by the parties, which was a synthesis of the previous submissions by the
2 parties. See Exhibit 6, FTB's Proposed Merged Introductory Statement; Hr'g Tr. Apr. 3, 2008,
3 5:11-13. The Court did not determine which proposed introductory statement she would adopt at
4 that time and no further discussion occurred between the parties or the Court regarding this issue
5 prior to the start of trial.³⁰

6 On the first day of trial, the Court read the following portions of the Introductory
7 Statement to the jury:

8 Although this case arises from the residency tax audit conducted by FTB, it is
9 important for you to understand that you will not be asked, nor will you be
10 permitted to make any determinations related to Mr. Hyatt's residency or the
11 correctness of the tax assessments, penalties and interest assessed by FTB against
12 Mr. Hyatt. Thus, although you may hear evidence during the course of this trial
13 that may be related to the determinations and conclusions reached by FTB
14 regarding Mr. Hyatt's residency and tax assessments, you are not permitted to
15 make any determinations regarding Mr. Hyatt's residency such as when he became
16 or did not become a resident of Nevada.

17 Likewise, you are not permitted to make any determinations related to the
18 propriety of the tax assessments issued by FTB against Mr. Hyatt, including but
19 not limited to the correctness or incorrectness of the amount of taxes assessed or
20 the determinations of FTB to assess Mr. Hyatt penalties and/or interest on those
21 tax assessments.

22 The residency and tax assessment determination and all factual and legal issues
23 related there to are the subject matter of a separate administrative process between
24 Mr. Hyatt and FTB in the State of California and will be resolved in that
25 administrative process. You are not to concern yourself with those issues.

26 Rough Trial Tr., Apr. 21, 2008, 39:11-40:14. During the course of trial, this portion of the
27 "Introductory Statement" was referred to by counsel on several occasions and displayed to the
28 jury. See Rough Trial Tr., June 2, 2008, 104:22-106:6; Rough Trial Tr., June 12, 2008, 124:19-
125:8; Rough Trial Tr., June 23, 2008, 68:10-69:17. Thus, on numerous occasions during the
trial, the Court and the parties reminded the jurors that they were **not permitted** to make any
factual determinations related to Hyatt's residency, the tax assessments, or the fraud penalties.

30 The Introductory Statement was never intended, nor discussed to be a jury instruction.

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v. Settlement of Jury Instructions

1
2 At the conclusion of trial, the parties and the Court embarked on the lengthy task of
3 settling jury instructions. See Rough Trial Tr., July 16-21, 2008. On the third day of these
4 hearings, the parties reached Jury Instruction 24. Four Hyatt attorneys were present in the
5 courtroom for this discussion: Michael Wall, Don Kula, Jennifer Carvalo, and John Steffen. In
6 addressing this instruction, FTB mistakenly, but inadvertently, indicated to the Court and
7 opposing counsel that the instruction was the “same” as the Introductory Statement that was
8 previously read and displayed to the jury. See Rough Trial Tr., July 18, 2008, 132:18-133:8. At
9 the time of this discussion, FTB’s counsel honestly believed that Jury Instruction 24 was the
10 “same” as the Introductory Statement. See Rough Trial Tr., July 25, 2008, 57:113-24; 58:6-9.

11 As it turned out, Jury Instruction 24 was not identical to the Introductory Statement.
12 Compare Jury Instructions filed 7/21/2008, Instruction No. 24, with Rough Trial Tr., Apr. 21,
13 2008, 39:11-40:14. Namely, Jury Instruction 24 included two statements instructing the jury that
14 it was not permitted to make any factual determinations related to the appropriateness of FTB’s
15 analysis in reaching its conclusions regarding Hyatt’s residency or to assess Hyatt taxes or
16 penalties. See FTB’s Proposed Jury Instructions, at 26. Conversely, the Introductory Statement
17 made no statement foreclosing the jury from making such factual determinations. See Rough
18 Trial Tr., Apr. 21, 2008, 39:11-40:14. Nevertheless, Hyatt stipulated to Jury Instruction 24,
19 which included this additional language. Rough Trial Tr., July 18, 2008, 132:18-133:8.

20 Over the course of the ensuing weekend, FTB counsel worked diligently to compile the
21 “agreed upon” instructions into one final document. FTB’s counsel sent a draft of this document
22 to all of Hyatt’s six attorneys, some of whom were not present at the hearings settling jury
23 instructions. See Exhibit 7, 7/19/2008 Email Sent by Carla Higginbotham to Michael Wall, Don
24 Kula, John Steffen, Jennifer Carvalo, Mark Hutchison, and Peter Bernhard re: Jury Instructions
25 and Proposed Edits. The draft document included Jury Instruction 24 as stipulated to by the
26 parties – which included the “analysis” language not present in the Introductory Statement. Id. at
27 Attachment 1. At no time over the course of the weekend did Hyatt object or bring the
28 differences between Jury Instruction 24 and the Introductory Statement to FTB’s attention. See

1 Exhibit 8, Various Emails Exchanges Between Parties Regarding Email re: Jury Instructions and
2 Proposed Edits.

3 On Monday, July 21, 2008, the parties and the Court met to conclude the settlement of
4 jury instructions. At the conclusion of the hearing, the Court pointedly asked the parties if either
5 side had any additional instructions to provide the Court or any additional objections to make on
6 the record. Rough Trial Tr., July 21, 2008, 113:16-114:14. Hyatt presented no additional
7 objections or concerns to the Court. Id.

8 Later that day, the Court read the final jury instructions to the jury. See Rough Trial Tr.,
9 July 21, 2008, 117-149. While the Court read the instructions, each of Hyatt's five attorneys
10 (Mark Hutchison, Pete Bernhard, Don Kula, Jennifer Carvalo, and Michael Wall) had a copy of
11 the instructions in their possession and read the instructions along with the Court, including Jury
12 Instruction 24. See Rough Trial Tr., July 25, 2008, 77:1-8. At no time did any of Hyatt's
13 attorneys object or raise any concern related to Jury Instruction 24. See id.; see also Rough Trial
14 Tr., July 21, 2008, 117-149.

15 vi. Closing Arguments

16 The following day, Hyatt proceeded with his closing argument. During his argument,
17 Hyatt referenced and displayed Jury Instruction 24 to the jury. See Rough Trial Tr., July 23,
18 2008, 23:5-12. Thereafter, FTB presented its closing argument. During this argument, FTB
19 displayed Jury Instruction 24, arguing that the instruction precluded the jury from making factual
20 determinations related to FTB's **analysis** conducted during the tax and residency audits. Rough
21 Trial Tr., July 24, 2008, 28:12-31:15. Hyatt did not object. Id.

22 vii. Curative Instruction re: Jury Instruction 24

23 The following day, in a hearing outside the presence of the jury, Hyatt objected to the
24 language of Jury Instruction 24 for the first time. Rough Trial Tr., July 25, 2008. Hyatt asserted
25 that the statements in Jury Instruction 24 prohibiting the jury from making any factual
26 determinations related to FTB's "analysis" were incorrectly given to the jury because that
27 language did not appear in the original Introductory Statement. Id. at 6:7-7:14. Hyatt asserted
28 that the prohibition created by Jury Instruction 24 was an incorrect state of the law and the law of

1 the case. Id. at 7:15-8:4. As a result, Hyatt asserted that the Court must give a curative
2 instruction explaining this error, replace Jury Instruction 24 with a new version which matched
3 identically to the Introductory Statement, and strike those portions of FTB's closing argument
4 relying on the original instruction. Id. at 8:20-9:6.

5 FTB objected to these requests. Id. at 10:20-18:25. First, FTB pointed out that it did not
6 intentionally misrepresent the language of Jury Instruction 24 as being the "same" as the
7 Introductory Statement. Id. Moreover, contrary to Hyatt's arguments, Jury Instruction 24, as
8 provided to the jury, entirely comported with the prior jurisdictional decisions in this case and the
9 law. Id. at 12:7-13:11; 32:8-33:1. Specifically, FTB pointed out that the Nevada Supreme Court
10 had already determined that FTB cannot be held liable for its discretionary or negligent acts
11 which clearly included its analysis. See id.

12 FTB explained that the jury could not make any factual determinations related to FTB's
13 "analysis" used in reaching its determinations of Hyatt's residency or the tax assessments without
14 also necessarily deciding Hyatt's residency, the propriety of the tax and fraud assessments – all in
15 violation of the previous decisions in this case. See id. at 12:7-11. Finally, FTB pointed out
16 Hyatt's many failures to object to the language at issue long before the parties met to settle jury
17 instructions and at various times thereafter. Based on these failures, FTB asserted it would be
18 entirely improper and procedurally impermissible for the Court to re-open the settlement of jury
19 instructions after the instructions had been presented to the jury and replace Jury Instruction 24.
20 Id. at 33:6-21; 35:13-38:12.

21 The Court disagreed and determined that Jury Instruction 24 had to be replaced with an
22 instruction that was "identical" to the Introductory Statement. Id. at 43:10-15; 68:6-69:7. The
23 Court also agreed to strike those portions of FTB's closing argument (but not Hyatt's) that relied
24 upon the "incorrect" instruction 24. Id. Finally, the Court adopted the curative instruction
25 proposed by Hyatt, over FTB's objections. Id. at 75:5-8.

26 The curative instruction advised the jury that a new instruction would be replacing the
27 original Jury Instruction 24, but went on to specifically state:
28

1 There is nothing in the correct Jury Instruction 24 that would prevent you
2 during your deliberations from considering the appropriateness or the
3 correctness of the analysis conducted by FTB employees in reaching its
4 residency determination and conclusion. There is nothing in Jury Instruction
24 that would prevent Malcolm Jumelet from rendering an opinion about the
appropriateness or correctness of the analysis conduct by FTB employees in
reaching its residency determinations and conclusions.

5 Court's Curative Instruction filed 7/28/2008. This instruction effectively wiped out all the work
6 done by the Nevada and United States Supreme Courts, as well as Judge Saitta, in establishing the
7 jurisdictional boundaries of this case. It was fatal.

8 2. The Court Erred When it Struck the Original Jury Instruction 24 and FTB's
9 Closing Argument Relying on that Instruction

10 Contrary to the Court's determination, the original version of Jury Instruction 24, as
11 initially provided to the jury, was an entirely accurate statement of the "law of this case" and the
12 issues that the jury was permitted to determine. See Ct.'s Order dated April 16, 1999 at 2
13 (dismissing issues related to determination of Hyatt's residency); See Hyatt v. Franchise Tax
14 Board, 2002 Nev. LEXIS 57 (Nev. April 4, 2002) (dismissing claims predicated on negligence
15 and discretionary actions of FTB); Franchise Tax Board v. Hyatt, 538 U.S. 488, 123 S.Ct. 1683
16 (2003) (same).

17 Moreover, the original Jury Instruction 24 properly comported with recent Nevada
18 Supreme Court authority which expressly precluded the jury from making factual determinations
19 related to FTB's discretionary analysis. See Martinez v. Maruszczak, 168 P.3d 720 (2007);
20 Butler v. Bayer, 168 P.3d 1055 (2007); Boulder City v. Boulder Excavating, 124 Nev. Adv. Op.
21 No. 65 (Nev. Sep. 11, 2008).

22 Accordingly, the Court's determinations to strike Jury Instruction 24 and portions of
23 FTB's closing argument were legal error which substantially prejudiced FTB and mandate a new
24 trial. See NRCP 59(a)(7); see also Nelson v. Equifax Info. Services, LLC, 522 F.Supp.2d 1222,
25 1237 (C.D. Cal. 2007) (interpreting federal counterpart to NRCP 59); see e.g., Bass-Davis v.
26 Davis, 134 P.3d 103, 110 (2006). Moreover, the Curative Instruction adopted by the Court
27 invited the jury to make express factual findings which were outside the jurisdictional scope of
28

1 this case and which mandated a directed verdict in Hyatt's favor – all of which compounded the
2 substantial prejudice already occasioned upon FTB by the Court's previous rulings.

3 Finally, because of the way this case was presented and the jury was instructed, the
4 determinations made the jury will be used by Hyatt to enjoin and interfere with the proper
5 assessment and collection of taxes in the State of California. Based on the law of this case, the
6 Court must afford comity to California's Tax Injunction Act. See Cal. Rev. & Tax Code § 19381
7 (West 2008). In doing so, the Court must grant FTB a new trial, limited to only those issues
8 related to FTB's alleged intentional misconduct in gathering of evidence in Nevada.

9 a. Original Jury Instruction 24 Properly Comported With Judge
10 Saitta's Order Precluding this Court From Making Determinations
11 Related to FTB's Analysis

12 As explained in detail above, Judge Saitta's Order prohibited the jury from making factual
13 determinations related to Hyatt's residency, the assessments of taxes and fraud penalties, and the
14 issues that continued to be under review in the California administrative process. Ct.'s Order
15 dated April 16, 1999 at 2; Tr. Hr'g, Apr. 7, 1999, 53:4-10; 55:9-16; 56. As a result, Judge Saitta's
16 Order necessarily precluded the jury from making factual determinations related to FTB's
17 "analysis." This is so because FTB's analysis was completely and inextricably intertwined with
18 the ultimate conclusions reached by FTB on the issues of Hyatt's residency and tax
19 determinations. For example, the jury could not make a factual determination regarding FTB's
20 "analysis" related to when Hyatt became a non-resident of Nevada without also necessarily
21 making factual determinations related to FTB's conclusions on Hyatt's residency. In short, the
22 jury could not decide that FTB's analysis was incorrect or flawed **without also deciding that the**
23 **conclusions reached by FTB related to these issues were likewise incorrect.** Id. The original
24 Jury Instruction 24 properly precluded the jury from making such factual determinations.

25 Moreover, Judge Saitta's Order expressly required that any issues that were the ongoing
26 subject matter of the administrative tax proceedings between FTB and Hyatt in California be left
27 for resolution in that forum. See Tr. Hr'g, April 7, 1999, 53:4-10; 55:9-16; 56 (relying upon
28 Public Service Comm'n of Nevada v. Eighth Judicial Dist. Court, 107 Nev. 680, 818 P.2d 396
(1991); Resnick v. Nevada Gaming Comm., 104 Nev. 60, 752 P.2d 229 (1988)). Specifically,

1 Judge Saitta indicated that based on Nevada law, “Courts should not adjudicate when
2 administrative decision is still pending and where a statute exists to provide an administrative
3 remedy.” Id. Therefore, Judge Saitta’s Order specifically dismissed the issues in this case which
4 were the subject matter of the ongoing administrative proceedings between Hyatt and FTB. Id.

5 Incidentally, this prohibition was not only required by Judge Saitta’s Order, but is
6 mandated by Nevada law. In Nevada, courts are prohibited from entertaining claims, if at the time
7 the claim is filed, there is another action or proceeding in which the same parties and issues will
8 be adjudicated. See Public Service, 107 Nev. At 684. This rule applies particularly to ongoing
9 administrative proceedings, which prohibits a party from attempting to receive “interlocutory
10 review” of an administrative agency’s determinations. Id. at 683; see also Allstate Ins. Co. v.
11 Thorpe, 170 P.3d 989, 994-95 (2007). Thus, under Nevada law, all administrative proceedings
12 must be concluded before a claim becomes “ripe” for review by the courts. Allstate, 170 P.3d at
13 994-95.

14 At the time of trial, the California administrative tax proceedings between Hyatt and FTB
15 were **ongoing** before the California State Board of Equalization. And in those administrative
16 proceedings, the California State Board of Equalization will be specifically charged with
17 determining whether FTB fairly **analyzed the facts** in Hyatt’s audit and impartially reached the
18 proper legal conclusions. Rough Tr., June 23, 2008, 66:22-67:9; 69:19-24 (Testimony of Steve
19 Illia explaining what Board of Equalization will be asked to consider in Hyatt’s administrative tax
20 proceedings.) For example, the State Board of Equalization will specifically consider the
21 evidence collected by FTB, the law that applies to the audit and the residency determinations,
22 whether or not FTB applied the correct law to the facts (i.e., properly analyzed the evidence), and
23 whether FTB reached the right conclusions (i.e., whether FTB had sufficient evidence to reach its
24 conclusions). As a result, the Board of Equalization will determine whether FTB acted “fairly
25 and impartially” during the audit.

26 As these issues are still under consideration in the California administrative proceedings
27 between Hyatt and FTB, they were prohibited by Judge Saitta’s Order and Nevada law from
28

1 being considered in this case. See Hr'g Tr., Apr. 7, 1999, 53:4-10; 55:9-16; 56; Ct. Order dated
2 4/7/1999 at 2; see also Public Service, 170 Nev. at 683-84.

3 Finally, even if all the above arguments were rejected, Hyatt was not entitled to a jury
4 instruction that would permit the jury to make factual determinations related to FTB's analysis.
5 A party is only entitled to a jury instruction on those theories of the case that are supported by the
6 evidence. See Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103, 106 (2006). First, the jury was
7 never provided all the evidence related to FTB's conclusions regarding Hyatt's residency. See
8 Hr'g Tr., Mar. 6, 2008, 90:14-18 (granting Hyatt's Motion in Limine excluding all "after
9 acquired" evidence related to Hyatt's residency because it did not relate to issues to be decided by
10 jury). As a result, the jury was not provided sufficient evidence to render any factual
11 determinations related to FTB's analysis on this issue.³¹ Therefore, Hyatt was not entitled to an
12 instruction that expressly permitted the jury to make such factual determinations.

13 More importantly, the jury was not provided the law and legal doctrines necessary to
14 render any determinations related to FTB's analysis. See Court's Final Jury Instructions filed
15 7/21/08 (no instructions related to California residency determinations). In California, there is an
16 extensive body of statutory provisions, administrative regulations, and California case law that
17 expressly governs FTB's "analysis" as it relates to residency determinations and the imposition of
18 tax and fraud penalties. See e.g., Cal. Rev. & Tax Code § 17041 *et. al.*; Cal. Regs. § 17041 *et. al.*
19 The jury was not provided any instruction on this law. Moreover, FTB was foreclosed from even
20 discussing at trial the law applicable to its analysis of residency or penalty determinations.

21 Without the facts, and more importantly, without the law, the jury was in no position to
22 determine whether FTB had properly and fairly weighed the "evidence" related to Hyatt's
23 residency and the tax and fraud penalty assessments or to determine whether FTB had properly
24 and impartially applied that "evidence" to the "law", i.e., conducted the right analysis. Therefore,
25

26 ³¹ For example: FTB had gathered a couple of boxes of evidence related to Hyatt's residency
27 during the audit, but 45 boxes of evidence during the protest. FTB was not permitted to introduce
28 to the jury the 45 boxes of evidence concerning Hyatt's residency during the protest.

1 the Court should not have struck the original Jury Instruction 24 which properly precluded the
2 jury from making such determinations entirely.

3
4 b. The Original Jury Instruction 24 Properly Comported with the
5 Jurisdictional Limits Placed on this Case by the Nevada and United
6 States Supreme Courts

7 The decisions of the Nevada Supreme Court and the United States Supreme Court strictly
8 prohibited the district court from asserting jurisdiction over FTB's alleged negligent acts or its
9 **discretionary conduct**. See Hyatt v. Franchise Tax Board, 2002 Nev. LEXIS 57 (Nev. April 4,
10 2002); Franchise Tax Board v. Hyatt, 538 U.S. 488, 499, 123 S.Ct. 1683 (2003). These decisions
11 are "law of the case" and were required to be followed by the district court throughout the
12 pendency of this litigation. Hsu v. County of Clark, 173 P.3d 724, 728 (2007); Wheeler, 119 Nev.
13 at 266. Thus, the Court was prohibited from allowing the jury to make factual determinations
14 related to FTB's **discretionary** actions – which includes FTB's analysis.

15 FTB's analysis in reaching its audit conclusions cannot be classified as anything but a
16 "discretionary function." For example, the verb "to analyze" means "to examine carefully and in
17 detail so as to identify causes, key factors, possible results, etc." Dictionary.com Unabridged (v
18 1.1), Random House, Inc., <http://dictionary.com/>, (last visited September 08, 2008). Moreover, in
19 dismissing Hyatt's negligence claim, the Nevada Supreme Court expressly noted that, "an
20 investigation is generally a discretionary function" – so, too, is the analysis that is conducted by
21 an administrative agency following such an investigation. See 2002 Nev. LEXIS at *10.
22 Therefore, based on the law of the case, the jury could not be permitted to make factual
23 determinations relating to FTB's discretionary determinations and its analysis. The original Jury
24 Instruction 24 properly precluded the jury from second guessing these discretionary
25 determinations.

26 c. Recent Nevada Supreme Court Precedent Precluded the Jury from
27 Rendering any Factual Determination Related to FTB's
28 Discretionary Analysis

The law of this case, as determined by the decisions of the Nevada Supreme Court and the
United States Supreme Court, required that the district court treat FTB the same as it would treat

1 a similarly situated Nevada state agency. See Hyatt v. Franchise Tax Board, 2002 Nev. LEXIS
2 57 (Nev. April 4, 2002); Franchise Tax Board v. Hyatt, 538 U.S. 488, 499, 123 S.Ct. 1683
3 (2003); Hsu v. County of Clark, 173 P.3d 724, 728 (2007); Wheeler, 119 Nev. at 266.³² Based on
4 recent Nevada precedent, FTB could not be held liable for the discretionary “analysis” that it
5 engaged in during the tax and residency audits – because any similarly situated Nevada agency
6 could not be held liable in this circumstance. See Martinez v. Maruszczak, , 168 P.3d 720
7 (2007); Butler v. Bayer, 168 P.3d 1055 (2007); Boulder City v. Boulder Excavating, 124 Nev.
8 Adv. Op. No. 65 (Nev. Sep. 11, 2008). Consequently, under this precedent, the jury was
9 prohibited from rendering any factual determinations related to FTB’s discretionary analysis.

10 Under Nevada law, a Nevada state agency is granted immunity from claims based on its
11 discretionary conduct, even if its discretion is abused. NRS 41.032(2). This statutory provision is
12 an express exception to Nevada’s general waiver of sovereign immunity. See e.g., NRS
13 41.031(1) (Nevada’s statute waiving sovereign immunity). The Nevada Supreme Court has
14 recently issued several opinions explaining the contours of the “discretionary-function” immunity
15 provision contained in NRS 41.032(2). See Martinez v. Maruszczak, 168 P.3d 720 (2007); Butler
16 v. Bayer, 168 P.3d 1055 (2007); Boulder City v. Boulder Excavating, 124 Nev. Adv. Op. No. 65
17 (Nev. Sep. 11, 2008). Based on these recent decisions, there is no question that this Court was
18 prohibited from permitting the jury to make any factual determinations related to FTB’s
19 discretionary analysis.

20 In these cases, the Nevada Supreme Court adopted the discretionary-function immunity
21 test applied by the United States Supreme Court for analyzing claims under the to the Federal
22 Torts Claim Act, which is virtually identical to NRS 41.032(2). See Martinez v. Maruszczak,
23 168 P.3d 720, 728 (2007) (adopting test created by Berkowitz v. United States, 486 U.S. 531, 108

24
25 ³² Hyatt is judicially estopped from asserting that the district court was not required to treat
26 FTB the same as a similarly situated Nevada state agency based his statements before the United
27 States Supreme Court arguing that this is exactly how the Nevada courts were required to treat
28 FTB. See Marcuse, 163 P.3d at 468-69.

1 S.Ct. 1954 (1988) and United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267 (1991 (hereinafter
2 the “Berkowitz-Gaubert test”)); see also Butler v. Bayer, 168 P.3d 1055, 1066-67 (2007); Boulder
3 City v. Boulder Excavating, 124 Nev. Adv. Op. No. 65 (2007).

4 Under the Berkowitz-Gaubert test, acts are entitled to discretionary-function immunity if
5 two elements are satisfied. Martinez, 168 P.3d at 728; Butler, 168 P.3d at 1066. First, a disputed
6 act must be deemed to be “discretionary.” Martinez, 168 P.3d at 728. An act is discretionary if it
7 involves “an element of judgment or choice.” Id. (internal quotations and citations omitted).
8 Second, even if the act is deemed “discretionary,” the court must then “determine if ‘the judgment
9 is of the kind that the discretionary function exception was designed to shield’ i.e., actions ‘based
10 on considerations of social, economic, or political policy.’” Butler, 168 P.3d at 1066 (quoting
11 Martinez, 168 P.3d at 728).

12 The focus on the second element, however, is not on the government employee’s
13 “subjective intent in exercising the discretion conferred . . . but on the nature of the actions taken
14 and on whether they are susceptible to a policy analysis.” Id. Thus, under this element, if the
15 conduct at issue is “an integral part of governmental-policy making or planning, if the imposition
16 of liability might jeopardize the quality of the government process, or if the legislative or
17 executive branch’s power or responsibility would be usurped,” this element is satisfied. Id. at
18 729 (internal citations and quotations omitted).

19 In applying this test, it is the “nature of the conduct, rather than the status of the actor that
20 governs whether the exception applies.” Gaubert, 499 U.S. at 322. The courts are required to
21 assess each case on their facts, “keeping in mind the purposes of the exception: **to prevent**
22 **judicial second-guessing of legislative and administrative decisions grounded in social,**
23 **economic, and political policy through the medium of an action in tort.”** Butler, 168 P.3d at
24 1067-68 (emphasis added).

25 In analyzing this test, the federal courts have made clear that where Congress specifically
26 delegated authority to a specific agency “to implement general provisions of a regulatory statute
27 or to issue regulations to that end, there is no doubt that planning-level decisions establishing
28 those programs would be protected by the discretionary function exception.” Gaubert, 499 U.S.

1 at 323. Therefore, "if a regulation allows the employee discretion, the very existence of the
2 regulation creates a strong presumption that a discretionary act authorized by the regulation
3 involves considerations of the same policies which led to the promulgation of the regulations."
4 Id. In other words, "when established governmental policy, as expressed or implied by statute,
5 regulation, or agency guideline, allows a government agent to exercise their discretion, it is
6 presumed that the agent's acts are grounded in the same policy when exercising that
7 discretion." Id. (emphasis added).

8 The application of this test is best exemplified by the recent Nevada Supreme Court
9 decision in Boulder City. There, a subcontractor sued the city for actions taken by a city
10 employee related to a building construction bid. 124 Nev. Adv. Op. No. 65 at 2. The
11 subcontractor claimed the city's engineer improperly asked for the substitution of the
12 subcontractor on a public works bid, which resulted in the subcontractor being removed from the
13 project. Id. The subcontractor alleged that the city's engineer asked for the substitution in order
14 to retaliate against it. Id. The Nevada Supreme Court determined that the municipality was
15 entitled to complete discretionary function immunity for its conduct because the city engineer was
16 entitled to make broad discretionary determinations related to bids sent to the city. Id. at 5. For
17 example, the city engineer was granted authority to exercise individual judgment in determining
18 how to save the agency money and to expedite public works projects, consistent with the city's
19 policies. Id. Therefore, the Nevada Supreme Court concluded the city engineer was exercising
20 his individual judgment based on these policy considerations when he requested the substitution
21 of subcontractor. Id. Therefore, the city was entitled to complete discretionary immunity.

22 Likewise, in Gaubert, the United States Supreme Court granted discretionary function
23 immunity to lower level employees of the Federal Home Loan Bank Board, which had
24 established general day-to-day oversight of a troubled savings and loan. 499 U.S. at 323-332.
25 The United States Supreme Court determined that the statutory provisions governing the board
26 were not mandatory but gave the employees great judgment and latitude in determining when and
27 how to exercise the board's authority. Id. at 331. As a result, the decisions made by the board's
28 employees were related to the broad policy considerations regarding federal oversight of the

1 savings and loan industry. Id.; see also Pina v. Commonwealth, 510 N.E.2d 253 (1987) (applying
2 Berkowitz and determining that evaluating and processing social security claims by executive
3 branch employees entitled to discretionary function immunity). Thus, although the employees
4 who made the determinations were lower level employees, who were not responsible for
5 implementing regulations or statutes, the employers were grounded in “policy decisions” because
6 the discretionary decisions made by these employees furthered the underlying policies of the
7 agency as a whole.

8 In this case, both of the elements of Berkowitz-Gaubert test are satisfied in FTB’s favor.
9 First, there is no question that the analysis conducted by FTB in determining Hyatt’s residency
10 and the amount of tax and penalties assessments required elements of “judgment and choice.” Id.
11 at 728.

12 Second, there is no question that the analysis conducted by FTB in making these
13 determinations required FTB employees to exercise individual judgment based on the policy
14 considerations enumerated by California’s Revenue and Taxation Code and its corresponding
15 regulations. In this case, it is the public policy of California to impose personal income tax on all
16 persons deemed to be residents or part-year residents of California for a particular tax year. Cal.
17 Rev. & Tax Code § 17041 (West 2008). California has charged the enforcement of this policy to
18 FTB and its employees. Id. at § 19501. FTB is also charged with enacting regulatory provisions
19 to effectuate the public policy created by California statutes related to the collection of personal
20 income taxes, including determinations related to residency. Id. at § 19503. To further this
21 public policy, FTB is provided the power to examine and investigate. Id. at § 19504.

22 Like the regulatory scheme at issue in Gaubert, there are no statutory or regulatory
23 provisions that specifically define the exact factors or issues that FTB must evaluate or analyze in
24 making its “residency” determinations. Id. at §§ 17014-17016. Rather, residency determinations
25 are inherently factual. See Appeal of Michael T. and Patricia C. Gabrik, 86-SBE-014 (Cal. State
26 Bd. Of Equalization, Feb. 4, 1986.) Thus, FTB employees are granted broad discretion in
27 determining what facts and considerations they will weigh in making residency and fraud
28 assessment determinations. Although California case law and administrative decisions provide a

1 variety of "objective factors" to be considered in making a "residency" determination, it is
2 ultimately a discretionary determination of FTB auditor's to determine how to weigh and analyze
3 those factors.

4 As a result, like in Gaubert and Boulder City, FTB employees that engaged in the analysis
5 of Hyatt's audit were granted broad discretionary authority to implement the public policy
6 determinations of California regarding which taxpayers were non-residents or residents for
7 personal income tax purposes. These employees were not operating under mandatory provisions
8 that dictated what facts, circumstances, or evidence they could or could not rely upon in
9 conducting their analysis. See Gaubert, 499 U.S. at 323. To the contrary, the broad discretionary
10 determinations and analysis engaged in by FTB employees were grounded in the same policy
11 considerations that underlie California's public policy to obtain personal income taxes from all
12 persons deemed to be California residents in a given year. Gaubert, 499 U.S. at 324. Therefore,
13 this is exactly type of discretionary activity that the government function immunity is intended to
14 shield. Martinez, 168 P.3d at 728. As a result, the original Jury Instruction 24 was mandated by
15 the application of the government function immunity, as articulated by this recent Nevada
16 Supreme Court precedent.

17 Moreover, the failure to apply the government function immunity to FTB – as a result of
18 the Court's determination to strike the original Jury Instruction 24 – resulted in the jury making
19 factual determinations regarding FTB's analysis and permitted the jury to improperly "second
20 guess" the "legislative and administrative decisions" of FTB which are grounded in California's
21 economic policies. Id. This completely undermined the purpose of the government function
22 immunity. Moreover, allowing this type of second guessing expressly permitted and invited the
23 jury to usurp the powers and responsibilities expressly delegated to FTB by the California
24 legislature. Id. at 729. Accordingly, the original Jury Instruction 24 should never have been
25 stricken as it was expressly mandated by this recent Nevada Supreme Court precedent.

1 d. Hyatt Waived His Right to Object to the Original Jury
2 Instruction 24

3 Nevada law is clear – the failure to object to a jury jurisdiction constitutes a waiver of that
4 party’s right to later object to the content of the instruction. See e.g., Evans v. Dean Witter
5 Reynolds, Inc., 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000); Etcheverry v. State, 107 Nev. 782,
6 784-85, 821 P.2d 350 (1991).

7 Hyatt failed to object to the offending language in Jury Instruction 24 on numerous
8 occasions both before and during the settlement of jury instructions. Specifically, Hyatt failed to
9 object to the language when he filed his written objections to FTB’s instruction on March 30,
10 2008. See Hyatt’s Objections to FTB’s Proposed Instructions, at 24. Hyatt later failed to object
11 to language in this instruction during the hearing settling this instruction. See Rough Trial Tr.,
12 July 18, 2008, 132:18 – 133:8. After receiving email communications from opposing counsel
13 after stipulating to the instruction but before the final settlement of instructions, Hyatt did not
14 object. See Exhibits 7 and 8. Hyatt failed to object at the time the instructions were being read to
15 the jury. See Rough Trial Tr., July 21, 2008, 117:149. And Hyatt failed to object when he and
16 FTB’s counsel used and relied on this instruction during their closing arguments. Rough Trial
17 Tr., July 23, 2008, 23:5-12. Based on these repeated failures, Hyatt waived his right to object to
18 this instruction. See e.g., Evans., 116 Nev. at 612; Etcheverry, 107 Nev. at 784-85.

19 e. The Curative Instruction Adopted by the Court was Legally
20 Improper

21 The Curative Instruction adopted by the Court specifically stated to the jury that:

22 There is nothing in the correct Jury Instruction 24 that would prevent you during
23 your deliberations from considering the appropriateness or the correctness of the
24 analysis conducted by FTB employees in reaching its residency determination and
25 conclusion. There is nothing in Jury Instruction 24 that would prevent Malcolm
Jumelet from rendering an opinion about the appropriateness or correctness of the
analysis conduct by FTB employees in reaching its residency determinations and
conclusions.

26 Court’s Curative Instruction filed 7/28/2008. This instruction was the improper argument of
27 Hyatt’s counsel indicating that the jury can and must decide the issues related to FTB’s analysis.
28

1 Moreover, the instruction expressly endorsed the factual determinations and opinions provided by
2 Hyatt's expert witness, Malcolm Jumelet – all of which violated Nevada law.

3 The purpose of jury instructions is to specifically inform the jury of the law and the legal
4 principles that apply to the case. See e.g., State Farm Fire & Cas. Ins. Co. v. Grabowski, 150
5 P.3d 275 (Ariz. App. 2007); Lee v. Hamilton, 841 N.E.2d 223 (Ind. App. 2006); Meier v. McCoy,
6 119 P.3d 519 (Colo. App. 2004); Honsinger v. Egan, 585 S.E.2d 597 (Va. 2003). Nommensen v.
7 Am. Continental Ins. Co., 629 N.W.2d 301 (Wis. 2001). As such, the Nevada Constitution and
8 the Nevada Revised Statutes expressly prohibit district judges from providing jury instructions
9 with regard to matters of fact and only require that the court “declare the law” to the jury.
10 Nevada Const. Art. 6 § 12; see also NRS 3.230.

11 The Nevada Supreme Court has elaborated on this restriction by clarifying that although a
12 party is entitled to an instruction on any theory supported by the evidence, Bass-Davis v. Davis,
13 122 Nev. 442, 134 P.3d 103, 106 (2006), a party is not entitled to a jury instruction that assumes
14 facts, is argumentative, or that stresses a particular aspect of a case. State v. Buralli, 27 Nev. 41,
15 71 P. 532, 536 (1903); see Red Mountain, LLC v. Fallbrook Pub. Util. Dist., 48 Cal. Rptr. 3d 875
16 (Cal. App. 2006). As succinctly stated by the Nevada Supreme Court, a party is not entitled to
17 “isolate [part of the circumstances of a case] from other facts, and demand that the court instruct
18 the jury as to the weight to be given them, independently of all the other proof in the case.”
19 Buralli, 71 P. at 536. Thus, “if an instruction embodies detailed recitals of fact drawn from the
20 evidence, in such a manner as to constitute an argument to the jury in the guise of a statement of
21 law, it is improper.” Munoz v. City of Union City, 120 Cal. Rptr. 3d 521, 544-545 (Cal. App.
22 2004).

23 The Nevada Supreme Court has also expressly rejected the use of “formula” instructions.
24 See Hartford Ins. Group v. Winkler, 89 Nev. 131, 508 P.2d 8 (1973). A “formula” instruction is
25 an instruction which makes a recital of facts favorable to one party then ends by directing that the
26 jury that if it finds those facts, it must return a verdict accordingly. Id. at 140 (quoting Ivie v.
27 Richardson, 336 P.2d 781, 786 (Utah 1959)); see also Elsey v. Domeqc, 299 P. 794, 798 (Cal.
28

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1 App. 1931). Formula instructions are improper because such instructions are argumentative and
2 do not set out the principles of law impartially for both parties. Ivie, 336 P.2d at 786.

3 The curative instruction violated all of these principles. First, the instruction expressly
4 isolated specific factual issues in this case related to FTB's analysis. See Jury Instruction filed
5 7/28/2008. The curative instruction expressly instructed the jury that they were not prohibited
6 from making factual determinations related to FTB's analysis and, in fact, virtually mandated that
7 the jury make finding against FTB in this respect. See Jury Instruction filed 7/28/2008. As a
8 result, the curative instruction stressed this one factual component of this case to FTB's prejudice,
9 which is legally improper. Buralli, 71 P. at 536 (1903).

10 In addition, the curative instruction expressly endorsed Hyatt's version of the facts related
11 to FTB's analysis by specifically endorsing the factual determinations reached by Hyatt's expert
12 Malcolm Jumelet. Based on the curative instruction, the Court became Hyatt's advocate and
13 effectively instructed the jury that FTB had not conducted an appropriate analysis of the facts and
14 therefore the jury must find in Hyatt's favor. See Hartford, 89 Nev. at 140. This was highly
15 improper and amounted to directing a verdict in Hyatt's favor on these factual issues. Id. As a
16 result, of these actions FTB is entitled to a new trial. NRCp 59(a)(7).

17 f. The Manner in which this Case was Tried and the Jury was
18 Instructed Violated the Tax Injunction Act

19 Finally, the manner in which Hyatt was allowed to present this case and the manner in
20 which the jury was ultimately instructed, resulted in a circumstance in which this litigation has
21 now effectively enjoined and interfered with the assessment and collection of taxes in California.
22 Under California law,

23 No injunction or writ of mandate or other legal or equitable process shall issue in
24 any suit, action, or proceeding in any court against this state or against any officer
of this state to prevent or enjoin the assessment or collection of any tax.

25 Cal. Rev. & T. Code § 19381 (West 2008) (hereinafter the "Tax Injunction Act"). Nevada has an
26 identical statutory provision, which likewise, prohibits any suit from being maintained in Nevada
27 that would enjoin or interfere with collection or assessment of any tax. See NRS 372.670.
28

1 In this case, by permitting Hyatt to litigate the issue of whether FTB acted "fairly and
2 impartially" in the way it analyzed the facts and reached its conclusions, the jury's verdict clearly
3 violated the Tax Injunction Act. These determinations are the identical issues that are currently
4 before the California State Board of Equalization. There is no question that the jury's
5 determination will be used by Hyatt in the California administrative proceedings in an attempt to
6 prevent the State of California from collecting the taxes, interest, and penalties that have been
7 assessed against Hyatt. Hyatt will likely argue that the jury's determination precludes the State
8 Board of Equalization from refusing to apply the findings of the jury to those proceedings –
9 which would effectively prohibit California from determining **on its own** whether the taxes
10 assessed are proper.

11 Based on the law of this case, California's Tax Injunction Act is entitled to comity and
12 must be applied. See Franchise Tax Board, 538 U.S. at 499. The policies of Nevada and
13 California are identical in this instance and no Nevada policy would be undermined by the
14 application of this statute. Id. Moreover, FTB must be treated the same as a Nevada agency
15 under the same circumstances. Id. Here, the failure of this Nevada court to apply this statute
16 would exhibit great hostility to the State of California. Therefore, the Court must apply
17 California's Tax Injunction Act to this case and grant FTB a new trial, limited to only those issues
18 which do not violate the Tax Injunction Act and do not interfere with the ongoing administrative
19 tax proceedings in California.

20 g. The Submission of Evidence Related to FTB's Alleged "\$24
21 Million Error" and Sourcing Determinations Epitomizes the
22 Improper Evidence Submitted to the Jury Related to FTB's
23 Discretionary Analysis

24 The quintessential example of the Court disregarding all of the previous jurisdictional
25 lines related to this case is demonstrated by the improper admission of evidence related to the
26 alleged \$24 million error made by FTB in calculating Hyatt's 1992 tax assessments. As the Court
27 will recall, Hyatt has adamantly asserted throughout this litigation that FTB erred in calculating
28 his 1992 taxable income by improperly including \$24 million in its calculation that Hyatt claimed

1 was not taxable to California. Hyatt went on to assert that FTB's failure to correct that error was
2 "bad faith."

3 FTB has steadfastly disagreed with this contention from the inception of this litigation. In
4 fact, it has always been FTB's position that no error occurred in the calculation of Hyatt's 1992
5 income. This is based upon the extensive evidence received by FTB during the administrative
6 protest proceedings. Thus, after reviewing and weighing all the evidence associated with this
7 issue, FTB determined that no error had occurred. Hyatt claims that the manner in which FTB
8 weighed this evidence and reached its conclusions, and FTB's failure to correct the alleged error
9 amounted to "bad faith."

10 The question of whether FTB committed any "error" in calculating Hyatt's tax
11 assessments or in weighing the evidence associated with this issue goes to the heart of the
12 propriety of FTB's tax assessments determinations. And as already detailed above, the questions
13 related to Hyatt's residency and the priority of FTB's tax assessments calculations were flatly
14 outside the jurisdiction of this Court. See Ct.'s Order 4/19/1999, at 2. Based on this clear
15 jurisdictional line, FTB filed a motion in limine seeking to exclude from trial all evidence and
16 assertions related to FTB's alleged error in calculating Hyatt's tax assessments. See FTB's Mot.
17 In Limine Re: Hyatt's Allegations of Income or Excessive Tax Assessments filed 1/30/2008. The
18 entire foundation for this motion was FTB's contention that the issues related to whether FTB
19 made an error in its tax assessments was only related to issues that were outside the jurisdictional
20 scope of this litigation - i.e., the question of whether FTB properly assessed Hyatt's taxes. Id.
21 FTB argued that all of the evidence related to this issue was irrelevant because it did not relate to
22 matter "at issue" in this case. Id. Pretrial, the Court agreed. Specifically, the Court determined
23 that:

24 THE COURT: Well, I don't see how we can address the \$24 million error without
25 going to the very heart of the validity of the tax assessment. So I think Mr. Hyatt
26 is not precluded, of course, from addressing the issue of the delay. But I think the
27 motion is well-taken and it ought to be granted.

28 Hr'g Tr., Mar. 6, 2008, 22:3-8.

1 At trial, however, the Court eviscerated this ruling. Specifically, the Court allowed Hyatt
2 to present extensive evidence at trial related to FTB's "\$24 million error." For example, Hyatt
3 was permitted to introduce extensive evidence and testimony related to a letter sent by Eugene
4 Cowan to FTB allegedly providing an explanation of when Hyatt "received" his 1992 income.
5 Pl's Trial Ex. 280. Several of Hyatt's witnesses testified at length regarding this evidence and the
6 accompanying information. Moreover, Hyatt was permitted to argue extensively to the jury that
7 FTB made this "error" in calculating Hyatt's income and that FTB "refused" to correct the error
8 "in bad faith." However, based on other pretrial rulings excluding "after-acquired evidence," the
9 Court refused to permit FTB to present the extensive evidence that established that FTB never
10 made any error in calculating Hyatt's 1992 income. See Hr'g Tr., Mar. 6, 2008, 90:14-15.
11 Therefore, because the Court allowed Hyatt to present this evidence and further these arguments,
12 the jury was expressly allowed and invited to consider and "second guess" whether FTB's
13 analysis related to the calculation of the 1992 tax assessments were proper – which was entirely
14 outside the jurisdictional boundaries in this case.³³

15 In addition to the \$24 million error, however, the Court allowed extensive evidence into
16 trial regarding FTB's analysis related to the sourcing of Hyatt's income. As the Court will recall,
17 FTB considered two theories during Hyatt's audit: (1) residency; and (2) income sourcing.
18 During the audit, however, FTB's analysis preliminarily concluded that the sourcing of Hyatt's
19 income was not feasible based on a federal earned income legal theory. See Pl's Trial Exs. 231,
20 250, 258. Hyatt was permitted to present evidence and argument to the jury at trial that FTB was
21 "out to get" him under "any theory" merely because it considered sourcing as a theory in this
22 case. Once again, FTB's analysis of the sourcing issue an issue that related only to: (1) audit
23 conclusions, Hyatt's residency, and the tax assessments; and (2) the discretionary determinations
24 related to FTB's analysis was impermissively introduced as evidence. The jury should not have
25 been permitted to hear evidence related to FTB's sourcing determinations and to second guess

26
27 ³³ Worse still, the jury was allowed to make factual determinations related to this analysis
28 without even having the benefit of all the evidence or the law related to this issue!

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1 FTB's analysis related to this issue. This was entirely improper and outside the jurisdictional
2 scope of this case.

3 h. The Jury Could not Make Factual Determinations Related to FTB's
4 Analysis because the Jury was not in Possession of all the Facts and
5 Law Necessary to Make these Determinations

6 The most egregious aspect of the Court's determination to allow the jury to make factual
7 determinations related to FTB's "analysis" is the fact that the Court precluded FTB from
8 presenting the evidence and the law that the jury needed to adequately make these determinations.
9 First, the Court expressly precluded FTB from presenting **all of the evidence** that FTB used in
10 making its residency and tax assessment conclusions. See Hr'g Tr., Mar. 6, 2008, 90:14-15.
11 Specifically, the Court excluded all after-acquired evidence from the trial. Therefore, the jury
12 was only permitted to see a small portion of the evidence that FTB relied on in reaching its
13 residency conclusions. For example, the Court precluded all of the evidence related to: Hyatt's
14 Continental Hotel story; the Youngmart documents; the XCS documents; Hyatt's IRS audit
15 evidence; the forged deed and the notary log evidencing that forgery related to the sale of Hyatt's
16 La Palma home; and an entire host of other critical evidence utilized by FTB in its residency and
17 fraud penalty analysis.

18 Moreover, the Court flatly refused to allow FTB to present evidence to the jury related to
19 the legal standards employed by FTB auditors in conducting residency analysis determinations.
20 For example, during the examinations of Steve Illia and Sheila Cox, the Court precluded FTB
21 from eliciting testimony from these witnesses related to the legal residency standards applied in a
22 residency audit.

23 Finally, the Court prohibited FTB from eliciting any "opinion" testimony from FTB's
24 own witnesses regarding FTB's audit and the analysis engaged in by FTB auditors working on
25 this case. This was in spite of having previously permitted Hyatt's own witness, Candace Les, a
26 third party percipient witness to provide her "opinions" of the audit and the audit analysis after
27 having simply "reviewed" the audit file. See Rough Trial Tr., April 23-24, 2008 (Candace Les
28 testimony). The Court precluded FTB from asking any of their FTB witnesses their "opinions" of
the audit, the analysis conducted by FTB's employees during the audit, or actions taken by the

1 auditors. See Rough Trial Tr., June 20, 2008. For example, the Court precluded Steve Illia from
2 providing any testimony related to his opinions of FTB's analysis during the audits, whether that
3 analysis was conducted in a fair and impartial manner, whether the analysis was in accord with
4 FTB policies and practices, and the like. The same prohibition was applied to Carol Ford, Penny
5 Bauche, Brad LaCour, and all other FTB witnesses that had reviewed the audit file. Therefore,
6 the Court permitted the jury to second guess FTB's analysis and to substitute its judgment for
7 FTB's determinations but with only a one-sided version of the necessary facts to guide its
8 decisions.

9 i. Full Faith and Credit as Applied Analysis

10 It is one thing for a state to assume jurisdiction and apply its laws to intentional torts
11 allegedly committed by a sister state's representatives within the forum-state's territorial
12 boundaries. It is quite a different proposition, however, for a state to assume jurisdiction and
13 apply its statutory and common law to a sister state's entire administrative process, whether that
14 process is tax administration or any other state program. The latter of which occurred in this
15 litigation.

16 State representatives have been on notice since 1979 that their conduct while in another
17 State may be subject to the police powers of the latter state. Nevada v. Hall, 440 U.S. 410, 99
18 S.Ct. 1182 (1979); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822, 105 S.Ct. 2965, 2797-80
19 (1985) ("When considering fairness in this [Full Faith and Credit] context, an important element
20 is the expectation of the parties"). This is so because Nevada v. Hall recognizes that a state has a
21 legitimate public policy interest in protecting residents and nonresidents alike from tortious
22 conduct occurring within the territorial boundaries of the State. 440 U.S. at 424. In other
23 words, it is the discrete conduct or "contacts" within a State that determine the legitimacy of its
24 interest and its lawmaking authority. Phillips Petroleum Co., 472 U.S. at 821-822 (the contacts
25 within a state are what create the state interest; where some conduct involved in the case has no
26 contact with forum state, latter must apply law of sister State).

1 Nothing in the above Supreme Court precedent, however, triggered any expectation by a
2 state that its administration of its own laws, its own regulations, and its own internal policies and
3 practices could or would be reviewed by a judge or jury in a sister state. This is so because, the
4 remote state has no legitimate public policy interest in, let alone legislative authority over, the
5 administration by another State of its own laws and programs. See Sun Oil Co. v. Wortman, 486
6 U.S. 717, 727, 108 S.Ct. 2117, 2124 (1988) (purpose of Full Faith and Credit Clause “is quite
7 simply to give both the forum state and other interested states the legislative jurisdiction to which
8 they are entitled). For a state to impose its own local policies specifically designed to apply only
9 within their own borders upon the administration of programs solely within the lawmaking and
10 territorial prerogative of **another state** flies in the face of and completely undermines the
11 principle of cooperative federalism embodied in the Full Faith and Credit Clause. “Full faith and
12 credit does not ... enable one state to legislate for the other or to project its laws across state lines
13 so as to preclude the other from prescribing for itself the legal consequences of acts within it.”
14 Pac. Emp. Ins. Co. v. Indust. Accident Comm’n, 306 U.S. 493, 504-505, 59 S.Ct. 629, 634
15 (1939).

16 Nothing in the law of this case supports the notion that Nevada may, consistent with the
17 Full Faith and Credit Clause, employ its narrower immunity law and apply its common law tort
18 principles to conduct a roving review of FTB’s administration of California’s tax laws. In this
19 case, the United States Supreme Court did not hold that Nevada had a legitimate interest in the
20 entirety of FTB’s administrative process simply because plaintiff had moved to Nevada prior to
21 that process being initiated. See FTB v. Hyatt, 2002 Nev. LEXIS 57 (Apr. 4, 2002); FTB v.
22 Hyatt, 538 U.S. 488, 123 S.Ct. 1683 (2003); see e.g., Home Ins. Co. v. Dick, 281 U.S. 397, 50
23 S.Ct. 338 (1930) (residency as too insignificant a contact to justify application of resident’s State
24 law); John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 57 S.Ct. 129 (1936) (residence
25 alone does not justify application of forum State law to transaction or occurrence elsewhere).
26 Nor, did the United States Supreme Court hold that FTB’s particular conduct within Nevada
27 opened the door for this Nevada court to review every aspect of FTB’s administrative process,
28

1 95% of which took place in California. See FTB v. Hyatt, 2002 Nev. LEXIS 57 (Apr. 4, 2002);
2 FTB v. Hyatt, 538 U.S. 488, 123 S.Ct. 1683 (2003).

3 Rather, the United Supreme Court simply held that Nevada v. Hall controlled this
4 litigation – rejecting FTB’s arguments to the contrary. Id. As the Court will recall, Nevada v.
5 Hall involved an accident on a California highway caused by a Nevada employee. California’s
6 interest in applying its laws was held to be a legitimate one because the conduct occurred in
7 California, not because the victims were California citizens; it was the locus of the conduct that
8 both defined and limited the reach of California’s lawmaking authority. 440 U.S. at 424
9 (“California’s interest is the ... substantial one of providing ‘full protection of those who are
10 injured on its highways through the negligence of both residents and nonresidents’”) (internal
11 citation omitted). The United States Supreme Court found nothing to distinguish this case from
12 Nevada v. Hall. FTB, 538 U.S. at 498. Thus, the United States Supreme Court made clear that
13 the only conduct that the State of Nevada was “‘competent to legislate’ with respect to the subject
14 matter of the alleged intentional torts, here” was the claimed intentional tortious conduct that
15 injured “one of its citizens **within its borders.**” FTB, 538 U.S. at 494.

16 This is exactly the way that Hyatt framed the question presented to the United States
17 Supreme Court – i.e., that this case involved “tort claims alleging intentional misconduct against a
18 Nevada citizen **in Nevada.**” Exhibit 14, Hyatt’s Resp’s Br. filed 1/21/2003, section(i) at 14 – 15
19 (noting principle that states are defined, and their lawmaking authority limited, by territorial
20 boundaries); at 18 (acknowledging that plaintiff’s state citizenship probably not a sufficient
21 contact under Full Faith and Credit analysis).

22 It is equally noteworthy that the concerns of the Justices during oral argument were
23 directed at the impact “new rule” furthered by FTB on appeal would have on Nevada’s
24 lawmaking authority over localized conduct by out-of-state representatives.³⁴ In Nevada v. Hall,
25 the Supreme Court stated that its holding might not translate to all situations. 440 U.S. at 424 n.

26
27 ³⁴ See e.g., Exhibit 13, Franchise Tax Board v. Hyatt, Hr’g Tr., Feb. 24, 2003 (Oral
28 Argument), 4-6, 8, 11, 13-14. 19, 20-21.

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1 24. The Court in FTB v. Hyatt held that this statement was not broad enough to support
2 California's requested "core sovereign responsibilities" rule. Franchise Tax Board, 538 U.S. at
3 497-498. In so holding, however, the Court did not wash its hands to consideration of the full
4 record facts in determining application of the Full Faith and Credit Clause.

5 While Nevada's assumption of jurisdiction over this case survived constitutional scrutiny
6 "on its face", that does not immunize Nevada from the constitutional requirements of the Full
7 Faith and Credit Clause "as applied". See e.g., Wis. Right to Life Inc. v. FEC, 546 U.S. 410, 411-
8 412, 126 S.Ct. 1016, 1017-18 (2006) (per curiam) (prior holding that statutory provision was
9 facially valid under the constitution does not resolve as-applied challenges).

10 This Court, however, expanded the jurisdiction of this case far beyond the legitimate
11 lawmaking authority of Nevada to permit the casting of judgment on every aspect of FTB's tax
12 administration process. The Court's improper expansion of the jurisdictional lines of this case
13 occurred both pretrial through its rulings related to discovery and motions, and continued through
14 trial with improper evidentiary rulings and the settlement of jury instructions.

15 This expansion is best exemplified by the Court's ruling permitting the jury to second
16 guess FTB's analysis of the residency determination, which was not to be part of the case, by
17 striking the original Jury Instruction 24. See Hr'g Tr., July 25, 2008, 43:10-15; 68:6-69:7
18 (Court's order striking the original Jury Instruction 24 and adopting curative instruction). To
19 assert, as Hyatt has, that applying Nevada law to FTB's analysis is no harm/ho foul because the
20 proceedings in California are still pending ignores that FTB's analysis – its weighing of the facts,
21 interpretation of its laws, and rules, etc. – are wholly outside Nevada's public policy interest and
22 lawmaking authority. See Nevada v. Hall, 440 U.S. at 424; see also FTB, 538 U.S. at 494 (the
23 State of Nevada is only "competent to legislate" with respect to the subject matter of the alleged
24 intentional torts" taken inside Nevada that "that injured one of its citizens **within its borders**").

1 Other examples abound.³⁵

- 2 • Pretrial, the Court denied FTB's various motions for partial summary
3 judgment and motions in limine seeking the exclusion of evidence from
4 trial of FTB's publication of the Litigation Roster. Court's Order denying
5 FTB's Mot. for Partial Summ. J. re: False Light filed 2/4/2008; Hr'g Tr.,
6 Jan. 17, 2008, 98:10-17; see also Hr'g Tr., Feb. 21, 2008 (Court's denial of
7 FTB's motion in limine to exclude Litigation Roster). As a result of these
8 rulings, the Court expressly allowed the jury to second guess FTB's
9 compliance with California's Public Records Act. See Rough Trial Tr.,
10 July 14, 2008(Ben Miller trial testimony), 67:13-72:9; see FTB's Mot. for
11 Partial Summ. J. re: False Light filed 12/3/2007 at 9-12. In this case,
12 Nevada has assumed jurisdiction to supplant its judgment for that of the
13 California legislature on what is a "public record" and thus required to be
14 disclosed to the public.
- 15 • Pretrial, the Court denied FTB's Motion for Partial Summary Judgment
16 which sought dismissal of Hyatt's claims that FTB delayed resolution of
17 Hyatt's California administrative protest in bad faith. Ct.'s Order
18 3/14/2006; see Hr'g Tr., Jan. 23, 2006, 87:13-88:21. Based on this
19 determination, the Court expressly asserted jurisdiction over the ongoing
20 California administrative proceedings and the manner in which those
21 proceedings were being conducted and managed by FTB, the California
22 administrative agency charged with engaging in this conduct. Id.
- 23 • At trial, the Court permitted extensive evidence of FTB's actions gathering
24 information in California from California residents, such as FTB's

25
26 ³⁵ The following is merely a representative list of examples of the types of actions taken by
27 the Court which improperly expanded the jurisdiction of this case. This list is not intended to be
28 an exhaustive list of all such instances.

1 gathering affidavits in California from Hyatt's California relatives (see
2 Rough Trial Tr., May 8, 2008 (Testimony Gilbert Hyatt re: Affidavit of
3 Priscilla Maystead), 158:24-178:1; Rough Trial Tr., May 18, 2008
4 (Testimony Gilbert Hyatt re: Affidavits of Beth Hyatt and Michael Brian
5 Hyatt), 5:52-15:69, evidence of FTB's visits to Hyatt's California
6 residence and FTB's discussions with Hyatt's California neighbors (see,
7 for example, Rough Trial Tr., May 29, 2008 (testimony Sheila Cox visits to
8 La Palma and interviews with neighbors), 95:19-101:1, and evidence of
9 FTB sending Demands to Furnish Information forms and letters to
10 California residents in California. (See Rough Trial Tr., May 12, 2008
11 (testimony Gilbert Hyatt, letter sent to "Great Expectations" in California),
12 8:60-9:22; Rough Trial Tr., May 27, 2008 (testimony Sheila Cox sending
13 letters to various Dr. Shapiros in California), 194:22-195:25. All of these
14 actions were taken **in California directly only at California residents** and
15 therefore were outside the jurisdictional boundaries of this case as defined
16 by the Full Faith and Credit Clause.

- 17 • The Court allowed the jury to consider extensive evidence related to FTB's
18 determinations to assess Hyatt fraud penalties for the 1991 and 1992 tax
19 years. For example, extensive testimony and evidence was permitted to
20 "undermine" the evidence relied upon by FTB as "indices of fraud." For
21 example, the Court allowed the jury to consider extensive evidence related
22 to Hyatt's "cooperation" during the audits in order to undermine FTB's
23 determination that Hyatt and his representatives "failed to cooperate" with
24 FTB. See Rough Trial Tr. Apr. 24 – May 5, 2008 (testimony of Michael
25 Kern and Eugene Cowan regarding their personal cooperation); Rough
26 Trial Tr., May 6-7, 2008 (Trial testimony of Edwin Antolin providing
27 expert testimony regarding "cooperation" during tax audit). Additionally,
28 the Court allowed the jury to consider extensive evidence that Hyatt's

1 behavior was plausible – in contradiction of FTB’s determinations. See
2 Rough Trial Tr., June 10, 2008 (Trial Testimony Paul Schervish regarding
3 the behavior of “wealth holders”). Here again, FTB’s analysis and
4 determinations to assess fraud penalties were outside the territorial
5 boundaries and legislative authority of Nevada. By admitting this
6 evidence, however, the Court asserted jurisdiction over this matters
7 allowing the jury to supplant its judgment for the judgment of FTB on
8 these issues.

9 • At trial, the Court took judicial notice of various California statutes that
10 were unrelated to any of the common law intentional torts in this litigation.
11 See Rough Trial Tr., Apr. 18, 2008, 86:14-87:17. The Court then
12 permitted extensive argument and evidence to be presented to the jury that
13 FTB violated these statutes – the California Information Practices Act,
14 particularly. Rough Trial Tr., Apr. 21, 2008 (Hyatt’s opening statement),
15 68:8-16; Rough Trial Tr., May 21, 2008 (Testimony of Prof. Dan Solove),
16 16:65-20:59; Rough Trial Tr., May 27, 2008 (Testimony of Sheila Cox),
17 70:23-71:16; 170:20-171:15; Rough Trial Tr., July 23, 2008 (Hyatt’s
18 closing argument), 36:10-38:1. As a result of these rulings, the Court
19 expressly allowed the jury to second guess FTB’s compliance with
20 California’s Information Practices Act and to supplant its judgment for that
21 of the California legislature related to the disclosure of information during
22 an administrative investigation. Id.

23 • The Court allowed the jury to consider FTB’s internal performance and
24 resource allocation measures, referred to as CBR in this case. See Rough
25 Trial Tr., Apr. 22-23, 2008 (Testimony of Kurt Sjoberg). Such measures,
26 whether identical to California’s or not, are a common management tool in
27 every federal, state, and local agencies in this nation. In this case, Nevada
28 has assumed jurisdiction as the national “government performance review”

1 guru despite the fact it has no lawmaking authority over how a sister
2 State's departments, agencies, or legislatures decide to manage their
3 affairs, programs, employees, or budgets.

4 Even in large class action cases, the Supreme Court has held that a forum State must
5 adhere to the territorial limits placed upon it by Full Faith and Credit Clause and respect the
6 lawmaking authority of sister States, even if this requires applying different State laws to different
7 aspects of the case before it. Phillips Petroleum Co., 472 U.S. at 821-822. The above rulings
8 establish that this court did not follow the limits set by the Supreme Court on its jurisdictional
9 reach under the Full Faith and Credit Clause. These are not instances where the interest of
10 Nevada and California conflicted, **but instances where Nevada had no legitimate policy or**
11 **lawmaking authority whatsoever.**

12 B. Jury Instruction 58 – EMC Back Up Tapes

- 13 1. FTB is Entitled to a New Trial Based on the Court's Legally Unsupported
14 Spoliation Finding Related to the EMC Backup Tapes and the Court's
15 Errors Related to Jury Instruction 58

16 FTB is entitled to a new trial pursuant to NRCP 59(a) because the Court committed
17 serious errors of law with respect to Jury Instruction 58 and abused its discretion by adopting
18 inaccurate facts in Jury Instruction 58 thus preventing FTB from receiving a fair trial. First, the
19 Court erred in finding that FTB spoliated evidence by allowing its EMC backup tapes, which
20 were used for disaster recovery, to be overwritten in 2002. Second, after improperly finding that
21 spoliation occurred, the Court violated the clear mandate of NRS 47.250 by refusing to allow
22 FTB to present any testimony or argument to dispute the finding in Jury Instruction 58 that the
23 jury could infer the information on the EMC backup tapes was adverse to FTB. Finally, the Court
24 abused its discretion in adopting inaccurate facts in Jury Instruction 58 and permitting Hyatt to
25 impermissibly broaden the scope of Jury Instruction 58 far beyond the alleged destruction of
26 EMC disaster recovery backup tapes.

27 In order to fully appreciate these assignments of error, it is necessary for FTB to explain
28 the factual background concerning the EMC system as well as the evidence and argument that

1 FTB would have presented at trial had the Court not impermissibly barred FTB from presenting
2 this evidence.³⁶

3 a. Factual Background Related to EMC

4 The EMC system used by FTB was an archaic system that was dramatically different from
5 other – especially modern – e-mail systems. In effect, EMC was a way to message other users
6 with short text messages or emails sent through FTB’s Sacramento mainframe computer to other
7 locations, such as FTB field offices. See Pl’s Tr. Ex. 438, at 5. Often, EMC users had to locate a
8 shared terminal to gain EMC access and to review any emails or messages sent to them through
9 the system. See Exhibit 9. Dunn Aff. at ¶ 8 and Pl. Tr. Ex. 438, at 87.

10 If some action was not taken by the user to save or print an EMC message from a user’s
11 inbox, the message would be automatically deleted within three days’ time by the built-in janitor
12 utility and become irretrievable. See id.; Pl’s Trial Ex. 438. EMC users were trained by FTB,
13 however, to delete the messages in their account folders and to not retain saved letters on the
14 system due to the limited amount of messages that could be retained by a user. Dunn Aff. at ¶ 9.
15 Thus, it was common business practice for EMC users to print hard copies of any important EMC
16 message for retention purposes and only rarely “save” EMC messages on the system.

17 b. FTB’s Efforts to Retrieve and Preserve all Documents, Including
18 Emails

19 At the time Hyatt’s complaint was filed in 1998, FTB was already in the process of an
20 agency-wide conversion from the EMC system to a new “e-mail” system, Microsoft Exchange.
21 Id. at ¶ 13. By late 1997, Microsoft Exchange was being made available to most FTB employees
22 and only a limited number of FTB employees continued to use the EMC system. Id.

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25 ³⁶ Much of the evidence that FTB would have discussed and argued from at trial would have
26 been the testimony of FTB counsel Robert Dunn, which was presented to the Court in his
27 underlying affidavits in support of FTB’s Opposition to Hyatt’s Motion to Strike FTB’s Answer
28 and in support of FTB’s Motion for Abeyance re: Sanctions (which were attached thereto) and the
stipulated and admitted exhibits relating to the EMC backup tapes offered by Hyatt.

1 From the outset of discovery in this case and in response to Hyatt's discovery requests,
2 FTB in-house counsel, Bob Dunn, made extensive efforts to locate, retrieve and preserve all
3 evidence maintained by FTB employees related to the litigation. See id. at ¶ 17. Mr. Dunn and
4 FTB Legal took the following efforts:

- 5 • Mr. Dunn identified and contacted each FTB employee who might have
6 exchanged EMC communications on the Hyatt audit between 1993 to 1997
7 and instructed them to provide any printed Hyatt-related EMC messages
8 and to login to FTB mainframe to look in their individual EMC account
9 folders for any "saved" communication related to Hyatt. See id. at ¶ 21.
10 None of these FTB employees, with the singular exception of Carol Ford,³⁷
11 possessed, located, or produced any Hyatt-related EMC emails. See id.;
12 Pl's Tr. Ex. 343.
- 13 • Mr. Dunn worked in close contact with FTB IT personnel to locate any and
14 all Hyatt-related electronic messages from the EMC system and Microsoft
15 Exchange and sought advice on backups from the EMC system during the
16 relevant time period. See id. at ¶¶ 18-19; Pl's Tr. Ex. 336, at 3-4.
- 17 • In April of 1999, FTB Tax Counsel, Natasha Page, made additional efforts
18 to locate documents, and later communicated to other FTB Counsel,
19 including Mr. Dunn, that FTB was confident through all of its efforts that it
20 had located all Hyatt audit related email messages. See id. at ¶ 27; Pl's Tr.
21 Ex. 342, at 3.

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26 ³⁷ In April 1999, Sacramento audit reviewer Carol Ford located an EMC communication she
27 had with supervisor Bauche in 1997 and printed it out. Pl's Tr. Ex. 309.
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1 c. FTB Legal's Internal Discussions Concerning Removal of the EMC
2 System

3 On June 1, 1999, every FTB employee – more than 4,500 people – received a Microsoft
4 Exchange communication explaining that EMC was to be removed from FTB's mainframe. See
5 PI's Trial Ex. 327, at 9. As the email explained, the purpose of this migration was "in fulfillment
6 of our commitment to simplify and standardize office productivity tools and infrastructure." Id.
7 at 11. By this date, most, if not all, FTB Audit and Legal personnel had not used EMC messaging
8 for up to two years. See Dunn Aff. at ¶ 32. By this date, there was virtually no chance any FTB
9 employee related to the Hyatt audit who might have exchanged discoverable communication
10 concerning the audit, had any undiscovered EMC "saved" email messages. See id. at ¶ 33.

11 FTB Legal immediately recognized that this migration could have an impact on ongoing
12 litigation, in particular this case. See PI's Tr. Ex. 327, at 16. As a result, FTB Legal questioned
13 whether some sort of "safety net" should be put in place in the Hyatt litigation or whether FTB
14 should consult with FTB trial counsel to determine if the entire migration and policy should not
15 proceed in light of this case. Id.

16 Based on these communications, Mr. Dunn notified FTB's lead litigation counsel, Felix
17 Leatherwood, seeking his counsel on how to proceed. See PI's Tr. Ex. 343, at 1-2; PI's Tr. Ex.
18 327, at 20. Mr. Dunn explained to Mr. Leatherwood FTB's operational determination to
19 completely transition to Microsoft Exchange, the anticipated removal the EMC system from
20 FTB's mainframe system. Id. Mr. Dunn made clear that when the system was removed all
21 ancient email would be lost and the system would be physically removed. Id. Mr. Dunn went on
22 to explain the extensive efforts taken to retrieve and locate all old/saved emails to date. Id. Mr.
23 Dunn indicated that he was "99% confident that [FTB] had recovered all email relating to the
24 current litigation." Mr. Dunn then expressed his concerns about this transition causing any issues
25 in the litigation and asked for Mr. Leatherwood's advice. Id.

26 In response, Mr. Leatherwood explained that FTB was required to make reasonable efforts
27 to locate and preserve all email related to the litigation. See PI's Tr. Ex. 327, at 20. Based on the
28 comprehensive efforts taken by FTB to locate and preserve this evidence, Mr. Leatherwood

1 advised FTB that it was not necessary to delay or alter the agency-wide decision to remove the
2 EMC system from the mainframe. Id.

3 Notwithstanding this virtual certainty, FTB counsel sent a final "safety net" request. Dunn
4 Aff. ¶ 34. On July 8, 1999, an email went to all FTB employees, who had any participation in
5 Hyatt's audit, which asked them to review ". . . your e-mail directories one last time for any e-
6 mails pertaining to Mr. Hyatt, Ms. Jeng, Digital Nutronics Corporation, Leetronics, and Xelex. . .
7 We have already conducted a full search for any e-mails but one last check is in order." See id.
8 Since these FTB employees had already searched for any such emails, it is not surprising that
9 none of these FTB employees possessed, located or produced any Hyatt-related EMC emails at
10 this point. Id.

11 By July 1999, Mr. Dunn, familiar with all the efforts to locate, preserve, and recover
12 email, concluded that there were no emails responsive to any discovery request that had not been
13 located, and certainly no electronically stored EMC communications responsive to any of Mr.
14 Hyatt's demands remaining on the EMC system. See id. at ¶ 35.

15 d. Removal of the EMC Back Up Tapes

16 In October 1999, the EMC database was removed from FTB's mainframe and the
17 database, as it existed at that point in time, was placed on emergency recovery backup tapes. See
18 FTB's Mot. for Abeyance, at 12 and Exhibits C, K, J and O. These backup tapes were long-term
19 disaster recovery backup tapes and were not daily backup tapes used to retrieve information. Id.
20 The final backup made of FTB's EMC database would only have contained a snapshot of the
21 information available on the EMC database as of the date the backup was created—October 1999.
22 Id. Therefore, these tapes only contained the information that was on the EMC system at the time
23 the tapes were created in October 1999 – which would have been any saved EMC emails on the
24 system or those emails that were created in the four days leading up to the creation of the backup
25 tapes and which were not deleted. Id. These tapes would not include any information related to
26 any documents or emails that had been previously deleted. Given the facts above, there could be
27 no Hyatt audit-related EMC messages on the "snapshot" backup of the entire database made in
28 October 1999. Id.

1 These disaster recovery tapes were written over in 2002 under FTB's standard policy of
2 overwriting its tapes after approximately a 3-year period. Id. Notably, the parties in this
3 litigation first learned of the existence of these backup tapes during discovery into FTB's EMC
4 system in mid-2005. See Dunn Aff. at ¶ 36. Hyatt likewise learned of the existence of these
5 tapes in 2005, long after the tapes had been overwritten.

6 2. Procedural History of EMC Issues

7 a. Hyatt's Motion to Strike Answer and for Alternate Sanctions to
8 Remedy FTB's Alleged Intentional Spoliation of E-Mails and
9 Related Evidence

10 On December 26, 2007, four months before trial was set to begin, Hyatt filed a motion
11 entitled, "Motion to Strike Defendant's Answer and For Alternate Sanctions to Remedy FTB's
12 Alleged Intentional Spoliation of E-Mails and Related Evidence." See Hyatt's Mot. to Strike
13 filed 12/26/2007. Hyatt argued that FTB intentionally spoliated evidence of EMC emails when it
14 failed to preserve those emails and later allowed the EMC backup tapes to be overwritten after the
15 litigation had commenced. Id. at 10. Based on this alleged spoliation, Hyatt requested a "menu"
16 of available sanctions. First, Hyatt requested that the Court "strike" FTB's answer and enter a
17 default judgment in his favor. Id. at 58. Alternatively, Hyatt requested that the Court provide one
18 of several adverse jury instructions ranging from an irrebuttable presumption instruction to an
19 adverse inference instruction, depending upon the Court's determination of FTB's culpability. Id.
20 at 58-60.

21 After full briefing, the Court heard extensive oral argument. See Hr'g Tr., Feb. 15, 2008.
22 At the conclusion of the hearing, the Court granted Hyatt's Motion to Strike, in part, determining
23 that FTB had "spoliated" evidence by allowing the EMC backup tapes to be written over. See id.
24 at 133-134. The Court rejected Hyatt's argument, however, that FTB's conduct was intentional.
25 See id. As a result, the Court expressly denied Hyatt's request to strike FTB's Answer. See id.
26 The question then became which jury instruction the Court should adopt as a sanction for FTB's
27 conduct. After additional argument of counsel, the Court expressly reserved its determination on
28 which sanction should be imposed against FTB and consequently which jury instruction it would
 adopt. Id. at 140.

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b. Trial Exhibits

Shortly after the Court granted Hyatt's Motion to Strike, but before the Court had made its determination related to which sanction it would impose, the parties' simultaneously exchanged their proposed trial exhibits. See FTB's Proposed Trial Exs. filed 3/10/2008; Hyatt's Proposed Trial Exs. filed 3/10/2008. In those trial exhibits, Hyatt proposed several exhibits related to FTB's efforts to obtain and preserve emails, the EMC transition to Microsoft Exchange, and EMC system generally. See Pl's Tr. Exs. 327, 336, 342, 343, 438. FTB stipulated to the admission of these exhibits.

c. FTB's Motion for Abeyance

By March 2008, the Court had still not ruled on the sanction that it would impose against FTB related to Hyatt's Motion to Strike. In anticipation of the evidence that would be presented at trial, FTB filed a "Motion for Abeyance Re: Remedy to be Imposed Regarding Hyatt's Motion for Sanctions." See FTB's Mot. for Abeyance filed 3/26/2008.

In its Motion, FTB requested that the Court continue to refrain from determining what jury instruction, if any, it would adopt **until after** the Court had heard all the evidence presented at trial related to the EMC backup tapes. Mot. for Abeyance at 15-26. FTB's Motion detailed the additional evidence that FTB intended to present at trial, which specifically refuted the characterization of FTB's actions by Hyatt. Id. at 4-15. In the alternative, FTB argued that if the Court determined that any adverse jury instruction was warranted after hearing this additional evidence, it should adopt the lowest possible sanction of an "adverse inference" jury instruction. Id. at 15-26. Based on such an inference, the jury would be permitted to infer that the evidence that was lost or destroyed would have not have been favorable to FTB. Id.

In Opposition, Hyatt asserted that FTB should not be permitted to present **any** evidence related to the EMC system or the spoliation issue at trial. Hyatt's Opp'n to Mot. for Abeyance filed 4/9/2008 at 4-5. Rather, Hyatt asserted that the only evidence FTB should be permitted to present to the jury was to be strictly limited to only evidence/testimony regarding whether the spoliated evidence was adverse to FTB. See id. at 7-8. Based on Hyatt's argument, he claimed FTB must be precluded from laying any factual foundation related to: (1) what the EMC was; (2)

1 how the system was used and operated; (3) the transition between email systems at FTB; (4) the
2 efforts taken by FTB and its counsel to preserve, locate, and obtain all emails and responsive
3 evidence to this litigation; (5) what the EMC backup tapes were and when and how they were
4 destroyed; and (6) what information, if any, would have been contained on the EMC back-up
5 tapes related to this case.

6 The Court ultimately denied FTB's Motion for Abeyance. The Court, however, did adopt
7 the negligence sanction for FTB's alleged spoliation – the adverse inference instruction outlined
8 by Bass v. Bass-Davis, 122 Nev. 442, 134 P.3d 103, 109 (2006) and cited in FTB's Reply in
9 Support of its Motion for Abeyance. See Hr'g Tr., Apr. 18, 2008. This instruction from Bass-
10 Davis stated:

11 Where relevant evidence which would properly be part of the case is within the
12 control of the party whose interest it would naturally be to produce it, and it fails to
13 do so, **without satisfactory explanation**, the jury may draw an inference that such
14 evidence would have been unfavorable to it. In this action, it has been established
15 that FTB failed to preserve its backup tapes for the EMC system. Under the law,
16 you **may infer** that this evidence would have been unfavorable to FTB.

17 FTB's Reply in Support of Mot. for Abeyance at 7 (emphasis added).

18 d. Trial Testimony Which FTB Sought to Present

19 During the course of trial, with the exception of one question posed to former FTB auditor
20 Sheila Cox related to her use of emails, Hyatt did not present any evidence at trial related to
21 FTB's EMC System. Rough Trial Tr., May 27, 2008, 196:18-25; 197:1-5.

22 Knowing that the jury was going to be given an adverse inference jury instruction, FTB
23 sought to present evidence and testimony related to the EMC system in order to rebut the adverse
24 inference created by the Court's adopted instruction. Specifically, FTB sought to establish that
25 there was a reasonable explanation for the destruction of the EMC backup tapes and that no
26 evidence was destroyed that was adverse to FTB. See Adverse Inference Instruction, FTB's
27 Reply Mot. for Abeyance at 7. For this purpose, FTB sought to present testimony from Bob
28 Dunn. As described in detail above, Mr. Dunn could explain what the EMC system was, why
FTB allowed the EMC backup tapes to be written over in the normal course of operations, and,
most importantly, why the evidence that was written over (i.e., the EMC backup tapes) did not

1 contain any adverse evidence to FTB. Exhibit 9 Dunn Aff. Moreover, Mr. Dunn was expected to
2 provide testimony that would explain the various stipulated and admitted exhibits, offered by
3 Hyatt, which directly related to these issues and explain their significance to the case, and, in
4 particular, the anticipated jury instruction the jury would receive prior to closing arguments. See
5 Pl's Tr. Ex. 327, 336, 342, 343 & 438.

6 During Mr. Dunn's testimony, FTB counsel began to ask Mr. Dunn questions related to
7 these very topics. See Rough Trial Tr., July 14, 2008 at 136-138. Although Mr. Dunn was
8 allowed to briefly testify about his and other FTB employee's efforts to obtain and preserve
9 electronic evidence, Hyatt quickly objected. Id. at 138-139. Hyatt renewed his previous
10 argument that FTB could only present testimony related to that EMC backup tapes which would
11 establish that the evidence on the tapes would was not adverse to FTB. Id.

12 FTB opposed Hyatt's attempts to prohibit it from presenting evidence to rebut the adverse
13 inference instruction the Court had previously adopted — particularly evidence and testimony
14 related to stipulated and admitted exhibits, which were offered by Hyatt. FTB pointed out that
15 the very language of the adverse inference instruction indicated that the jury could only draw an
16 adverse inference if there was no "reasonable explanation" for the failure to preserve or disclose
17 the evidence at issue. Id. at 137-151. FTB explained that the testimony sought from Mr. Dunn
18 went to the heart of FTB's "reasonable explanation" for not having preserved and disclosed the
19 EMC backup tapes. Id. FTB's counsel also explained testimony that was being sought from Mr.
20 Dunn was testimony related to and **found directly within stipulated and admitted exhibits** —
21 offered by Hyatt which related to these very issues. Id. The Court sustained Hyatt's objection
22 and prohibited Mr. Dunn from testifying to these matters.

23 e. Jury Instruction 58 and FTB's Objections to It

24 At the setting of jury instructions, Hyatt offered a proposed adverse inference jury
25 instruction to the Court. This instruction read as follows:

26 Where relevant evidence that would properly be part of the case is within the
27 control of the party whose interest it would naturally be to produce it, and that
28 party fails to produce the evidence because it failed to preserve the evidence after
having been put on notice of the litigation and **after the evidence has been
requested**, the jury may draw an inference that such evidence would have been

1 unfavorable to the that party. In this action, it has been established that FTB failed
2 to preserve electronic evidence in the form of e-mails after the litigation was
3 commenced and the evidence had been formally requested. Under the law, you
may infer that this evidence would have been unfavorable to FTB.

4 Hyatt's Response to Proposed Jury Instruction re: Spoliation of Evidence filed 4/21/2008; see
5 Rough Trial Tr., July 18, 2008, 160-175 (emphasis added). FTB objected to the instruction on
6 three bases.

7 First, FTB pointed out that the jury instruction indicated that the evidence FTB failed to
8 preserve was "electronic evidence in the form of e-mails." Id. This was factually inaccurate
9 because the Court had ruled only that FTB spoliated EMC backup tapes – not "emails." See Hr'g
10 Tr., Feb. 15, 2008, 74.

11 Second, FTB asserted out that the instruction improperly stated that FTB had failed to
12 preserve these backup tapes "after the evidence had been formally requested." Rough Trial Tr.,
13 July 18, 2008, 173. This, too, was factually inaccurate. As detailed in FTB's Motion for
14 Abeyance, the first time that Hyatt ever formally requested the production of anything related to
15 the EMC backup tapes came in Hyatt's 11th Supplemental Request for Production dated
16 December 29, 2004. FTB's Mot. for Abeyance at.19; Exhibit P. However, it was undisputed that
17 the EMC backup tapes were overwritten in mid-2002 — two years before Hyatt made any
18 discovery request for the backup tapes. Id.

19 Finally, FTB explained that Hyatt's instruction failed to track the adverse inference
20 mandated by the Nevada Supreme Court in Bass v. Bass-Davis. Unlike Hyatt's instruction, the
21 Bass-Davis instruction specifically required the following language -- "the jury may only draw an
22 adverse inference for spoliated evidence if the offending party did not have a satisfactory
23 explanation for its failure to preserve the evidence in question." See Bass-Davis, 134 P.3d at
24 109 (emphasis added).

25 FTB then proffered an alternative instruction, which did not included these factual
26 inaccuracies. FTB's Objections To Hyatt's Jury Instructions filed March 31, 2008, Exhibit C
27 (Alternate Adverse Inference Instruction); see also Rough Trial Tr., July 18, 2008, 166-176.
28

1 The Court adopted Hyatt's instruction but required him to alter it in two ways. See Rough
2 Trial Tr., July 18, 2008, 169:23-170:3. First, Hyatt was required to remove the language that
3 "FTB failed to preserve electronic evidence in the form of e-mails" and replace it with the proper
4 factual description of the evidence spoliated, i.e., the EMC backup tapes. See Rough Trial Tr.,
5 July 18, 2008, 169:23-170:3; 175:18-176:1. Second, Hyatt was required to include the
6 "satisfactory explanation" language as required by Bass-Davis. Id. The Court, however, **did not**
7 correct the critical factual inaccuracy contained in the Instruction — stating that FTB destroyed
8 the EMC backup tapes **after** Hyatt had requested them — when it was exactly the opposite.

9 Hyatt's instruction became "Jury Instruction 58" in the final instruction packet, and read
10 as follows:

11 Where relevant evidence that would properly be part of the case is within the
12 control of the party whose interest it would naturally be to produce it, and that
13 party fails to produce the evidence because it failed to preserve the evidence after
14 having been put on notice of the litigation and **after the evidence had been**
15 **requested**, the jury may draw an inference that such evidence would have been
16 unfavorable to that party. In this action, it has been established that FTB failed to
17 preserve electronic evidence of back up tapes for the EMC system after the
18 litigation was commenced **and the evidence had been formally requested**.
19 Under the law, you may infer that this evidence would have been unfavorable to
20 FTB.

21 Court's Final Jury Instructions dated 7/21/2008, J.I. 58 (hereinafter "Jury Instruction 58")
22 (emphasis added).

23 f. Closing Argument re: Jury Instruction 58

24 On July 22 and 23, 2008, Hyatt presented his closing argument relying heavily upon Jury
25 Instruction 58. See Rough Trial Tr., July 22, 2008, 50:25-53:23. Relying on the factual
26 inaccuracy contained in the instruction, Hyatt repeatedly asserted that FTB had destroyed the
27 EMC backup tapes **after** those tapes had been requested.

28 Worse still, Hyatt's closing argument substantially expanded the scope of the adverse
inference instruction by insinuating and then expressly stating to the jury that the evidence that
was the subject of this instruction was **not limited to the EMC backup tapes**. Hyatt improperly
argued, based on Jury Instruction 58, that the jury could infer several **other** pieces of evidence —
such as handwritten notes that were reduced to typed documents and later destroyed — that were

1 not maintained in normal course of FTB's business were also "adverse" to the agency. See
2 Rough Trial Tr., July 23, 2008, 28-31.

3 Finally, and most egregiously, Hyatt argued Jury Instruction 58 could be used by the jury
4 to "fill any gap" the jury may have related to whether FTB acted intentionally or related to FTB's
5 conduct. Id. at 19-20. In sum, Hyatt assumed that any time the jury could not find evidence in
6 the record to satisfy one of the essential elements of his claims, the jury could use Jury Instruction
7 58 to fill that evidentiary gap by inferring that the evidence existed but that FTB had destroyed it.
8 Id. In effect, Hyatt was allowed to shift the burden of proof on **his** claims to FTB by insinuating
9 it was FTB that was required to prove that no evidence existed to support Hyatt's claims.

10 In its closing argument, FTB attempted to counter these inflammatory arguments by
11 providing the jury with the information that it needed to understand what Jury Instruction 58 was
12 actually referring to — the EMC backup tapes — and why the jury should not draw any negative
13 inference against FTB. See Rough Trial Tr., July 29, 2008, 104-107. **Using stipulated and**
14 **admitted exhibits**, FTB started by discussing the memorandum sent by Mr. Dunn to Felix
15 Leatherwood explaining what the EMC system was, the efforts FTB had taken to retrieve and
16 maintain all emails from the EMC system related to the litigation, and the anticipated transition
17 from EMC to Microsoft Exchange in June 1999. PI's Trial Exs. 342, 343.

18 FTB then began to detail all the various examples of emails and electronic documents that
19 FTB did retrieve and preserve based on its efforts during discovery — **using the stipulated and**
20 **admitted exhibits as its foundation.** See Rough Trial Tr., July 29, 2008, 104-107. Hyatt
21 objected to these arguments, asserting that FTB's arguments were prohibited by the Court's
22 earlier rulings. Hyatt requested that FTB's arguments be stricken and FTB be prevented from
23 continuing. See id. at 106. In spite of the fact that FTB's arguments were all based upon
24 **stipulated and admitted documents**, the Court sustained Hyatt's objection and struck the
25 arguments of FTB. Id. at 107.

26 3. FTB is Entitled to a New Trial Pursuant to NRCP 59(a)(7)

27 NRCP 59(a) provides in relevant part that "[a] new trial may be granted to all or any of
28 the parties and on all or part of the issues for any of the following causes or grounds materially

1 affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the
2 court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by
3 which either party was prevented from having a fair trial; . . . (7) Error in law occurring at the trial
4 and objected to by the party making the motion.” NRCp 59(a). “The decision to grant or deny a
5 motion for a new trial rests within the sound discretion of the trial court’.” Bass-Davis v. Davis,
6 122 Nev. 442, 134 P.3d 103, 110 (2006)(citation omitted).

7 The Court committed two serious errors of law, over FTB’s objection. First, the Court
8 improperly and incorrectly determined that FTB spoliated evidence and then refused to allow
9 FTB to present any testimony or argument to dispute the finding of spoliation and to rebut the
10 adverse inference created by Jury Instruction 58. See Bass-Davis v. Davis, 122 Nev. 442, 134
11 P.3d 103, 110-111 (2006) (holding that the district court’s evidentiary ruling in error could only
12 be “cured by a new trial”).

13 As more fully argued in FTB’s Opposition to Hyatt’s Motion to Strike FTB’s Answer and
14 FTB’s Motion for Abeyance,³⁸ in making its finding of spoliation, the Court ignored the
15 following facts:

- 16 • The emergency data recovery backup tapes at issue were inaccessible for
17 information retrieval,³⁹
- 18 • Hyatt never asked to see the backup tapes during the relevant time period
19 even though he knew about the EMC system in the Spring of 1999;
- 20 • Hyatt asked for paper copies of electronically stored documents - and he
21 got them;

22
23 ³⁸ FTB incorporates these arguments by reference and will not repeat them here.

24 ³⁹ This fact alone reveals that spoliation could not have occurred as inaccessible back up
25 tapes are not required to be preserved under the controlling case law. See Zubulake v. UBS
26 Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“Zubulake IV”) (“As a general rule, that
27 litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely
28 for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth
in the company’s policy.”).

- 1 • FTB Legal confirmed that there was no possibility that any Hyatt-related
2 EMC emails existed on the EMC system at the time the backup tapes were
3 made.

4 Based on these facts alone, the Court erred in making its finding that FTB spoliated the
5 EMC back up tapes. Moreover, even if FTB still possessed the backup tapes, Hyatt failed to
6 make a showing to the Court that he was entitled to review those backup tapes. See e.g.,
7 Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“Zubulake IV”).
8 Notably, Hyatt did not and could not identify any default by FTB in responding to his discovery
9 requests which was absolutely required before the Court could make any spoliation finding. See
10 Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103, 106 (2006). Thus, the Court erred in finding
11 that spoliation of relevant evidence occurred in this first place and no jury instruction should have
12 ever been adopted.

13 Second, the Court compounded its improper spoliation finding by the adverse inference
14 instruction created by Bass-Davis and provided to the jury. The adverse inference instruction
15 created by the Nevada Supreme Court created the adverse inference **that is rebuttable**. Bass v.
16 Bass-Davis, 134 P.3d at 108-109. In other words, by its very terms, the adverse inference
17 instruction allows that the party that has been deemed to have spoliated the right to present
18 evidence to rebut the adverse inference. FTB attempted to do just that by presenting the
19 testimony of Mr. Dunn and arguing the evidence from stipulated and admitted exhibits. The
20 Court, however, explicitly precluded FTB from doing so. Therefore, FTB was entirely prohibited
21 from presenting **any** evidence to rebut the adverse inference created by the instruction adopted by
22 the Court.

23 Not only did this violate the express language of the instruction adopted by the Court but
24 the Court’s actions violated the clear provisions of NRS 47.250. NRS 47.250 dictates that certain
25 “presumptions **are disputable** . . . [including] [t]hat evidence willfully suppressed would be
26 adverse if produced.” NRS 47.250(3) (emphasis added). Specifically, FTB was prevented from
27 presenting testimonial evidence and argument from **stipulated and admitted exhibits offered by**
28 **Hyatt** which provided an explanation to dispute the adverse inference contained in Jury

1 Instruction 58 relating to the writing over of the EMC backup tapes. By preventing FTB from
2 doing so, the Court turned the adverse inference contained in Jury Instruction 58 into a
3 **conclusive inference – unrebuttal by FTB**. Given the Court’s refusal to allow FTB to present
4 any testimony or argument on this issue, as described above, FTB was denied a fair trial. See
5 NRCP 59(a)(7).

6 Had FTB been permitted to present its evidence and arguments, irrefutable, conclusive
7 presumption, in direct contravention of NRS and the Bass-Davis decision, it would have
8 specifically been able to explain to the jury its “satisfactory explanation” for not having preserved
9 the EMC back up tapes and that no evidence on those backup tapes was adverse to FTB. For
10 example, FTB would have used the EMC User Guide, which was a stipulated and admitted
11 exhibit, to explain what the EMC system was, how it operated, how emails were automatically
12 deleted after three days, and how emails could be saved in the system. See Pl’s Trial Ex. 438, at
13 5, 56-57, 87. FTB then intended to use the various stipulated exhibits to explain the agency-wide
14 transition from EMC to Microsoft Exchange. See Pl’s Trial Ex. 327.

15 FTB would also have explained, through the stipulated and admitted exhibits and the
16 testimony of Mr. Dunn, the extensive efforts taken by FTB attorneys to recover, preserve, and
17 produce all Hyatt-related EMC emails prior to the final transition. See Pl’s Tr. Ex. 343, at 1-2;
18 Ex. 327, at 20. FTB would have elaborated on the precautions and the considerations that were
19 raised by FTB legal related to this case and the proposed transition. Id. at 327; at 16-22. This
20 evidence and argument would also have demonstrated FTB’s virtual certainty that no Hyatt
21 related emails or documents remained on the EMC system at the time the EMC system was
22 entirely shut down. See Pl’s Tr. Ex. 343.

23 FTB would have explained, based on the stipulated and admitted exhibits, that no Hyatt-
24 related emails, other than the previously recovered documents, could have existed on the EMC
25 system prior to Hyatt’s filing his complaint in 1998 for a multitude of reasons. First, FTB would
26 have explained the trash utility function of EMC, which automatically deleted all read emails
27 after three days, rendering any of those emails unrecoverable. See Pl’s Tr. Ex. 438, at 56-57.
28 FTB would have also explained that FTB users were encouraged and trained to “print” emails

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1 from EMC and then to delete those emails based on the limited storage space on the system. Id.
2 at 87. FTB would have explained the manner in which the backup tapes were created and what
3 would have been on the EMC backup tapes created in October 1999 — which was merely a
4 snapshot of the EMC system as it existed at the time. Pl’s Tr. Ex. 336. Based on this evidence
5 and argument, FTB would have made it abundantly clear that when the EMC system was shut
6 down and the EMC backup tapes were created, no emails related to Hyatt or his audit — much
7 less adverse emails — existed on the EMC system.⁴⁰

8 Based on the Court’s rulings, however, FTB was unable to present any of these arguments
9 to the jury and was prohibited from attempting to dispute the adverse inference which a party has
10 a statutory right to do under NRS 47.250(3). FTB’s arguments, if allowed to be given, would
11 have entirely undermined Hyatt’s “fill in the gaps” argument as well as any argument that the
12 EMC backup tapes contained any “adverse” evidence to FTB. As FTB was entirely deprived of
13 making these arguments, it was also deprived of a fair trial.

14 4. FTB is Entitled to a New Trial Pursuant to NRCP 59(a)(1), based on the Factual
15 Inaccuracies

16 Moreover, the Court prevented FTB from having a fair trial by abusing its discretion in
17 adopting a factually inaccurate jury instruction. In addition to turning the adverse inference
18 contained in Jury Instruction 58 into a **conclusive** presumption by preventing FTB from disputing
19 the inference, the Court also allowed Hyatt to impermissibly broaden the scope of Jury Instruction
20 58 far beyond the alleged destruction of EMC backup tapes. See Rough Trial Tr., July 22, 2008,
21 50:25-53:23; Rough Trial Tr., July 23, 2008, 19-20; 28-31. On several occasions, Hyatt was
22 permitted to argue to the jury with impunity, without any factual foundation, that FTB had
23 “destroyed evidence” related to Hyatt and his audits. Id. As noted above, none of these
24 arguments were allowed to be rebutted by FTB.

25 _____
26 ⁴⁰ FTB obtained evidence from the very software engineers that created the EMC system
27 that corroborates FTB’s position. That evidence, from Fisher International, Inc. was precluded
28 when the court denied FTB Motion for Abeyance.

1 Hyatt first requested the backup tapes at issue in December 2004. See FTB's Motion for
2 Abeyance at 19; Exhibit P (Hyatt's 11th Request for Production dated 12/29/2004, Requests 133
3 and 134). However, the backup tapes were written over in 2002. Notwithstanding this clear
4 timing, the Court inaccurately instructed the jury that FTB had destroyed the EMC backup tapes
5 after Hyatt had formally requested this evidence. However, the complete opposite was true.
6 Over FTB's objection, the Court instructed the jury that:

7 In this action, it has been established that FTB failed to preserve electronic
8 evidence of back up tapes for the EMC system after the litigation was commenced
9 **and the evidence had been formally requested.** Under the law, you may infer
10 that this evidence would have been unfavorable to FTB.

11 Court's Final Jury Instructions dated 7/21/2008, J.I. 58 (emphasis added).

12 To make matters worse, FTB was not given the opportunity to provide any testimony or
13 evidence (as described above) concerning the sequence of Hyatt's request for the evidence at
14 issue. Thus, FTB was unable to mitigate or attempt to cure the negative inference given to the
15 jury in this inaccurate instruction.

16 Based on the Court's error in determining that FTB spoliated the EMC backup tapes,
17 which was compounded by the Court's various errors related to the admission of testimony and
18 evidence, and the adoption of a factually inaccurate jury instruction, FTB was substantially
19 prejudiced and denied a fair trial. Thus, for all of these reasons, FTB is entitled to a new trial. See
20 NRCP 59(a).

21 C. Conflicting Findings by the Jury

- 22 1. The Jury Manifestly Disregarded the Jury Instructions in Finding FTB
23 Liable for Publicity Of Private Facts and False Light Based on the Identical
24 Facts

25 A party is entitled to a new trial if the jury manifestly disregarded the jury instructions.
26 NRCP 59(a)(5). This standard is met if it can be shown that "had the jurors properly applied the
27 instructions of the court, it would have been impossible for them to reach the verdict which they
28 reached." M & R Inv. v. Anzalotti, 105 Nev. 224, 226, 773 P.2d 729 (1989). Here, had the jury
properly followed the Court's jury instructions related to Hyatt's claims for publicity of private

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1 facts and false light, it would have been impossible for the jury to return a verdict in favor of
2 Hyatt on both claims.

3 Hyatt's Third and Fourth Causes of Action were claims for: (1) publicity of private facts;
4 and (2) false light. See Sec. Am. Compl. filed 4/18/2008 ¶¶ 44-61. These two claims were
5 predicated upon Hyatt's allegation that FTB violated his right to privacy. Id. At trial, Hyatt
6 argued that he was entitled to recovery on both of these claims. Rough Trial Tr., July 23, 2008,
7 61:17-64:1; 64:3-65:23; 66:14-67:13. The facts and evidence Hyatt relied upon to prove FTB's
8 liability for these torts was identical in all respects. First, Hyatt argued that he was entitled to
9 recovery on both of these claims because FTB improperly mailed "demands to furnish
10 information" letters to third parties during the audit which included Hyatt's private information,
11 such as his name, address, social security number, and that he was under audit. Id. Moreover,
12 Hyatt argued that he was entitled to recovery on both of these claims because FTB improperly
13 published this case on its monthly Litigation Roster and private information about Hyatt's tax
14 assessments. Id. Hyatt made no distinction between the factual predicate that supported either of
15 these two claims.

16 The jury instructions on this claims rendered it impossible for the jury to find FTB liable
17 for both of these claims based on these identical facts. First, the Court instructed the jury that, in
18 order for it to find FTB liable for the claim of "publicity of private facts," the jury was required to
19 find: (1) FTB gave publicity; (2) to **Hyatt's private facts or private life**; (3) the publicity of
20 these private facts would be offensive and objectionable to a reasonable person; (4) the
21 information publicized was not a matter of public concern; and (5) Hyatt sustained injury or
22 damage as a result. Court's Final Jury Instructions filed 7/21/2008, J.I. 46. Thus, in order to find
23 for Hyatt on this claim, the jury was required to find that FTB publicized **true** facts about Hyatt
24 or his private life to third parties.

25 Conversely, the Court instructed the jury that in order for it to find FTB liable for "false
26 light," it was required to find: (1) FTB gave publicity to a statement about Hyatt; (2) the
27 statement publicized was **false** or an implicitly false; (3) the false light in which Mr. Hyatt was
28 placed would be highly offensive to a reasonable person; and (4) FTB made the publication with

1 actual malice. Id. at J.I. 48. The Court also instructed the jury that “truth” is a complete and
2 absolute defense to a false light claim. Id. at J.I. 56. In other words, based on this instruction, the
3 jury could not find FTB liable for false light if the information FTB publicized about Hyatt was
4 true.

5 In this instance, the jury found FTB liable for both publicity of private facts and false light
6 based on the identical facts and evidence argued by Hyatt. First, the jury determined that FTB
7 was liable for publicizing true information about Hyatt in the Demand Letters and the Litigation
8 Rosters. See Jury’s Verdict, dated 8/6/2008. In the very same breath, the jury found that FTB
9 was liable for publicizing false information about Hyatt in the Demand Letters and the Litigation
10 Rosters. Id. In other words, the jury found FTB liable for publicizing true and false information
11 based on the exact same evidence – the disclosure of Hyatt’s private information on the Demand
12 Letters and the publication of his tax assessments on the Litigation Rosters. Rough Trial Tr., July
13 23, 2008, 61:17-64:1; 64:3-65:23; 66:14-67:13.

14 This is impossible. The same information could not be both true and false at the same
15 time. It is either one or the other. It would be impossible for the jury to find that FTB published
16 true information on the Demand Letters, i.e., Hyatt’s social security number, address, and that he
17 was under audit, and at the very same time find FTB liable for publicizing this identical
18 information because it was “false.” If the information published in the Demand Letters was true,
19 Jury Instruction 56 explicitly indicated that FTB had an absolute defense to Hyatt’s claim for
20 false light based on those same facts. Court’s Final Jury Instructions filed 7/21/2008, J.I. 56.
21 This same analysis holds true for the publication of the Litigation Rosters. Therefore, it is
22 obvious that it was impossible for the jury to properly follow the jury instructions given by the
23 Court relative to these claims and find FTB liable for both claims. Anzalotti, 105 Nev. at 226.

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1 Therefore, FTB is entitled to a new trial based on the jury's manifest disregard of the Court's
2 instructions and the jury's patently inconsistent findings on these claims.⁴¹

3 D. The Court's Allowance of Judicial Notice

4 1. The Court Legally Erred by Taking Judicial Notice of Irrelevant and
5 Inapplicable California and Federal Statutory Laws

6 After making numerous representations and statements to the Court and FTB that neither
7 California nor federal law applied to this litigation, on March 31, 2008, Hyatt filed a document
8 entitled "Request for Judicial Notice at Trial of Relevant Laws of the United States of America,
9 Relevant Laws of the State of California." Hyatt's Request for Judicial Notice filed 3/31/2008
10 ("Request for Judicial Notice").⁴² Hyatt requested that the Court take judicial notice of several
11 federal and California state statutes, a California state constitutional provision, and a California
12 administrative regulation. Id. at 0-2. Over FTB's objection, the Court took judicial notice of
13 these provisions. Hr'g Tr., Apr. 18, 2008, 86:14-87:17.⁴³ As a result, Hyatt was permitted to
14 display these various provisions as "exhibits" to the jury and present "evidence" and "argument"

15 _____
16 ⁴¹ Also the Court legally erred in submitting both of these theories to the jury for
17 consideration. At a minimum, the Court should have granted FTB's motion for judgment as a
18 matter of law on one of these claims because Hyatt could not recover for both causes of action
based on the identical facts. This is impossible as a matter of law.

19 ⁴² The California legal authorities the Court judicially noticed were as follows: Cal. Cont
20 Art. I, § 1; Cal. Civ. Code § 1217; Cal. Civ. Code §§ 1798, 1798.1, 1798.3, 1798.18, 1798.20,
21 1798.24, 1798.85 (Provisions of California's Information Practices Act); Cal. Rev. & Tax Code
22 §§ 17014, 19131, 19164, 19504, 19504.7, 19542, 19542.1, 19552, 2001, 2002; 18 Cal. Admin.
Code § 17014.

23 The federal authorities that the Court judicial noticed were as follows: 5 U.S.C. § 552a (Federal
24 Privacy Act); 12 U.S.C. §§ 3401, 3402; 26 U.S.C. §§ 6663, 7454. See Hyatt's Request For
Judicial Notice, 0-2.

25 ⁴³ Incidentally, when the Court first heard the arguments related to Hyatt's Request, the
26 Court denied it. Hr'g Tr., Apr. 18, 2008, 68:13-15. Moments later, after an improper oral motion
27 for reconsideration was made by Hyatt's counsel, the Court entirely reversed itself, granting
Hyatt's Request. Id. at 86:14-87:17; see EDCR 2.24(a) ("no motion once heard and disposed may
28 be renewed in the same cause . . . unless leave of court is granted.").

1 that FTB had “violated” various California and federal laws. See e.g., Rough Trial Tr., April 21,
2 2008, 68:8-16 (Hyatt’s Opening Statement); Rough Trial Tr., May 21, 2008, 16:65-20:59
3 (Testimony of Prof. Daniel Solove); Rough Trial Tr., May 27, 2008, 70:23-71:16; 170:20-171:15
4 (Testimony Sheila Cox); Rough Trial Tr., May 28, 2008, 7:51-8:48 (same); Rough Trial Tr., July
5 23, 2008, 36:10-38:1 (Hyatt’s Closing Argument).

6 It was legal error to take judicial notice of these legal authorities. NRCP 59(a)(7). First,
7 Hyatt was judicially estopped from attempting to insert federal law into this litigation. Moreover,
8 these various legal authorities were entirely irrelevant issues in this case. Finally, allowing
9 Hyatt’s witnesses to testify to the content of these statutes, their meaning, and whether FTB
10 “violated” any of these resulted in the jury being presented improper and incorrect legal
11 opinions. As a result, the Court’s determination to judicially notice these irrelevant legal
12 provisions was legally improper and resulted in great prejudice to FTB. Accordingly, FTB is
13 entitled to a new trial on this basis. NRCP 59(a)(7).

14 a. Hyatt was Judicially Estopped from Interjecting Federal Law into
15 this Trial

16 Judicial estoppel applies when:

- 17 (1) the same party has taken two positions;
- 18 (2) the positions were taken in judicial proceedings;
- 19 (3) the party was successful in asserting the first position (i.e., the tribunal
20 adopted the position or accepted it as true);
- (4) the two positions are totally inconsistent; and
- (5) the first position was not taken as a result of ignorance, fraud, or mistake.

21 Marcuse v. Del Webb Communities, Inc., 163 P.3d 462, 468-69 (2007); Mainor v. Nault, 120
22 Nev. 750, 101 P.3d 308, 318-319 (2004) (internal citations and quotations omitted). The purpose
23 of this doctrine is “to prohibit the deliberate shifting of positions to suit exigencies of each
24 particular case that may arise concerning the subject matter in controversy” and to protect the
25 integrity of the judicial system. Sterling Builders, Inc. v. Fuhrman, 80 Nev. 543, 550, 396 P.2d
26 850 (1964) (quoting 31 C.J.S. Estoppel § 121 at 649, 650); Marcuse, 163 P.3d at 468-69. Here,
27 each and every element of judicial estoppel was satisfied with respect to Hyatt’s arguments that
28 federal law was in any way related to this case.

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1 Early in this litigation, FTB removed this case to the Federal District Court of Nevada.
2 Exhibit 10, Docket Sheet Federal District Court of Nevada. Hyatt filed a motion to remand this
3 litigation to the state court by arguing that this case was only premised on state law, i.e., **no**
4 **federal questions or issues were presented by the litigation.** In that motion, Hyatt specifically
5 stated:

6 The action is based **entirely on Nevada law.** 19:2-3 (emphasis added).

7 Plaintiff has clearly pleaded causes of action that are **recognized under Nevada**
8 **law.** 19:10-11 (emphasis added).

9 **His causes of action are grounded in the law of the State of Nevada.** His tort
10 claims speak for themselves as causes of action **recognized under Nevada law.**
11 22:17-18 (emphasis added).

12 Plaintiff has sought the protections and remedies **afforded Nevada residents**
13 **under Nevada law...** 23:7-8 (emphasis added).

14 Exhibit 11, Hyatt's Mot. to Remand filed March 4, 1998. The Federal District Court of Nevada
15 relied on Hyatt's representations and granted Hyatt's motion to remand. Exhibit 12. Therefore,
16 the Court should not have taken judicial notice of these federal provisions because Hyatt was
17 judicially estopped from relying on these authorities at trial. Hyatt should not have been
18 permitted to present evidence and argument to this jury that FTB somehow violated federal law.
19 Allowing Hyatt to present these federal laws during trial, permitted Hyatt to take a totally
20 differently and entirely inconsistent position than he had previously taken before the Federal
21 District Court of Nevada, a position that he was successful in asserting to that court. Id.

22 Moreover, by taking judicial notice of these provisions, the Court itself took entirely
23 inconsistent positions relative to this issue. Pretrial, the Court expressly agreed that Hyatt was
24 judicially estopped from asserting that federal law applied to this case. As the Court will recall,
25 on November 29, 2007 FTB filed a motion entitled, "Motion for Judgment of the Pleadings, or in
26 the Alternative, Motion in Limine re: Hyatt's Claims Concerning Information Privacy." In that
27 motion, FTB expressly argued that evidence of federal law should be excluded from trial
28 because Hyatt was judicially estopped from alleging that any federal claims or issues were at
issue in this case based on his previous assertions, detailed above. See FTB's Mot. on the
Pleadings, at 14-15.

1 Although the Court ultimately denied FTB's Motion for Judgment on the Pleadings,⁴⁴
2 the Court expressly stated that it agreed with FTB's points that Hyatt was judicially estopped
3 from asserting that federal law or issues were involved in this case, indicating:

4 THE COURT: Well, I think Ms. Lundvall's argument with respect to judicial
5 estoppel, those points you make, I think, are well taken by the Court.

6 Hr.'g Tr., Jan. 23, 2008, 84:23-25 (emphasis added). As such, the Court should have rejected
7 Hyatt's improper request for judicial notice of these federal authorities and enforced its own
8 orders. See Halverson v. Hardcastle, 123 Nev. 29, 163 P.3d 428, 440 (2007) (courts have
9 inherent power to enforce their own orders to protect the dignity and decency of the
10 proceedings). The Court's failure to do so resulted in grave prejudice to FTB, which deprived it
11 of a fair trial.

12 b. These Legal Authorities were Irrelevant to this Case and were not
13 Entitled to Judicial Notice

14 As readily admitted by Hyatt during trial, he did not plead any claims under either
15 California or federal law in his complaint. See Sec. Am. Compl. filed 4/18/2006; see also Rough
16 Trial Tr., July 2, 2008, 47:11-17. As a result, these legal authorities had absolutely no relevance
17 to the Nevada common law torts pled in this litigation. Relevant evidence is defined by NRS
18 48.015 which states:

19 "relevant evidence" means evidence having any tendency to make the existence of
20 any fact that is of consequence to the determination of the action more or less
21 probable than it would be without the evidence.

22 Information concerning California and/or federal legal authorities was entirely irrelevant
23 to this litigation because it did not fit this definition. These legal authorities did not shed any

24 ⁴⁴ It should be noted that this denial was based upon the argument of Hyatt's counsel that
25 other motions in limine had been filed which dealt more directly with the issues presented in the
26 motion in limine component of that filing. The Court agreed indicating that it "would be a
27 disservice for the Court to address some of the issues that [FTB] raised that are the subject of
28 another motion in limine, because I haven't had a chance to review those briefs yet." Hr.'g Tr.,
Jan. 23, 2008, 85:10-12.

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1 light on any remaining facet of this case or on any fact “of consequence to the determination of
2 the action.” NRS 48.015. In fact, the various legal authorities judicially noticed did not tend to
3 prove or disprove any of the elements of Hyatt’s intentional torts or any of the defenses furthered
4 by FTB – which were entirely controlled by Nevada common law as determined by the Nevada
5 Supreme Court.

6 Additionally, these statutory provisions, particularly the California Information Practices
7 Act (“IPA”) and the Federal Privacy Act (“Act”), were entirely irrelevant to this litigation
8 because Hyatt never pled any claims based on these statutory provisions in his complaint. Sec.
9 Am. Compl. filed 4/18/2006. These statutory provisions relate entirely to claims for invasions of
10 information privacy, which is not a recognized common law claim in Nevada. As a result,
11 evidence of these statutory provisions was entirely relevant to this case because Hyatt was
12 prohibited from seeking relief for common law claims invasions of his information privacy when
13 a statutory remedy was available – which he failed to utilize. See e.g., Badillo v. American
14 Brands, Inc., 117 Nev. 34, 42, 16 P.3d 435 (2001); People for Ethical Treatment of Animals v.
15 Berosini, Ltd., 111 Nev. 615, 636, 895 P.2d 1269 (1995); Sands Regent v. Valgardson, 105 Nev.
16 436, 440, 777 P.2d 898 (1989); D’Angelo v. Gardner, 107 Nev. 704, 720-22 819 P.2d 206, 217-
17 19 (1991); Canada v. Boyd Group, Inc., 809 F.Supp. 771, 782 (D. Nev. 1991); Advanced
18 Countertop Design, Inc. v. Second Judicial Dist. Court, 115 Nev. 268, 270, 984 P.2d 756 (1999);
19 Chavez v. Sievers, 118 Nev. 288, 43 P.3d 1022 (2002).

20 This concept is expressly explained in Johnson v. Sawyer, a case that is directly on point.
21 47 F.3d 716 (1995). In Johnson, the court rejected the attempts of a taxpayer to bring a common
22 law claim for the disclosure of information contained on his tax returns. Id. at 729. The court
23 noted that there was a federal statute that provided the exclusive remedy for such a claim. The
24 Johnson court specifically stated:

25 . . . [T]here is no showing that Texas would create a common law cause of action
26 for violation of section 6103(a)(1), [a statute which proscribes the disclosure of tax
27 return information] inasmuch as section 7217 provided for a comprehensive
28 private cause of action for any such violation (see n. 15 supra). While Texas
generally recognizes the doctrine of negligence *per se*, see El Chico Corp v. Poole,
732 S.W.2d 306 (Tex. 1987), no Texas decision has been found **applying the
doctrine to create a common law cause of action for a statutory violation**

1 **where there is a comprehensive and express statutory private cause of action**
2 **for the statutory violation.** Moreover, in this instance both the statute violated
3 and the statute creating the cause of action for that violation are federal. We can
4 think of no reason for a Texas court to create a common law cause of action for the
5 statutory violation in such a circumstance. We have long following the principle
6 that we will not create “innovative theories of recovery or defense” under local
7 law, but will rather merely apply it “as it currently exists.” Galindo v. Precision
8 Am. Corp., 754 F.2d 1212, 1217 (5th Cir. 1985) (footnote omitted). See also, e.g.,
9 Junior Money Bags Ltd. V. Segal, 970 F2d 1, 11 (5th Cir. 1992); Mitchell v.
10 Random House, Inc., 865 F2d 664, 672 (5th Cir. 1989); Graham v. Milky Way
11 Barge, Inc., 824 F.2d 376, 381 (5th Cir. 1987); Harmon v. Grande Tire Co., 821
12 F.2d 252, 259 (5th Cir. 1987). **As there is currently no Texas law creating a**
13 **common law cause of action for a statutory violation for which violation there**
14 **is an express and comprehensive statutory cause of action, we will not**
15 **undertake to ourselves to create such a Texas common law cause of action.**

16 Id. (footnotes omitted) (emphasis added). Based on this undeniable legal authority, Hyatt was
17 precluded from using “evidence” of the IPA and FPA to support his common law claims because
18 this effectively allowed him to sidestep the legal prohibition precluding him from asserting
19 common law claims when he had a statutory remedy available.

20 Moreover, several of the legal provisions judicially noticed were only **related to Hyatt’s**
21 **residency and FTB’s determinations to assess taxes and fraud penalties** -- issues that were
22 expressly off-limits in this case. See Ct.’s Order 4/19/1999 at 2 (Order dismissing Hyatt’s First
23 Cause of Action for Declaratory Relief and residency issues).

24 These statutes related **only** to the propriety of fraud penalty assessments **under federal**
25 **law.** Thus, the only issue that these statutes could possibly relate to was an issue that the Court
26 had indicated was “off limits” – i.e., the propriety of FTB’s tax assessments. Id. The same was
27 true of several of the California legal authorities judicially noticed by the Court, which also only
28 related to FTB’s residency conclusions. See e.g., Cal. Rev. & Tax Code § 19164 (West 2008);
Cal. Rev. & Tax Code § 17014 (West 2008); Cal. Admin. Reg. § 17014 (West 2008).

Moreover, prior to taking judicial notice of the various California legal authorities
presented by Hyatt, the Court expressly ruled that California law was not at issue – and not
relevant – to this case. Court’s Order Granting FTB’s Motion in Limine re: Mari Frank dated
3/28/2008 at 2; Hr’g Tr., Feb. 28, 2008, 66:15-66:8.

On January 4, 2008 FTB filed a motion in limine seeking the exclusion of Hyatt’s expert
witness, Mari Frank. The primary basis for FTB’s motion was the fact that Ms. Frank’s expert

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1 report as well as her deposition testimony was based almost entirely upon Ms. Frank's opinions
2 of California law and whether FTB violated that law. Motion in Limine re: Mari Frank dated
3 03/28/2008 at 4-7. For example, Hyatt argued extensively that Ms. Frank would testify as to
4 "what the California law is" and "to opine about whether or not those [California] privacy laws
5 were violated or not." Hr'g Tr., Feb. 28, 2008, 59:24-25; 62:13-15. In response, FTB asserted
6 that California law was irrelevant to this case and Ms. Frank's opinions were nothing more than
7 improper legal opinions concerning California law. *Id.* Although the Court denied FTB's
8 motion to exclude Ms. Frank, the Court made abundantly clear that Ms. Frank's testimony would
9 be expressly limited at trial, stating:

10 **I think the jury needs to be clear that whether or not FTB violated California law is**
11 **not at issue in this particular litigation.**

12 Hr'g Tr., Feb. 28, 2008, 66:15-66:8 (emphasis added.). The Court reiterated this statement in its
13 written order expressly holding, "[w]hether or not FTB violated California law is not at issue
14 in this particular litigation." Order Granting FTB's Mot. in Limine re: Mari Frank dated
15 3/28/2008 at 2.

16 Based on these rulings, the Court, once again, should have enforced its own orders and
17 rejected Hyatt's improper request for judicial notice of these irrelevant and inapplicable
18 California and federal authorities. *See Halverson*, 163 P.3d at 440 (2007) (courts have inherent
19 power to enforce their own orders to protect the dignity and decency of the proceedings).

20 c. Taking Judicial Notice of These Legal Authorities Improperly
21 Allowed Hyatt's Witnesses to Provide the Jury with Improper and
22 Incorrect Legal Opinions

23 By judicially noticing these legal provisions, the Court expressly permitted Hyatt's
24 witnesses and attorneys to instruct the jury on what the "law" was that controlled this case, the
25 meaning of those laws, and to testify and argue that based on the facts of this case (as determined
26 by Hyatt and his witnesses -- not the jury) FTB violated those provisions. As a result, the Court
27 expressly allowed and permitted Hyatt's witnesses and attorneys to **usurp the Court's function**
28 of instructing the jury on the law and to **usurp the jury's function** by determining the facts of

1 this case and then applying those facts to that law. See Las Vegas Sun, Inc. v. Franklin, 74 Nev.
2 282, 294, 329 P.2d 867, 873 (1958); United Fire Ins. Co v. McClelland, 105 Nev. 504, 509, 780
3 P.2d 193, 196 (1989) (relying on Ashton v. Ashton, 733 P.2d 147, 153 (Utah 1987)). This also
4 violated a previous Court Order entered in this case pretrial. See Ct.'s Order Granting FTB's
5 Mot. in Limine re: Legal Opinions dated 3/28/2008. As a result, the Court prohibited FTB from
6 receiving a fair trial.

7 Not only was it improper for judicial notice to be taken of these legal provisions, but due
8 to the manner the Court permitted Hyatt and his witnesses to use these provisions, the prejudice
9 to FTB was exponentially compounded. Here, Hyatt's witnesses were not only permitted to
10 testify to the meaning of these laws, but were permitted to testify that FTB "violated" these laws.
11 One example of this conduct was exemplified by the testimony of Hyatt's "privacy" expert,
12 Professor Dan Solove who was permitted to provide testimony regarding the Federal Privacy
13 Act, implying to the jury that this statutory scheme applied to FTB and this litigation. Rough
14 Trial Tr., May 21, 2008, 16-20. The Federal Privacy Act, however, has **no** application to FTB's
15 audit conduct. See 5 U.S.C. § 552a. Rather, the Federal Privacy Act only applies to the conduct
16 of the federal government and only has one limited application to state governments – which was
17 not at issue in this case. Id.

18 Worse still, Professor Solove was permitted to testify, over FTB's objection, to the
19 content of the IPA and to indirectly opine that FTB had violated the IPA with its conduct during
20 Hyatt's audit. Rough Trial. Tr., May 21, 2008, 16-20. Professor Solove, however, is not a
21 licensed California attorney and had no expertise on this subject. Id. at 37:34-36. As a result,
22 Prof. Solove was unfamiliar with proper application of the specific exception to the IPA
23 expressly exempting FTB's conduct from the provisions of the IPA when conducting an audit.
24 See Cal. Civ. Code § 1798.1(p)(West 2008); Rough Trial Tr., May 21, 2008 35-36. As a result,
25 Prof. Solove's legal opinion testimony was legally unsupported and inaccurate.

26 Thus, by judicially noticing these various irrelevant legal authorities and provisions, the
27 Court allowed Hyatt to side step numerous pretrial orders, which were intended to focus the
28 issues and the testimony that could be presented at trial. Ultimately, the Court allowed Hyatt and

1 his witnesses to usurp not only the Court's function in instructing the jury on the law, but also
2 the function of the jury in applying the law as instructed to the facts. See Las Vegas Sun, Inc. v.
3 Franklin, 74 Nev. 282, 294, 329 P.2d 867, 873 (1958); United Fire Ins. Co v. McClelland, 105
4 Nev. 504, 509, 780 P.2d 193, 196 (1989) (*relying on* Ashton v. Ashton, 733 P.2d 147, 153 (Utah
5 1987)). This was legally improper and highly prejudicial to FTB and resulted in denying FTB a
6 fair trial. Accordingly, FTB is entitled to new trial on this basis. NRCP 59(a)(7).

7 E. Law of the Case and Demands to Furnish Information

8 In the early stages of this case, Judge Saitta unequivocally ruled that the issues presented
9 by Hyatt's claim for Declaratory Relief, contained in his Second Amended Complaint, were the
10 subject of the ongoing administrative proceedings in California between Hyatt and FTB and
11 would necessarily be decided in that forum. At issue in Hyatt's claim for Declaratory Relief was
12 whether: (1) Hyatt became a resident of Nevada on September 26, 1991; and (2) FTB's use of its
13 "Demands to Furnish Information" were unlawful. See Sec. Am. Compl. filed 4/18/2006, ¶¶ 28-
14 32. By dismissing Hyatt's declaratory relief claim, Judge Saitta expressly deferred jurisdiction to
15 the State of California and its administrative agency on these issues. See Tr. Hr'g, Apr. 7, 1999,
16 55-56. Judge Saitta's decision, thus, became the law of the case. See Hsu v. County of Clark,
17 173 P.3d 724, 728 (Nev. 2007).

18 Despite Judge Saitta's clear ruling deferring the issue of whether FTB's use of "Demands
19 to Furnish Information" and their alleged unlawfulness, Hyatt focused extensively on these
20 "Demands to Furnish Information" at trial. Specifically, in support of his various tort claims,
21 Hyatt argued that he was entitled to recovery because FTB improperly mailed "Demands to
22 Furnish Information" letters to third parties during the audit which included Hyatt's private
23 information, such as his name, address, social security number, and that he was under audit. See
24 Rough Trial Tr., July 23, 2008 (a.m. session), 61:17-64:1; 64:3-65:23; 66:14-67:13. By allowing
25 Hyatt to present such evidence and by allowing such evidence to go to the jury, the Court ignored
26 the law of the case and committed an error of law.

1 1. The Court Erred in Allowing Evidence and Argument Concerning FTB's
2 Statutory Demand to Furnish Information Form

3 At trial, Hyatt was allowed to present evidence and argument that FTB's use of the
4 statutory Demands to Furnish Information form ("Demand") was wrongful. This was error
5 requiring a new trial because the Court previously dismissed these claims due to lack of subject
6 matter jurisdiction. Hyatt's witnesses were allowed to give improper legal opinion testimony
7 concerning the propriety of the use of these forms and irrelevant, prejudicial evidence was
8 admitted resulting in a runaway verdict based on mischaracterization of legal and lawful
9 information gathering through use of the Demand form.

10 a. The Dismissal of Hyatt's First Claim for Relief Dismissed the
11 Claims Concerning the Demands to Furnish Information and Any
12 Testimony on these Points was Irrelevant

13 Hyatt's First Cause of Action for declaratory relief was dismissed from this case by the
14 Order Granting Partial Judgment on Pleadings filed April 16, 1999. Hyatt's First Cause of Action
15 specifically sought two separate declarations from the Court. First, Hyatt sought a declaration that
16 he was a "bona fide" resident of the State of Nevada as of September 26, 1991. Second Am.
17 Compl. at ¶ 32. Hyatt specifically sought a "judgment declaring FTB's extraterritorial
18 investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada
19 residents without approval from a Nevada court or governmental agency, as alleged above, to be
20 without authority and violative of Nevada's sovereignty and territorial integrity." Id. The 1999
21 Order dismissed this claim in its entirety.

22 Hyatt never sought reconsideration of this order nor has he ever sought or received any
23 relief from the Nevada Supreme Court or higher courts reversing this decision. As such, the
24 complete dismissal of this claim – including the dismissal of Hyatt's attack on FTB's
25 investigation and investigatory methods – was no longer at issue in this case. Therefore, any
26 testimony regarding these issues was entirely irrelevant and inadmissible. NRS 48.015; NRS
27 48.025(2).
28

1 In spite of the Court's pre-trial orders, Hyatt was allowed to fully try the tax case under a
2 conspiracy theory pitting the California Legislature and Executive branch against the Nevada
3 court as a "check and balance" to be enforced by the jury. Rough Trial Tr., July 22, 2008, 8:17-
4 11:16.

5 Prior to trial, FTB moved the Court on January 16, 2008 for an order in limine on the non-
6 admissibility of opinion testimony sought to be introduced at trial by Hyatt from any of Hyatt's
7 witnesses, expert or lay, that wished to opine that FTB could not legally conduct its investigation
8 or use third party "Demands to Furnish Information" in Nevada. The motion was granted by
9 order dated March 28, 2008. In spite of FTB's objections and that Court's Order, Hyatt presented
10 improper evidence and argument at trial concerning the propriety of FTB's use of the statutory
11 Demand to Furnish Information form in gathering factual information concerning Mr. Hyatt's
12 residency and source and timing of receipt of income.

13 In Nevada, the law of the case doctrine makes an appellate court's decision on a rule of
14 law binding in subsequent proceedings involving the same issues. Wheeler Springs Plaza LLC v.
15 Beemon, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (Nev. 2003) (citing Bd. of Gallery of History v.
16 Datecs Corp., 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000)). Thus, when an appeals court
17 states a rule of law necessary to its decision, the rule is the law of the case and "must be adhered
18 to throughout its subsequent progress both in the lower court and upon subsequent appeal."
19 LoBue v. State, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976).

20 The legal determinations of: (1) whether FTB had the legal right to investigate Hyatt in
21 Nevada or send its Demands to Nevada; and (2) whether FTB was required to get a permission
22 slip from a Nevada court or state agency before it could lawfully conduct its investigation, are
23 determinations that were be made by the Court's judgment on the pleadings and pretrial orders,
24 yet Hyatt was allowed to present testimony by his expert and lay witnesses and the jury was told
25 by Hyatt's counsel that it was the jury's duty to decide if use of the Demands was lawful.

26 At the February 14, 2008 hearing, the Court granted FTB's Motion in Limine concerning
27 legal opinions being expressed by witnesses. In doing so, the Court recognized that it was the
28 Court's responsibility to decide legal issues and instruct the jury on the law. Hyatt should not

1 have then been allowed to introduce any witness testimony on the lawfulness of use of the
2 Demand form. The issues of whether FTB had the legal authority to investigate Hyatt, send
3 Demand Letters to Nevada or whether FTB was required to obtain "permission" before it took
4 these actions, were purely legal questions that were decided by the Court.

5 It is the role of the judge to determine the law applicable to a case and instruct the jury
6 accordingly and it is role of the jury to determine the facts. See Westinghouse Elec. Corp. v.
7 General Circuit Breaker & Elec. Supply Inc., 106 F.3d 894, 901 (9th Cir. 1997). Nevada law is
8 clear – expert witnesses cannot testify as to the state of the law or how that law should be applied
9 to the facts. See Las Vegas Sun, Inc. v. Franklin, 74 Nev. 282, 294, 329 P.2d 867, 873 (1958);
10 United Fire Ins. Co. v. McClelland, 105 Nev. 504, 509, 780 P.2d 196, 196 (1989), relying on
11 Ashton v. Ashton, 733 P.2d 147, 153 (Utah 1987). In fact, "[t]he principle that legal opinion
12 evidence concerning the law is inadmissible is 'so well established that it is often deemed a basis
13 premise or assumption of law – a kind of axiomatic principle.'" The Pine Creek Group v.
14 Newmont Mining Corp., 352 F.Supp.2d 1037, 1042 (D. Ariz. 2005) (internal citations and
15 quotations omitted.) Based on these principles, Hyatt's expert and lay witnesses should not have
16 been allowed to testify regarding their legal opinions concerning the Demand form.

17 The following are examples of error concerning FTB's use of the Demand form in Hyatt's
18 audit:

19 On May 25, 2006, FTB moved the Court for an order in limine on the non-admissibility of
20 expert witness opinion testimony from Malcolm Jumelet sought to be introduced at trial by
21 Hyatt. This motion was heard and denied on February 22, 2008. As a result, Mr. Jumelet
22 testified over FTB's objections that FTB's statutory Demand form was used improperly by the
23 auditor. He gave his legal analysis characterizing the statutory form as a "hip pocket subpoena",
24 rarely used by FTB, and only to be used as a last resort against uncooperative third parties after
25 first requesting the information from the taxpayer. In the context of use of the Demand form, Mr.
26 Jumelet gave his legal opinion that use of the social security number as an identifier on the form
27 was improper disclosure of confidential information. Rough Trial Tr., June 11, 2008, 197:15-
28 203:17; Rough Trial Tr., June 12, 2008, 3:10-7:5.

1 Mr. Jumelet was also allowed to give his legal opinion that providing credit card
2 information to identify transactions in a Demand to Federal Express was improper even though it
3 was information it already had from Hyatt. Rough Trial Tr., June 12, 2008, 6:24-8:14.

4 Hyatt's expert Daniel Solove testified over FTB's objections his legal opinion that the
5 California Information Practices Act required FTB to go first to Mr. Hyatt for information before
6 contacting third parties. He further testified that in contacting third parties FTB improperly sent
7 "letters" (a reference to the Demand form and transmittal letters) disclosing confidential
8 information, thereby failing in its responsibilities to Mr. Hyatt under the IPA. Rough Trial Tr.,
9 May 21, 2008, 54:4-56:14.

10 Hyatt presented testimony of the former Wagon Trails Apartment clerk, Clara Kopp
11 concerning the Demand she received. The inquiry of this witness was characterized by Hyatt's
12 counsel as "a test of the English language" but actually elicited her legal opinion that the Demand
13 form was invalid because it was sent to her in Nevada from California. Rough Trial Tr., June 11,
14 2008, 100:7-101:18.

15 Although the claims concerning the lawful use of the Demand form were dismissed,
16 Hyatt's counsel argued in closing that FTB's use of the Demand was the very basis for Hyatt
17 filing suit. Rough Trial Tr., July 30, 2008, 4:7-5:17. In closing argument, Hyatt's counsel
18 completely disregarded the Court's judgment on the pleadings as to the First Cause of Action as
19 well as the Court's Order granting of the Motion in Limine concerning lawful use of the Demand
20 form. In arguing the abuse of process claim, counsel told the jury that they could decide if FTB
21 could lawfully send a Demand to someone in Nevada. In doing so, counsel underscored Mr.
22 Jumelet's testimony about the "pocket subpoena" and his legal opinion that FTB was obligated to
23 go to Hyatt for information first. Rough Trial Tr., July 30, 2008, 52:17-54:21.

24 In sum, the evidence and argument presented by Hyatt at trial was allowed, in error, over
25 FTB's objections. What resulted was the jury verdict based on the misconception that the jury
26 was to decide whether FTB could lawfully investigate by use of the statutory Demand form, not
27 the Court.
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F. Compliance with NPO as Evidence of Bad Faith

Evidence of the FTB's compliance with the Nevada Protective Order (NPO) was allowed to be used by Hyatt at trial as evidence of bad faith delay, extortion and emotional distress. This was error.

At trial, Hyatt was allowed over the FTB's objections to present incomplete and misleading evidence of the FTB's interpretation and compliance with the NPO. Hyatt was allowed to argue to the jury that the passage of time primarily caused by compliance with the NPO constituted bad faith delay by the FTB Legal Department as part of a conspiracy to extort a settlement from Hyatt thus causing him emotional distress due to accruing interest on the proposed assessment. Hyatt's counsel argued that the years taken to resolve the protest was motivated by the FTB's desire to pressure Hyatt into settling, cause him emotional distress from accruing interest and to prevent the California Board of Equalization from hearing Hyatt's tax case before this litigation was resolved. See Rough Trial Tr., July 22, 2008, 54:1-56:16; Rough Trial Tr., July 23, 2008, 15:19-25:12; Rough Trial Tr., July 30, 2008, 27:21-29:13; 90:17-93:2;102-3-15.

That this influenced the jury in its deliberations is evidenced by the fact that the jury awarded all of the attorneys fees incurred by Hyatt in the protest as well as the entire proposed tax, including penalties and accrued interest as invasion of privacy compensatory damages rounded up to \$52 million. The daily accruing interest on the proposed tax was allowed by the jury as compensatory damages through the entire time the protest was pending.

During the pendency of the extraordinary writ proceedings before the Nevada Supreme Court and the U.S. Supreme Court, trial court proceedings and discovery were stayed by order of the court. Long periods of delay in both the litigation and protest were caused by stay of the litigation proceedings and the resulting delay in completion of discovery. The case was stayed by court order from June 7, 2000 through April 29, 2002 and again from June 19, 2006 through November 26, 2007. Hyatt was allowed to argue that the time which passed before completion of the protest, including the years during which the case was stayed by the court, was evidence of bad faith and extortion causing Hyatt emotional distress. Yet, the Court did not allow FTB to

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1 introduce evidence of the stay. As a result of the Court's error in allowing Hyatt to make an issue
2 of the passage of time in the protest, the jury held the FTB responsible for this delay in
3 proceedings whether the cause was the courts, Hyatt or the FTB.

4 Although central to the allegations of bad faith delay, extortion and emotional distress
5 damages and the FTB's defenses, the NPO was not allowed into evidence and the FTB's
6 witnesses were not allowed to testify concerning the interpretation and impact of the NPO. On
7 the other hand, Hyatt was allowed to present a speculative theory of undue delay through
8 inferences argued from incomplete testimony and heavily redacted exhibits. This allowed Hyatt
9 to litigate the litigation and protest activity while relevant evidence providing explanation, excuse
10 and justification was barred. This was error.

11 Hyatt filed the instant lawsuit on January 6, 1998. At the same time, Hyatt was pursuing
12 an administrative appeal (protest) of the audit's recommendations concerning his residency status
13 and proposed taxes and penalties for 1991 (June 17, 1996 notice of protest) and 1992 (October
14 10, 1997 notice of protest). Both Hyatt's lawsuit (in Nevada) and his protest (in California)
15 raised the same factual issue: Hyatt's residency.

16 On November 4, 2005, the FTB filed its Motion for Partial Summary Judgment re:
17 Ongoing California Administrative Process which the FTB incorporates by this reference. The
18 Motion was argued on December 14, 2005. It was denied by order filed March 14, 2006. Denial
19 of the motion was error and set the stage for amendment of the complaint and inclusion at trial of
20 the California administrative proceeding.

21 The protest activity was not put at issue by Hyatt until late in this litigation and there were
22 no pleading allegations concerning tortuous activity in the protest until the Second Amended
23 Complaint was filed on April 18, 2006. The Second Amended Complaint was allowed at the end
24 of discovery which was cut off on May 31, 2006. The Court previously allowed Hyatt discovery
25 into the protest over FTB's objections, including discovery of FTB's protest files and
26 communications and the deposition of eight FTB Legal Department attorneys with responsibility
27 in the protest or litigation. This was error. FTB's Objections to the DCR&R from the August 5,
28 2005 and hearing filed on September 27, 2005 is incorporated by reference. FTB moved to

1 discover Hyatt's protest files by counter-motion filed April 25, 2006 incorporated by this
2 reference. This was denied by DCR&R filed January 4, 2003. Thus, FTB was denied discovery
3 into the protest issues pled and pursued at trial by Hyatt. This was error.

4 In this lawsuit, Hyatt alleged that his residency had changed as of September 26, 1991,
5 that FTB knew it changed, yet FTB sought to extort additional taxes from him while knowing the
6 truth of his residency status. In the protest, Hyatt disputed the audit's finding concerning his
7 residency status, contending that he really changed his residency on September 26, 1991, not
8 April 3, 1992 as determined by the audit. Although the First Cause of Action concerning
9 determination of Hyatt's residency and FTB's power of examination was dismissed, Hyatt
10 incorporated by reference in each surviving cause of action all of the fact allegations concerning
11 his residency. Thus, both the lawsuit and the protest were examining the same issue: Hyatt's
12 residency status.

13 The alleged delay in completing the protest was put at issue by Hyatt but not until his
14 Second Amended Complaint. It was included in the Hyatt's opening statement and viciously
15 argued in closing. The primary reason for passage of time in the protest was the delay the NPO
16 allowed Hyatt to cause in turning over relevant information to the protest hearing officer. The
17 jury was prevented from hearing the relevant evidence underlying the delay. Pursuant to NRS
18 48.025, relevant evidence is admissible. Relevant evidence is that which has "any tendency to
19 make the existence of any fact that is of consequence to the determination of the action more or
20 less probable than it would be without the evidence." NRS 48.015. It was error to exclude the
21 relevant protest related evidence.

22 The Court had no jurisdiction over the protest proceeding, but tied the two proceedings by
23 entry of the NPO, which allowed Hyatt to cloak evidence relevant to the protest determination
24 under the NPO. FTB's witnesses were not allowed to explain their interpretation of the NPO or
25 the effect it had in delaying the protest proceeding. In fact, FTB was not even allowed to
26 introduce the NPO. But Hyatt's witnesses were allowed to offer their interpretation of the NPO.
27 This resulted in omission of evidence necessary to defend against Hyatt's contention that the time
28

1 it took to complete the protest proceeding was intentional, bad faith delay employed as part of a
2 conspiracy to extort a settlement, as well as a one-sided view described only by Hyatt.

3 In sustaining Hyatt's objections to FTB's testimony concerning the interpretation and the
4 impact of the NPO, the Court repeatedly validated Hyatt's contention that the protest proceeding
5 should not have been tied to the litigation discovery and that the NPO could not be used as an
6 excuse for delay. Ordinarily, the parties are not allowed to litigate the litigation at trial.
7 However, having erred in allowing Hyatt to try the protest process, the error should not have been
8 compounded by excluding FTB's evidence concerning the impact of the NPO.

9 In spite of the Court's pre-trial Order concerning the tax issues, Hyatt was allowed to fully
10 try the tax case under a conspiracy theory pitting the California Legislature and Executive branch
11 against the Nevada Court as a "check and balance" to be enforced by the jury. Rough Trial Tr.,
12 July 22, 2008, 8:17-11:16. Evidence of FTB's compliance with the NPO was used by Hyatt to
13 argue that FTB Legal Department was somehow complicit in the conspiracy to extort a settlement
14 out of Hyatt through delay calculated to pressure Hyatt through the emotional distress which
15 would be caused by accruing interest on the unpaid proposed assessment.

16 The NPO was entered on December 27, 1999. FTB filed its objection on December 15,
17 1999 to the Discovery Commissioner's December 3, 1999 Recommendation, but the Court signed
18 the order on December 21, 1999. Paragraph 4 of the NPO prohibited FTB from sharing any
19 evidence it gathered during discovery in the lawsuit with the protest hearing officer who was
20 responsible for deciding Hyatt's protest. This was error.

21 FTB petitioned for relief from this ruling by way of extraordinary writ to the Nevada
22 Supreme Court. By order filed April 4, 2002, the Nevada Supreme Court declined to review the
23 propriety of the discovery order in the writ proceeding indicating that FTB had a plain, speedy
24 and adequate remedy to challenge the order on appeal.

25 In the subsequent years of this litigation, Hyatt made much mischief of the NPO by
26 cloaking virtually all documents and information relevant to his residency and source and timing
27 of receipt of income discovered from him or his friendly witnesses under the NPO. At the same
28 time, he used the NPO to shield from disclosure documents and information requested by the

1 protest hearing officer. This caused great delay and expense in exchange of relevant evidence
2 between FTB litigation attorneys and the protest hearing officer who was located in the same
3 office.

4 The NPO prohibited FTB from using evidence it obtained in discovery in this case in the
5 parallel and related California administrative protest proceeding without first requesting Hyatt's
6 permission. If Hyatt's permission was refused, FTB could then go through the California
7 administrative subpoena process. Hyatt refused to consent to FTB's request for release of
8 discovery materials to the protest hearing officer, causing FTB to periodically issue an
9 administrative subpoena for documents until the close of discovery in this litigation on May 31,
10 2006.

11 FTB reasonably interpreted the NPO as requiring separation of the litigation and protest as
12 set forth in George McLaughlin's March 7, 2000 memo to Terry Collins setting forth the protocol
13 followed by FTB in coping with the NPO. Ex. 2333. Relevant information could not be shared
14 with the protest hearing officer without complying with the NPO.

15 Faced with parallel proceedings, both requiring fact discovery, FTB's management made
16 the decision to honor the NPO by separating the personnel involved in the litigation from the
17 protest hearing officer. Management also resolved not to duplicate discovery efforts and expense
18 by following the NPO protocol to request and subpoena information. It was also decided not to
19 allow FTB's litigation attorneys to select what discovery materials would go to the protest
20 hearing officer. There would be no "cherry picking" which Hyatt could later criticize. All
21 discovery material was to go to the protest hearing officer who would decide what was relevant to
22 the tax determination. The Court repeatedly instructed the jury to disregard FTB's management
23 testimony in this regard, thus discrediting FTB's compliance with the NPO in front of the jury on
24 the evidence most important to explain delay in the process put at issue by Hyatt. Rough Trial
25 Tr., July 14, 2008 (Ben Miller testimony), 54:1-58:20; 77:18-95:4.

26 Shortly after April 29, 2002, when the Nevada Supreme Court remitted the case to the
27 District Court, FTB made its first request for release of information to the protest hearing officer
28 on June 3, 2002. Ex. 2342. Hyatt refused to consent causing FTB issued an administrative

1 subpoena on July 7, 2002. Ex. 2344. Hyatt refused to comply with the subpoena, so it was
2 enforced through the California Superior court which issued its Order to Show Cause on February
3 28, 2003. Ex. 2348. Hyatt fought the subpoena through the California Third Circuit Court of
4 Appeal which upheld the Superior Court's order enforcing the subpoena by decision dated
5 December 31, 2003. Ex. 2352. A review of this decision shows how the NPO pitted the Nevada
6 litigation against the California administrative proceeding in an unprecedented manner.

7 As discovery progressed in this litigation, subsequent requests were made to Hyatt by
8 FTB to release discovery materials to the protest hearing officer. The second request was made
9 on October 28, 2005. Ex. 2354. Once again, Hyatt did not consent, so an administrative
10 subpoena was issued on January 30, 2006. Ex. 2356. Subsequent requests for release of
11 information to the protest hearing officer were made by FTB on December 6, 2005 and January
12 19, 2007. Exs. 2355 and 2357. Not until February 1, 2007 did Hyatt's counsel provide
13 begrudging consent to release of such highly relevant discovery such as Hyatt's own deposition
14 and the deposition of his close associate Grace Jeng. Ex. 782.

15 The series of requests by FTB, responses from Hyatt's counsel, administrative subpoenas
16 and the California Third Circuit Court of Appeal decision were admitted for the testimony of FTB
17 attorneys involved in the litigation and/or protest. However, the exhibits were admitted in heavily
18 redacted form due to the Court's trial rulings concerning exclusion of evidence which was "after
19 acquired" (meaning discovered facts unfavorable to Hyatt, or in fairness excluded because of
20 exclusion of evidence unfavorable to Hyatt), relating to interpretation or compliance with the
21 NPO or "litigating the litigation." Related testimony by the FTB attorneys was barred for the
22 same reasons, including Terry Collins, George McLaughlin, Ben Miller and Robert Dunn. This
23 resulted in exclusion of evidence relevant to explain, excuse, or justify the passage of time in the
24 protest proceeding.

25 The Court's evidentiary rulings resulted in these witnesses testifying without benefit of
26 unredacted, relevant documents. Examples of the heavily redacted or barred exhibits include Exs.
27 2320, 2321, 2322, 2323, 2324, 2325, 2335, 2336, 2341, 2352, 2353-105-143, 2354, 2356, 2357,
28 2359, 365, 374, 375, 391 and 401. Since the Court decided to allow Hyatt to present evidence of

1 delay in the protest, FTB should have been allowed to present any relevant evidence as to the
2 reasons, motives and causes of delay. As points of error, FTB incorporates those rulings and
3 protest related exhibits by reference, including the argument presented on June 11, 2008 (Rough
4 Trial Tr., 8:19-40:7) and during the testimony of Terry Collins (Rough Trial Tr., July 9, 2008,
5 64:8-135:4), George McLaughlin (Rough Trial Tr., July 9, 2008, 135:5-169:14; Rough Trial Tr.,
6 July 10, 2008, 39:14-137:15; Rough Trial Tr., July 11, 2008, 28:14-148:21), Ben Miller (Rough
7 Trial Tr., July 14, 2008, 15:11-186:17) and Robert Dunn (Rough Trial Tr., July 15, 2008, 2:9-
8 203:18).

9 In order to comply with the NPO and at the same time ensure that both FTB and the
10 protest hearing officer were aware of and getting the same information from Hyatt during both the
11 Nevada litigation and the protest proceedings, a one-way system of communication was put into
12 place. This system was intended to ensure that the answers being provided by Hyatt in the protest
13 proceedings were complete, truthful, and in accord with the information Hyatt provided in the
14 Nevada litigation. Under the system, Mr. Dunn, FTB's Nevada litigation counsel, was tasked
15 with reviewing the information requests made by the protest hearing officer and the responses
16 provided by Hyatt in the protest proceedings to determine whether the protest hearing officer was
17 receiving the complete information that Hyatt provided in the Nevada litigation.

18 Ensuring that Hyatt provided all of the information to the protest hearing officer that he
19 provided in the Nevada litigation was a major undertaking imposed by the Court's order which
20 took FTB great time to accomplish. For nearly eight years after the NPO was entered, as
21 documents were produced by Hyatt in the Nevada litigation, Mr. Dunn reviewed Hyatt's
22 responses to requests for information in the protest proceedings to determine if Hyatt had
23 provided the protest hearing officer with all of the documents that he provided in the Nevada
24 litigation. Each time this review process took place, it was discovered that Hyatt gave evidence,
25 facts, and documents about his residency in the lawsuit different than he gave to the protest
26 hearing officer. FTB, however, was precluded by the NPO from sharing all the evidence it knew
27 about Hyatt's residency with the protest hearing officer. Practically, sharing such evidence would
28 have been a simple matter of moving that information from one office to another at FTB.

1 Instead of merely allowing FTB's litigation team to turn over documents to the protest
2 hearing officer, the NPO had a provision that required FTB to seek Hyatt's consent to move
3 evidence from the lawsuit to the protest hearing officer. If Hyatt denied that consent, then FTB
4 was required to issue an administrative subpoena. When asked for his consent, Hyatt refused.
5 Thus, FTB was left with no alternative but to seek to compel Hyatt to provide the critical
6 information and documents by resorting to the issuance of an administrative subpoena. Hyatt
7 opposed the subpoena. However, the California district court agreed that FTB was entitled to the
8 information and allowed it be given to the protest hearing officer. Hyatt then appealed that
9 decision to the California Court of Appeals and lost. FTB had to undergo that same procedure
10 twice more as additional evidence became available in the lawsuit. All of these procedural steps
11 took great time.

12 In short, FTB expended great time and effort over an almost eight year period in
13 complying with the NPO entered by this Court to ensure that Hyatt had produced accurate and
14 truthful responses to the protest hearing officer. Clearly, FTB's compliance with this Court order
15 substantially contributed to the delay in the resolution of the protest proceedings.

16 Notwithstanding that FTB's compliance with this Court's order was the cause of this
17 delay, at trial, Hyatt was allowed to point to the length of time it took for the protest process to
18 finalize as evidence of FTB's alleged bad faith. However, the time or "delay" in resolving the
19 protest was the direct result of compliance with the NPO. To make matters worse, FTB was
20 prohibited from introducing the NPO as an exhibit at trial. Further, while Hyatt's witnesses were
21 allowed to testify to the operation of the NPO, FTB's witnesses were foreclosed from offering
22 their interpretation of what the NPO required FTB to do. Thus, FTB was denied the opportunity
23 to explain why this "delay" occurred i.e. because of the NPO.

24 In sum, it seems inconceivable that a party's compliance with a court order can be used as
25 evidence of bad faith. Cf. Virgin Atl. Airways Ltd. v. British Airways PLC, 872 F.Supp. 52, 62
26 (S.D.N.Y. 1994) (defendant could not be held liable for its actions taken in "[c]ompliance with a
27 federal court order"). In other words, how can the delay caused by FTB's good faith compliance
28 with a Court order be used as evidence of bad faith against FTB. By allowing Hyatt to use the

1 delay caused by the NPO against FTB (without allowing FTB to explain the delay caused by the
2 NPO), this Court erred. At a minimum, the NPO should have been introduced as an exhibit and
3 both sides should have been permitted to offer testimony interpreting the NPO, not just Hyatt.

4 G. Tax Amnesty Legislation as Evidence of Bad Faith

5 1. The Court Erred in Allowing Evidence and Argument Concerning
6 California's Tax Amnesty Program

7 At trial, Hyatt was allowed over FTB's objection to present evidence of California's Tax
8 Amnesty Program. Hyatt's counsel contended in closing argument that this was evidence of bad
9 faith and extortion supporting a finding of liability. The tax amnesty penalty was argued to be
10 evidence of compensatory damages and was included in the jury verdict awarding \$52 million in
11 damages for invasion of privacy. This was the amount of the proposed tax liability rounded to the
12 next highest million dollars. This evidence was not relevant, was highly prejudicial and clearly
13 influenced the jury in its deliberations, finding of liability and calculation of damages.

14 The California Tax Amnesty Program was not a part of either FTB's audit process or
15 FTB's protest, it was irrelevant and all evidence and argument concerning the Tax Amnesty
16 Program should have been barred as irrelevant. Pursuant to NRS 48.025, only relevant evidence
17 is admissible. Relevant evidence is that which has "any tendency to make the existence of any
18 fact that is of consequence to the determination of the action more or less probable than it would
19 be without the evidence." NRS 48.015. Hyatt's Second Amended Complaint is based upon the
20 Audit process directed at him, the issuance of the Notices of Proposed Assessment and his claim
21 that the Protest took too long. The Tax Amnesty Program was created by statute several years
22 after Hyatt's audit was closed during the pendency of this litigation.

23 Prior to trial, this Court ruled that Nevada would not assert jurisdiction over Hyatt's claim
24 for declaratory relief to determine his California residency or California's right to conduct audit
25 activities in Nevada, finding a lack of subject matter jurisdiction, thus committing the question of
26 his California residency and tax liability to the sole discretion of the State of California. See
27 Order dated April 16, 1999. This ruling was deemed correct by both the Nevada Supreme Court
28 and U.S. Supreme Court. It was therefore error to allow Hyatt to present evidence of the

1 California Tax Amnesty Program as some form of bad faith. That program impacted thousands
2 of California taxpayers. No evidence was introduced, nor did any evidence exist, that the
3 program had anything to do with Hyatt.

4 In spite of the Court's pre-trial Order concerning the tax issues, Hyatt was allowed to fully
5 try the tax case under a conspiracy theory pitting the California Legislature and Executive branch
6 against the Nevada Court as a "check and balance" to be enforced by the jury. See Rough Trial
7 Tr., July 22, 2008, 8:17-11:16. Evidence of the California Tax Amnesty Program was used by
8 Hyatt to infer that the California Legislature was somehow complicit in the conspiracy to extort a
9 settlement out of Hyatt.

10 Clearly, the evidence and argument presented by Hyatt concerning the California Tax
11 Amnesty Program had an unduly prejudicial impact on the jury. Hyatt's testimony characterizing
12 the program notice as a threat or extortion and Mr. Swartz' expert testimony including the
13 amnesty penalty and interest in calculating the proposed tax inflamed, confused and mislead the
14 jury resulting in an improper award of damages. NRS 48.035 required exclusion of relevant
15 evidence on grounds of prejudice, confusion or waste of time:

- 16 1. Although relevant, evidence is not admissible if its probative value is
17 substantially outweighed by the danger of unfair prejudice, of confusion of
the issues or of misleading the jury.

18 In 2004, years after the Hyatt Audit and Notices of Proposed Assessments and the filing
19 of this action, the State of California enacted a Tax Amnesty Program that ran from February 1,
20 2005 through March 31, 2005. Individual and business taxpayers who owed income, franchise,
21 sales or use taxes for tax years 2002 and earlier were eligible for amnesty. Taxpayers could avoid
22 criminal prosecution and get most penalties and fees waived by paying the tax and interest. The
23 Tax Amnesty Program was not part of Hyatt's audit process, nor was it part of the decisions to
24 issue the Notices of Proposed Assessment that are at the heart of this case.

25 Pursuant to that legislation passed by the California Legislature, every person who had a
26 pending Protest for amnesty - eligible tax years received a standard "Income Tax Amnesty
27 Application" form that informed them of their rights and options pursuant to the Amnesty
28 Program. A copy of the application form Mr. Hyatt received was included in trial Exhibit 409.

1 The Court barred Hyatt's attempts to conduct discovery into the Tax Amnesty Program as
2 irrelevant. FTB brought its motion in limine to obtain the Court's pre-trial ruling that any
3 evidence concerning the Tax Amnesty Program was inadmissible. This was briefed to the Court
4 in FTB's December 20, 2007 Consolidated Motion in Limine which is incorporated by this
5 reference. A copy of the tax amnesty legislation was attached thereto as Exhibit D. This motion
6 was heard on February 13, 2008 and denied as to exclusion of the Tax Amnesty Program notice
7 sent to Hyatt by the Court's February 14, 2008 decision. For the Court not to have found the
8 evidence to be irrelevant for trial the same as it did for discovery purposes, was error.

9 In his opening statement, Hyatt's counsel improperly stated that the amnesty program
10 would be presented as evidence of bad faith. See Rough Trial Tr., April 21 2008, 90:12-91:11,
11 159:15-22.

12 Over FTB's objections, Hyatt then improperly testified at trial concerning the amnesty
13 notice he received, his interpretation of the amnesty statute, that the program was a way "to get
14 quick money into the California coffers" and required him to give up his rights. He used the
15 amnesty notice to launch into testimony that this litigation was about principle, not money, that he
16 was trying to keep FTB "from doing to other people what they did to me and try to vindicate my
17 name and my reputation" that his father taught him not to give in to such extortion and that if not
18 stopped, FTB would do this to other people. See Rough Trial Tr., May 12, 2008, 75:10-78:13.

19 Hyatt was allowed to present the amnesty notice he received as part of Exhibit 409. Only
20 pages 409-00002-5 of Exhibit 409 were admitted into evidence at trial. Nevertheless, during the
21 testimony of expert witness, George Swartz, CPA, Hyatt displayed to the jury the first page of
22 Exhibit 409, which was not admitted. This page from "Hot News & Notes" was prominently
23 captioned "Unfair penalty will be imposed after amnesty." Mr. Swartz testified that he relied on
24 this document in forming his opinions, including the opinion that the tax FTB claimed Hyatt
25 owed was \$51,222,237 through June 30, 2008, with interest accruing at the rate of \$8,989 per
26 day. See Rough Trial Tr., June 18, 2008, 65:11- 69:3. FTB's counsel brought this to the
27 Court's attention outside of the jury's presence, making a record for the Court of the fact of the
28 jurors' note-taking of the improper display. See Rough Trial Tr., June 18, 2008, 79:12-81-5.

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1 Mr. Swartz's testimony was objected to in advance as an impermissible presentation of
2 the tax, penalty and interest determination. The Court allowed Mr. Swartz's testimony on these
3 issues, including the amnesty penalty and interest, based on Hyatt's counsel's argument that it
4 was presented as evidence of emotional distress. See Rough Trial Tr., June 18, 2008, 2:18-8:14.

5 In closing argument, Hyatt's counsel repeatedly held out the amnesty program and penalty
6 as evidence of bad faith and extortion and as a measure of damages to be awarded. See Rough
7 Trial Tr., July 23, 2008, 80:24-83:4; Rough Trial Tr., July 30, 2008, 26:6-28:7; and Rough Trial
8 Tr., August 11, 2008, 49:24-52:3 (punitive damage phase).

9 In essence, Hyatt was allowed to testify and argue that the California Tax Amnesty
10 Program itself was tortious. By sending him the standard Amnesty Application Form, Hyatt
11 inferred he was been "threatened" by the State of California to either pay his assessments or else
12 be assessed an additional penalty. Hyatt also improperly testified that the California Tax
13 Amnesty Program required him to drop this Nevada litigation or suffer the additional 50%
14 penalty. This amounted to presentation of an unsupported conspiracy theory.

15 Hyatt failed to present any evidence showing how California's Tax Amnesty Program was
16 aimed at him or this case. Accordingly, a new trial should be granted based on this error.

17 H. Various Additional Legal Errors and Irregularities Occurred during Trial which
18 Prohibited FTB from Receiving a Fair Trial⁴⁵

19 The trial was riddled with various errors of law and irregularities which deprived FTB of
20 substantial rights, including it rights to due process and a fair trial under the Nevada and United
21 States Constitutions. The Court committed various prejudicial legal errors in its rulings on
22 evidentiary issues, jury instructions, and arguments – during both the compensatory and punitive

23
24 ⁴⁵ Although this motion references several errors committed by the Court specifically, FTB in no
25 way waives its right to raise on appeal any other errors that were committed by the Court both
26 pretrial and during the trial. This includes, but is not limited to, the Court's orders either granting
27 or denying specific motions, pretrial discovery orders and determinations, and other like issues.
28 Therefore, by raising the specific arguments contained herein, this Motion should not be
construed as a waiver of **any other reversible errors** committed by the Court during the course
of this litigation.

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1 damage phases of trial. For all of these reasons cited above, and the various reasons that follow,
2 FTB is entitled to a new trial on all issues. See NRCP 59(a)(1)-(2), (5-7); see also NRCP 60.

3 1. The Court Made Numerous Evidentiary Errors which Prohibited FTB from
4 Receiving a Fair Trial

5 A party is entitled to a new trial if an “error in law occur[ed] at the trial” and the error
6 complained of was objected to by the party making the motion. NRCP 59(a)(7). Improper
7 evidentiary rulings are errors of law for purposes of a motion for a new trial. See Bass-Davis v.
8 Davis, 134P.3d 103, 110 (2006).

9 a. Errors in the Admission of Inadmissible Evidence

10 On various occasions during the trial, the Court erred in **admitting** irrelevant and highly
11 prejudicial evidence. These errors severely and unfairly prejudiced FTB’s defense and the
12 presentation of its case, especially when these errors are considered in the aggregate. These
13 errors include:

- 14 • **Admission of improper expert opinion testimony of Candace Les:**
15 Candace Les, a third party, percipient witness was permitted to testify as an
16 “expert witness” regarding the audit file and the audit analysis conducted
17 by FTB. Rough Trial Tr., Apr. 24, 2008, 149:1-150:1.⁴⁶

18 _____
19 ⁴⁶ While Hyatt was allowed to present opinion testimony concerning FTB’s analysis, FTB
20 was not. For example, Steve Illia is the head of FTB’s residency program, who independently
21 reviewed the audit file. Based on this review, Mr. Illia would have testified that the audit and the
22 analysis engaged in by FTB was entirely proper and in accord with all FTB policies, practices,
23 and procedures. Moreover, Mr. Illia was expected to testify that both the evidence collection and
24 the analysis conducted by FTB were done fairly and impartially. Moreover, Mr. Illia would have
25 testified that the use of the Demands to Furnish Information forms were proper and in accord with
26 the training provided to residency auditors as well as the policies and procedures related to the
27 disclosure of information during residency audit investigations. In sum, Mr. Illia was expected to
28 testify that, in his opinion, the audit, analysis, and the ultimate conclusions reached by FTB did
not violate any FTB policies or procedures and the job done by his staff was very good and
commendable.

Penny Bauche, was the lead reviewed in charge of reviewing Hyatt’s complete audits. Ms.
Bauche also independently reviewed the audit file and was expected to testify that the audit
process and the evidence gathering techniques utilized by FTB auditors was proper, fair, and in
accord with all established FTB practices and procedures. Moreover, Ms. Bauche was expected
Continued...

- 1 • **Admitting testimony of Hyatt's Expert, Edward Antolin:** Antolin
2 provided testimony regarding Hyatt's "cooperation" during the audit. See
3 Rough Trial Tr., May 6-7, 2008. This was error for two reasons. First, the
4 issues related to FTB's determination to assess Hyatt fraud penalties was
5 expressly dismissed from this litigation and was not to be decided by the
6 jury. Ct.'s Order April 16, 1999 at 2. Second, the expert testimony
7 provided by Antolin was not the proper subject matter for expert testimony.
8 See NRS 50.275. The issue whether or not Hyatt "cooperated" is not an
9 issue that requires any special skill, knowledge, or expertise. Id.
- 10 • **Admitting testimony of Hyatt's Expert, Malcolm Jumelet:** Jumelet
11 provided expert testimony that FTB's conduct during the audit did not
12 comply with "reasonable professional standards." See Rough Trial Tr.,
13 June 11-13, 2008; Exhibit 509 (Jumelet's Expert Report). In short, Jumelet
14 testified that FTB was "negligent" during the audit because it did not
15 conform to a "reasonable professional person standard." All claims related
16 to FTB's negligence and FTB's discretionary conduct were dismissed by
17 the Nevada Supreme Court and the United States Supreme Court. See
18 Hyatt v. Franchise Tax Board, 2002 Nev. LEXIS 57 (Nev. April 4, 2002);

19
20
21 to testify that the analysis conducted by the auditors, as well as, the conclusions reached during
22 the audit were proper and fair. Ms. Bauche was expected to testify that, in her opinion, the audit
23 of Mr. Hyatt was a good audit and there were no improprieties engaged in by FTB auditors or
24 reviewers – either in the information gathering or analysis.

25 Finally, Carol Ford was the initial reviewer assigned to review Hyatt's completed audits. Ms.
26 Ford, like Mr. Illia and Ms. Bauche, independently reviewed the audit file and was expected to
27 testify that the audit conduct by the auditors, as well as the analysis and conclusions reached,
28 were fair, proper, and in accord with FTB policies and procedures. Ms. Ford was expected to
testify that in her review of the audit file she saw no improprieties engaged in by the auditors –
either when gathering the information or in analyzing the information related to Hyatt's audit.
Ms. Ford would have testified that the conclusions reached in this audit were accurate and that the
job done by the auditors in this case was very good.

1 Franchise Tax Board v. Hyatt, 538 U.S. 488, 123 S.Ct. 1683 (2003).

2 Therefore, this testimony was entirely irrelevant and inadmissible.

3 Additionally, Jumelet was improperly permitted to testify that FTB's
4 analysis during the audit was improper, which was in direct contravention
5 to these previous rulings. Rough Trial Tr., June 13, 2008, 155:10-15.

- 6 • Second, Jumelet was improperly permitted to testify to opinions that were
7 not contained in his expert report. Rough Trial Tr., June, 11, 2008, 54:5-
8 57:51. In his expert report, Jumelet asserted that there was insufficient
9 evidence in the audit file to support the clear and convincing evidence
10 standard required to support a fraud penalty assessment. PI's Tr. Ex. 509.
11 At trial, the Court precluded this testimony from being admitted because it
12 was improper and irrelevant. Rough Trial Tr., Apr. 21, 2008, 9:14-19:4.
13 Jumelet, however, was permitted to change his expert opinion related to the
14 fraud penalty — opining for the first time — that FTB was not “fair and
15 impartial” when it assessed the fraud penalties. Rough Trial Tr., June 11,
16 2008, 54:5-57:51. This was a clear manipulation by Hyatt of the Court's
17 order and should never have been permitted, but was over FTB's objection.

- 18 • **Permitting Testimony of Hyatt's Expert, Daniel Solove:** Professor
19 Solove testified that FTB had violated Hyatt's privacy rights during the
20 audit. Rough Trial Tr., May 21, 2008. However, the Court erred when it
21 permitted Solove to testify that FTB violated provisions of the California
22 Information Practices Act and the Federal Privacy Act. Hyatt never pled
23 claims under either of these statutory schemes. See Second Am. Compl.
24 filed 4/18/2006. Therefore, this evidence was entirely irrelevant to this
25 case.

- 26 • **Allowing Testimony of Gilbert Hyatt Outside of Personal Knowledge:**
27 Under Nevada law, a lay witness is not permitted to testify to issues and
28 matters that are outside of that witness's personal knowledge. NRS

1 50.025. During the audit, Hyatt had no personal contact or interaction with
2 anyone from FTB. In spite of this, Hyatt was permitted to testify, over
3 FTB's objections, with impunity to FTB's conduct during the audit, the
4 conduct of his representatives, the subject of conversations between his
5 representatives and FTB, and plethora of other matters that were entirely
6 outside the scope of Hyatt's personal knowledge. Rough Trial Tr., May 8-
7 20, 2008. The Court claimed that Hyatt was entitled to express his
8 opinions.

- 9 • **Allowing Testimony by Gilbert Hyatt Related to his Prior Litigation:**
10 Pretrial, the Court entered an order prohibiting FTB from making reference
11 or presenting evidence related to various cases and other pieces of litigation
12 that Hyatt had been involved in. Hr'g Tr., Feb. 28, 2008, 44:17-46:1. At
13 trial, however, the Court permitted Hyatt to testify about his prior
14 litigation, while continuing to prohibit FTB from presenting similar
15 evidence in opposition. See Bomar v. United Resort Hotels, Inc., 88 Nev.
16 344, 346, 497 P.2d 898 (1972) (if a party opens the door, "however
17 slightly," to otherwise inadmissible evidence, the opposing party must be
18 allowed to pursue the issue on rebuttal or cross-examination).
- 19 • **Allowing Evidence of Hyatt's Expert, Kurt Sjoberg:** Sjoberg provided
20 his expert testimony regarding FTB's use of "cost-benefit ratios" or "CBR"
21 in making its budgeting determinations. Rough Trial Tr., Apr. 22-23,
22 2008. This evidence was irrelevant and improper because there was no
23 evidence presented at trial that FTB used CBR in way related to Hyatt or
24 his audit.
- 25 • **Allowing Testimony of Vince Turner:** Vince Turner is a long-time friend
26 and attorney of Hyatt. At his deposition, Turner refused to answer various
27 questions posed to him by FTB's counsel on the basis of attorney/client
28 privilege. At trial, Turner was permitted to testify, over FTB's objection,

1 to matters that he had previously refused to testify about based on
2 privilege. This violated a previous court order, as well as Nevada law.
3 Wardleigh v. Second Judicial Dist. Court, 111 Nev. 345, 891 P.2d 1180
4 (1995); Court Order dated 2/2/2004, 5 (“Hyatt cannot be using the
5 attorney-client privilege as both a sword and shield.”)

- 6 • **Admitting Litigation Rosters into Evidence:** The Litigation Rosters
7 should never have been admitted into evidence because the publication of
8 the Litigation Rosters was absolutely privileged pursuant to four separate
9 and distinct privileges. See FTB’s Mot. for Partial Summ. J. re: False
10 Light filed 12/3/2007 (FTB incorporates this motion and the arguments
11 contained therein by reference.); FTB’s Mot. in Limine re: Litigation
12 Privilege filed 1/16/2008 (same). Therefore, the jury never should have
13 been permitted to consider this evidence, which was highly prejudicial to
14 FTB.
- 15 • **Permitting Extensive Evidence Related to FTB’s Alleged \$24 Million**
16 **Dollar Error After Expressly Precluding that Evidence Pretrial:** On
17 March 6, 2008, the Court expressly granted FTB’s motion in limine to
18 exclude evidence related to FTB’s alleged \$24 million dollar error. Hr’g
19 Tr., Mar. 6, 2008, 22:3-8. In spite of this ruling, at trial, the Court allowed
20 Hyatt to present extensive evidence and testimony on this issue, which was
21 highly prejudicial to FTB. Pl’s Trial Ex. 280, and related testimony.

22 a. Errors Excluding Proper and Admissible Evidence

23 On various occasions during the trial, the Court also erred in **excluding** highly relevant
24 and critical evidence supporting FTB’s case and its defenses. The exclusion of this evidence
25 unfairly prejudiced FTB, especially when these errors are considered in the aggregate. These
26 errors include:
27
28

1 • **Refusal to Permit FTB Employees to Testify Regarding their Opinions**
2 **of Audit:** In spite of previously allowing Candace Les to provide her
3 “opinions” of the audit based on her personal review of the audit file, the
4 Court refused to allow FTB employee witnesses Steve Illia, Brad LaCour,
5 Penny Bauche, Carol Ford, and others **who actually worked on the audit**
6 from providing their opinions of the audit in opposition. The Court’s sole
7 rationale for this preclusion was that these employees were not disclosed as
8 “experts” prior to the discovery cutoff deadline. See Rough Trial Tr., June
9 20, 2008, 225-241. However, this was not accurate. On March 31, 2006,
10 FTB filed with the Court a document entitled, “FTB’s Initial Disclosure of
11 Expert Witnesses.” In this document, FTB expressly stated that it was
12 disclosing its “initial list” of “expert witnesses.” Id. at 1. FTB also stated,
13 “In addition, though not specifically employed, FTB reserves the right to
14 elicit expert opinion testimony at trial from any witness properly
15 qualified.” Id. at 2. Therefore, FTB had specifically reserved the right to
16 elicit expert testimony from any witness that could be so qualified. These
17 FTB witnesses all had particular and specific expertise related to FTB, its
18 audits, and, in particular, residency audits. FTB should not have been
19 foreclosed from presenting these witnesses’ testimony, particularly based
20 on the erroneous basis cited by the Court.

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22 • **Refusal to Admit FTB’s Proffered Evidence of Hyatt’s IRS Audits as**
23 **an Alternate Theory of Causation Related to Hyatt’s Alleged**
24 **Emotional Distress:** In this case, Hyatt alleged that FTB was the sole
25 source of emotional distress he experienced between 1993 to the present.
26 In order to prevail on this allegation, however, Hyatt was required to prove
27 that FTB was the cause of his \$85 million in emotional distress. Maduike
28 v. Agency Rent-A-Car, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998); Watson v.

1 Las Vegas Valley Water Dist., 378 F.Supp.2d 1269, 1278-79 (D.Nev.
2 2005). Therefore, FTB was absolutely entitled to present to the jury
3 evidence of alternate theories for the cause of Hyatt's emotional distress.
4 To this end, FTB intended to present evidence of Hyatt's IRS audits that
5 were ongoing at the same time as FTB's audits, as an alternate theory of
6 causation for Hyatt's emotional distress. This evidence would have been
7 presented by the testimony of Clint Lowder, the IRS auditor who worked
8 on Hyatt's audit.⁴⁷ In spite of this, the Court precluded FTB from
9 presenting this evidence to the jury and thus precluded FTB its due process
10 right to defend itself against Hyatt's claims.

- 11 • **Refusal to Admit FTB's Proffered Evidence Related to Hyatt's Loss of**
12 **his '516 Patent as an Alternate Theory of Causation Related to Hyatt's**
13 **Alleged Emotional Distress:** Here again, the Court refused to permit FTB
14 the opportunity to present evidence related to Hyatt's loss of his '516
15 patent which occurred at virtually the same time FTB issued its proposed
16 tax assessments for the 1991 tax year. Rough Trial Tr., July 10, 2008, 2-
17 16. FTB intended to present this evidence through the testimony of
18 Richard Donaldson who would have provided the specific timeline for
19 these events related to Hyatt's loss of the patent in order to establish an
20 alternate theory of causation to Hyatt's claims of emotional distress. The
21 Court, however, repeatedly sustained Hyatt's objections preventing the jury
22 from hearing this evidence. Id.
- 23 • **Striking Testimony of Richard Donaldson and Keith Kalm:** The Court
24 improperly struck the testimony of Richard Donaldson and Keith Kalm that

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26 ⁴⁷ Worse still, during opening statements, Hyatt's counsel lied to the jury and expressly
27 stated that Hyatt was not the subject of any IRS audit (and the jury would not be hearing any such
28 evidence). Rough Trial Tr., Apr. 21, 2008, 57-1:15. By taking this position, Hyatt expressly
opened the door or the admission of this evidence to rebut these contentions.

1 related to Hyatt's loss of the '516 patent, thus prohibiting the jury from
2 considering this evidence of an alternate theory of causation for Hyatt's
3 emotional distress. Mr. Donaldson's testimony explicitly indicated that
4 Hyatt lost the '516 patent in April 1996, at virtually the same time Hyatt
5 received the 1991 proposed tax assessments. Rough Trial Tr., July 10,
6 2008, 2-16.

- 7 • **Allowing Testimony of Gilbert Hyatt Related to His Reputation and**
8 **Prohibiting FTB from Rebutting this Evidence:** During pretrial
9 discovery and in his pretrial submission of jury instructions, Hyatt asserted
10 that he was seeking "reputational damages" from FTB. Hyatt's Proposed
11 Jury Instructions filed 3/17/2008 at 77. During his direct testimony, Hyatt
12 repeated these claims by testifying that he was bringing this case, in part, to
13 compensate him for the damage to his reputation. Rough Trial Tr., May 8,
14 2008, 143:9-20; Rough Trial Tr., May 12, 2008, 77:18-78:13. Based on
15 these assertions, FTB sought to admit the testimony of Dr. Ted Hoff, who
16 had direct knowledge of Hyatt's professional reputation. FTB announced
17 its intent to call Dr. Hoff, Hyatt then claimed he was not claiming
18 "reputational" damages. Rough Trial Tr., July 8, 2008, 7:5-13:4. Based on
19 this later representation, FTB was prohibited from presenting evidence of
20 Hyatt's bad reputation; in spite of the fact that Hyatt had already presented
21 evidence related to his "good reputation." See Bomar v. United Resort
22 Hotels, Inc., 88 Nev. 344,346, 497 P.2d 898 (1972) (if a party opens the
23 door, "however slightly," to otherwise inadmissible evidence, the opposing
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1 part must be allowed to pursue the issue on rebuttal or cross-
2 examination).⁴⁸

- 3 • **Preclusion of Evidence related to Hyatt's Publicity:** This case involved
4 claims of invasion of privacy. Hyatt was the subject of extensive publicity
5 during the exact time frame that his was being audited and when he claims
6 that his privacy was violated. Whether Hyatt could maintain a reasonable
7 expectation of privacy in his private life based on this extensive publicity
8 went to the heart of Hyatt's invasion of privacy claims. Therefore, it was
9 error for the Court to exclude this evidence from trial. See Hr'g Tr., Mar.
10 6, 2008, 82:13-85:5 (Court denying FTB's Mot. In Limine Re: Admit
11 Documents Evidencing Hyatt's Public Figure Status).

12 2. The Court Erred in Numerous Respects Concerning Jury Instructions

13 During all phases of trial, the Court erred by giving jury instructions that materially
14 misstated the law and by refusing to give instructions requested by FTB that were legally proper
15 and supported by the evidence. These errors severely and unfairly prejudiced FTB and were
16 subject to timely objections.

17 a. The Court Erroneously and Improperly Adopted Several Jury
18 Instructions which were Incorrect Statements of the Law

19 The Court **adopted** several jury instructions which incorrectly stated the law. These
20 instructions included the following:

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26 ⁴⁸ Dr. Ted Hoff was well-familiar with Hyatt's reputation, especially as a so-called
27 "inventor." Hyatt's reputation was not a good one. But more importantly, Dr. Hoff would have
28 testified that Hyatt's bad reputation had nothing to do with FTB.

- 1 • **Jury Instruction 25 and 26, definitions of bad faith:** Based on Hyatt's
2 failure to plead a separate claim for bad faith, no instruction on this issue
3 should have been given and Hyatt should not be have been permitted to
4 argued "bad faith" to the jury. See Rough Trial Tr., July 16, 2008, 72-97.⁴⁹
- 5 • **Jury Instruction 28, definition of representation:** At Hyatt's request, the
6 Court improperly included the last paragraph of this instruction, which
7 stated "A false representation is any words or conduct which produce a
8 false or misleading impression of fact in the mind of another. The false
9 representation must be made concerning an actually existing or past fact."
10 This paragraph, particularly the first sentence, was not supported by
11 Nevada law and convoluted the correct definition of a representation
12 already included in the instruction. See FTB's Objections to Hyatt's
13 Proposed Instructions, 3-5; Rough Trial Tr., July 16, 2008, 101-105;
14 Rough Trial Tr., July 18, 2008, 154-161.
- 15 • **Jury Instruction 30 regarding government representations:** This
16 instruction is an incorrect statement of Nevada law and placed an improper
17 emphasis on FTB's status as a government agency. FTB's Objections to
18 Hyatt's Proposed Jury Instructions, 41-42; Rough Trial Tr., July 16, 2008,
19 125/128. This instruction was based upon a federal decision dealing with a
20 totally inapposite factual and legal principles and should never have been
21 given to the jury. Id.

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24 ⁴⁹ As the Court will recall, FTB argued against the inclusion of all bad faith instructions
25 because Hyatt did not plead any claims for bad faith in his Second Amended Complaint.
26 Although the Court initially agreed that no instruction on these issues would be given, the Court
27 indicated that Hyatt could argue "bad faith" to the jury. See Rough Trial Tr., July 16, 2008, 72-
28 97. As a result, FTB agreed to the inclusion of this instruction on this basis and this basis only
and did not waive its prior objections.

- 1 • **Jury Instruction 31, fraudulent intent:** This instruction was not a proper
2 statement of “fraudulent intent” under Nevada law. See FTB’s Objections
3 to Hyatt’s Proposed Jury Instructions, 44; Rough Trial Tr., July 16, 2008,
4 128-132. This instruction is based entirely upon Utah case law, which does
5 not accurately reflect Nevada law on this point. Id.
- 6 • **Jury Instruction 33, reliance:** This instruction was also not supported by
7 Nevada law. In addition, this instruction was duplicative of prior
8 instructions and confusing to the jury. Rough Trial Tr., July 16, 2008, 129-
9 132; Rough Trial Tr., July 17, 2008, 1-7.
- 10 • **Jury Instruction 41, emotional distress:** Although parts of this instruction
11 were legally correct, the first sentence was legally incorrect. See FTB’s
12 Objections to Hyatt’s Proposed Jury Instruction, 59-60. The jury could
13 not, as a matter of law, determine that Hyatt suffered extreme emotional
14 distress merely because he suffered “anguish, fear, nervousness” and the
15 like. Id.; see also Rough Trial Tr., July 17, 2008, 77-100. Therefore, it
16 was completely improper for the Court to provide the jury this instruction.
17 Moreover, it was legally incorrect to instruct the jury that Hyatt was not
18 required to prove that he suffered some sort of physical injury before he
19 could recover for emotional distress. Id.
- 20 • **Jury Instruction 58, Spoliation of EMC Back-Up Tapes:** This issue was
21 addressed in Section IV(B), supra and will not be repeated here.
- 22 • **Jury Instruction 61, Attorneys Fees As Special Damages:** Hyatt was not
23 entitled to attorneys fees as special damages, as a matter of law. Therefore,
24 the Court should not have provided any instruction to the jury on this issue.
25 See FTB’s Mot. for Partial Summ. J. re: Attorneys Fees as Special
26 Damages filed 12/3/2008, which is incorporated herein by reference.
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1 “criminal” law standard. See e.g., Rough Trial Tr., July 18, 2008, 138-154.
2 However, this standard applies to all claims for invasions of privacy and
3 should have been provided.

- 4 • **FTB Proposed Jury Instructions 38-42:** Each of these instructions were
5 legally accurate statements of the law, which gave specific legal instruction
6 on the legal privacy interests maintained by individuals in certain areas or
7 things. In this case, each of the items specifically identified in these
8 instructions were relied upon by Hyatt to allege his privacy had been
9 invaded; i.e., his trash, the open view of his home, etc. Therefore, it was
10 legally improper for the Court to refuse these instructions. Rough Trial Tr.,
11 July 18, 2008, 138-154.
- 12 • **FTB’s Jury Instruction 57, actual malice standard:** This instruction
13 properly instructed the jury that in determining whether FTB acted with
14 “actual malice” it was required to focus its attention on the state of mind on
15 FTB at the time it allegedly published false statements about Hyatt. FTB’s
16 Proposed Instructions, at 57; see also Rough Trial Tr., July 17, 2008 (p.m.
17 session), 44-46. Contrary to the Court’s assertions on the record, this
18 instruction was supported by Pegasus v. Reno Newspapers, Inc., 118 Nev.
19 706, 57 P.3d 82 (2002).
- 20 • **FTB’s Proposed Instruction 64-65, definitions of severe emotional**
21 **distress:** Each of these instructions was legally accurate and should have
22 been provided to the jury. Moreover, Jury Instruction 41, which was
23 provided to the jury, contradicted these legally proper statements of the law
24 by indicating to the jury that generalized symptoms of emotional distress
25 were sufficient. See Rough Trial Tr., July 17, 2008 (a.m. session), 77-100;
26 (p.m. session), 1-9.

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- **FTB's Jury Instruction 67:** Here again, this instruction is an accurate statement of the law and was supported by the evidence. Therefore, FTB was entitled to have the jury instructed that it could not be held liable for emotional distress if the conduct FTB engaged in had social value. See FTB's Proposed Instructions, at 67; see Rough Trial Tr., July 17, 2008 (p.m. session), 1-9.
- **FTB Proposed Instructions 70:** This was a correct statement of Nevada law and should have been provided to the jury in order to properly define the specific elements of an abuse of process claim. For example, FTB's Proposed Instruction 70 properly explained that in order for there to be an "abuse of process" claim in Nevada, the "process" at issue must "legal process." See FTB's Proposed Instructions, at 70; see also Rough Trial Tr., July 17, 2008, 28-35.
- **FTB Proposed Instruction 75, "fraudulent intent":** This was a correct instruction on the law of fraudulent intent in Nevada and should have been provided to the jury in place of Instruction 31. See FTB's Proposed Instructions, at 75.
- **FTB Proposed Instructions 80-81:** These instructions were legally proper instructions and should have been provided to the jury. First, Instruction 80 explained that the necessary relationship for a claim of breach of confidential relationship generally arises in the context of family or close friendships – not between the government and a citizen. See FTB's Proposed Instructions, at 80. Moreover, Instruction 81 was important to remind the jury that this claim did not relate to the disclosure of "confidential" information. Id. at 81.
- **FTB Proposed Instructions 94, 108-110:** Here, the Court improperly rejected FTB's right to defend itself against Hyatt's "bad faith allegations." Specifically, FTB was entitled to present its argument and defense to the

1 jury that the conduct it engaged in was “discretionary” and therefore FTB
2 could not be held liable for Hyatt’s claims – based on the law of this case
3 and the prior procedural history of this litigation. See FTB’s Proposed
4 Instructions, at 94, 108-110; Rough Trial Tr., July 17, 2008 (p.m. session),
5 78-82; see also Hyatt v. Franchise Tax Board, 2002 Nev. LEXIS 57 (Nev.
6 April 4, 2002); Franchise Tax Board v. Hyatt, 538 U.S. 488, 123 S.Ct.
7 1683 (2003) (FTB withdrew on Instructions 108-110 on the basis of the
8 Court’s prior rulings on Instruction 94.)

- 9 • **FTB’s Proposed Instruction 111, Tax Injunction Act Defense:** Based on
10 the law of the case, FTB was required to be treated like a Nevada State
11 agency would be treated under the same circumstances. Hyatt v. Franchise
12 Tax Board, 2002 Nev. LEXIS 57 (Nev. April 4, 2002); Franchise Tax
13 Board v. Hyatt, 538 U.S. 488, 123 S.Ct. 1683 (2003); see also Rough Trial
14 Tr., July 17, 2008, 38-58. Nevada recognizes the Tax Injunction Act,
15 which prohibits cases that attempt to enjoin or prevent the collection or
16 assessment of taxes. See NRS 372.670; Cal. Rev. & Tax Code § 19381
17 (West 2008). Based on the manner in which Hyatt tried this case, FTB was
18 entitled to present its argument that this case, as presented by Hyatt, was
19 entirely precluded by the Tax Injunction Act. Id. There was sufficient
20 evidence in the record from which the jury could infer that Hyatt had used
21 this litigation to interfere with and prevent the collection of California
22 income taxes. The Court legally erred in failing to give this instruction.
23 Bass-Davis, 134 P.3d at 106 (party entitled to jury instruction on all
24 theories supported by the evidence.)
- 25 • **FTB’s Proposed Jury Instructions 112-113, Statute of Limitations**
26 **Defense:** The Court improperly and erroneously granted Hyatt’s Motion
27 for Judgment as a Matter of Law dismissing FTB’s statute of limitations.
28 See Rough Trial Tr., July 16, 2008, 8-38. Based on this legally erroneous

1 ruling, the Court failed to properly instruct the jury on this defense.
2 Rough Trial Tr., July 18, 2008, 59. There was more than ample evidence
3 in the record that the jury could infer Hyatt's knowledge of his claims as
4 early as April 2005, over two and a half years before Hyatt filed his
5 complaint. See Rough Trial Tr., July 16, 2008, 8-38; FTB's Mot. for
6 Partial Summ. J. re: Privacy Claims filed 11/26/2007, incorporated herein
7 by reference. Therefore, it was legally improper to grant the rule 50
8 motion, and legally improper to fail to instruct the jury on this defense.
9 Bass-Davis, 134 P.3d at 106 (party entitled to jury instruction on all
10 theories supported by the evidence.)

- 11 • **FTB's Proposed Jury Instruction 115-118, Litigation Privilege:** FTB
12 was entitled to have the jury instructed on its affirmative defense related to
13 the litigation privilege, particularly as this privilege related to FTB's
14 publication of the litigation rosters. These instructions were legally correct
15 and supported by the record. See Rough Trial Tr., July 18, 2008, 59-88;
16 Bass-Davis, 134 P.3d at 106 (party entitled to jury instruction on all
17 theories supported by the evidence).
- 18 • **FTB's Proposed Jury Instruction 118, Required Publication Privilege:**
19 FTB was entitled to have the jury instructed on its affirmative defense
20 related to the required publication privilege, particularly as this privilege
21 applied to FTB's publication of the litigation rosters. This instruction was
22 based on Nevada law and supported by the evidence. Compare Rough
23 Trial Tr., July 18, 2008, 88-100, with Rough Trial Tr., July 21, 2008, 2-16;
24 86-92; Bass-Davis, 134 P.3d at 106 (party entitled to jury instruction on all
25 theories supported by the evidence.)
- 26 • **FTB's Proposed Jury Instructions 119-122, Fair Reporting Privilege:**
27 FTB was entitled to have the jury instructed on its affirmative defense
28 related to the fair reporting privilege, particularly as this privilege applied

1 to FTB's publication of the litigation rosters. These instructions were
2 based on Nevada law and supported by the evidence presented in this case.
3 Rough Trial Tr., July 18, 2008, 101-111; Bass-Davis, 134 P.3d at 106
4 (party entitled to jury instruction on all theories supported by the evidence.)

5 • **FTB's Proposed Jury Instruction 123, Government Privilege Defense:**
6 FTB was entitled to have the jury instructed on its affirmative defense
7 related to the required publication privilege. This instruction was based on
8 Nevada law, particularly Nevada's adoption and reliance on the
9 Restatement (Second) of Torts, and supported by the evidence. Compare
10 Rough Trial Tr., July 18, 2008, 111-116; Bass-Davis, 134 P.3d at 106
11 (party entitled to jury instruction on all theories supported by the evidence.)

12 • **FTB's Proposed Jury Instruction 124, Common Interest Privilege**
13 **Defense:** FTB was entitled to have the jury instructed on its affirmative
14 defense related to the required publication privilege. This instruction was
15 based Nevada law and supported by the evidence presented at trial.
16 Compare Rough Trial Tr., July 18, 2008, 116-120; Bass-Davis, 134 P.3d at
17 106 (party entitled to jury instruction on all theories supported by the
18 evidence.)

19 • **FTB's Proposed Jury Instruction 135, Economic Damages:** This
20 instruction was a proper statement of the prior rulings entered in this case.
21 See Hr'g Tr., Jan. 23, 2008, 53:23-54:13 (order granting FTB's Motion in
22 Limine Re: Economic Damages). Due to the reference to Hyatt's licensing
23 programs, and in light of the astronomical damage award, it appears that
24 the jury believed that it could also award Hyatt damages for any emotional
25 distress he may have suffered from the loss of his licensing business. This
26 was exactly contrary to the many pretrial orders. Therefore, it was error for
27 the Court not to provide this instruction to the jury. Rough Trial Tr., July
28 21, 2008, 68-72.

- 1 • **FTB's Proposed Jury Instruction 137, Fear of Future Identity Theft:**
2 This instruction was a proper statement of the law and should have been
3 provided to the jury to ensure that Hyatt was not provided damages for
4 "injuries" that were not compensable under Nevada law. Due to the
5 references to Hyatt's fear of identity theft, and in light of the astronomical
6 damage award, it appears that the jury believed that it could also award
7 Hyatt damages for these harms. Therefore, it was error for the Court not to
8 provide this instruction to the jury. Rough Trial Tr., July 21, 2008, 76-80.
- 9 • **FTB's Supplemental Instruction, Reasonable Attorneys Fees:** The
10 Court instructed the jury that it could award Hyatt attorneys fees as special
11 damages. Court's Final Jury Instructions filed 7/21/2008 at 61. However,
12 the Court refused FTB's supplemental instruction which provided the jury
13 with the proper factors that it should consider, if it determined that these
14 damages were warranted. Rough Trial Tr., July 21, 2008, 62-68; FTB's
15 Supplement Instruction filed 4/9/2008. This instruction was based on a
16 correct statement of Nevada law and should have been provided to the jury.

17 *Jury Instructions Improperly Rejected During Punitive Damage Phase:*

- 18 • **FTB's Proposed Punitive Damage Instructions re: Vicarious Liability:**
19 The Court also improperly rejected this proposed jury instruction which
20 was submitted by FTB for use during the punitive damage phase of trial.
21 The arguments related to this assignment of error were discussed
22 previously and will not be repeated here.
- 23 • **FTB's Proposed Punitive Damage Instruction re: Managing Agent:**
24 Same as above
- 25 • **FTB's Proposed Punitive Damage Instruction re: Harms to Others:**
26 Same as above
- 27 • **FTB's Proposed Punitive Damage Instruction re: Government**
28 **Immune From Punitive Damages:** Same as above

- 1 • **The Jury Manifestly Disregarded Jury Instruction 53:** Jury Instruction
2 53 specifically stated that, “[t]here is no liability when the defendant
3 merely gives further publicity to information about the plaintiff that is
4 already public.” Court’s Final Jury Instructions filed 7/21/2008, J.I. 53.
5 Therefore, pursuant to the clear language of this instruction, FTB could not
6 be held liable for merely publishing information about Hyatt that was
7 already available to the public. In this case, the undisputed evidence
8 revealed that Hyatt’s social security number and home address were a
9 matter of public record and available to the public. See Def’s Trial Ex.
10 2800, 12, 16 (voter’s registration); Def’s Trial Ex. 2954, 1, 2958, 1, 2960,
11 15, 2962, 1 (court documents); Def’s Trial Ex. 2001, 374-377 (property
12 tax payments). In addition, all of the information placed on the Litigation
13 Rosters regarding this litigation was also a matter of public record and
14 available to the public. Def’s Trial Ex. 3170-3176 (Litigation Rosters);
15 Pl’s Trial Ex. 771; see also Exhibit 10, Federal Ct. Compl. (same complaint
16 filed in this litigation, which remains unsealed in federal court). Based on
17 this undisputed evidence, it would be impossible for the jury to have found
18 FTB liable for invasions of Hyatt’s privacy based on the publication of
19 Hyatt’s social security number, home address, and the information
20 contained on the Litigation Roster if the jury had properly
21 applied and followed Jury Instruction 53. M & R Inv. v. Anzalotti, 105
22 Nev. 224, 226, 773 P.2d 729 (1989). Therefore, the jury manifestly
23 disregarded Jury Instruction 53 and FTB is entitled to a new trial on this
24 basis alone. NRCPP 59(a)(5).
- 25 • **FTB’s Proposed Punitive Damage Instruction re: Defining Fraud:** On
26 8/8/2008 defining the “fraud” requirement for a finding of punitive damage
27 liability. FTB’s Proposed Punitive Damage Instructions filed 8/8/2008, p. 1-2.
28 This instruction specifically explained that the finding of “fraud” required for a

1 finding of punitive damage liability was not the same as a simple “fraud”
2 finding required to a finding in tort. The instruction specifically made clear that
3 “fraud” in this context required a finding of “aggravated fraud.” *Id.* This was a
4 correct statement of Nevada and was improperly rejected by the Court.

5 3. The Court Failed to Cure Various Improper Arguments Made by Hyatt’s
6 Counsel during Opening and Closing Statements

7 Finally during trial, there were several instances of improper statements made by Hyatt’s
8 counsel during opening statement and closing arguments. This misconduct was highly improper,
9 violated Nevada law, and tainted the jury’s findings against FTB. Therefore, this misconduct
10 requires a new trial. See NRCP 59(a)(1). These statements included the following:

- 11 • **Improper Statements in Opening/Closing that this Court was the**
12 **“Check” On FTB:** On two different occasions, Hyatt’s counsel told the
13 jury that this Nevada court was the governmental branch that was the
14 “check” on FTB, an agency of the executive branch of the State of
15 California. This is both factually and legally inaccurate and should not
16 have been presented to the jury.
- 17 • **Improper Jury Nullification Closing Argument:** During closing
18 argument, Hyatt’s counsel implied that the jury was not required to follow
19 the jury instructions as provided by the Court. This invited improper jury
20 nullification in violation of Lioce v. Cohen, 174 P.3d 970 (2008). FTB
21 objected, but no corrective measure was taken by the Court.
- 22 • **Improper Golden Rule Argument:** During closing arguments, Hyatt’s
23 counsel argued that the jury should put itself in “Hyatt’s shoes,” which is
24 an improper “golden rule” argument. Rough Trial Tr., July 23, 2008, 83;
25 Lioce v. Cohen, 174 P.3d 970 (2008). FTB objected to this argument, but
26 no corrective measure was taken by the Court to correct this error. Rough
27 Trial Tr., July 24, 2008, 7.

- 1 • **Improper Damage Stacking Argument:** During closing argument,
2 Hyatt’s counsel argued that the jury could “stack” damages against FTB by
3 multiplying one amount of damages for each claim Hyatt pled. Rough
4 Trial Tr., July 23, 2008 (p.m. session), 73-86.
- 5 • **Repeated Personal Attacks on FTB’s Counsel:** Throughout the whole of
6 Hyatt’s closing remarks, various personal attacks were made against FTB’s
7 counsel. One particular example relates to Hyatt’s “new sheriff in town”
8 argument. As the Court will recall, in Hyatt’s Rebuttal Closing
9 Arguments, Hyatt’s counsel repeatedly argued that FTB’s counsel
10 misrepresented the law and the facts of the case to the jury – referring to
11 FTB’s counsel as the “new sheriff in town.” See, for example, Rough Trial
12 Tr., July 30, 2008, 6-6; 22-25. This was an improper personal attack on
13 FTB’s counsel and should not have been permitted. See Riley v. State, 107
14 Nev. 205, 808 P.2d 551 (1991). Additionally, Hyatt’s counsel made
15 several arguments insinuating that FTB’s attorneys had placed words in the
16 mouths of witnesses, improperly tried the case, and engaged in other
17 misconduct. These statements were false and improper. Id.
- 18 • **Repeated “overemotional” arguments:** Throughout the whole of Hyatt’s
19 closing arguments, Hyatt asserted that this was the “first” time that the “tax
20 man” had ever been subjected to the scrutiny involved in this case. Hyatt
21 also repeatedly argued to the jury’s emotions regarding the taxing
22 authorities in general and how those authorities were “out of control” and
23 that only Hyatt “had the guts” to take on FTB on behalf of all “wronged”
24 taxpayers. See Rough Trial Tr., July 22-23, 2008 and July 30, 2008.
25 These over-emotional arguments, coupled with the personal attacks on
26 counsel and FTB, were legally improper. See DeJesus v. Flick, 116 Nev.
27 812, 7 P.3d 459 (2000), overruled on other grounds, Lioce v. Cohen, 174
28 P.3d 970 (2008).

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• **Coaching from Counsel Table:** At several points during Hyatt’s examination, Hyatt’s counsel was permitted to “coach” Hyatt. Particularly, over FTB’s objections, Hyatt’s counsel was permitted to stop Hyatt from providing his answers to currently pending questions and otherwise interfere with the responses being given by Hyatt to the jury. Rough Trail Tran. 5/14/2008, p. 32:4-17 (Mr. Bernhard suggests that he would be “happy” to “interrupt my own client’s answers” to questions posed by defense counsel). Examples of this behavior include:

Answer: Well, that’s what Miss Cox wrote in the audit file. I don’t have any personal knowledge of it. And also it was because it was significantly erroneous –

Mr. Bernhard: I hate to interrupt but please confine your answers to the questions that are asked.

Rough Trial Tr., May 14, 2008, 54: 7-11.

Answer: I didn’t have my policies in Santa Ana, so I’m ---

Mr. Bernhard: Again, if you don’t mind, listen to the question and just respond to the question, please.

Id. at 82:8-12; Id. at 108:15-16 (same). This was highly improper and impermissible conduct. See, for example, In Re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D.Nev. 1998) (unpublished disposition) (attorney entitled to have witness, and witness alone, answer posed questions.)

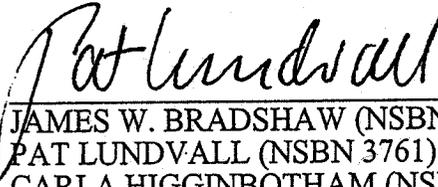
1 VII. CONCLUSION

2 Based upon the foregoing, FTB respectfully requests that the Court vacate the Judgment,
3 and/or grant a new trial or the further relief described herein.

4 Dated this 22 day of September, 2008.

5 McDONALD CARANO WILSON LLP

6
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CERTIFICATE OF MAILING

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served a true and correct copy of the foregoing **FTB'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY AND CONDITIONALLY MOTION FOR NEW TRIAL PURSUANT TO NRCP 50; AND FTB'S ALTERNATIVE MOTION FOR NEW TRIAL AND OTHER RELIEF PURSUANT TO NRCP 59** on this 2nd day of September, 2008 by hand delivery upon the following:

Peter C. Bernhard, Esq.
Bullivant Houser Bailey PC
3883 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89169

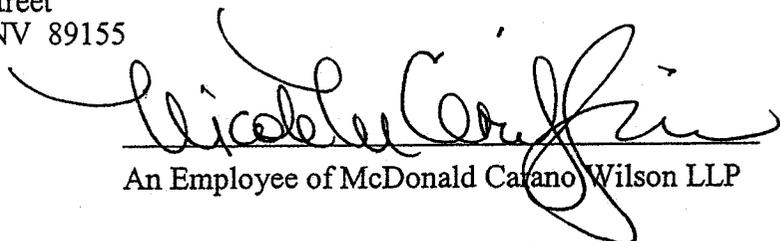
I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served true and correct copies of the foregoing **FTB'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY AND CONDITIONALLY MOTION FOR NEW TRIAL PURSUANT TO NRCP 50; AND FTB'S ALTERNATIVE MOTION FOR NEW TRIAL AND OTHER RELIEF PURSUANT TO NRCP 59** on this 2nd day of September, 2008 by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

Mark A. Hutchison, Esq.
Hutchison & Steffen
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Donald Kula, Esq.
Perkins Coie
1620 - 26th Street
Sixth Floor, South Tower
Santa Monica, CA 90404-4013

Robert L. Eisenberg
Lemons, Grundy & Eisenberg
6005 Plumb Street, Suite 300
Reno, NV 89519

COURTESY COPY:
The Honorable Jessie Walsh
Regional Justice Center
200 Lewis Street
Las Vegas, NV 89155


An Employee of McDonald Carano Wilson LLP

MCDONALD-CARANO-WILSON
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966



Exhibit 10

No. 22

The following are the claims that were asserted by Plaintiff and Cross-Appellant Hyatt and the disposition of those claims:

Declaratory Relief: Dismissed by District Court order (4//19/00) via defendant's motion for judgment on the pleadings; see Exhibit 14 hereto;

Invasion of Privacy based on Intrusion Upon Seclusion: Judgment (9/8/08) in favor of Hyatt; see Exhibit 5 hereto;

Invasion of Privacy based upon Publicity of Private Facts: Judgment (9/8/08) in favor of Hyatt; see Exhibit 5 hereto;

Invasion of Privacy based on False Light: Judgment (9/8/08) in favor of Hyatt; see Exhibit 5 hereto;

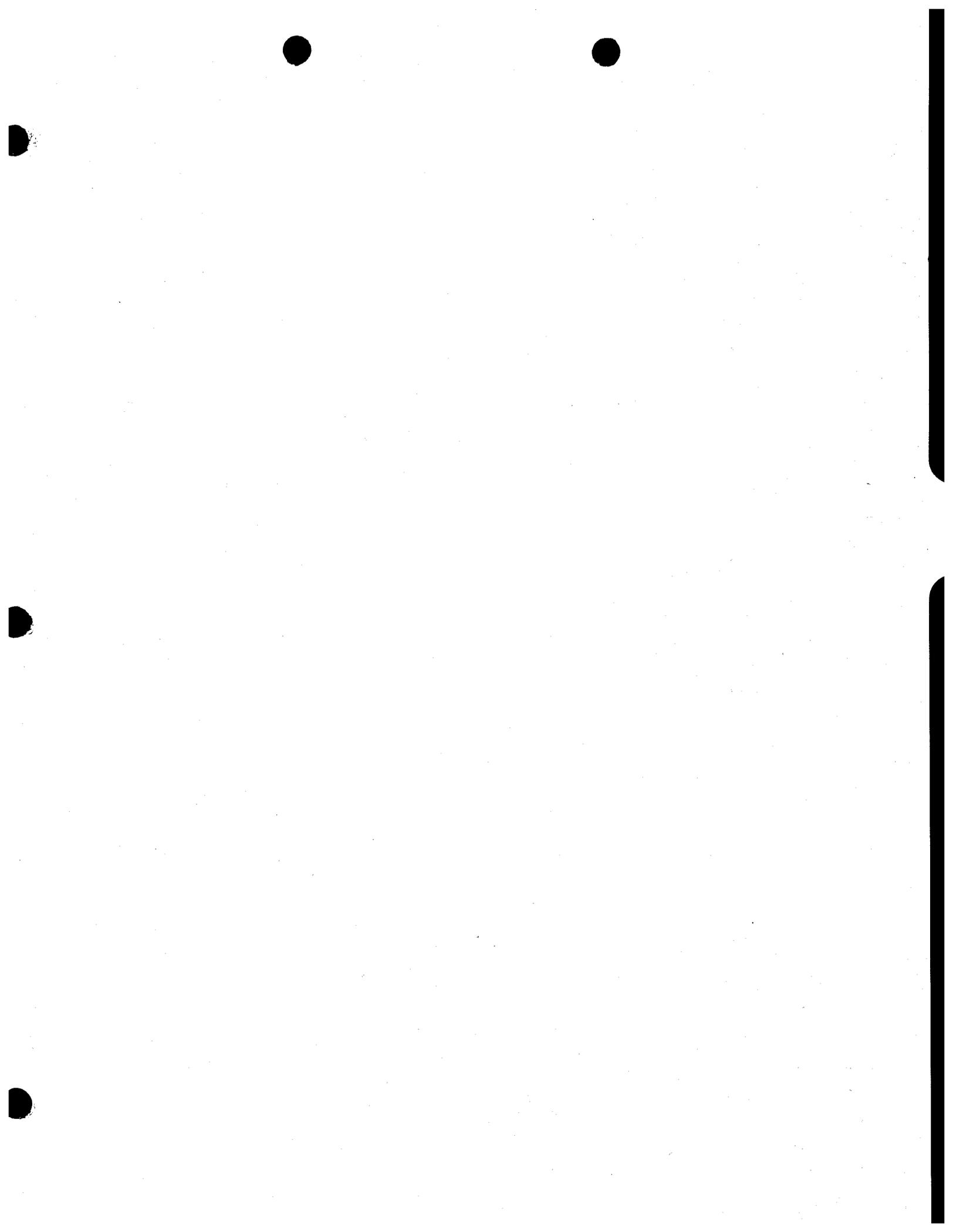
Abuse of Process: Judgment (9/8/08) in favor of Hyatt; see Exhibit 5 hereto;

Intentional Infliction of Emotional Distress: Judgment (9/8/08) in favor of Hyatt; see Exhibit 5 hereto;

Intentional Misrepresentation (Fraud): Judgment (9/8/08) in favor of Hyatt; see Exhibit 5 hereto;

Breach of Confidential Relationship: Judgment (9/8/08) in favor of Hyatt; see Exhibit 5 hereto;

Negligent Infliction of Emotional Distress: Dismissed by order of this Court (4/4/02), see Exhibit 15 hereto.



1 Plaintiff, Gilbert P. Hyatt, in this Second Amended Complaint, complains against
2 defendants, and each of them, as follows:

3 PARTIES

4 1. Plaintiff resides in Clark County, Nevada and has done so since September 26,
5 1991.

6 2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is
7 a governmental agency of the State of California with its principal office located in Sacramento,
8 California, and a district office located in Los Angeles, California. The FTB's function is to
9 ensure the collection of state income taxes from California residents and from income earned in
10 California by non-residents.

11 3. The identity and capacities of the defendants designated as Does 1 through 100
12 are so designated by plaintiff because of his intent by this complaint to include as named
13 defendants every individual or entity who, in concert with the FTB as an employee,
14 representative, agent or independent contractor, committed the tortious acts described in this
15 complaint. The true names and capacities of these Doe defendants are presently known only to
16 the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants
17 who are designated by fictitious names only until plaintiff is able, through discovery, to obtain
18 their true identities and capacities; upon ascertaining the true names and capacities of these Doe
19 defendants, plaintiff shall promptly amend this complaint to properly name them by their actual
20 identities and capacities. For pleading purposes, whenever this complaint refers to
21 "defendants," it shall refer to these Doe defendants, whether individuals, corporations or other
22 forms of associations or entities, until their true names are added by amendment along with
23 particularized facts concerning their conduct in the commission of the tortious acts alleged
24 herein.

25 4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in
26 acting or omitting to act as alleged, acted or omitted to act within the course and scope of their
27 employment or agency, and in furtherance of their employer's or principal's business, whether
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1 the employer or principal be the FTB or some other governmental agency or employer or
2 principal whose identity is not yet known; and that FTB and defendants were otherwise
3 responsible and liable for the acts and omissions alleged herein.

4 5. This action is exempt from the court-annexed arbitration program, pursuant to
5 Rule 3, because: (1) this is an action for, inter alia, declaratory relief; (2) substantial issues of
6 public policy are implicated concerning the sovereignty of the State of Nevada and the integrity
7 of its territorial boundaries as opposed to governmental agencies of another state who enter
8 Nevada in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules
9 and regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular;
10 and (3) the sums of money and damages involved herein far exceed the \$40,000.00
11 jurisdictional limit of the arbitration program.

12 6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, Fifth, Sixth,
13 Seventh and Eighth Causes of Action.

14 SUMMARY OF CLAIMS

15 7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 et seq. to
16 confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and
17 continuing to the present and, correspondingly, his non-residency during said period in
18 California (FIRST CAUSE OF ACTION) — *re-pled in this Second Amended Complaint to*
19 *preserve plaintiff's right to appeal the District Court's April 3, 1999 ruling dismissing this*
20 *cause of action; this cause of action is therefore no longer at issue in the District Court;* (2)
21 recovery of compensatory and punitive damages against the FTB and the defendants for
22 invasion of plaintiff's right of privacy, including and in particular his informational privacy as
23 well as the FTB's failure to abide by the confidential relationship created by the FTB's request
24 for and receipt of Hyatt's highly personal and confidential information, resulting from their still
25 ongoing investigation in Nevada of plaintiff's residency, domicile and place of abode and
26 causing (a) an unreasonable intrusion upon plaintiff's seclusion (SECOND CAUSE OF
27 ACTION); (b) an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION);
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1 (c) casting plaintiff in a false light (FOURTH CAUSE OF ACTION); (3) recovery of
2 compensatory and punitive damages against the FTB and the defendants for their outrageous
3 conduct in regard to their continuing investigation in Nevada of plaintiff's residency, domicile
4 and place of abode, including but not limited to the FTB's failure to abide by the confidential
5 relationship created by the FTB's request for and receipt of Hyatt's highly personal and
6 confidential information (FIFTH CAUSE OF ACTION); (4) recovery of compensatory and
7 punitive damages against the FTB and defendants for an abuse of process (SIXTH CAUSE OF
8 ACTION); (5) recovery of compensatory and punitive damages against the FTB and defendants
9 for fraud, including but not limited to the FTB's failure to abide by the confidential relationship
10 created by the FTB's request for and receipt of Hyatt's highly personal and confidential
11 information (SEVENTH CAUSE OF ACTION); and (6) recovery of compensatory and punitive
12 damages against the FTB and defendants for breach of confidentiality in regard to the FTB's
13 breach of its duty not to disclose Hyatt's personal and confidential information (EIGHTH
14 CAUSE OF ACTION). The claims specified in this paragraph constitute EIGHT separate
15 causes of action as hereinafter set forth in this complaint.

16 FACTUAL BACKGROUND

17 Plaintiff's Residency in Nevada

18 8. Plaintiff moved to the State of Nevada, County of Clark, and established full-
19 time residency here on September 26, 1991 and has remained a full-time, permanent resident
20 since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California.
21 Plaintiff is a highly successful inventor. Specifically, plaintiff has been granted numerous
22 important patents for a wide range of inventions relating to computer technology. Plaintiff
23 primarily works alone in the creation and development of his inventions and greatly values his
24 privacy both in his personal life and business affairs. After certain of his important inventions
25 were granted patents in 1990, plaintiff began receiving a great deal of unwanted and unsolicited
26 publicity, notoriety and attention. To greater protect his privacy, to enjoy the social,
27 recreational, and financial advantages Nevada has to offer, and to generally enhance the quality
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1 of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move
2 took place after much consideration and almost an entire year of planning.

3 9. The following events are indicative of the fact that on September 26, 1991,
4 plaintiff commenced both his residency and intent to remain in Nevada, and a continuation of
5 both down to the present: (1) the sale of plaintiff's California home in October 1991; (2) his
6 renting and residing at an apartment in Las Vegas commencing in October 1991 and continuing
7 until April 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November
8 1991, plaintiff registered to vote in Nevada, obtained a Nevada driver's license, and joined a
9 religious organization in Las Vegas; (4) plaintiffs' extensive search, commencing in early
10 October 1991, for a new home in Las Vegas, and in the process utilizing the services of various
11 real estate brokers; (5) during the process of finding a home to purchase, plaintiff made
12 numerous offers to buy; (6) plaintiff's purchase of a new home in Las Vegas on April 3, 1992;
13 (7) plaintiff maintained and expanded his business interests from Las Vegas; and (8) plaintiff
14 has, through the years from September 26, 1991 and down to the present, contacted persons in
15 high political office, in the professions, and other walks of life, as a true Nevada resident of
16 some renown would, not concealing the fact of his Nevada residency. In sum, plaintiff has
17 substantial evidence, both testimonial and documentary, in support of the fact of his full-time
18 residency, domicile and place of abode in Nevada commencing on September 26, 1991 and
19 continuing to the present.

20 The FTB and Defendants' Investigation of Plaintiff in Nevada

21 10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a
22 Part- Year state income tax return with the State of California for 1991 (the "1991 Return").
23 Said return reflects plaintiff's payment of state income taxes to California for income earned
24 during the period of January 1 through September 26, 1991.

25 11. In or about June of 1993 — 21 months after plaintiff moved to Nevada — for
26 reasons that have never been specified, but are otherwise apparent, the FTB began an audit of
27 the 1991 Return. In or about July of 1993, as part of its audit, the FTB began to investigate
28

1 plaintiff by making or causing to be made numerous and continuous contacts directed at
2 Nevada. Initially, the FTB sent requests to Nevada government agencies for information
3 concerning plaintiff — a paper foray that continued for the next several years.

4 12. In or about January of 1995, FTB auditors began planning a trip to Las Vegas,
5 the purpose of which was to enhance and expand the scope of their investigation of plaintiff. In
6 March of 1995, the FTB and defendants commenced a “hands on” investigation of plaintiff that
7 included unannounced confrontations and questioning about private details of plaintiff’s life.
8 These intrusive activities were directed at numerous residents of Nevada, including plaintiff’s
9 current and former neighbors, employees of businesses and stores frequented by plaintiff, and
10 alas, even his trash collector!

11 13. Both prior and subsequent to the intrusive, “hands on” investigations described in
12 paragraph 12, above, the FTB propounded to numerous Nevada business and professional
13 entities and individual residents of Nevada “quasi-subpoenas” entitled “Demand to Furnish
14 Information” which cited the FTB’s authority under California law to issue subpoenas and
15 demanded that the recipients thereof produce the requested information concerning plaintiff.
16 Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission
17 from a Nevada court or any Nevada government agency to send such “quasi-subpoenas” into
18 Nevada where, induced by the authoritative appearance of the inquisitions, many Nevada
19 residents and business entities did respond with answers and information concerning plaintiff.

20 14. Subsequent to the documentary and “hands on” forays into Nevada by the FTB
21 and defendants, the FTB also sent correspondence, rather than “quasi-subpoenas,” to Nevada
22 Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and
23 agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is
24 further informed and believes, and therefore alleges, that the FTB intentionally sent
25 unauthorized “quasi-subpoenas” (i.e., “Demand to Furnish Information”) to private individuals
26 and businesses in a successful attempt to coerce their cooperation through deception and the
27 pretense of an authoritative demand, while on the other hand, sending respectful letter requests
28 for information to Nevada governmental agencies and officials who undoubtedly would have

ORIGINAL
ORIGINAL



In the Supreme Court of the State of Nevada

FILED

MAR 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

INDICATE FULL CAPTION:

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant(s),

vs.

GILBERT P. HYATT,

Respondent(s).

GILBERT P. HYATT,

Cross-Appellant(s),

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Cross-Respondent(s).

No. 53264

DOCKETING STATEMENT
CIVIL APPEALS

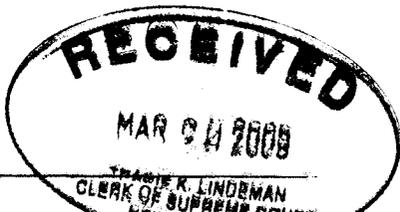
GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to attach documents as requested in this statement, completely fill out the statement, or to fail to file it in a timely manner, will constitute grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See *Moran v. Bonneville Square Assocs.*, 117 Nev. 525, 25 P.3d 898 (2001); *KDI Sylvan Pools v. Workman*, 107 Nev. 340, 810 P.2d 1217 (1991). Please use tab dividers to separate any attached documents.



1. Judicial District 8th Judicial Department X County Clark
Judge Jessie Walsh District Ct. Docket No. A 382999

2. Attorney filing this docket statement:

Attorney Mark A. Hutchinson/Michael K. Wall Telephone (702) 385-2500
Firm Hutchinson & Steffen
Address Peccole Professional Park
10080 West Alta Drive, Suite 200
Client(s) Las Vegas, NV 89145

If this is a joint statement completed on behalf of multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondent(s):

Attorney Pat Lundvall, Carla Higginbotham Telephone (775) 788-2000
Firm McDonald Carano Wilson LLP
Address 100 West Liberty Street, 10th Floor
Reno, NV 89501
Client(s) Franchise Tax Board of the State of California

Attorney Robert Eisenberg Telephone (775)-786-6868
Firm Lemons, Grundy & Eisenberg
Address 6005 Plumas Street, Suite 300
Reno, NV 89509
Client(s) Franchise Tax Board of the State of California

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief |
| <input checked="" type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Grant/Denial of injunction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Grant/Denial of declaratory relief |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Review of agency determination |
| <input type="checkbox"/> Dismissal | <input type="checkbox"/> Divorce decree: |
| <input type="checkbox"/> Lack of jurisdiction | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Failure to state a claim | <input type="checkbox"/> Other disposition (specify)..... |
| <input type="checkbox"/> Failure to prosecute | |
| <input type="checkbox"/> Other (specify)..... | |

5. Does this appeal raise issues concerning any of the following: No

- | | |
|--|--|
| <input type="checkbox"/> Child custody | <input type="checkbox"/> Termination of parental rights |
| <input type="checkbox"/> Venue | <input type="checkbox"/> Grant/denial of injunction or TRO |
| <input type="checkbox"/> Adoption | <input type="checkbox"/> Juvenile matters |

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

1. *Franchise Tax Board of the State of California v. Eight Judicial District Court and Gilbert P. Hyatt, Real Party in Interest.* [Docket No. 35549]
2. *Franchise Tax Board of the State of California v. Eighth Judicial District Court and Gilbert P. Hyatt, Real Party in Interest.* [Docket No. 36390]
3. *Gilbert P. Hyatt v. Eighth Judicial District Court and Franchise Tax Board of the state of California, Real Party in Interest.* [Docket No. 47141]

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

1. *Franchise Tax Board of the State of California v. Gilbert P. Hyatt and Eighth Judicial District Court of the State of Nevada*, 538 U.S. 488, 123 S. Ct. 1683 (2003). Case No. 02-42 in the Supreme Court of the United States
Date of Disposition: April 23, 2003

8. **Nature of the action.** Briefly describe the nature of the action, including a list of the causes of action pleaded, and the result below:

See Exhibit No. 1

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal:

See Exhibit No. 2

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:

NONE

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A Yes..... No.....

If not, explain.....

12. **Other issues.** Does this appeal involve any of the following issues? **NO**

- Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))
- An issue arising under the United States and/or Nevada Constitutions
- A substantial issue of first-impression
- An issue of public policy
- An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- A ballot question

If so, explain.....

13. **Trial.** If this action proceeded to trial, how many days did the trial last? 75 Days

Was it a bench or jury trial? Jury

14. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. If so, which Justice? **No.** Justice Nancy Siatta voluntarily recused herself

from this appeal. [See Court's February 19, 2009 notice]

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from 3/14/06, 9/8/08, 2/3/09. Attach a copy. If more than one judgment or order is appealed from, attach copies of each judgment or order from which an appeal is taken.

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:
See Exhibit 3. (The above-referenced orders and judgment are attached as Exhibits 4, 5 and 6 respectively)

16. Date written notice of entry of judgment or order served 8, respectively 9/8/08 and 2/5/09 (Exhibits 7 and 8). Attach a copy, including proof of service, for each order or judgment appealed from.

(a) Was service by delivery Exh. 7 (hand delivered) or by mail Exh. 8 (mailed on 2/5/09) (specify).

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59),

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

NRCP 50(b)	<input checked="" type="checkbox"/>	Date served	<u>9/22/08</u>	By delivery	<input checked="" type="checkbox"/>	or by mail	Date of filing	<u>9/22/08</u>
NRCP 52(b)		Date served		By delivery		or by mail	Date of filing	
NRCP 59	<input checked="" type="checkbox"/>	Date served	<u>9/22/08</u>	By delivery	<input checked="" type="checkbox"/>	or by mail	Date of filing	<u>9/22/08</u>

Attach copies of all post-trial tolling motions. (Exhibit 9 hereto)

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration do not toll the time for filing a notice of appeal.

(b) Date of entry of written order resolving tolling motion 2/3/09 (Exhibit 6 hereto). Attach a copy.

(c) Date written notice of entry of order resolving motion served 2/5/09 (Exhibit 6 hereto). Attach a copy, including proof of service.

(i) Was service by delivery _____ or by mail 2/5/09 (specify).

18. Date notice of appeal was filed 3/4/09.

(a) If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal:

Franchise Tax Board of California filed a Notice of a Appeal on or about 03/9/09

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), NRS 155.190, or other _____

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

NRAP 3A(b)(1) NRS 155.190 (specify subsection) _____
NRAP 3A(b)(2) NRS 38.205 (specify subsection) _____
NRAP 3A(b)(3) NRS 703.376 _____
Other (specify) _____

Explain how each authority provides a basis for appeal from the judgment or order:

In an appeal from the final judgment, this Court may review any interlocutory ruling of the district court that was not immediately appealable but contributed to the final judgment.

21. List all parties involved in the action in the district court:

Franchise Tax Board of the State of California -- Defendant

Gilbert P. Hyatt -- Plaintiff

(a) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the trial court's disposition of each claim, and how each claim was resolved (i.e., order, judgment, stipulation), and the date of disposition of each claim. Attach a copy of each disposition.

See Exhibit No. 10

23. Attach copies of the last-filed version of all complaints, counterclaims, and/or cross-claims filed in the district court.

Exhibit 11 hereto

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action below:

Yes No

25. If you answered "No" to the immediately previous question, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b):

Yes No If "Yes," attach a copy of the certification or order, including any notice of entry and proof of service.

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment:

Yes No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Gilbert P. Hyatt

Name of appellant

March 19, 2009

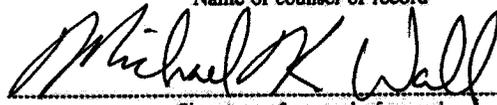
Date

Clark County, Nevada

State and county where signed

Michael K. Wall

Name of counsel of record



Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the 19 day of March, 2009, I served a copy of this completed docketing statement upon all counsel of record:

By personally serving it upon him/her; or

By mailing it by first class mail with sufficient postage prepaid to the following address(es):

James A. Bradshaw
Patricia Lundvall
MC DONALD CARANO WILSON, LLP
100 West Libert Street, 10th Fl.
Reno, NV 89501

Robert L. Eisenberg
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Suite 300
Reno, NV 89509

Jeffrey Silvestri
MC DONALD CARANO WILSON, LLP.
2300 West Sahara Avenue, Suite 300
Las Vegas, NV 89102

Dated this 19 day of March, 2009.


Signature

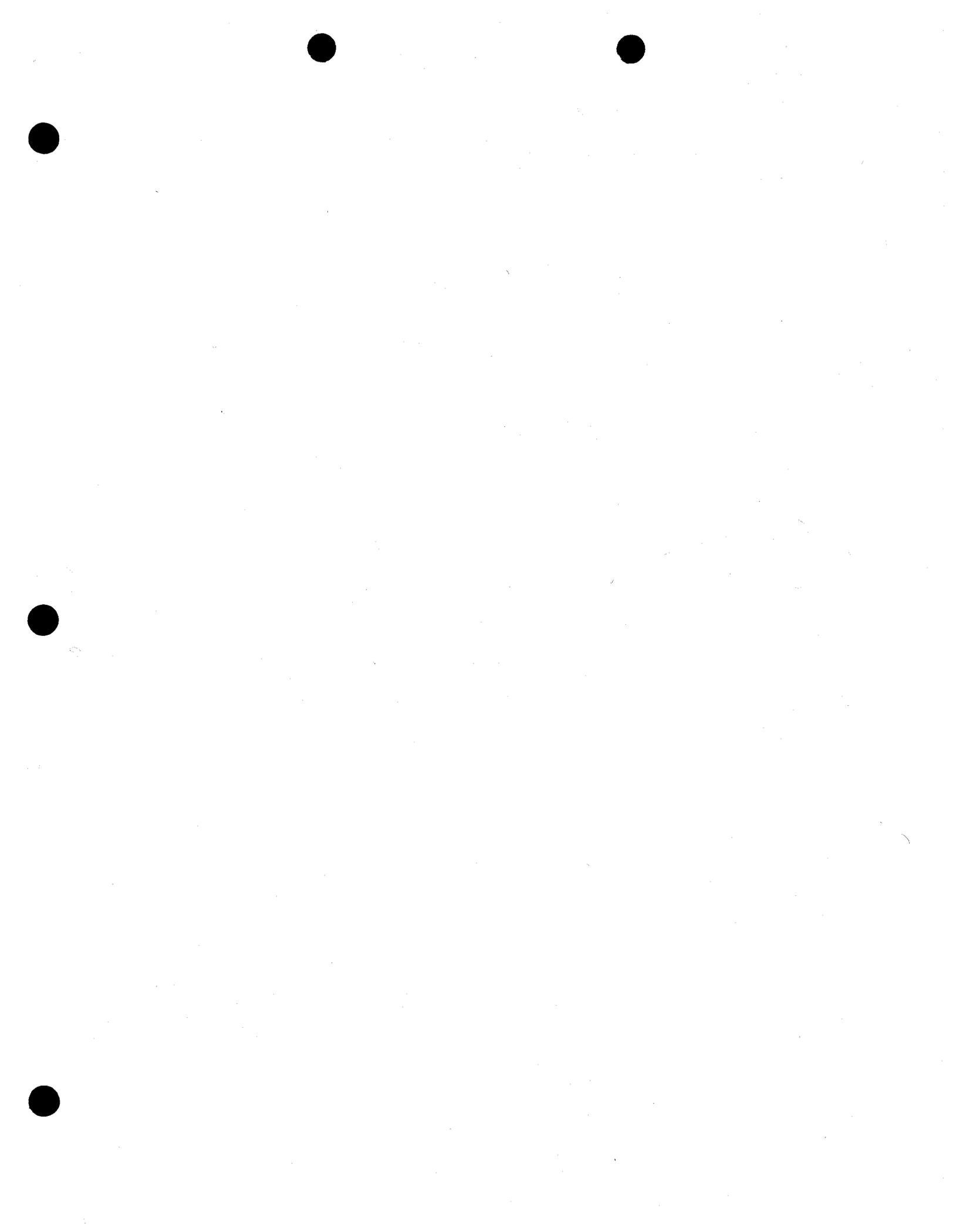


Exhibit 1

No. 8:

Plaintiff Gilbert P. Hyatt brought this tort action against Defendant Franchise Tax Board of the State of California (the "FTB"). The claims tried to a jury between April and August of 2008 consisted of:

- (1) Invasion of Privacy based on Intrusion Upon Seclusion;
- (2) Invasion of Privacy based upon Publicity of Private Facts;
- (3) Invasion of Privacy based on False Light;
- (4) Abuse of Process;
- (5) Intentional Infliction of Emotional Distress;
- (6) Intentional Misrepresentation (fraud) based on bad faith governmental conduct; and
- (7) Breach of Confidential Relationship.

The claims were based on the bad faith actions of the FTB during the course of auditing and investigating Hyatt commencing in 1993 and continuing through 2007. In sum, Hyatt asserted, and the jury agreed, that the FTB conducted a bad faith audit in which it sought to extort a settlement from Hyatt for taxes and penalties despite having no good faith belief that Hyatt owed any taxes to the State of California. In so doing, the FTB also disclosed confidential and private information concerning Hyatt that the FTB had agreed to keep confidential, knowingly published false information about Hyatt, cast Hyatt in a false light, and engaged in an abuse of process by using its authority as a government agency to attempt to coerce disclosure of information that it had no legal right to compel from Nevada residents, businesses and organizations.

On August 6, 2008, the jury returned a verdict in favor of Hyatt on all claims. The jury awarded Hyatt total compensatory damages of \$138.1 million. The jury then determined that the FTB's conduct warranted punitive damages. On August 14, 2008, the jury awarded Hyatt \$250 million in punitive damages.

On September 8, 2008, the District Court entered judgment in favor of Hyatt and against the FTB. Post-trial motions were then filed by the FTB including motions for a new trial or remittitur. On January 29, 2009, the District Court denied the FTB's motions in their entirety.

Hyatt's appeal in this matter, however, does not stem from the final judgment. Hyatt seeks to uphold and enforce the final judgment. Hyatt's appeal seeks relief in addition to what was awarded in the judgment. Specifically, Hyatt appeals the District Court's order of March 14, 2006, granting the FTB's motion for partial summary judgment on Hyatt's claim for economic damages. Hyatt seeks an order from this Court reversing the District Court's grant of the FTB's motion for partial summary judgment re economic damages. As part of this, Hyatt seeks a

remand to the District Court for the limited purpose of trying the issues of whether the FTB's misconduct caused Hyatt to suffer economic damages, and if so, the amount of those damages. In all other respects, Hyatt seeks to uphold and enforce the final judgment in this action.



Exhibit 2

No. 9

Did the District Court err as a matter of law when it dismissed Hyatt's claim for economic damages on the basis that causation of economic damages cannot be established solely by circumstantial evidence?

Hyatt asserts that the District Court erred as a matter of law when it dismissed from the case Hyatt's claim for economic damages because it was supported by only circumstantial evidence. The Court ruled that the claim could not be sustained without some direct evidence supporting Hyatt's assertion that the FTB's misconduct caused economic damage to his patent licensing business. The District Court's ruling was contrary to law. Causation of damages, here economic damages, can be proven entirely with circumstantial evidence. The District Court should have submitted to the jury the question of whether the FTB's misconduct caused Hyatt to suffer economic damages to his patent licensing business. Hyatt seeks reversal of this ruling by the District Court and remand to the District Court for a trial limited to the issue of whether the FTB's intentionally tortious conduct caused Hyatt to incur economic damages, and if so, the amount of those damages.



Exhibit 3

No. 15

Hyatt appeals only from the 1/23/06 partial summary judgment order dismissing his claims for economic damages. A judgment was entered in this case on 9/8/08 in favor of Hyatt on each of his intentional tort claims, and he was awarded other, non-economic damages on those claims. The time for Hyatt to file his appeal ran from notice of entry on 2/5/09 of the order denying the FTB's post-trial motions.



1 NEO
2 THOMAS R. C. WILSON, ESQ.
3 Nevada State Bar # 1568
4 JAMES W. BRADSHAW, ESQ.
5 Nevada State Bar # 1638
6 JEFFREY A. SILVESTRI, ESQ.
7 Nevada State Bar # 5779
8 McDONALD CARANO WILSON LLP
9 100 West Liberty Street, Tenth Floor
10 P.O. Box 2670
11 (775) 788-2000
12 Attorneys for Defendant Franchise Tax Board

8 DISTRICT COURT
9 FOR CLARK COUNTY, NEVADA

10 GILBERT P. HYATT,
11
12 Plaintiff,
13
14 v.
15 FRANCHISE TAX BOARD OF THE
16 STATE OF CALIFORNIA; and DOES 1-
17 100, inclusive,
18 Defendant.

Case No.: A 382999
Dept. No.: X

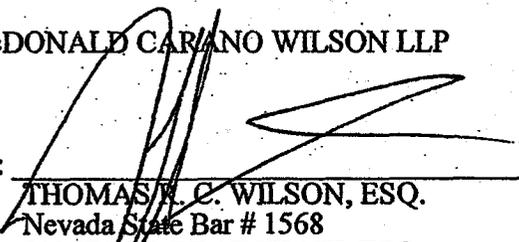
**NOTICE OF ENTRY OF ORDER
GRANTING PARTIAL SUMMARY
JUDGMENT RE: HYATT'S ECONOMIC
DAMAGE CLAIMS**

***FILED UNDER SEAL BY ORDER OF THE
DISCOVERY COMMISSIONER DATED
FEBRUARY 22, 1999***

18 PLEASE TAKE NOTICE that an Order Granting Partial Summary Judgment Re: Hyatt's
19 Economic Damage Claims was entered in the above-entitled matter on the 14th day of March, 2006,
20 a copy of which is attached hereto.

21 DATED this 14th day of March, 2006.

22 McDONALD CARANO WILSON LLP

23
24 By: 
25 THOMAS R. C. WILSON, ESQ.
26 Nevada State Bar # 1568
27 JAMES W. BRADSHAW, ESQ.
28 Nevada State Bar # 1638
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Attorneys for Defendant Franchise Tax Board

McDONALD CARANO WILSON
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PHONE (702) 873-1100 • FAX (702) 873-9966

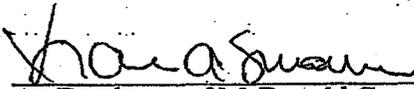
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and on this 14th day of March, 2006, I caused a true and correct copy of the foregoing Notice of Entry of Order Granting Partial Summary Judgment Re: Hyatt's Economic Damage Claims to be served by via facsimile and U.S. Mail to the following:

Peter C. Bernhard, Esq.
Bullivant Houser Bailey PC
3980 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89109

Mark A. Hutchison, Esq.
Hutchison & Steffen
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Donald Kula, Esq.
Bingham McCutchen LLP
355 South Grand Avenue, Suite 4400
Los Angeles, California 90071-3106


An Employee of McDonald Carano Wilson LLP

 **MCDONALD-CARANO-WILSON**
2300 WEST SAHARA AVENUE • NO. 10, SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
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1 **ORDR**
THOMAS R. C. WILSON, ESQ.
2 Nevada State Bar # 1568
JAMES W. BRADSHAW, ESQ.
3 Nevada State Bar # 1638
JEFFREY A. SILVESTRI, ESQ.
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6 Reno, Nevada 89505-2670
Telephone No. (775) 788-2000
7 Attorneys for Defendant Franchise Tax Board

FILED

MAR 14 11 51 AM '06

Shirley S. Ruggiana
CLERK

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 * * * *

11 GILBERT P. HYATT,
12 Plaintiff,

Case No. : A 382999
Dept. No. : X
Docket No. : R

13 vs.

14 FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA, and DOES 1-
15 100, inclusive

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT RE: HYATT'S
ECONOMIC DAMAGE CLAIMS**

16 Defendants.

*Filed Under Seal By Order of the Discovery
Commissioner Dated February 22, 1999*

Hearing Date: January 23, 2006
Hearing Time: 1:30 pm
Dept. X:

19
20 Defendant California Franchise Tax Board's Motion for Partial Summary Judgment Re: Hyatt's
21 Economic Damage Claims having come before the Court on the 23rd day of January 2006, the
22 Defendant being represented by Pat Lundvall and James W. Bradshaw, and the Plaintiff being present
23 and represented by Mark Hutchison, Peter Bernhard and Donald Kula, and the Court having considered
24 the Defendant's motion, the Plaintiff's opposition, the Defendant's reply, supplemental authorities and
25 second supplemental authorities, as well as the oral arguments of counsel, and GOOD CAUSE
26 APPEARING,

27 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant California
28 Franchise Tax Board's Motion for Partial Summary Judgment Re: Hyatt's Economic Damage Claims

McDONALD-CARANO-WILSON
2300 WEST SAHARA AVENUE • NO. 10, SUITE 1000 • LAS VEGAS, NEVADA 89102-4334
PHONE (702) 873-1100 • FAX (702) 873-9966

1 is GRANTED because Plaintiff failed to come forward with admissible evidence to demonstrate that
2 Defendant's actions were a cause in fact of Plaintiff's alleged economic damages.

3 Dated this 8th day of March, 2006.

4
5 Jessie Walsh
6 DISTRICT COURT JUDGE

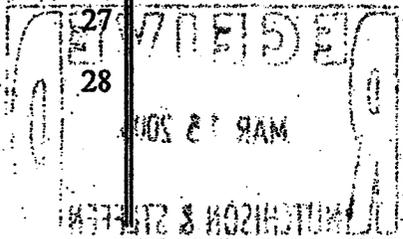
7 Submitted this 6th day of March, 2006 by:

8
9 McDONALD CARANO WILSON LLP

10
11 By [Signature]
12 THOMAS R. C. WILSON, ESQ.
13 Nevada State Bar # 1568
14 JAMES W. BRADSHAW, ESQ.
15 Nevada State Bar # 1638
16 JEFFREY A. SILVESTRI, ESQ.
17 Nevada Bar # 5779
18 McDONALD CARANO WILSON LLP
19 100 West Liberty Street, Tenth Floor
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21 Reno, Nevada 89505-2670
22 (775) 788-2000

23
24 Attorneys for Defendant Franchise Tax Board
25 of the State of California
26

27
28
MCDONALD-CARANO-WILSON
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1 **NEOJ**
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2 Hutchison & Steffen
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4 (702) 385-2500

5 Peter C. Bernhard (734)
Bullivant Houser Bailey PC
6 3883 Howard Hughes Pkwy., Ste. 550
Las Vegas, NV 89169
7 Telephone: (702) 669-3600

8 *Attorneys for Plaintiff Gilbert P. Hyatt*

FILED
SEP. 8 3 54 PM '08

Edna J. Fusi
CLERK OF THE COURT

FUS

DISTRICT COURT
CLARK COUNTY, NEVADA

BullivantHouser|Bailey PC
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Las Vegas, NV 89169
Telephone: (702) 669-3600
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12 GILBERT P. HYATT,
13
14 Plaintiffs,
15
16 v.
17 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA, and DOES 1-100 inclusive,
18
19 Defendants.

Case No.: A382999
Dept. No.: X

NOTICE OF ENTRY OF JUDGMENT

Date of Hearing: N/A
Time of Hearing: N/A

(filed under seal by order of the Discovery
Commissioner dated February 22, 1999)

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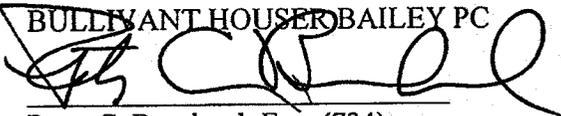
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TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

PLEASE TAKE NOTICE that a Judgment was entered in the above-entitled matter, on the 8th day of September, 2008, a copy of which is attached hereto as Exhibit "A".

DATED this 8 day of September, 2008.

HUTCHISON & STEFFEN, LTD.
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~~BULLIVANT HOUSER BAILEY PC~~


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JGJV

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11 Telephone: (702) 669-3600
12 Attorneys for Plaintiff Gilbert P. Hyatt

FILED

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CLERK OF THE COURT

8
9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 GILBERT P. HYATT,

12 Plaintiff,

13 v.

14 FRANCHISE TAX BOARD OF THE STATE
15 OF CALIFORNIA,

16 Defendant.

Case No.: A382999

Dept. No.: X

JUDGMENT

Date of Hearing: N/A

Time of Hearing: N/A

(filed under seal by order of the Discovery
Commissioner dated February 22, 1999)

17
18
19
20 This matter came on for trial before the Court and a jury, beginning on April 14, 2008,
21 and concluding with the verdicts of the jury on August 6, 2008 (liability for and amount of
22 compensatory damages), on August 12, 2008 (liability for punitive damages), and on August 14,
23 2008 (amount of punitive damages), the Honorable Jessie Walsh, District Judge, presiding.
24 Plaintiff Gilbert P. Hyatt appeared with his counsel Mark A. Hutchison, Esq. of Hutchison &
25 Steffen, LLC, Peter C. Bernhard, Esq. of Bullivant Houser Bailey, PC, and Donald J. Kula Esq.
26 of Perkins Coie. Defendant Franchise Tax Board of the State of California appeared with its
27
28

1 representative and its counsel, Pat Lundvall Esq., and James Bradshaw Esq., of McDonald
2 Carano Wilson, LLP.

3 Testimony was taken under oath, and evidence was offered, introduced and admitted.
4 Counsel argued the merits of their clients' cases, the issues have been duly tried, and the jury
5 duly rendered its verdict. The jury rendered a verdict in favor of Plaintiff Gilbert P. Hyatt and
6 against Franchise Tax Board on all causes of action presented to the jury, including Plaintiff's
7 second cause of action for invasion of privacy intrusion upon seclusion, third cause of action for
8 invasion of privacy publicity of private facts, fourth cause of action for invasion of privacy false
9 light, fifth cause of action for intentional infliction of emotional distress, sixth cause of action
10 for abuse of process, seventh cause of action for fraud and eighth cause of action for breach of
11 confidential relationship. This Court previously dismissed Plaintiff's first cause of action for
12 declaratory relief, and that cause of action was not presented to the jury.
13

14 The jury returned its verdict awarding Plaintiff Gilbert P. Hyatt compensatory damages
15 of EIGHTY-FIVE MILLION DOLLARS AND NO CENTS (\$85,000,000.00) for emotional
16 distress; compensatory damages of FIFTY-TWO MILLION DOLLARS AND NO CENTS
17 (\$52,000,000.00) for invasion of privacy; attorneys' fees as special damages of ONE MILLION,
18 EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS
19 (\$1,085,281.56); and punitive damages of TWO HUNDRED FIFTY MILLION DOLLARS
20 AND NO CENTS (\$250,000,000.00).
21

22 At the conclusion of the verdict reached on August 6, 2008, the jury was polled, and
23 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that
24 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to liability and the
25 amount of compensatory damages awarded on each of Plaintiff's seven claims. At the
26 conclusion of the verdict on punitive damages on August 12, 2008, the jury was polled, and
27
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1 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that
2 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to whether the conduct
3 of the Defendant warranted punitive damages. At the conclusion of the verdict on punitive
4 damages on August 14, 2008, the jury was polled, and seven jurors responded that the verdict as
5 read by the Clerk of the Court was the verdict of that juror, with one juror responding in the
6 negative, resulting in a verdict of seven (7) in favor and one (1) opposed, as to the amount of
7 punitive damages awarded against Defendant.

8
9 NOW, THEREFORE, based on the foregoing, judgment upon the jury verdicts is entered
10 in favor of Plaintiff Gilbert P. Hyatt and against Defendant Franchise Tax Board, as follows:

11 IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is
12 awarded compensatory damages in the amount of EIGHTY-FIVE MILLION DOLLARS AND
13 NO CENTS (\$85,000,000.00) for emotional distress, plus prejudgment interest at the rate of
14 seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of
15 \$63,184,110.12 from the date the Complaint was served (calculated through August 27, 2008,
16 and accruing from August 27, 2008 at the rate of \$ 16,301.37 per day until the date of this
17 Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from
18 the date of this Judgment until satisfied in full;

19
20 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
21 Hyatt is awarded compensatory damages in the amount of FIFTY-TWO MILLION DOLLARS
22 AND NO CENTS (\$52,000,000.00) for invasion of privacy, plus prejudgment interest at the rate
23 of seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of
24 \$38,653,797.60 from the date the Complaint was served (calculated through August 27, 2008,
25 and accruing from August 27, 2008 at the rate of \$ 9,972.60 per day until the date of this
26
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1 Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from
2 the date of this Judgment until satisfied in full;

3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
4 Hyatt is awarded attorneys' fees as special damages in the amount of ONE MILLION,
5 EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS
6 (\$1,085,281.56), plus prejudgment interest at the rate of seven percent per annum (7%) (the
7 applicable prejudgment statutory rate) in the amount of \$497,824.53 from the dates the special
8 damages were incurred (calculated through August 27, 2008, and accruing from August 27,
9 2008 at the rate of \$ 208.14 per day until the date of this Judgment), with interest continuing to
10 accrue at the applicable postjudgment statutory rate from the date of this Judgment until
11 satisfied in full; and

12 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
13 Hyatt is awarded punitive damages in the amount of TWO HUNDRED FIFTY MILLION
14 DOLLARS AND NO/100 CENTS (\$250,000,000.00), with interest to accrue at the applicable
15 postjudgment statutory rate from the date of this Judgment until satisfied in full.
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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.

Hyatt is awarded costs in the amount of to be determined with interest to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full.

DATED this 5 day of ~~August~~ ^{Sept}, 2008.

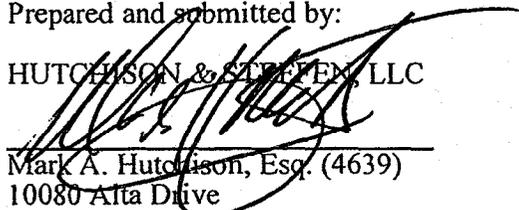
JESSIE WALSH

DISTRICT JUDGE

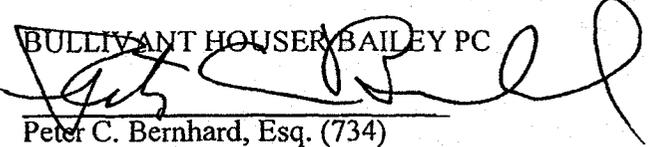
Prepared and submitted by:

Prepared and submitted by:

HUTCHINSON & STEFFEN, LLC


Mark A. Hutchinson, Esq. (4639)
10080 Alta Drive
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Las Vegas, Nevada 89145

BULLIVANT HOUSER BAILEY PC


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Attorneys for Plaintiff Gilbert P. Hyatt

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 9 Telephone: (702) 669-3600

8 *Attorneys for Plaintiff Gilbert P. Hyatt*

9
 10 DISTRICT COURT
 11 CLARK COUNTY, NEVADA

12 GILBERT P. HYATT,
 13
 14 Plaintiffs,
 15
 16 v.
 17 FRANCHISE TAX BOARD OF THE STATE
 18 OF CALIFORNIA, and DOES 1-100 inclusive,
 19
 20 Defendants.

Case No.: A382999

Dept. No.: X

NOTICE OF ENTRY OF ORDER

Date of Hearing: N/A

Time of Hearing: N/A

**(filed under seal by order of the Discovery
Commissioner dated February 22, 1999)**

FILED

2009 FEB -5 P 2:18

E. J. ...
CLERK OF THE COURT

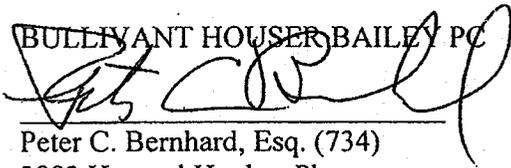
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TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

PLEASE TAKE NOTICE that an Order was entered in the above-entitled matter, on the 3rd day of February, 2009, a copy of which is attached hereto as Exhibit "A".

DATED this 5 day of February, 2009.

HUTCHISON & STEFFEN, LTD.
Mark A. Hutchison, Esq. (4639)
10080 Alta Drive
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~~BULLIVANT HOUSER BAILEY PC~~


Peter C. Bernhard, Esq. (734)
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(702) 669-3600

Attorneys for Plaintiff Gilbert P. Hyatt

CERTIFICATE OF MAILING

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I hereby certify that I am an employee of Bullivant Houser Bailey PC, and that on the

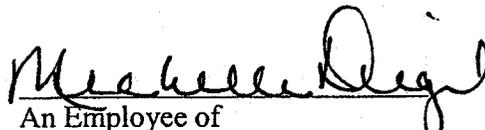
5th day of February, 2009, I caused to be deposited, postage fully prepaid, at Las Vegas,

Nevada, a true copy if the foregoing, **NOTICE OF ENTRY OF ORDER** to all parties below.

James A. Bradshaw, Esq.
Pat Lundvall, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street
10th Floor
Reno NV 89501

Jeffrey Silvestri, Esq.
McDonald Carano Wilson LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102

Robert L. Eisenberg
Lemons, Grundy & Eisenberg
6005 Plumas Street, Suite 300
Reno, NV 89509


An Employee of
Bullivant Houser Bailey PC

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ORIGINAL

1 **ORDER**

2 Mark A. Hutchison (4639)
3 Hutchison & Steffen
4 10080 Alta Drive, Suite 200
5 Las Vegas, NV 89145
6 (702) 385-2500

7 Peter C. Bernhard (734)
8 Bullivant Houser Bailey PC
9 3883 Howard Hughes Pkwy., Ste. 550
10 Las Vegas, NV 89169
11 Telephone: (702) 669-3600

12 *Attorneys for Plaintiff Gilbert P. Hyatt*

FILED

2009 FEB -3 A 9 50

[Signature]
CLERK OF THE COURT

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 **GILBERT P. HYATT,**

16 **Plaintiffs,**

17 **v.**

18 **FRANCHISE TAX BOARD OF THE STATE**
19 **OF CALIFORNIA, and DOES 1-100 inclusive,**

20 **Defendants.**

Case No.: A382999

Dept. No.: X

ORDER DENYING:

**(1) FTB'S MOTION FOR JUDGMENT AS A
MATTER OF LAW OR ALTERNATIVELY,
AND CONDITIONALLY MOTION FOR
NEW TRIAL PURSUANT TO NRCP 50;
AND**

**(2) FTB'S ALTERNATIVE MOTION FOR
NEW TRIAL AND OTHER RELIEF
PURSUANT TO NRCP 59**

DATE: January 29, 2009

TIME: 9:00 a.m.

**(filed under seal by order of the Discovery
Commissioner dated February 22, 1999)**

21 This matter having come before the Court on January 29, 2009, for hearing the
22 Defendant California Franchise Tax Board's ("FTB") Motion for Judgment as a Matter of Law
23 or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's
24 Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59, Plaintiff having been

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1 represented by Mark A. Hutchison, Peter C. Bernhard, Donald J. Kula, and Michael K. Wall and
2 the Franchise Tax Board having been represented by Pat Lundvall, Carla Higginbotham, and
3 Robert L. Eisenberg; the Court having considered the papers submitted by counsel as well as
4 oral arguments at the hearing; and GOOD CAUSE APPEARING;

5
6 IT IS HEREBY ORDERED that the FTB's Motion for Judgment as a Matter of
7 Law or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's
8 Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59 be and the same
9 hereby are denied.

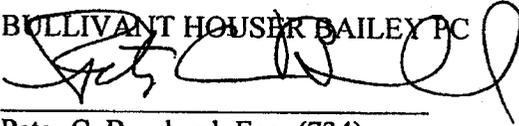
10 DATED this 2 day of Feb, 2009

JESSIE WALSH

DISTRICT JUDGE

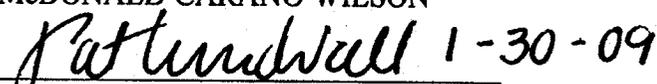
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14 **SUBMITTED BY:**

15 **BULLIVANT HOUSER BAILEY PC**

16 
17 Peter C. Bernhard, Esq. (734)
18 3883 Howard Hughes Pkwy.
19 Suite 550
20 Las Vegas, Nevada 89109
21 (702) 669-3600
22 *Attorneys for Plaintiff Gilbert P. Hyatt*

23 **APPROVED AS TO FORM BY:**

24 **McDONALD CARANO WILSON**

25 
26 Pat Lundvall (3761)
27 100 West Liberty Street, 10th Floor
28 Reno, NV 89505-2670
Attorneys for Defendant Franchise Tax Board of the State of California



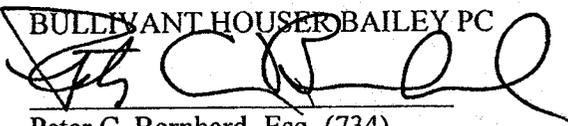
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TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

PLEASE TAKE NOTICE that a Judgment was entered in the above-entitled matter, on the 8th day of September, 2008, a copy of which is attached hereto as Exhibit "A".

DATED this 8 day of September, 2008.

HUTCHISON & STEFFEN, LTD.
Mark A. Hutchison, Esq. (4639)
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RECEIPT OF COPY

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RECEIPT OF COPY of NOTICE OF ENTRY OF JUDGMENT is hereby

acknowledged this 8th of September, 2008.

McDonald Carano Wilson LLP

By: Kim L. Christman
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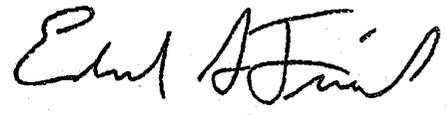
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JGJV
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Telephone: (702) 669-3600
Attorneys for Plaintiff Gilbert P. Hyatt

FILED

SEP 8 10 21 AM '08



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT,
Plaintiff,
v.
FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,
Defendant.

Case No.: A382999
Dept. No.: X

JUDGMENT

Date of Hearing: N/A
Time of Hearing: N/A

(filed under seal by order of the Discovery
Commissioner dated February 22, 1999)

This matter came on for trial before the Court and a jury, beginning on April 14, 2008, and concluding with the verdicts of the jury on August 6, 2008 (liability for and amount of compensatory damages), on August 12, 2008 (liability for punitive damages), and on August 14, 2008 (amount of punitive damages), the Honorable Jessie Walsh, District Judge, presiding. Plaintiff Gilbert P. Hyatt appeared with his counsel Mark A. Hutchison, Esq. of Hutchison & Steffen, LLC, Peter C. Bernhard, Esq. of Bullivant Houser Bailey, PC, and Donald J. Kula Esq. of Perkins Coie. Defendant Franchise Tax Board of the State of California appeared with its

1 representative and its counsel, Pat Lundvall Esq., and James Bradshaw Esq., of McDonald
2 Carano Wilson, LLP.

3 Testimony was taken under oath, and evidence was offered, introduced and admitted.
4 Counsel argued the merits of their clients' cases, the issues have been duly tried, and the jury
5 duly rendered its verdict. The jury rendered a verdict in favor of Plaintiff Gilbert P. Hyatt and
6 against Franchise Tax Board on all causes of action presented to the jury, including Plaintiff's
7 second cause of action for invasion of privacy intrusion upon seclusion, third cause of action for
8 invasion of privacy publicity of private facts, fourth cause of action for invasion of privacy false
9 light, fifth cause of action for intentional infliction of emotional distress, sixth cause of action
10 for abuse of process, seventh cause of action for fraud and eighth cause of action for breach of
11 confidential relationship. This Court previously dismissed Plaintiff's first cause of action for
12 declaratory relief, and that cause of action was not presented to the jury.

13
14 The jury returned its verdict awarding Plaintiff Gilbert P. Hyatt compensatory damages
15 of EIGHTY-FIVE MILLION DOLLARS AND NO CENTS (\$85,000,000.00) for emotional
16 distress; compensatory damages of FIFTY-TWO MILLION DOLLARS AND NO CENTS
17 (\$52,000,000.00) for invasion of privacy; attorneys' fees as special damages of ONE MILLION,
18 EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS
19 (\$1,085,281.56); and punitive damages of TWO HUNDRED FIFTY MILLION DOLLARS
20 AND NO CENTS (\$250,000,000.00).
21

22 At the conclusion of the verdict reached on August 6, 2008, the jury was polled, and
23 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that
24 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to liability and the
25 amount of compensatory damages awarded on each of Plaintiff's seven claims. At the
26 conclusion of the verdict on punitive damages on August 12, 2008, the jury was polled, and
27
28

1 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that
2 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to whether the conduct
3 of the Defendant warranted punitive damages. At the conclusion of the verdict on punitive
4 damages on August 14, 2008, the jury was polled, and seven jurors responded that the verdict as
5 read by the Clerk of the Court was the verdict of that juror, with one juror responding in the
6 negative, resulting in a verdict of seven (7) in favor and one (1) opposed, as to the amount of
7 punitive damages awarded against Defendant.
8

9 NOW, THEREFORE, based on the foregoing, judgment upon the jury verdicts is entered
10 in favor of Plaintiff Gilbert P. Hyatt and against Defendant Franchise Tax Board, as follows:

11 IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is
12 awarded compensatory damages in the amount of EIGHTY-FIVE MILLION DOLLARS AND
13 NO CENTS (\$85,000,000.00) for emotional distress, plus prejudgment interest at the rate of
14 seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of
15 \$63,184,110.12 from the date the Complaint was served (calculated through August 27, 2008,
16 and accruing from August 27, 2008 at the rate of \$ 16,301.37 per day until the date of this
17 Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from
18 the date of this Judgment until satisfied in full;
19

20 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
21 Hyatt is awarded compensatory damages in the amount of FIFTY-TWO MILLION DOLLARS
22 AND NO CENTS (\$52,000,000.00) for invasion of privacy, plus prejudgment interest at the rate
23 of seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of
24 \$38,653,797.60 from the date the Complaint was served (calculated through August 27, 2008,
25 and accruing from August 27, 2008 at the rate of \$ 9,972.60 per day until the date of this
26
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1 Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from
2 the date of this Judgment until satisfied in full;

3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
4 Hyatt is awarded attorneys' fees as special damages in the amount of ONE MILLION,
5 EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS
6 (\$1,085,281.56), plus prejudgment interest at the rate of seven percent per annum (7%) (the
7 applicable prejudgment statutory rate) in the amount of \$497,824.53 from the dates the special
8 damages were incurred (calculated through August 27, 2008, and accruing from August 27,
9 2008 at the rate of \$ 208.14 per day until the date of this Judgment), with interest continuing to
10 accrue at the applicable postjudgment statutory rate from the date of this Judgment until
11 satisfied in full; and

12
13 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
14 Hyatt is awarded punitive damages in the amount of TWO HUNDRED FIFTY MILLION
15 DOLLARS AND NO/100 CENTS (\$250,000,000.00), with interest to accrue at the applicable
16 postjudgment statutory rate from the date of this Judgment until satisfied in full.
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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.

Hyatt is awarded costs in the amount of to be determined with interest to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full.

DATED this 5 day of ~~August~~ ^{Sept}, 2008.

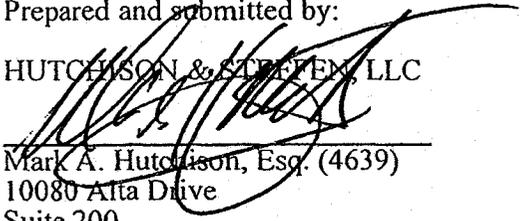
JESSIE WALSH

DISTRICT JUDGE

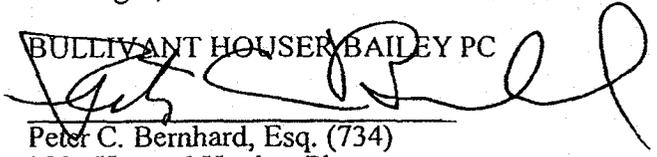
Prepared and submitted by:

Prepared and submitted by:

HUTCHINSON & STEFFEN, LLC


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8 *Attorneys for Plaintiff Gilbert P. Hyatt*

FILED

2009 FEB -5 P 2: 18

E. J. ...
CLERK OF THE COURT

9
10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 GILBERT P. HYATT,
13
14 Plaintiffs,
15 v.
16 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA, and DOES 1-100 inclusive,
17
18 Defendants.

Case No.: A382999

Dept. No.: X

NOTICE OF ENTRY OF ORDER

Date of Hearing: N/A

Time of Hearing: N/A

**(filed under seal by order of the Discovery
Commissioner dated February 22, 1999)**

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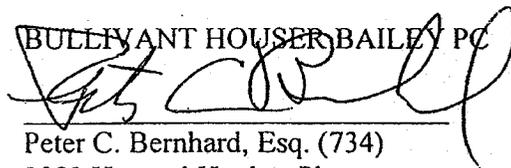
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TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

PLEASE TAKE NOTICE that an Order was entered in the above-entitled matter, on the 3rd day of February, 2009, a copy of which is attached hereto as Exhibit "A".

DATED this 5 day of February, 2009.

HUTCHISON & STEFFEN, LTD.
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CERTIFICATE OF MAILING

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I hereby certify that I am an employee of Bullivant Houser Bailey PC, and that on the

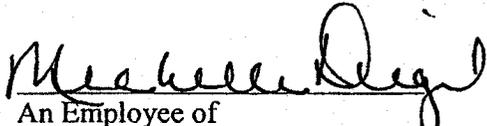
5th day of February, 2009, I caused to be deposited, postage fully prepaid, at Las Vegas,

Nevada, a true copy if the foregoing, NOTICE OF ENTRY OF ORDER to all parties below.

James A. Bradshaw, Esq.
Pat Lundvall, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street
10th Floor
Reno NV 89501

Jeffrey Silvestri, Esq.
McDonald Carano Wilson LLP
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Las Vegas, Nevada 89102

Robert L. Eisenberg
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ORIGINAL

1 **ORDER**
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12 *Attorneys for Plaintiff Gilbert P. Hyatt*

FILED

2009 FEB -3 A 9 50

[Signature]
CLERK OF THE COURT

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 GILBERT P. HYATT,
16
17 Plaintiffs,
18
19 v.
20 FRANCHISE TAX BOARD OF THE STATE
21 OF CALIFORNIA, and DOES 1-100 inclusive,
22
23 Defendants.

Case No.: A382999

Dept. No.: X

ORDER DENYING:

(1) FTB'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY, AND CONDITIONALLY MOTION FOR NEW TRIAL PURSUANT TO NRCP 50; AND

(2) FTB'S ALTERNATIVE MOTION FOR NEW TRIAL AND OTHER RELIEF PURSUANT TO NRCP 59

DATE: January 29, 2009

TIME: 9:00 a.m.

(filed under seal by order of the Discovery Commissioner dated February 22, 1999)

24 This matter having come before the Court on January 29, 2009, for hearing the
25 Defendant California Franchise Tax Board's ("FTB") Motion for Judgment as a Matter of Law
26 or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's
27 Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59, Plaintiff having been
28

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1 represented by Mark A. Hutchison, Peter C. Bernhard, Donald J. Kula, and Michael K. Wall and
2 the Franchise Tax Board having been represented by Pat Lundvall, Carla Higginbotham, and
3 Robert L. Eisenberg; the Court having considered the papers submitted by counsel as well as
4 oral arguments at the hearing; and GOOD CAUSE APPEARING;

5
6 IT IS HEREBY ORDERED that the FTB's Motion for Judgment as a Matter of
7 Law or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's
8 Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59 be and the same
9 hereby are denied.

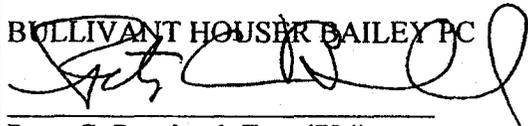
10 DATED this 2 day of Feb, 2009

JESSIE WALSH

DISTRICT JUDGE

11
12
13
14 **SUBMITTED BY:**

15 BULLIVANT HOUSER BAILEY PC

16 
17 Peter C. Bernhard, Esq. (734)
18 3883 Howard Hughes Pkwy.
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20 Las Vegas, Nevada 89109
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22 Attorneys for Plaintiff Gilbert P. Hyatt

23 **APPROVED AS TO FORM BY:**

24 McDONALD CARANO WILSON
25  1-30-09
26 Pat Lundvall (3761)
27 100 West Liberty Street, 10th Floor
28 Reno, NV 89505-2670
Attorneys for Defendant Franchise Tax Board of the State of California



FILED

2008 SEP 22 P 4 57

Edmund J. ...

CLERK OF THE COURT

1 0031
2 JAMES W. BRADSHAW (NSBN 1638)
3 PAT LUNDVALL (NSBN 3761)
4 CARLA HIGGINBOTHAM (NSBN 8495)
5 McDONALD CARANO WILSON LLP
6 2300 West Sahara Avenue, Suite 1000
7 Las Vegas, Nevada 89102
8 Telephone No. (702) 873-4100

Attorneys for Defendant Franchise Tax Board of the State of California

DISTRICT COURT

CLARK COUNTY, NEVADA

10 GILBERT P. HYATT,
11 Plaintiff,

12 vs.

13 FRANCHISE TAX BOARD OF THE STATE
14 OF CALIFORNIA,
15 Defendants

Case No. : A 382999
Dept. No. : X

**FTB'S MOTION FOR JUDGMENT AS A
MATTER OF LAW OR ALTERNA-
TIVELY AND CONDITIONALLY
MOTION FOR NEW TRIAL PURSUANT
TO NRCP 50;**

AND

**FTB'S ALTERNATIVE MOTION FOR
NEW TRIAL AND OTHER RELIEF
PURSUANT TO NRCP 59.**

**Hearing Date: November 19, 2008
Hearing Time: 9:00 a.m.**

MCDONALD-CARANO-WILSON
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

JW23

21 Defendant Franchise Tax Board of the State of California ("FTB") respectfully renews its
22 request, pursuant to NRCP 50(b), for the entry of judgment as a matter of law in favor of FTB and
23 against plaintiff Gilbert P. Hyatt. When the evidence is viewed in the light most favorable to
24 Hyatt there is no legally sufficient basis upon which a reasonable jury could have found in favor
25 of Hyatt on any of his claims. Alternatively and conditionally, FTB moves for an order granting a
26 new trial pursuant to NRCP 50(c).

27 In the alternative, FTB moves for a new trial and other relief pursuant to NRCP 59. The
28 trial of this matter was riddled with errors and irregular proceedings that, particularly, erased the

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1 clear jurisdictional lines previously drawn by the Nevada and United States Supreme Courts
2 thereby depriving FTB of substantial rights, including its right to due process, a fair trial, Full
3 Faith and Credit protection under the Nevada and United States Constitutions, and its proper
4 rights to a bifurcated proceeding under NRS 42.005. Moreover, the jury manifestly disregarded
5 the Court's instructions and the jury's compensatory and punitive damage awards were excessive
6 and influenced by passion and prejudice. The judgment based upon those awards, must either be
7 vacated and/or reduced in accord with earlier directives from the Nevada and United States
8 Supreme Courts, and the award of prejudgment interest must be stricken, along with the award of
9 punitive damages and attorneys fees as special damages. In addition, the Court committed
10 prejudicial errors in its rulings on evidence, argument and jury instructions, all the while
11 permitting Hyatt's counsel to engage in misconduct that unfairly prejudiced FTB. For all of these
12 reasons, FTB is entitled to a new trial or such other relief as allowed under NRCP 59 and
13 described herein.

14 This motion is based upon the points and authorities that follow, the trial record, the
15 exhibits attached hereto, all other pleadings and papers on file with the Court, and such other
16 matters as the Court may wish to consider.

17 Dated this 22 day of September, 2008.

18 McDONALD CARANO WILSON LLP

19
20
21 By:


22 JAMES W. BRADSHAW (NSBN 1638)
23 PAT LUNDVALL (NSBN 3761)
24 CARLA HIGGINBOTHAM (NSBN 8495)
25 2300 West Sahara Avenue, Suite 1000
26 Las Vegas, NV 89102
27 Telephone No. (702) 873-4100

28 Attorneys for Defendant
Franchise Tax Board of the State of California

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN.

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **FTB'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY AND CONDITIONALLY MOTION FOR NEW TRIAL PURSUANT TO NRCP 50; AND FTB'S ALTERNATIVE MOTION FOR NEW TRIAL AND OTHER RELIEF PURSUANT TO NRCP 59** on for hearing before the above-entitled Court on the 19th day of November, 2008, at the hour of 9:00 a.m. in Department X or as soon thereafter as counsel may be heard.

McDONALD CARANO WILSON LLP

By:



JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
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Attorneys for Defendant
Franchise Tax Board of the State of California


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POINTS AND AUTHORITIES

I. OVERVIEW OF FTB'S REQUESTS

When the Court began trial of this matter, it was not writing upon a fresh slate. The Court had received extensive guidance from prior district judges assigned to this case, from the Nevada Supreme Court, and from the United States Supreme Court. This Court was duty bound to follow and protect that law of this case. In addition, the Court itself made many pretrial rulings. By the time trial was over, however, each and every pretrial ruling favoring FTB had been eviscerated.

For example: As detailed herein, strict jurisdictional lines were drawn by the Nevada and United States Supreme Courts placing FTB's discretionary analysis, which weighed and evaluated the evidence collected by FTB, of Hyatt's residency, tax, penalty and interest liability outside the scope of the jury's review. Notwithstanding those strict limits, at trial the Court allowed Hyatt's witnesses to testify extensively in criticism of FTB's discretionary analysis. This is best illustrated by the summary offered by Malcolm Jumelet, Hyatt's lead expert:

Q. Mr. Jumelet, you certainly have some criticism about a few of the ways in which the information was gathered including disclosures of social security numbers and use for demands of information, right?

A. Yes, I do.

Q. But on the whole are your opinions critical of the way in which the information was gathered or the way in which the information was analyzed and weighed?

A. It was the way the information was analyzed and weighed.

While the Court allowed many of Hyatt's witnesses to criticize FTB's discretionary analysis, the Court prohibited FTB from offering opinion testimony of its own, and prohibited FTB from offering all evidence supporting its discretionary analysis, or any of the law guiding those who made FTB's discretionary analysis. In addition the Court allowed Hyatt to contend that FTB made a \$24 million error concerning Hyatt's 1992 tax liability, and had erred by considering a

1 sourcing theory for Hyatt's 1991 and 1992 tax liability. And finally, the Court became Hyatt's
2 advocate on these issues, instructing the jury:

3 There is nothing in the correct Jury Instruction 24 that would prevent you during
4 your deliberations from considering the appropriateness or correctness of the
5 analysis conducted by FTB employees in reaching its residency determination and
6 conclusions. There is nothing in Jury Instruction 24 that would prevent Malcolm
7 Jumelet from rendering an opinion about the appropriateness or correctness of the
8 analysis conducted by FTB employees in reaching its residency determinations
9 and conclusions.

10 As further example: As detailed herein, under the guidance from both the Nevada and the
11 United States Supreme Court, this Court was obligated to treat FTB, a California government
12 agency, the same as a Nevada government agency which are not subject to liability for
13 discretionary acts or punitive damages. Notwithstanding that clear guidance, at trial the Court
14 allowed the jury to second guess FTB's discretionary acts and impose excessive punitive damages
15 against FTB. Contributing to the excessiveness of the punitive damages, the Court even defied its
16 own Bifurcation Order refusing to make a prima facie entitlement determination and allowing
17 Hyatt to argue for punitive damages suggesting that the "net worth" of the entire State of
18 California, not simply FTB, could be considered in imposing punitive damages.

19 As further example: As detailed herein, under the guidance from both the Nevada and the
20 United States Supreme Court, any contentions of negligence or negligent acts were inadmissible
21 since Hyatt's negligence claim had been dismissed. Notwithstanding, at trial the Court permitted
22 Hyatt's witnesses to opine that FTB's conduct in auditing and reviewing its residency
23 determinations "fell below reasonable standards of care."

24 As further example: As detailed herein, pretrial the Court expressly found that Federal law
25 and California law were not at issue in this case. Notwithstanding, at trial the Court, at Hyatt's
26 request, took judicial notice of many Federal and California laws allowing Hyatt to display them
27 as exhibits to the jury and to introduce expert opinion testimony based upon those exhibits
28 suggesting that FTB violated Nevada's common law by allegedly violating those Federal and
California laws.

As further example: As detailed herein, based upon Hyatt's refusal to participate properly
in discovery, the Court ordered that Hyatt could only recover "garden variety" emotional distress,

1 not "severe" emotional distress. Notwithstanding, at trial, in part because FTB was
2 impermissively foreclosed from offering alternative causes of Hyatt's emotional distress or from
3 discovering those causes through a review of Hyatt's medical records, the jury awarded an
4 unprecedented award of \$85,000,000 in emotional distress damages.

5 As further example: As detailed herein, Hyatt's first cause of action was dismissed which
6 sought declaratory relief, specifically, "for judgment declaring that the FTB has no lawful basis
7 for continuing to investigate plaintiff in Nevada concerning his residency between September 26,
8 1991 through December 31, 1991 or any subsequent period down to the present, and declaring
9 that the FTB had no right or authority to propound or otherwise issue a 'Demand to Furnish
10 Information' or other quasi-subpoenas to Nevada residents and businesses seeking information
11 concerning plaintiff." In addition, the Court made 3 pre-trial rulings expressly finding that (1)
12 FTB was statutorily authorized to conduct audit investigations both within and outside the State
13 of California; (2) Nevada does not prohibit an out of state agency from conducting an
14 investigation inside the State of Nevada; and (3) FTB was not required to obtain authorization or
15 permission from a Nevada governmental agency or court before proceeding with its investigation
16 of Mr. Hyatt in Nevada. Notwithstanding, at trial Hyatt was permitted to introduce evidence and
17 argument to the contrary to support his multiple invasion of privacy claims, his abuse of process
18 claim, his fraud claim and his breach of confidential relationship claim.

19 As further example: As detailed herein, the Court imposed the Nevada Protective Order
20 upon FTB prohibiting FTB from sharing evidence gathered in this litigation with its protest
21 hearing officer who was examining Hyatt's residency in California. FTB religiously followed the
22 Nevada Protective Order which consumed considerable time. Notwithstanding, at trial, Hyatt was
23 permitted to argue that FTB's compliance with a Court order was evidence of bad faith.

24 As further example: As detailed herein, the Court found that FTB negligently allowed its
25 EMC disaster recovery back up tapes to be written over and imposed the negligence "adverse
26 interference" jury instruction against FTB. Notwithstanding, at trial the Court allowed Hyatt to
27 rewrite that rebuttable jury instruction into an irrebuttable jury instruction and impermissively
28 shifted the burden of disproving key elements of Hyatt's claims to FTB.

1 This list of errors, and others, continues. These errors contributed to the unprecedented,
2 excessive awards given by the runaway jury in this case. This Court has the duty and opportunity
3 to fix these errors before they are examined by the appellate courts. FTB urges the Court to do so
4 as detailed herein.

5 II. STANDARDS OF REVIEW

6 A. Renewed Motion for Judgment as a Matter of Law

7 The 2005 amendments to the Nevada Rules of Civil Procedure amended NRCP 50 to
8 follow federal practice. See Nevada Drafter's Note, NRCP 50, Amendment effective January 1,
9 2005. Based on the great similarities between the Nevada and federal rules, the Nevada Supreme
10 Court regularly relies on federal decisions interpreting the Federal Rules of Civil Procedure when
11 interpreting the Nevada rules. See Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d 1252, 1253
12 (2005); Executive Management, Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872,
13 876 (2002).

14 A party may move for a judgment as a matter of law either at the close of the non-moving
15 party's case or at the close of trial. NRCP 50(a). FTB moved for judgment as a matter of law at
16 the close of Hyatt's case in chief.

17 If unsuccessful, the party may renew its request for judgment as a matter of law within 10
18 days of service of written notice of entry of judgment and join it with an alternative and
19 conditional request for new trial under to NRCP 50. NRCP 50 (b).¹ Service of written notice of
20 entry of judgment was made on FTB on September 8, 2008. As such, this request for post-trial
21 judgment as a matter of law is timely.

22 "Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of
23 law if the opposing party 'has failed to prove a sufficient issue for the jury,' so that his claim
24 cannot be maintained under the controlling law. The standard for granting a motion for judgment

25
26 ¹ A motion for directed verdict has been redesignated as a motion for judgment as a matter
27 of law, and a motion for JNOV has been replaced by renewal of the motion for judgment as a
28 matter of law. Vollrath Co. v. Sammi Corp., 9 F.3d 1455, 1458 n.2 (9th Cir. 1993).

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1 as a matter of law is based on the standard for granting a motion for involuntary dismissal under
2 former NRCP 41(b). In applying that standard and deciding whether to grant a motion for
3 judgment as a matter of law, the district court must view the evidence and all inferences in favor
4 of the nonmoving party. To defeat the motion, the nonmoving party must have presented
5 sufficient evidence such that the jury could grant relief to that party.” Nelson v. Heer, 123 Nev.
6 26, 163 P.3d 420, 424 (2007).

7 “If the district court does not grant a motion for judgment as a matter of law that is made
8 at the close of all the evidence, then NRCP 50(b) provides that a ‘movant may renew its request
9 for judgment as a matter of law by filing a motion no later than 10 days after service of written
10 notice of entry of judgment and may alternatively request a new trial or join a motion for new
11 trial under Rule 59.’ A renewed motion for judgment as a matter of law under NRCP 50(b) is
12 subject to the same standard as a motion filed at the close of evidence under NRCP 50(a).” Id.

13 When appropriate, judgment as a matter of law may also be granted on purely legal issues
14 unrelated to the sufficiency of the evidence produced at trial. K&T Enterprises., Inc. v. Zurich
15 Ins. Co., 97 F.3d 171, 175 (6th Cir. 1996). This Court’s denial of a summary judgment motion on
16 a legal or factual question is not a bar to the subsequent grant of judgment as a matter of law. 6
17 James Wm. Moore et al., Moore’s Federal Practice and Procedure § 50.06[5][b](3d ed. 1997);
18 Williams v. County of Westchester, 171 F.3d 98, 102 (2d Cir. 1999). Why? Because a motion
19 for summary judgment is an interlocutory order which is always “subject to modification before
20 the entry of a final judgment adjudicating claims to which they pertain.” Id.

21 Finally, “if the trial court does not grant a Rule 50(a) motion for judgment as a matter of
22 law, the court is deemed to have submitted the action to the jury subject to later determination of
23 the legal issues raised by the motion.” Moore et al., supra, § 50.33. “Thus, a trial court’s
24 decision not to grant a pre-verdict motion for judgment automatically operates to reserve a
25 decision on the legal issues raised in the pre-verdict motion until after the jury reaches or fails to
26 reach a verdict.” Id.; Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 321 (1967)
27 (“Under Rule 50(b), if a party moves for a directed verdict at the close of evidence and the trial
28

1 judge elects to send the case to the jury, the judge is “deemed” to have reserved decision on the
2 motion.”).²

3 B. Alternative and Conditional Motion for New Trial Pursuant to NRCP 50(c)

4 In relevant part, Nevada Rule of Civil Procedure 50(b) allows FTB to:

5 renew its request for judgment as a matter of law by filing a motion no later than
6 10 days after service of written notice of entry of judgment and may alternatively
7 request a new trial or join a new trial under Rule 59.

8 This provision, like most under Nevada Rule of Civil Procedure 50, models and expressly adopts
9 the 1991 amendments to the corresponding Federal Rule of Civil Procedure 50. See Nevada
10 Drafter’s Notes, NRCP 50, Amendment Effective Jan. 1, 2005.

11 The common practice under NRCP 50 allows FTB to file this single motion to seek relief
12 in the alternative pursuant to both NRCP 50 and NRCP 59. 9B Charles Alan Wright & Arthur B.
13 Miller, Federal Practice & Procedure Civ. 2d § 2539 (West 1978-2008). By its alternative
14 motion, FTB asks the Court to grant a new trial if it is later found to have been wrong in its
15 contention that FTB was entitled to judgment as a matter of law. Id.

16 FTB, as the movant, is entitled to ask for a new trial on any of the grounds that would
17 support a motion for new trial under NRCP 59 and this branch of the motion is subject to the
18 same standards that would apply if FTB had filed a separate, independent motion for new trial.
19 Id. It also goes without saying that this Court needs to rule on FTB’s request for relief pursuant
20 to NRCP 59 even if the renewed NRCP 50(b) motion is denied.

21 However, even if this Court grants FTB’s renewed NRCP 50(b) motion for judgment as a
22 matter of law, it is obligated to “also rule on the motion for new trial, if any, by determining
23 whether it should be granted if the judgment is thereafter vacated or reversed.” NRCP 50(c)(1).

24 ² The policy here is that it is often safer practice for trial courts to refrain from granting a
25 pre-verdict motion for judgment as a matter of law until after the jury reaches a verdict. That
26 way, if it is necessary to grant the motion, the jury verdict can stand (assuming no other error
27 exists with regard to that verdict), if the appellate court finds that the motion for judgment as a
28 matter of law was erroneously granted. 6 James Wm. Moore et al., Moore’s Federal Practice and
Procedure § 50.33 (3d ed. 1997)

1 In any such conditional ruling, the Court “shall specify the grounds for granting or denying the
2 motion for new trial.” Id. This prevents the needless protraction of piecemeal litigation should
3 an appellate court disagree with this Court’s award of relief to FTB. Wright & Miller, Federal
4 Practice & Procedure, Civ. 2d § 2539 (West 1978-2008). Instead of further motion practice on
5 remand for NRCP 59 relief that could again be appealed to the appellate court before any
6 possibility of a new trial, the appellate court can address these issues at one time. See
7 Montgomery Ward & Co. v. Ward, 311 U.S. 243, 251-55 (1940) for a description of the wasteful
8 process absent compliance with that is now NRCP 50(c)(1). All of the parties should want to
9 avoid a needless appeal that can be prevented by this Court issuing the required rulings on the
10 relief sought by FTB.

11 C. Motion to Alter or Amend Judgment Pursuant to NRCP 59(e)

12 “A motion to alter or amend the judgment shall be filed no later than 10 days after service
13 of written notice of entry of the judgment.” NRCP 59(e). Courts have broad discretion in
14 determining whether to grant or deny such a motion. 7 James Wm. Moore et al., Moore’s Federal
15 Practice and Procedure § 59.30[4] (3d ed. 1997); In re Prince, 85 F.3d 314, 324 (7th Cir. 1996);
16 McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983).

17 Amendment or alteration of a judgment is appropriate under NRCP 59(e) if “the district
18 court committed clear error or made an initial decision that was manifestly unjust.” Zimmerman
19 v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001); see also Moore et al., supra, §
20 59.30[5][a][iv] (court may grant a motion to alter or amend a judgment to correct clear legal
21 error, regardless of whether it is an error of law or fact). An example of clear legal error or a
22 manifestly unjust result is where a court has overlooked controlling decisions that might
23 reasonably be expected to alter the conclusion reached by the court; a court can grant a motion to
24 alter or amend on that basis. Shrader v. Cox Transp., 70 F.3d 255, 257 (2d Cir. 1995); Motor
25 Vehicle Mfrs. Ass’n v. New York State Dep’t of Env’tl. Conservation, 831 F. Supp 57, 60
26 (N.D.N.Y. 1993). While courts must be mindful of the strong interest in the finality, “where the
27 motion is timely and properly supported, the court must carefully consider whether any manifest
28

1 errors were made in the first instance. If so, the court should take a second look at its original
2 decision and reconsider it in light of the matters raised by the movant.” Id. at 60-61.

3 D. Motion for New Trial Pursuant to NRCP 59(a)

4 The Court can grant a new trial if the litigant’s rights have been “materially affected” by
5 any of the seven factors set forth in NRCP 59(a). Edwards Indust. v. DTE/BTE, Inc., 112 Nev.
6 1025, 1035, 923 P.2d 569, 575-76 (1996). A litigant’s rights are considered substantially and
7 materially affected if the complaining party may “reasonably contend and assert that, were it not
8 for the error complained of, a different result might reasonably have been expected. . . .” See
9 Peterson v. Pittsburg Silver Peak Gold Mining Co., 37 Nev. 117, 140 P. 510, 527 (1914). In
10 other words, if a party demonstrates prejudice to any substantial right, a motion for a new trial
11 may be granted. Edmonds v. Perry, 62 Nev. 41, 69, 140 P.2d 566, 579 (1943). The decision to
12 grant a new trial rests within the discretion of the district court. Nelson v. Heer, 123 Nev. 26,
13 163 P.3d 420, 424-25 (2007).

14 III. RELEVANT PROCEDURAL HISTORY

15 To appreciate certain errors FTB assigns to various of the Court’s actions, it is necessary
16 to remind the Court of the procedural history and the prior decisions made in this litigation which
17 expressly defined the jurisdictional lines that were to be followed as this case progressed through
18 trial. In sum, one of the primary errors that FTB ascribes to the Court concerns the fact that the
19 clear jurisdictional lines previously drawn by both the Nevada and United States Supreme Court
20 were erased, and the jury was invited to re-analyze discretionary decisions which were to be
21 reserved exclusively to FTB. The Court allowed this re-analysis by permitting Hyatt to offer the
22 testimony of many witnesses concerning FTB’s discretionary decisions contending that FTB
23 committed fraud or bad faith by not “fairly and impartially” analyzing the evidence FTB
24 gathered, and through the Court’s curative instruction concerning Jury Instruction 24. Any re-
25 analysis of FTB’s decisions was to be exclusively made through the administrative appeal process
26 in California, not through Nevada’s civil jury system. In other words, contrary to Hyatt’s
27 repeated argument made during opening statement, throughout trial, and during closing argument,
28

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1 a Nevada jury is not a “check” on California legislative and executive branch discretionary
2 functions.

3 A. Judge Saitta’s Order Dismissing Issues Related to Hyatt’s Residency, Tax
4 Assessments, and Penalty Determinations

5 Shortly after this case was filed, FTB filed a Motion for Judgment on the Pleadings
6 seeking the dismissal of this action in its entirety. See FTB Mot. for J. on Pleadings filed
7 2/10/1999. FTB took particular aim at Hyatt’s First Cause of Action for Declaratory Relief. Id. at
8 5-11; 12-15. With this claim, Hyatt sought a declaration from the Nevada courts that: (1) he
9 became a resident of Nevada on September 26, 1991; and (2) FTB’s use of its “Demands to
10 Furnish Information” and its investigation in the State of Nevada were unlawful. See Sec. Am.
11 Compl. filed 4/18/2006, ¶¶ 28-32 (Hyatt’s re-pled Declaratory Relief Claim). FTB argued
12 extensively that Nevada could not assert subject matter jurisdiction over this claim for a variety of
13 reasons. FTB’s Mot. for J. on Pleadings filed 2/10/1999 at 5-11; 12-15.

14 In response to this motion, Judge Saitta dismissed Hyatt’s First Cause of Action for
15 Declaratory Relief. Ct.’s Order dated April 16, 1999 at 2. Judge Saitta, relying on two Nevada
16 Supreme Court decisions, specifically noted that “Courts should not adjudicate when an
17 administrative decision is still pending and where a statute exists to provide an administrative
18 remedy.” Hr’g Tr., Apr. 7, 1999, 53:4-10; 55:9-16; see Public Service Comm’n of Nevada v.
19 Eighth Judicial Dist. Court, 107 Nev. 680, 818 P.2d 396 (1991); Resnick v. Nevada Gaming
20 Comm., 104 Nev. 60, 752 P.2d 229 (1988). Judge Saitta determined that the issues presented by
21 Hyatt’s Declaratory Relief claim were the subject of the ongoing administrative proceedings in
22 California between Hyatt and FTB and would necessarily be decided in that forum. Based on this
23 ruling, Judge Saitta expressly deferred jurisdiction to the State of California and its administrative
24 agency on all issues related to Hyatt’s residency. Hr’g Tr., Apr. 7, 1999, 55-56. This
25 determination significantly narrowed the scope of this litigation to exclude those issues relating
26 not only Hyatt’s claims concerning his residency, but also to any determinations flowing from
27 that ultimate conclusion, i.e., the correctness of FTB’s proposed tax assessments, FTB’s
28 determination to impose fraud penalties, the accrual of interest, amnesty penalties, etc. With this

1 Order, Judge Saitta made perfectly clear that issues under review in the California administrative
2 proceedings would not and could not be adjudicated in this case. Id.

3 In the years that followed, Judge Saitta's Order was repeatedly reaffirmed. For example,
4 the Court specifically stated:

5 THE COURT: Thank you, counsel. There are several issues that I want to address
6 because I want to make as clear a record as I can. First of all, defendant is correct
7 in stating that this Court should neither decide the residency status of the plaintiff
8 nor the tax liabilities that plaintiff may or may not have.

8 Hr'g Tr., Jan. 23, 2006, 87:13-88:1. On several subsequent occasions, the Court frequently made
9 similar statements and comments on the record. See Hr'g Tr., Jan. 24, 2008, 60:10-19 (residency
10 and tax issues not a part of this case); Hr'g Tr., Feb. 21, 2008, 36:6-17 ("The parties are precluded
11 from debating Mr. Hyatt's residency and the validity of the assessments against him. That's my
12 understanding of what this case is about."); Hr'g Tr., Mar. 6, 2008, 11:11-12 (Hyatt's residency
13 and validity of tax assessments are not issue in the case); Id. at 22:3-8 (tax assessments not at
14 issue in this case.)

15 Thus, the first jurisdictional line was drawn in this case – the Nevada court would not and
16 could not assert jurisdiction over FTB's conclusions related to Hyatt's residency, the tax
17 assessments, or FTB's determination to assess fraud penalties. Ct.'s Order dated April 16, 1999
18 at 2; Hr'g Tr. Apr. 7, 1999 53:4-10; 55:9-16; 56. Moreover, the Nevada court would not assert
19 jurisdiction over the issues and matters that were under review in the ongoing administrative tax
20 proceedings between Hyatt and FTB in California. Id.

21 B. The Decisions of the Nevada and United States Supreme Courts Dismissing
22 Claims Related to FTB's Discretionary Conduct and Alleged Negligence

23 After extensive discovery, on January 27, 2000, FTB filed a motion for summary
24 judgment, or in the alternative, a motion to dismiss pursuant to NRCP 12(h)(3). This motion
25 made two alternative arguments. First, FTB argued that summary judgment should be entered
26 because there was insufficient evidence as to one or more of the essential elements of each of
27 Hyatt's tortious claims. See FTB's Mot. for Summ. J. filed 1/27/2000 at 16-31.

28

1 Alternatively, FTB argued that the complaint should be dismissed based upon the court's
2 lack of subject matter jurisdiction. With this issue, FTB contended that the principles of Full
3 Faith and Credit, sovereign immunity, choice of laws and comity, required Nevada to apply a
4 California statute, California Government Code § 860.2, which provided FTB with complete
5 sovereign immunity for its conduct. See Cal. Gov't Code § 860.2 (West 2008). Based on this
6 statute, FTB asserted that the district court should dismiss Hyatt's complaint for a lack of subject
7 matter jurisdiction because FTB was completely immune from liability in this case. FTB's Mot.
8 for Partial Summ. J. filed 1/27/2000, at 31-39.

9 Hyatt opposed this two-fold motion as follows. First, Hyatt argued: (1) there was
10 sufficient evidence to establish genuine issues of fact to his tort claims; (2) the issue of the
11 sufficiency of the evidence had already been decided by previous court orders; and (3) at a
12 minimum, the motion should be denied to allow additional discovery. See Hyatt's Opp'n filed
13 3/22/2000 at 3, 6, 19-47, 65-66. As to the second component of FTB's motion, Hyatt argued that
14 this aspect of FTB's motion should be denied because the Court had previously addressed each of
15 FTB's "jurisdictional" arguments in prior motions. Id. at 4-5; 49-62.

16 At the hearing on this motion, Judge Saitta denied FTB's motion, without prejudice, based
17 upon her determination that additional discovery was required. See Hr'g Tr. Apr. 21, 2000 (Mot.
18 for Summ. J.), 46-51. The Court did not reference FTB's arguments regarding FTB's sovereign
19 immunity or the application of Full Faith and Credit, choice of laws, or comity to California's
20 immunity statute. Id.

21 FTB then filed a Writ of Mandamus/Prohibition with the Nevada Supreme Court. See
22 FTB's Writ of Mandamus or in the Alternative Prohibition filed 7/07/2000. FTB argued that a
23 writ of mandamus should be issued ordering the dismissal of Hyatt's case based entirely upon the
24 contention that the district court should have given full faith and credit, or at a minimum comity,
25 to California's laws. See FTB's Writ of Mandamus or in the Alternative Prohibition filed
26 7/07/2000.

1 Initially, the Nevada Supreme Court granted the writ on grounds not raised by the writ
2 petition or briefed by the parties. See Nevada Supreme Court Order dated 6/13/2001 Granting
3 Writ Petition. Based upon this ruling, Hyatt filed a "Petition for Rehearing." See Hyatt's Pet. For
4 Reh'g filed July 5, 2001. The Nevada Supreme Court granted the Petition for Rehearing and
5 reversed the earlier decision. See Hyatt v. Franchise Tax Board, 2002 Nev. LEXIS 57 (Nev.
6 April 4, 2002).

7 In rendering its decision on rehearing, the Nevada Supreme Court expressly limited itself
8 to the issues raised by the parties, i.e., whether Nevada lacked subject matter jurisdiction in this
9 case based on the application of Full Faith and Credit, sovereign immunity, choice of laws, and/or
10 comity to California Government Code § 8620.2. Id. at *2. Ultimately, the Nevada Supreme
11 Court held that the district court properly asserted subject matter jurisdiction over all of Hyatt's
12 claims, with the exception of the negligence claim. Id. at *8.

13 The Nevada Supreme Court first rejected FTB's argument that Nevada was required to
14 give Full Faith and Credit to California's statute providing FTB with complete immunity. Id. The
15 Nevada Supreme Court then considered whether the district court should have declined to assert
16 jurisdiction over this litigation based on the doctrine of comity. Id. Comity is an accommodation
17 policy under which the courts of one state voluntarily give effect to the laws of another state out
18 of deference and respect. Hyatt, 2002 Nev. LEXIS 57 at *9. In considering whether Nevada
19 should give respect to California's statute granting of immunity to FTB, the court was required to
20 determine whether granting comity to this statute would "contravene Nevada's policies and
21 interests" Id. To make this determination, the Nevada Supreme Court embarked upon a
22 comparison of the governmental immunities that would be extended to a Nevada state agency
23 under the facts of this case in contrast to the complete immunity extended to FTB under
24 California law. Id.

25 The Nevada Supreme Court first ascertained that "Nevada provides its agencies with
26 immunity for the performance of a discretionary function even if the discretion is abused." Id. at
27 *10; see also NRS. 41.032(2). The Nevada Supreme Court noted that conducting an investigation
28 was generally a "discretionary act." Id. at *10. Therefore, under Nevada law, a Nevada agency

1 could not be held liable for its discretionary acts or claims sounding in negligence, even if that
2 agency abused its discretion. Id. Conversely, Nevada law does not grant Nevada state agencies
3 immunity for intentional torts committed by an agency's employees during the course and scope
4 of employment or for discretionary acts taken in "bad faith." Id. at *10-11. On the other hand,
5 California's immunity statute provided FTB with complete immunity for all its actions – whether
6 the actions taken were discretionary or intentional. Id.; see Cal. Gov't Code § 860.2 (West 2008).
7 Based on this comparison, the Nevada Supreme Court concluded that California and Nevada each
8 provided their respective state agencies with immunity from suit for discretionary or negligent
9 actions. Id. Thus, Nevada's policies or interests would not be contravened by applying
10 California's sovereign immunity statute to the extent that statute provided FTB immunity for its
11 discretionary conduct or negligent acts. Id. In effect, the Nevada Supreme Court determined that
12 FTB should be given the same immunities, and treated in the same manner, as a similarly situated
13 Nevada agency and that a Nevada citizen should enjoy the same rights against a California
14 agency as the citizen would enjoy against a Nevada agency. Hyatt, 2002 Nev. LEXIS at *10-11.
15 Based on this analysis, the Nevada Supreme Court held that the district court erred when it failed
16 to dismiss Hyatt's negligence claim because such a claim could not be pursued against a similarly
17 situated Nevada state agency. Id.

18 FTB appealed this decision to the United States Supreme Court, which granted certiorari.
19 Franchise Tax Board v. Hyatt, 537 U.S. 946, 123 S.Ct. 409 (2002). At the oral argument, Hyatt
20 expressly argued the Nevada Supreme Court properly applied comity to this case because:

21 [A]n important principle emerging – emerging principle of comity, is [states] have
22 tended to look at their own immunity to see what kinds of suits could be brought
23 against them and to try, then, to grant to the – to the outside sovereign that same
type of immunity.

24 Exhibit 13, Hr'g Tr., Feb. 24, 2003 (Oral Argument, United States Supreme Court), 33:3-8. Based
25 on this "principle," Hyatt asserted that Nevada must treat FTB the same as it would treat a
26 Nevada state agency.

27 THE COURT: -- do I understand – your comity argument basically is – it's kind a
28 self-executing thing, because each time a state has to answer the comity question,
it asks the question, "What would I do if the tables were reversed?" And as history

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teaches us, they generally treat the other sovereign the way they would want to be treated themselves. And that's –

...

MR. FARR: That's correct, Justice Stevens. And, in fact, they have become more specific as – (inaudible) – comity, I believe, in saying we want to treat the other sovereign as we do treat ourselves, not just as we want to be treated. We are treating the other sovereign the way we treat ourselves.

Id. at 46:6-22 (emphasis added). According to Hyatt, the Nevada courts properly applied the doctrine of comity because the Nevada Supreme Court treated FTB in the same way it would treat its own state agencies under the same circumstances. Id.

The United States Supreme Court agreed, affirming the Nevada Supreme Court's Rehearing Order in its entirety. Franchise Tax Board v. Hyatt, 538 U.S. 486, 499, 123 S.Ct. 1683 (2003). The United States Supreme Court concluded that, "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." Id. at 499.

These holdings became "law of the case," and were required to be followed by this Court as the case progressed. In Nevada, "[t]he doctrine of the law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." Hsu v. County of Clark, 173 P.3d 724, 728 (Nev. 2007) (emphasis added and omitting internal citations); see e.g., Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 266, 71 P.3d 1258 (2003) (same); LoBue v. State, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976) (same). Accordingly, this Court was required to "apply the principles of comity with a healthy regard to California's sovereign status" and to "rely o[n] Nevada's own sovereign immunity from suit as a benchmark for its analysis." Franchise Tax Board, 438 U.S. at 499. In

1 short, this Court was required to treat FTB the same way it would treat a similarly situated
2 Nevada agency.³ This Court did not follow that mandate. That was error.

3 Equally important, based on his prior arguments and positions taken before the United
4 States Supreme Court, Hyatt is judicially estopped from asserting that this Court was not required
5 to treat FTB the same as a similarly situated Nevada state agency. Judicial estoppel precludes a
6 party from assuming a position in a legal proceeding that contradicts, or is inconsistent with, a
7 previously asserted position. The purpose of this doctrine is “to prohibit the deliberate shifting of
8 position to suit exigencies of each particular case that may arise concerning the subject matter in
9 controversy” and to protect the integrity of the judicial system. Sterling Builders, Inc. v.
10 Fuhrman, 80 Nev. 543, 549-550, 396 P.2d 850 (1964) (quoting 31 C.J.S. Estoppel § 121 at 649,
11 650). This doctrine “looks to the connection between the litigant and the judicial system,
12 preserving the integrity of the courts by preventing litigants from ‘playing fast and loose with the
13 courts’.” Chaffee v. Kraft General Foods, Inc., 886 F.Supp. 1164, 1168-69 (D.N.J. 1995)
14 (quoting Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3d Cir. 1992); Russell v. Rolfs, 893 F.2d
15 1033, 1037 (9th Cir. 1990). Therefore, judicial estoppel prevents Hyatt from attempting to assert
16 that FTB should not be treated the same as a similarly situated Nevada agency in this litigation.

17 Under Nevada law, there are five criteria that must be met in order for judicial estoppel to
18 apply:

- 19 (1) the same party has taken two positions;
20 (2) the positions were taken in judicial proceedings;

21 _____
22 ³ Other courts that have reviewed this decision confirm that the Nevada Supreme Court and
23 the United States Supreme Court decisions mandated that this Court treat FTB in the same
24 manner that Nevada would treat its own agencies. See Sam v. Sam, 134 P.3d 761, 768 (N.M.
25 2006) (citing to Hyatt, 539 U.S. at 493-94 and stating “Therefore, not only was it appropriate for
26 Nevada to grant California immunity, but also to only grant to California what it deemed
27 appropriate for itself.”) Also, as one of the Justices observed at the United States Supreme Court
28 argument, the Nevada Supreme Court decision essentially said: “The law we apply to tax
collectors who act in this state is the same we apply to Nevada tax collectors.” Exhibit 13, Hr’g
Tr., Feb. 24, 2003, 9:25 – 10:2.

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- 1 (3) the party was successful in asserting the first position (i.e., the tribunal
- 2 adopted the position or accepted it as true);
- 3 (4) the two positions are totally inconsistent; and
- 4 (5) the first position was not taken as a result of ignorance, fraud, or mistake.

5 Marcuse v. Del Webb Communities, Inc., 163 P.3d 462, 468-469 (2007) (internal citations and

6 quotations omitted). Here, each element of judicial estoppel is satisfied.

7 First, Hyatt is the same party who asserted, under principles of comity, that FTB must be

8 treated the same as a similarly situated Nevada agency. See Hr’g Tr., Feb. 24, 2003 (Oral

9 Argument, United States Supreme Court), 46:6-22. Based on this position, Hyatt was successful

10 in defeating FTB’s position on appeal and in convincing the United States Supreme Court to

11 affirm the decision of the Nevada Supreme Court in its entirety. Id.; see also Franchise Tax

12 Board, 538 U.S. at 499. Any attempt by Hyatt to now claim that FTB should not be treated like a

13 Nevada agency would be totally inconsistent with his prior position. Finally, Hyatt cannot claim

14 “ignorance” “fraud” or “mistake” in taking this position. Hyatt was represented by a legion of

15 accomplished, highly intelligent, and highly-paid legal counsel – including the well-known, well-

16 respected United States Supreme Court appellate practitioner who made these specific arguments.

17 These attorneys knew full well the arguments they were making and the effect of these positions.

18 Therefore, all five elements of judicial estoppel are satisfied and Hyatt cannot play “fast and

19 [the] exigencies” of this case. Sterling, 80 Nev. at 550.

20 In sum, the clear jurisdictional lines drawn by the foregoing decisions of Judge Saitta, the

21 Nevada Supreme Court, and the United States Supreme Court precluded the following issues

22 from being re-litigated in this case: (1) issues pertaining to Hyatt’s residency, the tax assessments,

23 and the imposition of fraud penalties; (2) issues pertaining to the discretionary or allegedly

24 negligent acts of FTB during the audit and/or the California Administrative Protest Process; and

25 (3) issues that were still under administrative review in California. Conversely, the only claims

26 that the district court had jurisdiction over were the intentional tort claims asserted by Hyatt.

27 Finally, as the case progressed and new issues arose, this Court is required – and continues to be

28 required – to grant FTB the same statutory governmental immunities as those available to a

1 Nevada agency, and to decline jurisdiction over those matters and issues for which a Nevada
2 agency would be entitled to assert sovereign immunity.

3 IV. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND
4 ALTERNATIVELY AND CONDITIONALLY MOTION FOR NEW TRIAL
PURSUANT TO NRCP 50(b) and (c).

5 A. Renewed Motion for Judgment as a Matter of Law

6 On June 20, 2008, at the conclusion of Hyatt's case in chief, FTB submitted its motion for
7 judgment as a matter of law pursuant to NRCP 50(a). Exhibit 1, Rough Trial Tr., June 20, 2008,
8 1-117 (hereinafter "FTB's NRCP 50(a) Motion"). The Court denied the motion. Id. at 117. FTB
9 then proceeded to present its case in chief. Hyatt did not present a rebuttal to FTB's case in chief.
10 See Rough Trial Tr., July 15, 2008, 73:52-58. As a result, the evidence presented by Hyatt to
11 support his causes of action during his case in chief remained entirely unchanged at the
12 conclusion of trial. As a result, there is no new evidence or assertions that need to be explored in
13 the renewed motion because all arguments contained in FTB's NRCP 50(a) motion apply equally
14 to the renewed NRCP 50(b).

15 Rather than unnecessarily repeat the same arguments presented in the prior motion, FTB
16 hereby renews its NRCP 50(a) motion presented at the conclusion of Hyatt's case in chief. FTB
17 renews this motion **in its entirety** by incorporating the prior motion, and the arguments contained
18 therein, by reference. Id. FTB attaches a complete copy of the transcript of FTB's NRCP 50(a)
19 Motion at Exhibit 1. Additionally, for the Court's convenience, FTB attaches copies of the
20 demonstrative aides utilized by FTB when presenting that motion as Exhibit 2, which expressly
21 provided the legal authorities and factual analysis presented by FTB at the oral hearing.⁴

22 _____
23 ⁴ This procedure is specifically permitted by Rule 50. In 2005, Nevada Rule of Civil
24 Procedure 50 was entirely revised to expressly adopt the 1991 amendments to the corresponding
25 Federal Rule of Civil Procedure 50. See Nevada Drafter's Note, NRCP 50, Amendment
26 Effective, Jan. 1, 2005. Pursuant to Rule 50, a party may renew a previously denied motion for
27 judgment as a matter of law after the entry of judgment. NRCP 50(b). According the Advisory
28 Committee Notes to the 1991 Amendments to Federal Rule of Civil Procedure 50, which were
implicitly adopted by Nevada, "the information required with the motion may be supplied by
explicit reference to materials and arguments previously supplied to the court." Fed. R. Civ. 50,
Continued...

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1 B. Alternatively and Conditionally, Motion for New Trial Pursuant to NRCP 50(c)
2 Alternatively and conditionally, based upon arguments presented in FTB's NRCP 50(a)
3 motion, and incorporated herein by reference, the Court should grant FTB a new trial. NRCP
4 50(b)(1)(B). In ruling upon a renewed motion for judgment as a matter of law, the Court may
5 adopt several alternative remedies, including ordering a new trial. NRCP 50(b)(1)(B). In this
6 instance, if the Court is not inclined to enter judgment in FTB's favor, the Court should order a
7 new trial based on the numerous errors and irregularities that occurred at the trial and detailed
8 herein. Id.

9 V. IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND JUDGMENT
10 PURSUANT TO NRCP 59⁵

11 FTB requests that this Court grant its motion to alter or amend the Judgment pursuant to
12 NRCP 59(e). Amendment or alteration of the Judgment is appropriate under NRCP 59(c) when
13 "the district court committed clear error or made an initial decision that was manifestly unjust."
14 Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001). An example of clear error or a
15 manifestly unjust decision is when a court has overlooked controlling decisions that might
16 reasonably be expected to alter the conclusion reached by the court; a court can grant a motion to
17 alter or amend on that basis. Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995); Motor

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20 1991 Advisory Committee Note. Therefore, in order to renew a motion for judgment as a matter
21 of law a party need only make explicit reference and incorporate by reference the prior motion for
22 judgment as a matter of law. Id.; see e.g., Feldman v. Philadelphia Housing Authority, 1993 WL
23 404094 at * 3 (E.D. Pa. Sept. 16, 1993) (unpublished opinion interpreting federal rule).

24 ⁵ Out of an abundance of caution, FTB also makes the same request pursuant to NRCP
25 59(a)(6) and NRCP 59(a)(7) and NRCP 50. Pursuant to NRCP 59(a)(6) and NRCP 59(a)(7), the
26 Court can grant a new trial based on "excessive damages appearing to have been given under the
27 influence of passion or prejudice," or based on "[e]rrors in law occurring at the trial and objected
28 to by the party making the motion." As set forth herein, the excessive damages or errors of law
discussed may also require a reduction of damages without affording Hyatt an option of a new
trial. Additionally, pursuant to NRCP 50, a judgment must be vacated if it is unwarranted as a
matter of law." University and Community College System of Nevada v. Farmer, 113 Nev. 90,
95, 930 P.2d 730, 734 (1997) (omitting internal citations).

1 Vehicle Mfr. Ass'n v. New York State Dep't of Env'tl. Conservation, 831 F. Supp. 57, 60
2 (N.D.N.Y. 1993).

3 With regard to the compensatory damages, the Court must apply controlling decisions
4 which require (1) this Court to treat FTB like a Nevada governmental agency; and (2) since
5 Nevada governmental agencies are immune from civil judgments above \$75,000.00 per cause of
6 action, Hyatt's compensatory damages must be reduced to a maximum of \$525,000.00. This is
7 the first time FTB is raising this issue, because it was not proper to have raised it before the
8 Judgment was entered.

9 Regarding the award of prejudgment interest, this Court must apply controlling decisions
10 that show that Hyatt is not entitled to any prejudgment interest as a matter of law. As a result, the
11 award of prejudgment interest must be vacated in its entirety. This is the first time FTB is raising
12 this issue, because it was not proper to have raised it before the award of prejudgment interest
13 was made.

14 Regarding the compensatory damage award, the amount for emotional distress and
15 invasion of privacy are without factual foundation and are excessive as a matter of law. The
16 Court must reduce them, and the compensatory award of attorneys' fees as special damages must
17 be struck as a matter of law.

18 Regarding the punitive damages award, this Court overlooked controlling decisions that
19 mandate that FTB is immune from an award of punitive damages and that the issue of punitive
20 damages was not a jury issue as this Court has previously stated. FTB has raised this issue
21 before, but believes that the Court overlooked controlling decisions directly on point that
22 materially affected earlier rulings. As such, the award of punitive damages must be vacated in its
23 entirety for this reason, or a new trial should be granted pursuant to NRCP 59(a)(b).⁶

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27 ⁶ All of FTB's requests for remittitur also entitle FTB to a new trial pursuant to NRCP
28 59(a)(b).

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A. \$75,000 Statutory Cap on Compensatory Damages

The law of the case is that this Court must grant comity to California's laws to the extent that doing so does not interfere with Nevada's interest or policies. Stated another way – and the way that Hyatt requested from the United States Supreme Court and with which that Court agreed – is that Nevada courts must treat FTB exactly as they would treat a Nevada governmental agency engaging in the same acts.

In Nevada, governmental agencies have waived their immunity from lawsuit, but on a limited basis that allows a party to recover up to \$75,000.00 in tort damages per cause of action pled. Since FTB is to be treated just like a Nevada governmental agency under the law of this case and the doctrine of judicial estoppel, the maximum compensatory damages that can be assessed against FTB are \$525,000.00. The compensatory damage award must be amended to reflect that amount.

More specifically, FTB previously asserted to the Nevada Supreme Court and the United States Supreme Court that the Nevada courts should exercise comity, apply California's law in total, and conclude that FTB was immune from lawsuit in Nevada. At Hyatt's request, however, the Nevada Supreme Court rejected FTB's arguments, and agreed to grant comity to California's laws only as long as doing so did not interfere with Nevada's policies or interests. The Nevada Supreme Court stated:

In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protection, and consider whether granting California's law comity would contravene Nevada's policies and interests.

Franchise Tax Board v. Eighth Judicial Dist. Ct., 2002 Nev. LEXIS 57, at *7 (Nev. April 4, 2002).

The Nevada Supreme Court noted that both California and Nevada had conferred immunity on their state agencies and public employees in limited situations. California granted immunity for negligent and intentional torts committed within the scope of employment while Nevada did not. Nevada granted immunity for negligent acts only, but did not grant immunity for intentional torts. Applying the rules of comity as set forth above, the Nevada Supreme Court held

1 that because Nevada law granted immunity for state employees' negligent acts, it was not against
2 Nevada's public policy to apply California's law granting immunity for FTB's negligent acts.
3 Thereafter, all of Hyatt's negligence claims were dismissed. In short, the Nevada Supreme Court
4 made clear that FTB should be treated the same as any Nevada state agency would be under the
5 same circumstances.

6 On appeal to the United States Supreme Court, Hyatt asserted in his oral argument that the
7 Nevada Supreme Court had properly resolved the comity issue, and asserted that it did so by
8 following the "emerging principal of comity" whereby the forum state court looks to the forum
9 state's immunity law to see what kinds of cases could be brought against the forum state's
10 government, and then the forum state grants the same type of immunity to the outside sovereign.
11 Franchise Tax Board v. Hyatt, Hr'g Tr, Feb. 24, 2003 (Oral Argument), 25-26,⁷ attached hereto as
12 Exhibit 13. Hyatt's counsel then engaged in the following exchange with Justice Stevens:

13 QUESTION: - - do I understand - - your comity argument basically is - - it's kind
14 of a self-executing thing, because each time a state has to answer the
15 comity question, it asks the question, "what would I do if the tables were
16 reversed?" And as history teaches us, they generally treat the other
17 sovereign the way they would want to be treated themselves. And that's - -

18 MR. FARR: Well - -

19 QUESTION: - - well, that's the rule that seems to have been developed without
20 any overriding constitutional command order here.

21 MR. FARR: That's correct, Justice Stevens. And, in fact, they have become
22 more specific in comity, I believe, in saying we want to treat the other
23 sovereign as we do treat ourselves, not just as we want to be treated. We
24 are treating the other sovereign the way we treat ourselves.

25 Id. at 46 (emphasis added).

26 Hyatt's arguments in his written Respondent Brief before the United States Court make
27 similar claims. For example, Hyatt noted that "state courts are fully capable of recognizing the
28 sovereign interests of other States, using their own sovereign interests as a benchmark." Resp't

29 ⁷ Hyatt's counsel further stated to the United States Supreme Court that "[o]ther courts have
30 said, yes, we will open our courts, but we are going to look to our own immunity to try to have
31 essentially a baseline to measure the sort of immunity that we are going to . . . accept." Id. at 34.

1 Br., January 21, 2003 at 39, attached hereto as Exhibit 14. Hyatt further recognized that the
2 Nevada Supreme Court's "reference point was not the liability of private individuals for
3 tortious conduct, but the liability of the State itself." Id. at 20 (emphasis in original). Finally,
4 Hyatt cited numerous state cases in support of the proposition that forum courts have "often done
5 what the Nevada Supreme Court did below: looked to the immunity of the forum State in
6 determining what acts of the defendant State would be subject to suit." Id. at 38.

7 Following Hyatt, other courts have confirmed that this is exactly what the Nevada
8 Supreme Court and the United States Supreme Court did. See Sam v. Sam, 134 P.3d 761, 768
9 (N.M. 2006) (citing to Hyatt, 539 U.S. at 493-94 and stating "Therefore, not only was it
10 appropriate for Nevada to grant California immunity, but also to only grant to California what it
11 deemed appropriate for itself.")

12 In Nevada, "[t]he doctrine of the law of the case provides that the law or ruling of a first
13 appeal *must* be followed in *all subsequent proceedings*, both in the lower court and on any later
14 appeal." Hsu v. County of Clark, 173 P.3d 724, 728 (Nev. 2007) (emphasis added and omitting
15 internal citations). The Hsu court continued:

16 Under the law of the case doctrine, when an appellate court states a principle or
17 rule of law necessary to a decision, the principle or rule becomes the law of the
18 case and must be followed throughout its subsequent progress, both in the lower
19 court and upon subsequent appeal. The law of the case doctrine is designed to
20 ensure judicial consistency and to prevent the reconsideration, during the course of
21 a single continuous lawsuit, of those decisions which are intended to put a
particular matter to rest. The law of the case doctrine, therefore, serves important
policy considerations, including judicial consistency, finality, and protection of the
court's integrity.

22 Id. (omitting internal citations and quotations). Moreover, the law of the case cannot be avoided
23 by a new argument made after the prior appellate proceedings. Hall v. State, 91 Nev. 314, 535
24 P.2d 797 (1975).

1 In sum, the Nevada Supreme Court granted comity to California law in such a way that it
2 required FTB to be treated exactly like it would treat a Nevada governmental agency. This is the
3 law of the case, and it must be followed in this proceeding and in any subsequent appeal.⁸

4 The result is that this Court must treat FTB just as it would treat a Nevada governmental
5 agency engaging in the same acts. Because Hyatt successfully asserted to the United States
6 Supreme Court that FTB should be treated in this lawsuit as if it was a Nevada governmental
7 agency, Hyatt is now judicially estopped from asserting anything to the contrary now.⁹

8 1. Nevada Limits Damages Against Governmental Agencies to \$75,000.00
9 per Claim

10 In Nevada, governmental agencies have waived their immunity from lawsuit, but only to a
11 limited basis that allows a party to recover up to \$75,000.00 in tort damages in certain situations.

12 ⁸ In Nevada v. Hall, 440, U.S. 410 (1979), a Nevada employee working in California
13 injured a California resident. Nevada asked that its state law – which limited recovery against the
14 state to \$25,000.00 – apply. California refused to apply Nevada’s law because California had
15 waived immunity from lawsuit and permitted full recovery in *an unlimited amount* in actions
16 against the state of California. *Id.* at 424. Applying Nevada’s law would have been contrary to
17 California’s policy of permitting unlimited recovery, so California did not apply Nevada law. In
18 this case, such a misalignment of policies does not exist. Nevada now actually permits more
19 recovery against itself for actions against the state than California does, and treating FTB just like
20 a Nevada agency gives Nevada’s citizens the full protection they would receive if a Nevada
21 governmental agency took the same actions that FTB allegedly took.

19 ⁹ Under Nevada law, judicial estoppel applies when the following five criteria are met:

- 20 (1) the same party has taken two differing positions;
21 (2) such positions were taken in judicial or quasi-judicial administrative
22 proceedings;
23 (3) the party was successful in asserting the first position (i.e., the tribunal
24 adopted the position or accepted it as true);
25 (4) the two positions are totally inconsistent; and
26 (5) the first position was not taken as a result of ignorance, fraud, or mistake.

25 Marcuse v. Del Webb Communities, Inc., 163 P.3d 462, 468-69 (Nev. 2007). Hyatt meets all of
26 these criteria. In order to defeat FTB’s request for total immunity, Hyatt argued that the Nevada
27 Supreme Court should grant comity only to the extent that in doing so Nevada would treat
28 California just as Nevada would treat itself. This was a successful argument, and any change
from that position would be totally inconsistent.

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1 See NRS 41.031(1), 41.035(1); Clark County School District v. Richardson Constr., 123 Nev. 39,
2 168 P.3d 87, 92 (2007). This limitation “applies on a per-person, per-claim basis.” Richardson
3 Constr., 168 P.3d at 92.

4 The Nevada Supreme Court has confirmed that this means that a plaintiff is entitled to a
5 maximum recovery of \$75,000 for each cause of action pled, not for each alleged instance of
6 wrong.¹⁰ Id. Since Hyatt arguably pled eight claims at most, and the first claim was dismissed,
7 Hyatt’s maximum damages are \$525,000 (\$75,000 multiplied by the remaining seven claims),
8 even if all seven claims are considered separate “causes of action,” which FTB does not concede.

9 Nevada and California both have damage cap limitations, they just differ in the amount of
10 those limitations. California, through its grant of immunity, limits damages to zero dollars. Cal.
11 Gov’t Code § 860.2 (West 2008). Nevada also has a damage limitation, but permits damages in
12 intentional tort and bad faith cases up to \$75,000.00 per cause of action. Above \$75,000.00, both
13 Nevada and California’s policies are aligned – neither permits any damages above \$75,000.00 per
14 cause of action. Treating FTB like a Nevada governmental agency respects both states’ aligned
15 interest in capping damages against a governmental agency, but gives full effect to Nevada’s
16 higher limitation on damages. This gives “due regard” to the “obligations, rights and
17 convenience of Nevada’s citizens.” Franchise Tax Board v. Eighth Judicial Dist. Ct., 2002 Nev.
18 LEXIS 57 (Nev. April 4, 2002) (The court “should give due regard to the duties, obligations,
19 rights and convenience of Nevada’s citizens and persons within the court’s protection, and
20 consider whether granting California’s law comity would contravene Nevada’s policies and
21 interests”). Applying Nevada’s law on the amount of damages permitted against government
22 entities gives effect to both California and Nevada’s policy of limiting damages, and gives full
23 effect to Nevada’s public policy of allowing its citizens to collect up to \$75,000.00 per cause of
24 action for an intentional or bad faith tort.

25 _____
26 ¹⁰ The Richardson Constr. court stated that the per person, per incident or occurrence
27 standard had specifically not been adopted by the Nevada Supreme Court in County of Clark v.
28 Upchurch, 114 Nev. 749, 757, 961 P.2d 754,759 (1998).

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1 The New Mexico Supreme Court applied this exact analysis in a very similar case in
2 2006, and did so using the comity analysis from the Hyatt decisions in the Nevada Supreme Court
3 and the United States Supreme Court described herein. See Sam v. Sam, 134 P.3d 761 (N.M.
4 2006). In Sam, an Arizona state employee accidentally ran over and killed his young son while
5 acting in the course and scope of his employment in New Mexico. Id. at 763. The son's
6 representatives sued the Arizona governmental agency for whom the employee worked. Id. They
7 filed the lawsuit in New Mexico exactly one day prior to three years after the accident happened.
8 Id. The son's representatives asked the New Mexico court to apply New Mexico's general three
9 year statute of limitations. Sam, 134 P.3d at 763. Arizona, on the other hand, asked the New
10 Mexico court to apply Arizona's one year statute of limitations pursuant to its Tort Claims Act
11 (which applies to actions against government employees), or to apply New Mexico's two year
12 statute of limitations pursuant to its Tort Claims Act (which applies to actions against government
13 employees), and to therefore dismiss the action as untimely. Id.

14 The Sam court of appeals held that Arizona's Tort Claims Act (one year statute of
15 limitations) did not apply because New Mexico courts were not obligated to give effect to
16 Arizona law, the New Mexico Tort Claims Act (two year statute of limitations) did not apply
17 because Sam was not a New Mexico employee, and as such, the general three year statute
18 applied. Id.

19 The New Mexico Supreme Court reversed the court of appeals using an analysis identical
20 to (and based on), the Hyatt analysis from both the Nevada and United States Supreme Courts.
21 The New Mexico Supreme Court concluded that, just like the Nevada Supreme Court did, it
22 would grant comity to Arizona's law as long as doing so did not undermine New Mexico's
23 policies. The Sam court concluded that if a New Mexico governmental agency was involved, the
24 case would be barred by the New Mexico two-year statute of limitations. Sam, 134 P.3d at 767.
25 It also concluded that Arizona likely would extend comity to New Mexico. Id. Third, it
26 concluded that New Mexico had an interest in litigating the case, and that Arizona and New
27 Mexico both had a policy of limiting the time in which people could sue the government – two
28 years in New Mexico, and one year in Arizona. Id. The Sam court stated "we are faced with a

1 situation similar to that which Nevada faced in Hyatt. Id. at 768. In Hyatt, the United States
2 Supreme Court ‘approved of Nevada’s applying its own limited waiver of immunity to
3 California’. . . . Nevada recognized that both states waived immunity, but differed in **how** they
4 waived that immunity. . . . Therefore, not only was it appropriate for Nevada to grant California
5 immunity, **but also to grant to California what it deemed appropriate for itself.**” Id.
6 (emphasis added).

7 The Sam court agreed to grant comity to Arizona’s law on a limited basis and to extend a
8 limited grant of immunity to Arizona because both states had agreed to some level of immunity
9 through their Tort Claims Acts. Id. The Sam court applied New Mexico’s two-year statute, not
10 Arizona’s one year statute, because using the one year statute was not in accord with New
11 Mexico’s public policy behind its two year statute, which was to allow two years to file a claim
12 against the government. The Sam court applied New Mexico’s two year statute to the Arizona
13 government agency, even though the New Mexico statute only expressly applied to New Mexico
14 government agencies. Sam, 134 P.3d at 768. The Sam court concluded that using the New
15 Mexico two year statute, the case was time barred because it was filed more than two years after
16 the date of the accident. Id.

17 The issue on damage limitations raised by FTB is nearly identical to the issue in Sam.
18 Following Sam and the previous law of this case from the Nevada and United States Supreme
19 Court leads to the conclusion that Nevada’s \$75,000.00 limitation on damages per cause of action
20 applies. Nevada and California both have clear and express public policies of limiting the amount
21 of damages available to a person who has been harmed by a governmental agency, but they have
22 set the levels differently (just like New Mexico and Arizona set their statute of limitations
23 differently). California limits the damages to zero, and Nevada limits them to \$75,000.00 per
24 cause of action. Like in Sam and like the Nevada Supreme Court and the United States Supreme
25 Court have stated, it is appropriate for the Nevada court to grant California immunity from
26 damages, but only if doing so does not violate Nevada’s interests and policies, *i.e.*, it can grant
27 California exactly what Nevada deems appropriate for itself. Using California’s total immunity
28 from damages would contravene Nevada’s public policy of allowing damages up to \$75,000.00

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1 per cause of action, but using Nevada's \$75,000.00 limitation extends limited immunity to
2 California under the principle of comity in accord with the law of the case and in accord with
3 Nevada's public policy.

4 Because FTB is to be treated like a Nevada governmental agency, and because Nevada
5 governmental agencies have waived their immunity from lawsuit on a limited basis that allows a
6 party to recover up to \$75,000.00 in tort damages per cause of action, any compensatory award
7 above that limit is improper as a matter of law. This Court must reduce Hyatt's compensatory
8 damages to comply with the limit.

9 B. Hyatt's Award of Prejudgment Interest

- 10 1. No Prejudgment Interest can be Awarded, since the General Verdict Form
11 does not Distinguish Between Past and Future Damages

12 In Nevada, the award of prejudgment interest is governed by NRS 17.130(2). In relevant
13 part, NRS 17.130(2) states that:

14 The judgment draws interest from the time of service of the summons and
15 complaint until satisfied, except for any amount representing future damages,
16 which draws interest only from the time of the entry of the judgment until
17 satisfied, at [the statutory rate].¹¹

18 As plaintiff, Hyatt bears the burden of proving by the preponderance of the evidence that
19 damages awarded by the jury are eligible for prejudgment interest under this statute. See
20 Jacobsen v. Manfredi, 100 Nev. 226, 233-34, 679 P.2d 251, 256 (1984) ("Unless the amount of
21 past damages is established in some manner, it is not proper for a prejudgment interest award to
22 be made."); see also Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours of So. Nev.,
23 106 Nev. 283, 289-90, 792 P.2d 386, 389-90 (1990).

24
25
26 ¹¹ There is no dispute among the parties that the applicable statutory rate is 7.00% for
27 prejudgment interest. See Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022,
28 1036 (2006).

1 The Nevada Supreme Court has made it clear that prejudgment interest may not be
2 awarded in cases when both past and future damages are awarded by verdict and it is impossible
3 to determine what portion of the total verdict was for past damages. “Prejudgment interest may
4 not be awarded on an entire verdict when it is impossible to determine what part of the verdict
5 represented past damages.” Shuette v. Beazer Homes Holding Corp., 121 Nev. 837, 865, 124
6 P.3d 530, 549-550 (2005); Las Vegas-Tonopah-Reno Stage Line, Inc., 106 Nev. at 290 (“[I]f it
7 cannot be determined whether an award of damages represents past or future damages, it is not
8 appropriate to award any interest on the judgment.”). For example, when a general verdict form
9 does not distinguish between past and present damages, a trial court cannot award prejudgment
10 interest. See Stickler v. Quilici, 98 Nev. 595, 597, 655 P.2d 527, 528 (1982).

11 An exception to this well-settled rule has been recognized by the Nevada Supreme Court
12 in allowing prejudgment interest to be awarded if a plaintiff can demonstrate that “there is
13 nothing in the record to suggest that future damages were included in the award.” Hazelwood v.
14 Harrah’s, 109 Nev. 1005, 1011, 862 P.2d 1189, 1193 (1993) (overruled in part on other grounds
15 in Vinci v. Las Vegas Sands, Inc., 115 Nev. 243, 984 P.2d 750 (1999)); see also Farmers Home
16 Mutual Ins. v. Fiscus, 102 Nev. 371, 725 P.2d 234 (1986). In determining whether an award
17 included future damages, the Nevada Supreme Court will look to see if there is a “reference to
18 future damages in evidence” upon which the jury could have based its verdict. Bongiovi v.
19 Sullivan, 122 Nev. 556, 574 138 P.3d 433, 450 (2006). Here, Hyatt is in the identical situation
20 set forth by the Nevada Supreme Court in the Stickler case. Nothing from the verdict form
21 indicates or identifies what damages (if any) were past damages for purposes of prejudgment
22 interest. Therefore, consistent with the Stickler decision and rule, this Court cannot award
23 prejudgment interest to Mr. Hyatt.

24 Moreover, Hyatt cannot demonstrate that the Hazelwood exception to this well-settled
25 rule is applicable. Notably, a myriad of evidence was presented to the jury concerning Hyatt’s
26 future damages upon which the jury could have based its verdict. See Bongiovi, 122 Nev. at 574.
27 Some examples of Hyatt’s evidence upon which the jury could have awarded future damages in
28 its general verdict are set forth below:

- 1 • During Hyatt's closing argument, Hyatt counsel argued that Hyatt was
2 incurably damaged: "Medicine doesn't provide a cure or a pill for
3 emotional distress of the kind suffered by Mr. Hyatt. This goes to the very
4 core of his existence and his nature. How he views what other people view
5 him to be. He knows FTB has called him a fraud. He thinks a lot of other
6 people believe he's a fraud. That is devastating to him." See Rough Tr.,
7 July 24, 2008 (p.m. session), 75:24-76:4.
- 8 • Hyatt counsel also argued: "We're talking about his heart and his soul and
9 how do you put a dollar amount on that." See id. at 82:11-12.
- 10 • Hyatt counsel further argued that Hyatt had a concern about identity theft
11 and the dissemination of his private information. Hyatt counsel stated:
12 "once you lose control of your private information, who knows what would
13 happen with it? . . . Each and every day Mr. Hyatt would wake up
14 internally and he had that concern, that fear. That is the type of thing we're
15 talking about for emotional distress." Rough Tr., July 23, 2008 (a.m.
16 session), 66:14-23.
- 17 • Hyatt counsel argued that Hyatt could never be made whole for the damage
18 that he suffered and stated: "How much is it worth to this man for this
19 information to be out there on the World Wide Web, never to be got back
20 again? You can never put the toothpaste back in the tube." Id. at 71:13-18.

21 By insinuating that Hyatt's core, heart, and soul had been "incurably" damaged and by
22 stating that FTB's conduct is devastating to Hyatt in the present tense, it is plain that the jury
23 could have inferred or relied upon this evidence to find that Hyatt would suffer these damages
24 into the future. However, since the jury was not asked to make any specific findings about future
25 damages on the general verdict form, no one will ever know how much of its award represented
26 future damages. Since evidence concerning future damages was presented, the jury's failure to
27 differentiate between the damages awarded in the general verdict form mandates that this Court
28

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1 cannot award prejudgment interest to Mr. Hyatt. See Stickler, 98 Nev. 595, 597, 655 P.2d 527,
2 528 (1982). Any finding to the contrary would ignore binding Nevada Supreme Court precedent.

3 2. No Prejudgment Interest can be Awarded Since there are no Findings on
4 Specifically When or How Much Hyatt was Damaged

5 As noted above, NRS 17.130 provides that a judgment representing past damages draws
6 interest from the date the summons and complaint are served. However, in Las Vegas-Tonopah-
7 Reno Stage Line, Inc. v. Gray Line Tours of So. Nev., 106 Nev. 283, 289-90, 792 P.2d 386, 389-
8 90 (1990), the Nevada Supreme Court acknowledged that NRS 17.130 does not give clear
9 direction as to when interest begins to accrue on damages that occur after the service of the
10 complaint, but before judgment is entered. Id. In Las Vegas-Tonopah-Reno Stage Line, the
11 district court found that a defendant intentionally interfered with the plaintiff's business
12 relationship with a client. See id. at 286. The interference started before suit was filed and
13 continued nearly a year after the summons and complaints were served. See id. The district court
14 awarded damages for the entire time, based on the plaintiff's evidence establishing the losses
15 sustained by defendant's tortious conduct. See id. The district court then allowed prejudgment
16 interest on the entire award. See id.

17 On appeal, the Nevada Supreme Court reversed the district court's award of prejudgment
18 interest. The Las Vegas-Tonopah-Reno Stage Line court noted that "the [NRS 17.130] does not
19 specifically state when interest shall begin on damages suffered after the service of the
20 complaint but prior to the entry of judgment." Id. at 289 (emphasis added). The court then
21 stated:

22 We do not believe that the legislature contemplated this problem when it was
23 determined that interest should run from the date the complaint was served. Nor
24 do we think that the legislature would want to permit damages to bear
25 interest from the date the complaint was served even though they were
26 actually incurred some time after the service of the complaint.

27 Id. (emphasis added). The court then unequivocally held:

28 Accordingly, we conclude that interest should begin to accrue from the time
damages actually occur if they are sustained after the complaint is served but

1 **before judgment**, rather than from the date of serving the complaint or from the
2 date of judgment. To carry interest, damages must be sustained and specifically
 quantified.

3 Id. (emphasis added). The Las Vegas-Tonopah-Reno Stage Line court then summarized the rule
4 by stating “interest should be awarded on damages suffered after serving the complaint but prior
5 to judgment once the time when incurred and the amount of these damages have been proven by a
6 preponderance of the evidence.” Id. at 290. In applying the rule to the facts of that case, the
7 Nevada Supreme Court noted that there was no breakdown in the record as to what damages were
8 sustained prior to, or after the service of the complaint, or any other smaller period basis. Id.
9 Because there was no proof by a preponderance of the evidence as to when plaintiff incurred its
10 damages, the court limited the plaintiff’s recovery for prejudgment interest. Id.; see also
11 Keystone Realty v. Osterhus, 107 Nev. 173, 807 P.2d 1385 (1991) (district court erred by
12 awarding interest from start of litigation rather than when damages were actually incurred).

13 The Nevada Supreme Court’s interpretation in Las Vegas-Tonopah-Reno Stage Line is
14 consistent with the purpose of prejudgment interest, which is to make the plaintiff whole by
15 including the loss of use of the money for the plaintiffs’ damages. See Ramada Inns, Inc. v.
16 Sharp, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985) (holding that prejudgment interest is not a
17 penalty, but instead is compensation for the time value of money); see also Uniroyal Goodrich
18 Tire Co. v. Mercer, 111 Nev. 318, 324, 890 P.2d 785, 789-90 (1995) (“NRS 17.130 attempts to
19 compensate a judgment creditor for the use of money by a judgment debtor.”). Prejudgment
20 interest is not designed as a penalty. See id. In other words, awarding a plaintiff an amount
21 representing a loss of use of money for damages before such damages were incurred or lost does
22 more than make a plaintiff whole, and thus equates to an inappropriate penalty to the defendant.

23 Here, even if prejudgment interest was appropriate, Hyatt has not established by a
24 preponderance of the evidence when and how much damages have been suffered since the
25 summons was served in January 6, 1998, such that this Court could award the appropriate amount
26 to compensate Hyatt for the time value of his damages. Thus, any prejudgment interest awarded
27
28

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1 to Hyatt would violate the clear rule outlined in Las Vegas-Tonopah-Reno Stage Line and would
2 be merely an inappropriate penalty imposed on FTB.

3 At trial, Hyatt provided various forms of testimony and evidence which allegedly
4 supported his theory that he suffered damages from various acts committed by FTB after his
5 complaint was filed in January 1998.

- 6 • During Hyatt's closing argument, Hyatt counsel stated that: "And, again,
7 our theory, what we think the evidence shows is that publication in the
8 litigation roster placed Mr. Hyatt in a false light." See Rough Trial Tr.,
9 July 23, 2008 (a.m. session), 72:9-11. Hyatt's Trial Exhibit 418 shows that
10 the litigation roster was published on 5/31/98, 06/30/98, 07/31/98,
11 08/31/98, 09/30/98, 01/31/99, 02/28/99, 03/31/99, 04/30/99 and 05/31/99,
12 06/30/99, 07/30/99, 08/31/99, 01/31/04, 02/29/04, 03/31/04, 04/30/04,
13 05/31/04, 06/30/04 and 07/31/04, 08/31/04, 09/30/04, 10/31/04, 11/31/04,
14 12/31/04, 01/31/05, 02/28/05, 03/05 and 04/05, 05/05, 06/05, 07/05, 08/05,
15 09/05, 10/05, 11/05, 12/05, 01/06. Trial Ex. 418. **Each of these**
16 **publications occurred after FTB was served with the summons and**
17 **complaint in this matter.**
- 18 • During Hyatt's closing argument, Hyatt counsel contended that Hyatt
19 suffered additional damages when FTB put the penalty amount assessed
20 against Hyatt in its January 2005 litigation roster. See Rough Trial Tr.,
21 July 23, 2008 (a.m. session), 74:11-12. **That event occurred in 2005,**
22 **clearly after FTB was served with summons and complaint.**
- 23 • Hyatt contended that he suffered damages as a result of FTB's bad faith
24 delay in the protest process up until November 2007. To support the
25 damages he suffered from this post-complaint conduct, Hyatt introduced
26 into evidence Trial Exhibit 427, which was a compilation of billing
27 statements from Hyatt's law firm, Morrison & Foerster. See Trial Ex. 427.
28 Hyatt then argued that these attorneys' fees were incurred from 1999

1 through 2006 in conjunction with FTB's bad faith delay of the protest.
2 **Those events were clearly after FTB was served with summons and**
3 **complaint.**

- 4 • Hyatt contends that he suffered emotional distress beginning in 1999 after
5 learning of anti-semitic remarks Candace Les attributed to Sheila Cox. See
6 Rough Trial Tr., May 12, 2008, 97. This event, too, occurred after FTB
7 was served with summons and complaint.

8 These are but a few of the examples of harms allegedly suffered by Hyatt after FTB was served
9 with summons and complaint.

10 Since Hyatt presented evidence and argued to the jury that he suffered damages stemming
11 from FTB's **post-complaint** conduct, consistent with the Nevada Supreme Court's holding in Las
12 Vegas-Tonopah-Reno Stage Line, the jury should have been required to determine after proof by
13 a preponderance of the evidence **when** Hyatt suffered **what amount** of damages, such that this
14 Court could make an informed determination of exactly how much prejudgment interest is
15 required to compensate him for the time value of damages lost. Again, no such record exists
16 before this Court. Instead, the record only contains a general verdict form that awarded Hyatt
17 \$85,000,000 in compensatory damages for emotional distress, \$52,000,000 in compensatory
18 damages for invasion of privacy, and \$1,085,281.56 in attorneys' fees as special damages.
19 Because there are no further determinations by the jury on these questions (as to timing and
20 amount), it constitutes alternative grounds why this Court must strike the award of prejudgment
21 interest to Hyatt in its entirety. See Las Vegas-Tonopah-Reno Stage Line, 106 Nev. at 290 ("[I]f
22 it cannot be determined whether an award of damages represents past or future damages, it is **not**
23 appropriate to award **any** interest on the judgment." (emphasis added)).

24 3. Hyatt's Damages do not Stem from a Single Act

25 It is anticipated that Hyatt will argue that his damages are akin to the damages sustained
26 by a plaintiff in a construction defect action. However, Hyatt's damages claim could not be more
27 different. In Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022, 1035 (2006),
28 the Nevada Supreme Court held that an award of prejudgment interest on an entire verdict in a

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1 construction defect case could be proper “because . . . unexpended costs to repair constructional
2 defects, which necessarily occurred early on, should be treated as past damages, even though the
3 defects will be repaired in the future.” Id. (quoting Shuette v. Beazer Homes Holdings Corp., 121
4 Nev. 837, 124 P.3d 530 (2005)). Critical to the court’s analysis was that these damages “stem
5 from past injuries that have already occurred but have yet to be cured.” Id. Using this analysis,
6 the court awarded prejudgment interest on these past “abatement” damages. Id.

7 In the present case, Hyatt’s damages are markedly different. Here, Hyatt presented
8 various testimony and evidence that he suffered emotional distress from several different acts
9 committed by FTB. See, supra Section V.B.2. Many of these acts occurred after the complaint
10 was filed in January 1998. Thus, the emotional distress damages that Hyatt allegedly suffered
11 after the complaint was filed did not stem from past injuries, but instead, stemmed from separate
12 acts which occurred after the complaint was filed. As to his privacy damages, Hyatt argued they
13 stemmed, in part, from publication of the litigation rosters which were undeniably published after
14 the complaint was filed. Hyatt’s situation is completely different than that of a construction
15 defect plaintiff where the damage to the home is committed and sustained upon the improper
16 construction constituting a single act. Hyatt cannot (and did not at trial) point to a single instance
17 of pre-complaint FTB conduct upon which all his damages stemmed.

18 4. It is Irrelevant that FTB Argued to the Jury that Hyatt would Ask for
19 Prejudgment Interest

20 It is similarly anticipated that Hyatt will contend that because FTB argued to the jury that
21 Hyatt “would argue that he was entitled” to prejudgment interest, that FTB somehow conceded
22 that prejudgment interest was proper. However, FTB never stated that Hyatt was “entitled” to
23 prejudgment interest. To the contrary, FTB plainly stated, during the punitive damages phase of
24 closing arguments that Hyatt would **argue** that he was entitled to prejudgment interest, argumen
25 that the Court struck and instructed the jury to disregard it See Rough Trial Tr., Aug. 11, 2008
26 30:10-12 (emphasis added).

27
28

1 Regardless of what was argued to the jury about what Hyatt would contend he was
2 entitled to, the determination of whether prejudgment interest is appropriate is a question of law
3 reserved for the Court. As demonstrated above, the binding and clear decisions of the Nevada
4 Supreme Court mandate that the Court cannot award prejudgment interest to Hyatt.

5 C. Remittitur and New Trial

6 If this Court does not reduce the compensatory damages as requested above FTB requests
7 pursuant to NRCP 59(a)(6) that this Court either grant a new trial or a remittitur and reduce or
8 vacate the amount of compensatory damages awarded to Hyatt or grant a new trial, because the
9 award was “given under the influence of passion or prejudice.” In addition, the attorney’s fees as
10 special damages must be stricken as a matter of law pursuant to NRCP 50 and 59. FTB also
11 requests that the Court vacate the award of punitive damages as a matter of law, pursuant to
12 NRCP 50 and NRCP 59, or if it will not do so, either conduct a new trial on punitive damages
13 because of trial irregularities or remit them because they are excessive pursuant to NRCP 59.

14 A court can “disallow or reduce the award if its judicial conscience is shocked.” Miller v.
15 Schnitzer, 78 Nev. 301, 309, 371 P.2d 824, 829 (1962) (*overruled* in part on other grounds by
16 Ace Truck and Equipment Rentals, Inc. v. Kahn, 103 Nev. 503, 746 P.2d 132(1987)); Leslie v.
17 Jones Chemical Co., 92 Nev. 391, 395, 551 P.2d 234, 236 (1976) (when an award is
18 unsupportable and shocks the judicial conscience, the Court should intervene to strike the award
19 or require the plaintiff to choose between remittitur and a new trial); Harris v. Zee, 87 Nev. 309,
20 311-12, 486 P.2d 490, 491-92 (1971) (a remittitur is appropriate when the amount awarded by the
21 jury is unreasonable given the evidence or “so excessive as to suggest the intrusion of passion and
22 prejudice upon [the jury’s] deliberations”).

23 In deciding whether to grant a remittitur, the Court should consider whether the awards
24 are fair and reasonable under the facts and circumstances established at trial. See, e.g., Wells v.
25 Shoemaker, 64 Nev. 57, 74, 177 P.2d 451, 460 (1947). An award must be deemed unreasonable
26 and excessive if “the amount of the damages is obviously so disproportionate to the injury proved
27 as to justify the conclusion that the verdict is not the result of the cool and dispassionate
28 discretion of the jury.” Id. at 75 (internal citation omitted).

1 Although the size of the award does not, in and of itself, usually determine that it is
2 excessive (see Miller, 78 Nev. at 351, 371 P.2d at 828), an award more than *30 times* larger than
3 the next largest award of damages for emotional distress and nearly *5 times larger than what*
4 *Hyatt himself requested, and over twice as large as Hyatt admitted was "absurd"* shows
5 strongly that passion and prejudice led to the present award of damages.

6 This Court is faced with one of the single largest verdicts in United States history. See
7 Hutchison & Steffen Press Release (8/14/2008), attached hereto as Exhibit 3. This award so
8 shocks the judicial conscience that it should be disallowed entirely or, at minimum, reduced by
9 this Court. No other reported decision in Nevada has awarded damages for emotional distress or
10 invasion of privacy or punitive damages anywhere near that awarded by this jury. The fact that it
11 so far exceeds amounts that even Hyatt called "**absurd**," shows that the jury inappropriately
12 sought to punish FTB with compensatory damages in contravention of Nevada law, rather than
13 compensate Hyatt for proven harms.

14 1. Emotional Distress Damages

15 Here, because Hyatt refused to provide FTB with any of his medical records, he was
16 limited to claiming only "garden variety" emotional distress damages. (Feb. 6, 2006 Order
17 adopting Dec. 9, 2005 Discovery Commissioner's Report & Recommendations (hereinafter
18 "DCR&R"). The use of the term "garden variety" emotional distress damages was a term used by
19 Discovery Commissioner Bigger to describe emotional distress claims that **are not severe**. This
20 term was incorporated in Commissioner Biggar's December 9, 2005 Report and
21 Recommendation and adopted by Order of the Court on February 6, 2006. Id. Hyatt's claim of
22 "garden variety" emotional distress is thus relegated to those relating solely to his "feelings" or
23 emotional distress such as sadness, anger, humiliation, embarrassment, or other "ordinary and
24 commonplace" distress. (Feb. 6 Order adopting Dec. 9, 2005 DCR&R). Hyatt was not permitted
25 to testify to or provide evidence that his emotional distress was **severe or serious**, or that he
26 required medical treatment, or that he experienced an extreme or diagnosable injury as result of
27 his alleged emotional distress. Id.
28

1 Garden variety emotional distress claims are defined as “ordinary or commonplace” or
2 “simple and usual.” Jessamy v. Ehren, 153 F.Supp.2d 398, 402 (S.D.N.Y. 2002) (*citing*
3 Ruhlmann v. Ulster County Dep’t of Soc. Servs., 194 F.R.D. 445, 449 n.6 (N.D.N.Y. 2000)).
4 Garden variety emotional distress claims do not require medical attention and are based on
5 generalized allegations of certain “emotions” such as humiliation, anger, shock, and the like.
6 Meacham v. Knolls Atomic Power Laboratory, 185 F.Supp.2d 193, 220 (N.D.N.Y. 2002), cert.
7 granted and opinion vacated on other grounds by, KAPL, Inc. v. Meacham, 544 U.S. 957, 125
8 S.Ct. 1731 (2005)). In contrast, an emotional distress claim is not “garden-variety” when the
9 claims are complex and require medical treatment for a specific psychiatric disorder. Jessamy,
10 153 F.Supp.2d at 402 (*citing Ruhlmann*, 194 F.R.D. at 446 n.6).¹²

11 Hyatt’s evidentiary manifestations of “garden variety” emotional distress were of minor
12 magnitude compared to prior awards by Nevada courts under similar circumstances. Specifically,
13 Hyatt did not watch a loved one die before him, nor was he been pistol whipped and threatened at
14 gun point. Hyatt suffered no loss of life or limb, or even any bodily injury. There is no medical
15 documentation showing whether or how Hyatt suffered any damages to his health that are
16 connected to FTB’s alleged actions, compared to what other plaintiffs have demonstrated at trial
17 in reported Nevada decisions. In fact, there was no objective indicia that Hyatt even suffered any
18 emotional distress. The emotional distress award is so outside the bounds of reason and norms in
19 Nevada that it manifestly shocks the conscience, such that it warrants the immediate intervention
20 of this Court.

21 At closing argument, Hyatt made a clear distinction between emotional distress damages
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23
24

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26 ¹² FTB has been unable to locate any Nevada case law that uses the term “garden variety”
27 emotional distress and therefore relies upon case law from other jurisdiction to provide guidance
28 and description of this term to the Court.

1 he thought could be warranted by the evidence and those that would clearly be absurd.

2 Specifically, Hyatt's counsel argued:

3 So you look at this and we're not saying, yes you should take 51 million and
4 subtract 7.5 million and that's Mr. Hyatt's emotional distress. I'm not saying that
5 and **I think that's absurd**. I think it is fair to say, if the amount of money Mr.
6 Hyatt is being asked to pay increased by almost \$9,000 a day, there's **some**
7 **number short of that** that might be reflective of Mr. Hyatt's damages. I throw out
8 a number again within your complete discretion, but just to show how the numbers
9 work and why we think at least there's some basis to it in your deliberations. Let's
10 say it's less than half the \$9,000 a day, \$4,000 a day, 365 days a year, 1.46 million
11 a year. We're almost to 13 years. Multiply that out, you get **\$18,980,000**. I say
12 that without gasping or without shock. **It's a big number**.

9 Hr'g Tr., July 23, 2008 (p.m. session), 82:9-24 (emphasis added).

10 Rather than award Hyatt the "big number" of \$18,980,000 or the "absurd" number of
11 \$43,500,000, instead the jury awarded emotional distress damages of \$85,000,000.00. That
12 award is more than four times the amount that Hyatt claimed was a "big number" and almost
13 double the "absurd" number. To use Hyatt's words, this is an award that cannot be said "without
14 gasping or without shock." It is more than a big number. It is shocking, particularly given the
15 evidentiary issues previously raised above. Even Hyatt argued and admitted that this number was
16 absurd. This alone warrants a new trial on the issue of damages. Cf. DeJesus v. Flick, 116 Nev.
17 812, 7 P.3d 459 (2000) (Nevada Supreme Court ordered new trial based on attorney misconduct
18 resulting in passion or prejudice, where verdict was more than counsel requested).¹³

19 It is also an unprecedented award for emotional distress in Nevada, especially when Hyatt
20 presented no medical evidence of his claimed distress. See Olivero v. Lowe, 116 Nev. 395, 401,
21 995 P.2d 1023, 1027 (2000) (upholding \$10,000 emotional distress award for brandishing and
22 threat of gun to head with no medical treatment); Dillard Dept. Stores, Inc. v. Beckwith, 115 Nev.
23 372, 375-76, 989 P.2d 882, 884 (1999) (upholding \$200,000 emotional distress award for forcing
24 employee out of work while injured, resulting in medical treatment for a major depressive

25
26 ¹³ In this context, it is shocking that Hyatt even claimed \$18,900,000 for "garden variety"
27 emotional distress damages. Obviously, the award of \$85,000,000 for what the Discovery
28 Commissioner termed "garden variety" emotional distress damages is excessive as a matter of
law. This Court now must not let this injustice stand.

1 disorder and embarrassment); Albert H. Wohlers & Co. v. Bartgis, 114 Nev. 1249, 1253, 969
2 P.2d 949, 952 (1998) (upholding \$275,000 emotional distress award for bad faith denial of
3 insurance coverage resulting in documented distress, which caused loss of sleep, bladder
4 infections, upper-respiratory infection, and dramatic weight loss); State ex rel. Dept. of Transp. v.
5 Hill, 114 Nev. 810, 812, 963 P.2d 480, 481 (1998), *abrogated* in part on other grounds by Grotts
6 v. Zahner, 115 Nev. 339, 989 P.2d 415 (1999) (upholding \$35,000 emotional distress award for
7 witnessing death of wife and \$10,000 emotional distress award for witnessing death of sister);
8 Stapp v. Hilton Hotels Corp., 108 Nev. 209, 210, 826 P.2d 954, 955 (1992) (upholding \$20,000
9 emotional distress award for witnessing wife being hit by a car); United Fire Ins. Co. v.
10 McClelland, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989) (overturning \$73,000 emotional
11 distress award for denial of insurance benefits to spouse for lack of standing); Farmers Home
12 Mut. Ins. Co. v. Fiscus, 102 Nev. 371, 374, 725 P.2d 234, 236 (1986) (upholding respective
13 awards of \$5,000 and \$15,000 for emotional distress resulting from 45 month denial of claim for
14 destruction of family's personal possessions, including a total emotional breakdown); Ramada
15 Inns, Inc. v. Sharp, 101 Nev. 824, 825, 711 P.2d 1, 2 (1985) (upholding \$15,000 emotional
16 distress award for hotel security shoving an escort service employee down a stairwell); Nevada
17 Independent Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337, (1983) (issuing remittitur
18 reducing compensatory damages for gubernatorial candidate's embarrassment on local television
19 to \$50,000, consistent with awards from other states); Star v. Rabello, 97 Nev. 124, 125, 625 P.2d
20 90, 91 (1981) (reversing award of \$300 as emotional distress award to daughter witnessing assault
21 and battery of mother); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 446, 420 P.2d
22 855, 859 (1966) (upholding \$2,500 emotional distress award for person who drank soda with
23 decomposing rat inside, became ill, underwent treatment, and lost 20 pounds).

24 Many other courts describe monetary limitations that should be placed upon "garden
25 variety" emotional distress claims like the ones the Discovery Commissioner allowed Mr. Hyatt
26 to pursue, after the Discovery Commissioner barred FTB from obtaining Hyatt's medical records.
27 See e.g., Epstein v. Calvin-Miller Intern., Inc., 139 F.Supp.2d 469, 479-481 (S.D.N.Y. 2001);
28 Shannon v. Fireman's Fund Ins. Co., 156 F.Supp.2d 279, 295-98 (S.D.N.Y. 2001); Lynch v.

1 Town of Southampton, 492 F.Supp.2d 197, 204-208 (E.D.N.Y. 2007). In fact, these cases agree
2 that the appropriate range for “garden variety” emotional distress damages, which do not involve
3 any medical treatment or diagnosable ailments, is between \$5,000 to \$125,000 at the most. Id.
4 This is far less than what Hyatt sought at the close of evidence (\$18.98M) and what he actually
5 received (\$85M).

6 a. No Opportunity to Present Alternative Causation Evidence of
7 Emotional Distress to the Jury

8 This Court denied FTB the opportunity to present possible alternative causes for the
9 symptoms Hyatt told others were attributable to FTB, notwithstanding the fact that the issue of
10 proximate cause is for the jury to determine. Francis v. Plaza Pacific Entities, 109 Nev. 91, 94,
11 847 P.2d 722, 724 (1993). A brief review of what happened at trial regarding two alternative
12 causes for any alleged distress will highlight this issue. FTB submits that the Court’s failure to
13 permit FTB to introduce evidence of alternative causes of Hyatt’s alleged emotional distress
14 contributed to the excessiveness of the jury’s verdict.

15 First, Hyatt lost the important rights to his 516 patent when he lost a patent interference
16 claim filed against him by Gary Boone and Texas Instruments for the single-chip microprocessor,
17 during the exact same time period wherein he alleged FTB’s audit caused him emotional distress.
18 This patent interference litigation resulted in the loss of a patent Hyatt took great pride in,
19 something that he gave to others as a gift, and otherwise Hyatt circulated as a trophy. Hyatt
20 initially lost that case in 1995, with the decision becoming final in 1996. Rough Trial Tr., July
21 10, 2008, 13:15 – 14:11. That decision was upheld by the Federal Circuit Court of Appeals and a
22 writ of certiorari was denied by the United States Supreme Court in 1998. Id. at 14:19 – 15:12.

23 During the same time period, Hyatt spoke with his neighbor, Keith Kalm, regarding the
24 patent interference claim. At one point, Hyatt mentioned to Mr. Kalm that he was working on the
25 patent interference claim. Id. at 18:8-12. Later, Hyatt told Mr. Kalm that he had to appeal a
26 decision of the patent office. Id. at 18:15-19. FTB elicited this testimony to establish a chain of
27 events that constituted circumstantial evidence on the issue of emotional distress damages. In
28 other words, from those events the jury could have reasonably inferred that Hyatt suffered


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1 emotional distress caused by the loss of his important patent rights, not necessarily caused by
2 FTB.

3 Immediately prior to the issuance of jury instructions and after the close of evidence,
4 Hyatt successfully moved this Court to strike portions of testimony from Mr. Kalm and all
5 testimony of Richard Donaldson, a retired employee of Texas Instruments who was involved with
6 the patent interference claim against Hyatt. See Rough Trial Tr., July 21, 2008, 162:11 – 190:6.
7 By granting this ruling, the Court prevented the jury from contemplating for itself whether
8 Hyatt's loss of his patent could have contributed to his emotional distress, based on the evidence
9 that he lost it during the same time period and that he obviously and understandably took great
10 pride in it.

11 Second, as if the loss of the patent was not enough, Hyatt underwent an I.R.S. audit during
12 the same time period. See, e.g., Ex. 2426 (memorandum referencing conversation regarding
13 various Hyatt audits, both by California and the United States). However, notwithstanding the
14 plain facts, Hyatt made arguments implying that he had no IRS issues:

15 Mr. Hyatt paid every dime that was due the federal government on that income. . .
16 You're not going to have any IRS agents coming in here saying he owes us any
money.

17 Rough Trial Tr., Apr. 21, 2008, 57:11-15. The next day, prior to FTB's opening argument, FTB
18 sought admission of Ex. 2426 to rebut this false impression. The Court rejected this effort:

19 I think it's premature to admit this. I think the issues are fairly clear. The reasons
20 are clear. I'm not inclined to agree that Mr. Hutchison has somehow now in his
21 statements yesterday, in his opening, he has opened a door with respect to this
issue. I think there's enough for this jury to consider without references to the IRS
when -- an IRS audit, if there was one, isn't part of this litigation.

22 See Rough Trial Tr., Apr. 22, 2008, 15:6-14. Thereafter, the Court foreclosed FTB completely
23 from making any mention of Hyatt's IRS audits.

24 Among other purposes, the IRS information would provide one more cause for Hyatt's
25 claimed emotional distress other than FTB's audit. However, this Court, by its ruling, tied one
26 arm around FTB's back, preventing it from suggesting another alternative causes for the alleged
27 emotional distress. By taking this evidence away from the jury, it was left with the mistaken
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1 impression that there could only be one possible cause of the emotional distress described at trial:
2 the FTB's audit.¹⁴

3 3. Invasion of Privacy Damages

4 Unlike with his emotional distress damages, Hyatt made no specification on how much
5 those damages should be to the jury during trial or at closing argument. However, a cursory
6 review of Nevada cases addressing these types of damages highlights the gross excessiveness of
7 this award. See, e.g., Republic Ins. Co. v. Hires, 107 Nev. 317, 320, 810 P.2d 790, 792 (1991)
8 (upholding \$410,000 compensatory damage award based on numerous claims, including invasion
9 of privacy claims, tied to insurance company's bad faith refusal to pay claim and unjustified
10 investigation of claimant with their neighbors); Weber v. Merkin, Case No. CV 93-02442, 1994
11 WL 881537 (Nev. Dist. Ct. Mar. 15, 1994) (jury award of \$33,000 for invasion of privacy and
12 other claims tied to threatening calls made by public defender to juror on jury that returned death
13 penalty verdict against client).

14 To the extent that Hyatt may claim there are too few invasion of privacy damage cases in
15 Nevada for a comparison, a review of reported decisions in the related defamation cause of action
16 further emphasizes the excessiveness of the jury's \$52,000,000 award. See, e.g., Bongiovi v.
17 Sullivan, 122 Nev. 556, 138 P.3d 433, 448-49 (2006) (upholding \$250,000 compensatory damage
18 award where competing plastic surgeon told potential client that plaintiff had murdered a patient
19 in the operating room); Pombo v. Nevada Apartment Ass'n, 113 Nev. 559, 561, 938 P.2d 725,
20 727 (1997) (upholding \$12,000 compensatory damage award where plaintiff wrongly accused of
21 financial misconduct); K-Mart Corp. v. Washington, 109 Nev. 1180, 1196, 866 P.2d 274, 284
22 (1993) (upholding \$45,000 compensatory damage award for defamation tied to wrongful
23 detention and arrest for shoplifting, overruled later on other grounds); Hale v. Riverboat Casino,
24 Inc., 100 Nev. 299, 304, 682 P.2d 190, 193 (1984) (upholding \$2,100 compensatory damage
25

26 ¹⁴ Of course, this does not take into account other possible reasons for Hyatt's claimed
27 emotional distress that could not be explored due to his conscious decision not to produce his
28 medical records when faced with the choice by Discovery Commissioner Biggar.

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1 award on various claims, including defamation, connected to wrongful detention and arrest by
2 casino); Nevada Independent Broadcasting Corp. v. Allen, 99 Nev. 404, 419, 664 P.2d 337, 347
3 (1983) (reducing \$675,000 compensatory damage award as excessive to \$50,000 for defamation
4 of losing gubernatorial candidate on television station).

5 Finally, a comparison of substantial awards each involving death or severe bodily harm
6 (excess of \$1 million as reported by the Trial Reporter) to the alleged harm suffered by Hyatt
7 highlights the excessiveness of this verdict. See, e.g., Garcia v. Mountainview OB/GYN, Case
8 No. A454816 (Nev. Dist. Ct. Aug. 9, 2007) (awarding \$5,000,387 for failing to properly care for
9 unborn child that is now (at age 12) unable to answer simple questions, cannot read, becomes
10 easily confused, and will never be able to live independently); Barrera v. Northern Nevada
11 Emergency Physicians, Case No. CV 04-00920 (Nev. Dist. Ct. Mar. 27, 2007) (awarding
12 \$2,201,219 for reckless treatment of injury that resulted in below-knee amputation of left leg);
13 Provenza v. Lemans Corp., Case No. A446708 (Nev. Dist. Ct. May 4, 2007) (awarding
14 \$41,519,423 for full thickness third-degree burns over ninety percent of body due to defectively
15 designed clothing); Bahena v. Goodyear Tire & Rubber Co., Case No. A503395 (Nev. Dist. Ct.
16 Feb. 9, 2007) (awarding \$30,183,754 for death of three plaintiffs and severe injury of seven other
17 defendants due to defective tire design); Wright v. Winston Products Co., Inc., CV 03-02979
18 (Nev. Dist. Ct. Apr. 7, 2005) (awarding \$4,000,000 to man sustaining second and third degree
19 grease burns over thirty-seven percent of his body, which required extensive skin grafting,
20 intractable permanent pain, deformity, loss of stamina, and resulting depression); Copies of the
21 Trial Reporter information are attached hereto for the Court's convenience as Exhibit 15. Hyatt
22 certainly has not established injuries as shocking as those set forth in these cases, yet the jury
23 awarded him compensatory damages 4 to 60 times greater than those set forth here.

24 Even Hyatt himself claims that the damages awarded to him are among the highest ever
25 awarded to a plaintiff in United States history. This Court should consider these past decisions
26 when determining whether this unprecedented award is excessive as a matter of Nevada law.

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1 would swallow the purposes of attorneys' fees statute [NRS 18.010]." Id. at 992.¹⁵ Each of
2 Hyatt's causes of action pled in his Second Amended Complaint is a "common law" intentional
3 tort claim. Pursuant to the case law cited above, Hyatt's claim for attorneys' fees as special
4 damages based on those common law torts is not permitted.

5 Hyatt's claims also do not fall into one of the specifically enumerated categories of cases
6 in which such fees have been allowed under Nevada Supreme Court's jurisprudence. Sandy
7 Valley Ass'n v. Sky Rank Estates Owners Ass'n, 117 Nev. 948, 957-58, 35 P.3d 964 (2001)
8 (internal citations and footnotes omitted). This is not a "third party legal dispute . . . result[ing
9 from] a breach of contract or tortious conduct by the defendant." Id. at 957. Neither is it a case
10 "in which a party incurred the fees in recovering real or personal property acquired through the
11 wrongful conduct of the defendant or in clarifying or removing a cloud upon the title to property."
12 Sandy Valley, 117 Nev. at 957. Finally, Hyatt's claims for attorneys fees as special damages are
13 not based upon "actions for declaratory or injunctive relief . . . necessitated by the opposing
14 party's bad faith conduct." Sandy Valley, 117 Nev. at 957-958.

15 Next, in order to recover his claimed attorneys fees, Hyatt must establish that the
16 attorneys' fees were necessarily and proximately caused by FTB's injurious conduct at issue in
17 this case, i.e., the allegedly intentional tortious acts of FTB. Hyatt has repeatedly admitted on the
18 record that the underlying intentional torts pled in his complaint are not the "cause" of the
19 attorneys fees he seeks to recover. Instead, Hyatt testified that the attorneys' fees were caused by
20 the discretionary decision of FTB to audit him and Hyatt's own decision to protest or appeal the
21 preliminary findings made during the audit via the California Administrative Protest Process. In
22 other words, Hyatt has admitted that the underlying conduct giving rise to this litigation, i.e., the
23

24
25 ¹⁵ The Nevada Supreme Court further rejected the recovery of attorneys fees as special
26 damages based upon common law claims of abuse of process and malicious prosecution in Works
27 v. Kuhn, 103 Nev. 65, 68, 732 P.2d 1373 (1987). Although the court based its decision upon the
28 appellant's failure to contend that these damages were available before the district court, the
refusal to allow such damages further supports the position that such damages are not recoverable
when based solely upon common law tort claims. Id. at 68.

1 intentional torts, were not the “cause” of his claimed attorneys’ fees. As such, there is no
2 evidence of the essential element of causation to maintain these claims.

3 Next, Hyatt admits that the attorneys’ fees he seeks to recover as special damages are
4 those he incurred in defending against the parallel tax proceedings ongoing in the State of
5 California. If successful in California, Hyatt has an avenue in California to seek recovery of his
6 claimed attorneys’ fees. See Cal. Rev. & Tax Code § 21013 (West 2008). Therefore, this Court
7 cannot consider Hyatt’s claim for attorneys’ fees without violating the clear jurisdictional lines of
8 demarcation established by Hyatt himself before Nevada’s Supreme Court and the United States
9 Supreme Court. See Franchise Tax Board v. Eighth Judicial Dist. Ct., 2002 Nev. LEXIS 57, at *2
10 (Nev. April 4, 2002); See Franchise Tax Board v. Hyatt, 538 U.S. 488, 499, 123 S.Ct. 1683
11 (2003).

12 b. This Court Erred in Allowing the Attorneys’ Bills to be Entered
13 into Evidence without Permitting FTB to Address whether the Bills
14 were Reasonable and Necessary pursuant to Schouweiler v. Yuncy

15 This Court erred by allowing Hyatt’s legal bills from both Eugene Cowan and from
16 Morrison and Foerster to be admitted into evidence by failing to require Hyatt to prove the
17 reasonableness and necessity of those bills pursuant to Schouweiler v. Yuncy, 101 Nev. 827; 712
18 P.2d 786 (1985). This error requires this Court to vacate the award of attorneys’ fees as special
19 damages or to conduct a new trial on this issue.

20 At trial, this Court permitted Hyatt to enter into evidence his attorney bills from both
21 Eugene Cowan and Morrison and Foerster, incurred in handling the protest, that comprised his
22 alleged special damages. However, the Court did not require Hyatt to prove that the attorneys’
23 fees were reasonable and necessary, and because Hyatt did not produce an authenticating witness,
24 FTB was not able to question anyone from Morrison and Foerster about the reasonableness and
25 necessity of the bills. In addition, the Court denied FTB’s request for a jury instruction on the
26 issues of reasonableness and necessity. The Court claimed that only when an attorney has
27 requested a fee award post-trial were such issues to be examined. Rough Trial Tr., July 21, 2008,
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1 61-68. Such a ruling defies common sense. If reasonableness and necessity are not required, then
2 one could seek any amount from a jury without any moderating factors.

3 Pursuant to Schouweiler v. Yuncy, 101 Nev. 827; 712 P.2d 786 (1985), when making an
4 award of attorneys fees post-trial, the following factors must be considered: (1) the qualities of
5 the advocate: his ability, training, education, experience, professional standing and skill; (2) the
6 character of the work to be done: its difficulty, intricacy, importance, the time and skill required,
7 the responsibility imposed and the prominence and character of the parties when they affect the
8 importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and
9 attention given to the work; and (4) the result: whether the attorney was successful and what
10 benefits were derived. Id. at 833-34, 712 P.2d at 790 (citing Brunzell v. Golden Gate Nat'l Bank,
11 85 Nev. 345, 349, 455 P.2d 31 (1969)); see also Sandy Valley Associates v. Sky Ranch Estates,
12 117 Nev. 948, 956, 35 P.3d 964, 969(2001) (overruled on other grounds by Horgan v. Felton, 170
13 P.3d 982 (Nev. 2007)).

14 While Schouweiler involved a district court making a determination of a discretionary fee
15 award post trial, the case also applies to the jury determining whether to award fees as special
16 damages. A party seeking attorneys' fees as damages must prove them with competent evidence
17 just as any other element of damages. Sandy Valley Associates v. Sky Ranch Estates, 117 Nev.
18 948, 956, 35 P.3d 964, 969(2001). This means that in connection with his claim for attorneys'
19 fees as damages, Hyatt was required to prove that his attorneys' fees were reasonable and
20 necessary. See First Nat'l Bank of Clovis v. Diane, Inc., 102 N.M. 548, 556, 698 P.2d 5, 13
21 (1985); see also Harmon v. Shell, 1994 WL 148663 (Tenn. Ct. App.) at *6 (evidence of attorney's
22 fees as special damages must be presented in plaintiff's case in chief "and should include some
23 evidence that they are reasonable . . . trial courts should award attorneys' fees only after affording
24 the opposing party opportunity to cross-examine the requesting party's witness or to present proof
25 of its own.") (unpublished opinion).

26 In Diane, Inc., the court determined that the plaintiff was entitled to his attorneys' fees as
27 damages when the party was required to engage counsel to defend a separate action that resulted
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1 from his prior attorneys' negligence. Id. at 555, 698 P.2d at 12. With respect to the proof
2 necessary to prove attorney's fees as an item of special damages, the court stated:

3
4 Proof of attorney fees as an item of special damages is really no
5 different than proof of the cost of medical care or any other
6 professional service made reasonably necessary by the negligence
7 of another. The reasonable value of those services is ordinarily
8 established by showing what a competent professional in the
9 community would customarily charge for similar services.

10 Id.

11 Similarly, in Aspen Investments Corp. v. Holzworth, the court determined that a party
12 claiming attorney's fees as damages must present evidence that the fees incurred were reasonable.
13 587 So.2d 1374, 1377 (Fla.App. 4 Dist. 1991). Moreover, the court concluded that the opposing
14 party "was entitled to require that reasonableness be proved as a predicate to admitting the
15 evidence of the fee incurred." Id.

16 Hyatt was permitted to present his legal bills as evidence, but was not required to show
17 that the bills were reasonable and necessary, or to establish what a competent professional in the
18 community would customarily charge for similar services. This Court's failure to require Hyatt
19 to present this information, and its failure to give FTB's jury instruction on the issue was error.

20 5. Punitive Damages

21 For multiple reasons set forth below, the award of punitive damages must be vacated
22 either in its entirety as a matter of law, or it must be vacated and a new trial on punitive damages
23 must be conducted, or the award must be remitted because the amount shocks the judicial
24 conscience. FTB's arguments are summarized as follows.

25 Most importantly, under the law of the United States Supreme Court in City of Newport v.
26 Fact Concerts, Inc., 453 U.S. 247 (1981), FTB, a governmental agency, is immune from an award
27 of punitive damages. Also, under the law of this case, FTB is to be treated just like a Nevada
28 governmental agency, and Nevada prohibits any award of punitive damages against its
governmental agencies. FTB has raised these issues before, but this Court has never addressed
this legal question of whether FTB is immune from a punitive damage award. The case law

1 requires that the award of punitive damages be vacated pursuant to NRCP 59(a), NRCP 59(e),
2 NRCP 50, and the due process clauses of the United States and Nevada constitutions.

3 Second, this Court ruled in response to FTB's Motion to Bifurcate that it would, as
4 required by Smith's Food & Drug v. Bellagarde, 114 Nev. 602, 606, 958 P.2d 1208, 1211 (1998),
5 determine, as a matter of law, whether Hyatt had offered substantial evidence of malice in fact to
6 support a punitive damage instruction. FTB asked this Court to make that *prima facie*
7 determination before any punitive damage instruction was given. The Court declined to make
8 that determination. This was an error that requires that the award of punitive damages be vacated.
9 Moreover, had this Court engaged in the determination of a *prima facie* case, it should have and
10 would have concluded that Hyatt did not have the legal right to pursue punitive damages against
11 FTB, and would have found that Hyatt had not presented substantial evidence of malice to
12 support an instruction on punitive damages. This requires that the award of punitive damages be
13 vacated pursuant to NRCP 59(a), NRCP 59(e), NRCP 50, and the due process clauses of the
14 United States and Nevada Constitutions.

15 Third, the Court refused to give the "harm to others" jury instruction and refused to give a
16 vicarious liability instruction after it concluded that FTB could be liable for punitive damages.
17 Both errors require that pursuant to NRCP 50 and NRCP 59 that the punitive award be vacated
18 and a new trial on punitive damages be conducted.

19 Fourth, Hyatt waived his right during phase one of the trial to request punitive damages.

20 Fifth, adding insult to error, Hyatt was impermissively allowed to change the identity of
21 the defendant from FTB to the State of California in order to argue for a higher award of punitive
22 damages.

23 Finally, the award should be remitted pursuant to NRCP 59(a)(6) because it so large that it
24 shocks the judicial conscience.

25 a. No Legal Foundation

26 i. No Common Law Foundation

27 Since at least 1871, the United States Supreme Court has expressly disallowed punitive
28 damages against any governmental agency upon common law claims, absent a statute expressly

1 allowing such punitive damages. FTB is a governmental agency and no statute authorizes
2 punitive damages against FTB in this case which was based upon common law claims. Because
3 FTB is immune from an award of punitive damages, any award of punitive damages is excessive
4 as a matter of law and a violation of FTB's constitutional rights.

5 The United States Supreme Court has definitively addressed the issue and has stated that
6 punitive damages can not be awarded against a governmental agency based upon common law
7 claims. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).¹⁶ In that case, the Supreme
8 Court examined whether a municipality was subject to punitive damages under common law in
9 order to determine whether that status changed with the passage of 42 U.S.C. § 1983 in 1871.
10 The Supreme Court concluded that "[i]n sum, we find that the considerations of history and
11 policy do not support exposing a municipality to punitive damages for the bad faith actions of its
12 officials." Newport, 453 U.S. at 271.¹⁷

13 Specifically, the Supreme Court first engaged in a historical review of punitive damages,
14 and concluded that since 1871 (and even before then) it was universally understood that a
15 municipality was immune from punitive damages at common law. The Supreme Court stated:

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18 ¹⁶ FTB raised this same legal issue in its Motion for Partial Summary Judgment Re: Punitive
19 Damages, basing its motion primarily on comity, but discussing the Newport case at oral
20 argument. This Court did not address this issue in denying that motion. Rather, this Court
21 deferred the legal issues regarding whether punitive damages were available against FTB as a
22 matter of law, and stated only that "the issue of whether or not defendants engaged in wrongful,
23 fraudulent, oppressive, malicious conduct is an issue for the jury to determine, so too should the
24 issue of punitive damages." Hr'g Tr., Feb.13, 2007, 21:19-23. FTB raised this issue again on
25 August 6, 2008, but again the Court never addressed the legal issues. See Rough Trial Tr., Aug.6,
26 2008. This Court has never addressed whether punitive damages are awardable against FTB as a
27 matter of law or whether the Newport case applies.

28 ¹⁷ See Doe v. County of Centre, Pa., 242 F.3d 437, 455 (3d. Cir 2001) ("[Newport] stands
for the proposition that municipalities, and more broadly state and local government entities, are
immune from punitive damages."); Petchem, Inc. v. Canaveral Port Auth., 368 F. Supp.2d 1292,
1295 (M.D. Fla. 2005) ("governmental entities – municipalities or otherwise – should be immune
from punitive damages claims so long as the cost of such claims would likely be passed onto
taxpayers").

1 By the time Congress passed what is now Section 1983, the immunity of a
2 municipal corporation from punitive damages at common law was not open
3 to serious discussion. It was generally understood by 1871 that a municipality,
4 like a private corporation, was to be treated as a natural person subject to suit for a
5 wide range of tortious activity, but this understanding did not extend to the
6 award of punitive or exemplary damages. Indeed, the courts that had
7 considered the issue prior to 1871 were virtually unanimous in denying such
8 damages against a municipal corporation. Judicial disinclination to award
9 punitive damages against a municipality has persisted to this day in the vast
10 majority of jurisdictions.

11 Id. at 259-260 (emphasis added).

12 The Newport court clearly found that municipal immunity from punitive damages was
13 well established at common law by 1871 (id. at 263), and that “the general rule today is that
14 no punitive damages are allowed unless expressly authorized by statute,” (id. at 261 n.21
15 (citing 18 E. McQuillin, Municipal Corporations, § 53.18a (3d Rev. ed. 1977)); Hines, Municipal
16 Liability for Exemplary Damages, 15 Clev.-Marshall L. Rev. 304 (1966) (emphasis added)). The
17 Supreme Court additionally, concluded that “a municipality, however, can have no malice
18 independent of the malice of its officials.”¹⁸ Damages awarded for *punitive* purposes, therefore,
19 are not sensibly assessed against the governmental entity itself.” Newport, 453 U.S. at 267; see
20 also Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 785 n.
21 15 (2000); Herrera v. Las Vegas Metro. Police Dept., 298 F. Supp.2d 1043, 1055 (D. Nev. 2004)
22 (granting summary judgment in favor of the Las Vegas Metropolitan Police Department pursuant
23 to Newport because punitive damages are not recoverable against a municipality because a
24 municipality is unable to form the necessary intent required for punitive damages); Hammond v.
25 County of Madera, 859 F.2d 797, 803 n.2 (9th Cir. 1988), abrogated in part on other grounds
26 recognized by L.W. v. Grubbs, 92 F.3d 894 (9th Cir. 1996) (citing to Newport and concluding that
27 “The Supreme Court in Smith v. Wade made it clear that local governing bodies like the County
28

¹⁸ For additional support on this issue, see Okeson v. Tolley School District, 570 F.Supp 408,
412 (D. N.D. 1983) (“Governmental entities are instruments, not beings. As such, they cannot
themselves have malice. Only the individuals that act through the polity can develop and act
upon malicious intentions”).

1 of Madera are immune from awards of punitive damages”); Harrelson v. Elmore County, 859 F.
2 Supp 1465, 1467 (D. Ala. 1994) (“neither the United States Supreme Court nor the Eleventh
3 Circuit has indicated a desire to limit [Newport]”).

4 When the United States Supreme Court next addressed the issue, it confirmed the
5 Newport rule disallowing punitive damages against a municipality based upon immunity by
6 stating: “A better reading of Newport is that we were concerned with imposing punitive damages
7 on taxpayers **under any circumstances.**” Vermont Agency of Natural Resources v. United
8 States ex rel. Stevens, 529 U.S. 765, 785 n. 15 (2000) (emphasis added). The Newport case has
9 been cited and followed in thousands of cases since it was issued in 1981. Exhibit 16.

10 The Newport court also explained the reasons why punitive damages could not be
11 awarded against a municipality or other government agency. The Newport court stated that the
12 two major policy arguments for punitive damages – deterrence and retribution – would not be
13 advanced by assessing punitive damages against a governmental agency. First, punitive damages
14 against a governmental agency are not justified by a policy of deterrence because (1) it was
15 unclear that municipal officials would be deterred by the prospect of damages borne by the
16 taxpayers; (2) voters would, nonetheless, be likely to vote wrongdoing officials out of office
17 absent punitive damages, both because they had done wrong and because of the possibility of
18 compensatory damages; (3) punitive damages assessed directly against the offending officials
19 would be a more effective means of deterrence; and (4) punitive damages could “create a serious
20 risk to the financial integrity” of cities. Id. at 270.

21 Additionally, the goal of retribution would not be furthered because the damages would
22 punish only innocent taxpayers:

23 Punitive damages by definition are not intended to compensate the injured party,
24 but rather to punish the tortfeasor whose wrongful action was intentional or
25 malicious, and to deter him and others from similar extreme conduct. Regarding
26 retribution, it remains true that an award of punitive damages against a
27 municipality “punishes” only the taxpayers, who took no part in the commission
28 of the tort. . . . Indeed, punitive damages imposed on a municipality are in effect a
windfall to a fully compensated plaintiff, and are likely accompanied by an
increase in taxes or a reduction of public services for the citizens footing the bill.
Neither reason nor justice suggests that such retribution should be visited upon the
shoulders of blameless or unknowing taxpayers.

1 Id. at 266-67.¹⁹ The Newport court also observed that:

2 Because evidence of a tortfeasor's wealth is traditionally admissible as a measure
3 of the amount of punitive damages that should be awarded, the unlimited taxing
4 power of a municipality may have a prejudicial impact on the jury, in effect
5 encouraging it to impose a sizable award. The impact of such a windfall recovery
6 is likely to be both unpredictable and, at times, substantial, and we are sensitive to
7 the possible strain on local treasuries and therefore on services available to the
8 public at large. Absent a compelling reason for approving such an award, not
9 present here, we deem it unwise to inflict the risk.

7 Id. at 270-271.

8 Newport, Vermont Agency, and their prodigy all unanimously confirm that a government
9 agency such as FTB is immune from an award of punitive damages, and that the jury's award of
10 punitive damages was improper and must be vacated. Hyatt's previously articulated basis for
11 allowing punitive damages against FTB – denial of comity to honor California's statute against
12 awarding punitive damages against FTB, Nevada's statute that prohibits punitive damages from
13 being awarded against a Nevada governmental agency does not apply to California, and the
14 imposition of punitive damages is required as a check on FTB's power to act in Nevada because
15 Nevada has no political remedy to control what FTB does – are of no avail.

16 First, FTB's argument for immunity is not only based on comity; it is based on United
17 States Supreme Court precedent. The United States Supreme Court has stated that absent a
18 statute allowing punitive damages, municipalities and other government agencies are immune
19 from punitive damages at common law under any circumstance. Newport, 453 U.S. at 261;

21 ¹⁹ The Newport and Vermont Agency courts further explained:

22 [Punitive damages], being evidently vindictive, cannot, in our opinion, be
23 sanctioned by this court, as they are to be borne by widows, orphans, aged men
24 and women, and strangers, who, admitting that they must repair the injury
25 inflicted . . . on the plaintiff, cannot be bound beyond that amount.

26 Newport, 453 U.S. at 261 (*quoting* McGary v. President & Council of City of Lafayette, 12 Rob.
27 (LA) 668, 667 (La. 1846); Vermont Agency, 529 U.S. at 785 n.15 (*quoting* Newport as further
28 explanation for why the United States Supreme Court was "concerned with imposing punitive
damages on taxpayers under any circumstances").

1 Vermont Agency, 529 U.S. at 785 n.15. "Any circumstances" necessarily includes when a
2 California government agency takes actions in Nevada. The policy for not permitting punitive
3 damages under such circumstances does not change.

4 Moreover, Hyatt stated in opposition to FTB's Motion for Partial Summary Judgment Re:
5 Punitive Damages that this Court needed to be able to award punitive damages against California
6 because the State of Nevada had no "political" remedy to stop California's abuses. Hr'g Tr,
7 February 13, 2006, 13. Hyatt argued that Nevada could not force California's political process to
8 remedy the abuses, and that the only way to remedy the abuses was through punitive damages.
9 The Newport court also rejected this argument, stating:

10 First, it is far from clear that municipal officials, including those at the
11 policymaking level, would be deterred from wrongdoing by the knowledge that
12 large punitive awards could be assessed based on the wealth of their municipality.
13 Indemnification may not be available to the municipality under local law, and
14 even if it were, officials likely will not be able themselves to pay such sizable
awards. Thus, assuming arguendo, that the responsible official is not impervious
to shame and humiliation, the impact on the individual tortfeasor of this
deterrence in the air is at best uncertain.

15 Newport, 453 U.S. at 268-69. As such, the United States Supreme Court has already stated that
16 punitive damages do not act as a check on a government agency's action, which is one of the
17 purposes of an award of punitive damages. The Newport court also stated:

18 There also is no reason to suppose that corrective action, such as the discharge of
19 offending officials who were appointed and the public excoriation of those who
20 were elected, will not occur unless punitive damages are awarded against the
municipality. The Court recently observed in a related context: "The more
reasonable assumption is that responsible superiors are motivated not only by
concern for the public fisc but also by concern for the Government's integrity."
21 Carlson v. Green, 446 U.S., at 21, 100 S.Ct. at 1473. This assumption is no less
22 applicable to the electorate at large. And if additional protection is needed, the
compensatory damages that are available against a municipality may themselves
induce the public to vote the wrongdoers out of office.

23 Newport, 453 U.S. at 269. This addresses and negates all of Hyatt's previously articulated
24 arguments.²⁰

25
26
27 ²⁰ Significantly, Hyatt decided not to sue the individual FTB employees who allegedly
28 committed the torts. Thus, Hyatt's argument that punitive damages against FTB are necessary to
Continued...

1
2 ii. No Statutory Law

3 Both Nevada and California prohibit the imposition of punitive damages against a
4 government agency. NRS 41.035; Cal. Gov't. Code § 818 (West 2008). Virtually all states have
5 adopted statutes similar to Nevada and California and likewise prohibit the recovery punitive
6 damages against governmental entities. See e.g., Ala. Code § 6-11-26 (Alabama); Ark. Code Ann.
7 § 21.9.301 (Arkansas); Co. Rev. Stat. § 24-10-114(4)(a) (Colorado); 10 Del. C. §§ 4010, 4011
8 (Delaware) (as interpreted by Schuler v. Martin, 674 A.2d 882, 887 (Del. 1996); F.S.A. §
9 768.28(5) (Florida); Ga. Code. Ann. § 36-33-1 (Georgia); 745 I.L.C.S. 10/2-102 (Illinois); I.C. §
10 34-13-3-4(b) (Indiana); Md. Code § 5-303(c)(1) (Maine); MCLA § 691.1407 (Michigan); M.S.A
11 § 466.04(b) (Minnesota); Vernon's Ann. Mo. Code § 537.610(3) (Missouri); Mont. C. Ann. § 2-
12 9-105 (Montana); N.J.S.A. § 59:9-2(c) (New Jersey); O.R.C. § 2744.05(A) (Ohio); O.R.S. §
13 30.270(30) (Oregon); Pa. C.S.A. § 8553 (Pennsylvania); Gen. Law. 1956 § 9-31-3 (Rhode
14 Island); V.T.C.A. § 101.024 (Texas); U.C.A. § 63-30d-603(1)(a) (Utah); W.Va. Code § 29-12A-
15 7(a) (West Virginia); W.S.A. § 893.80(3) (Wisconsin); W.S. 1977 § 1-39-118 (Wyoming).

16 Newport answers all inquiries regarding the unavailability of punitive damages against
17 FTB based upon immunity. There is no question that the United States Supreme Court has
18 concluded that for at least the last 135 years, governments and governmental agencies are
19 immune from punitive damages absent a statute that authorizes such damages. No such statute
20 exists. Rather, both Nevada and California have each adopted statutes **prohibiting** an award of
21 punitive damages against their respective state agencies. See NRS 41.035; Cal. Gov't Code § 818
22 (West 2008).

23 Therefore, no matter what law this Court applies, the result is the same -- punitive
24 damages cannot be imposed against FTB. Because FTB is immune from any award of punitive
25 damages, any award of punitive damages is excessive as a matter of law and must be vacated.

26
27 deter future conduct does not have merit. If Hyatt wanted to deter such conduct, he could have
28 sued the employees.

1 iii. Law of the Case – Comity Required

2 As set forth above, the law of the case is that Nevada courts will grant comity to
3 California’s laws as long as doing so does not violate Nevada’s interests or policies. In short,
4 Nevada courts must treat FTB just as it would treat a Nevada agency engaged in the same
5 conduct. This law of the case mandates that there can be no award of punitive damages against
6 FTB.

7 Nevada has adopted a statute **prohibiting** an award of punitive damages against its state
8 agencies. See NRS 41.035. California has adopted the same rule regarding its state agencies.
9 Cal. Gov’t Code § 818 (West 2008). Section 818 was added to the Californian Government Code
10 based on the recommendation of the California Law Revision Commission, which commented:
11 Public entities shall not be liable for punitive and exemplary damages. Such damages are
12 imposed to punish a defendant for oppression, fraud or malice. They are inappropriate where a
13 public entity is involved, since they would fall upon the innocent taxpayers. See State Dep’t. of
14 Corr. v. Workmen’s Comp. Appeals Bd., 5 Cal. 3d 885, 888, 489 P.2d 818, 820 (1971) (quoting
15 Recommendations Relating to Sovereign Immunity, No. 1 – Tort Liability of Public Entities and
16 Public Employees, 4 Cal. Law Revision Com. Rep. (Jan. 1963), 817). As noted above, the State
17 of Nevada has, similarly, exempted its state agencies and their employees from punitive damages.
18 NRS 41.035(1); see No. Nevada Ass’n of Injured Workers v. Nevada State Indus. Ins. System,
19 107 Nev. 108, 112, 807 P.2d 728, 730 (1991) (quoting Rush v. Nevada Indus. Commission, 94
20 Nev. 403, 408, 580 P.2d 952, 954 (1978)); Herrera v. Las Vegas Metro. Police Dep’t., 298
21 F.Supp.2d 1043, 1055.

22 The policies of each state are identical, and as such, granting comity to California’s laws
23 on punitive damages does not “contravene Nevada’s policies and interests;” rather, it enforces
24 those policies and interests. If FTB is treated just like a Nevada state agency – which is the law
25 of the case and what Hyatt has claimed should happen -- there can be no award of punitive
26 damages, and the award must be nullified.

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1 iv. Judicial Estoppel

2 Equally important, based on his prior arguments and positions taken before the United
3 States Supreme Court, Hyatt is judicially estopped from asserting that this Court was not required
4 to treat FTB the same as a similarly situated Nevada state agency. Judicial estoppel precludes a
5 party from assuming a position in a legal proceeding that contradicts, or is inconsistent with, a
6 previously asserted position. The purpose of this doctrine is “to prohibit the deliberate shifting of
7 position to suit exigencies of each particular case that may arise concerning the subject matter in
8 controversy” and to protect the integrity of the judicial system. Sterling Builders, Inc. v.
9 Fuhrman, 80 Nev. 543, 549-550, 396 P.2d 850 (1964) (quoting 31 C.J.S. Estoppel § 121 at 649,
10 650). This doctrine “looks to the connection between the litigant and the judicial system,
11 preserving the integrity of the courts by preventing litigants from ‘playing fast and loose with the
12 courts.’” Chaffee v. Kraft General Foods, Inc., 886 F.Supp. 1164, 1168-69 (D.N.J. 1995)
13 (quoting Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3d Cir. 1992); Russell v. Rolfs, 893 F.2d
14 1033, 1037 (9th Cir. 1990). Therefore, judicial estoppel prevents Hyatt from attempting to assert
15 that FTB should not be treated the same as a similarly situated Nevada agency in this litigation.

16 Under Nevada law, there are five criteria that must be met in order for judicial estoppel to
17 apply:

- 18 (1) the same party has taken two positions;
- 19 (2) the positions were taken in judicial proceedings;
- 20 (3) the party was successful in asserting the first position (i.e., the tribunal
21 adopted the position or accepted it as true);
- 22 (4) the two positions are totally inconsistent; and
- 23 (5) the first position was not taken as a result of ignorance, fraud, or mistake.

24 Marcuse v. Del Webb Communities, Inc., 163 P.3d 462, 468-469 (2007) (internal citations and
25 quotations omitted). Here, each element of judicial estoppel is satisfied.

26 First, Hyatt is the same party who asserted, under principles of comity, that FTB must be
27 treated the same as a similarly situated Nevada agency. See Hr’g Tr., Feb. 24, 2003 (Oral
28 Argument, United States Supreme Court), 46:6-22. Based on this position, Hyatt was successful
in defeating FTB’s position on appeal and in convincing the United States Supreme Court to
affirm the decision of the Nevada Supreme Court in its entirety. Id.; see also Franchise Tax

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1 Board, 538 U.S. at 499. Any attempt by Hyatt to now claim that FTB should not be treated like a
2 Nevada agency would be totally inconsistent with his prior position. Finally, Hyatt cannot claim
3 “ignorance” “fraud” or “mistake” in taking this position. Hyatt was represented by a legion of
4 accomplished, highly intelligent, and highly-paid legal counsel – including the well-known, well-
5 respected United States Supreme Court appellate practitioner who made these specific arguments.
6 These attorneys knew full well the arguments they were making and the effect of these positions.
7 Therefore, all five elements of judicial estoppel are satisfied and Hyatt cannot play “fast and
8 loose” with the integrity of this Court by attempting now to take an inconsistent position “to suit
9 [the] exigencies” of this case. Sterling, 80 Nev. at 550.

10 b. No Prima Facie Finding By The Court

11 This Court did not engage in the analysis required by the Nevada Supreme Court in
12 Smiths Food & Drug Centers v. Bellagarde, 114 Nev. 602, 606, 958 P.2d 1208, 1211(1998)
13 before it allowed the punitive damage instruction to go to the jury. This error requires that the
14 punitive damage award be vacated pursuant to NRCP 50, NRCP 59, and the due process clause of
15 the Nevada and United States Constitutions. Alternatively, it requires that this Court order a new
16 trial on punitive damages pursuant to NRCP 50 and NRCP 59.

17 In any case regarding punitive damages, the plaintiff is not entitled to an instruction on
18 punitive damages as a matter of right. Dillard Department Stores v. Beckwith, 115 Nev. 372,
19 380, 989 P.2d 882, 887 (1999). Before a jury can even consider an award of punitive damages,
20 the district court “is responsible to determine, as a matter of law, whether plaintiff has offered
21 substantial evidence of malice, in fact, to support a punitive damage instruction. Thus, the district
22 court is charged in the first instance with determining whether instructions on punitive damages
23 are warranted.” Smiths Food & Drug Centers v. Bellagarde, 114 Nev. 602, 606, 958 P.2d 1208,
24 1211 (1998); see also Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 612, 5 P.3d 1043, 1052
25 (2000); Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433, 451 (2006). This ruling was restated
26 in Countywide Home Loan v. Thitchner, 124 Nev. Adv. Op. No. 64 (Sept. 11, 2008), at *6
27 (“Once the district court makes the threshold determination that a defendant’s conduct is subject
28 to this form of civil punishment, the decision to award punitive damages rests entirely within the

1 jury's discretion"). This Court did not engage in that analysis, even though expressly requested to
2 do so by FTB. If the Court had, it would have found that Hyatt did not, and could not, present
3 evidence of FTB's malice.

4 FTB raised this very issue in its Motion in Limine re: Procedures to Bifurcate Punitive
5 Damage Claims pursuant to NRS 42.005. Hyatt did not disagree with FTB's contention on this
6 point in either his opposition or at the hearing on the motion, and this Court granted FTB's
7 motion. However, during trial when it was time to discuss jury instructions on the issue of
8 punitive damages, FTB asked this Court to conduct the Bellagarde analysis and "determine, as a
9 matter of law, whether plaintiff has offered substantial evidence of malice, in fact, to support a
10 punitive damage instruction." See Rough Tr., Aug. 8, 2008, 7-8, 15-16. Rather than engage in
11 that analysis as required by law, this Court did not do so, stating "we heard so many pretrial
12 motions on so many various subjects and I have to think if this isn't the basis of a pretrial motion,
13 it may be the basis of a post trial motion, but I think we can move on to the next point." Id. at 24.

14 The failure to conduct the required analysis warrants setting aside the award of punitive
15 damages. Despite Hyatt's contention in the August 8, 2008 hearing that NRS 42.005 does not
16 require this Court to make such a determination (see Rough Tr. Aug. 8, 2008, 9-10) and that "the
17 Nevada Supreme Court has not come out and said this is the procedure, this is the way that you
18 proceed with a punitive damages case." (id. at 10), Hyatt is demonstrably wrong. The Nevada
19 Supreme Court has expressly stated that the district court "is charged in the first instance with
20 determining whether instructions on punitive damages are warranted." Bellagarde, 114 Nev. at
21 606, 958 P.2d at 1211 (1998). It reaffirmed this statement in Evans, 116 Nev. at 62, 5P.3d at
22 1052, and then again in Countrywide, 124 Nev. Adv. Op. No. 64. These cases post-date the
23 passage of NRS 42.005, which was last amended in 1995, so there can be no question that the
24 Nevada Legislature may have been trying to overrule the Nevada Supreme Court's determination
25 on how to adjudicate a punitive damages claim.

26 Moreover, had this Court engaged in the analysis, it would have found that Hyatt did not
27 present evidence sufficient to support an award of punitive damages. The failure to engage in the
28 analysis warrants a new trial on punitive damages.

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1 In this case, there can be no malice as a matter of law. FTB is an agency of the State of
2 California, and as such, can only act through its officers and agents. See Inland Mediation Bd v.
3 City of Pomona, 158 F. Supp 2d 1120, 1159 (C.D. Ca. 2001) (“A municipality can act only
4 through its employees”); Okeson v. Tolley Sch. Dist., 570 F.Supp. 408, 412 (D. N.D. 1983)
5 (“Governmental entities are instruments, not beings. As such, they cannot themselves have
6 malice. Only the individuals that act through the polity can develop and act upon malicious
7 intentions”); Warren v. Westchester County Jail, 106 F. Supp 2d 559, 566 (S.D.N.Y. 2000) (a
8 municipality can only act through its employees). Courts have concluded that as a result, a
9 municipality cannot form the necessary intent required for the imposition of punitive damages.
10 Newport, 453 U.S. at 267; Herrera v. Las Vegas Metro. Police Dep’t, 298 F. Supp 1043, 1055 (D.
11 Nev. 2004); Okeson, 570 F. Supp. at 412.

12 As such, it was legally impossible for FTB to have any “malice.” This fact alone would
13 negate Hyatt’s right to seek punitive damages and for this Court to permit a punitive damages
14 award. This Court must vacate the jury’s award of punitive damages, or at a minimum, grant a
15 new trial on punitive damages.

16 c. No Jury Instruction re: Vicarious Liability

17 Because the Court refused to follow City of Newport v. Fact Concerts, Inc., 453 U.S. 247
18 (1981) and the law of this case, both of which conclude that FTB is immune from an award of
19 punitive damages, the only way that FTB could be held liable for punitive damages is on a
20 vicarious liability theory; i.e. that FTB somehow is responsible for the acts of its officers or
21 agents. While this also is a legally impossible remedy²¹ and FTB does not believe that it is even
22 an available remedy, intellectually speaking it is the only way that FTB could have been liable for
23 punitive damages because FTB is a governmental entity that can only act through its employees.

24
25 ²¹ See Inland Mediation Board v. City of Pomona, 158 F. Supp 2d 1120, 1159 (C.D. Ca.
26 2001) (“A municipality can act only through its employees, and to permit awards of punitive
27 damages through the doctrine of respondeat superior would effectively vitiate the holding of
28 [Newport]”).

1 FTB explained this to the Court and asked for a vicarious liability instruction in light of this
2 Court's refusal to follow Newport, to grant comity to California on this issue, or to find that FTB
3 could not legally have any malice. This Court refused to give the instruction. The failure to give
4 the instruction requires that this Court vacate the award of punitive damages and grant a new trial
5 on punitive damages pursuant to NRCP 50 and NRCP 59.

6 Under Nevada law, no statute exists for allowing for punitive damages against a
7 governmental agency, as would be expected because Nevada, and all other, governmental
8 agencies are immune from punitive damages under any circumstances. NRS 41.031, NRS
9 41.035. The only analogous statute would be NRS 42.007, which discusses when punitive
10 damages can be awarded vicariously. That statute states that an employer is responsible for
11 punitive damage for the actions of the employee only if one of the following elements is met by
12 an officer, director or managing agent of the corporation who was expressly authorized to direct
13 or ratify the employee's conduct on behalf of the corporation:

- 14 (a) The employer had advance knowledge that the employee was unfit
15 for the purposes of the employment and employed him with a
16 conscious disregard of the rights or safety of others;
- 17 (b) The employer expressly authorized or ratified the wrongful act of
18 the employee for which the damages are awarded; or
- 19 (c) The employer is personally guilty of oppression, fraud or malice,
20 express or implied.

21 NRS 42.007(1). Once the Court decided to give punitive damage instructions, it was legal error
22 not to give FTB's proffered vicarious liability instruction.

23 Hyatt never presented evidence to satisfy any of the three elements of NRS 42.007. He
24 never proved or even identified who the requisite "officer, director or managing agent" was that
25 was "expressly authorized to direct or ratify the employee's conduct on behalf of the [FTB]."
26 Without such proof, there can be no vicarious liability by FTB for punitive damages under NRS
27 42.007.
28

1 d. No Jury Instruction re: Harm to Others

2 FTB requested that this Court provide an instruction on “harm to others” during the
3 punitive damage phase of the trial. This Court did not give the instruction, which requires that the
4 punitive damage award be vacated or a new trial held on punitive damages pursuant to NRCP 50
5 and 59.

6 FTB requested that the Court give the following instruction:

7 In deciding whether or in what amount to award punitive damages, you may
8 consider only the specific conduct by FTB that injured Mr. Hyatt. You may not
9 punish FTB for conduct or practices that did not affect Mr. Hyatt, even if you
10 believe that such conduct or practices were wrongful or deserving of punishment.
Also, you may not punish FTB for harms that it allegedly committed against other
persons.

11 See FTB Proposed Jury Instruction re: Punitive Damages.

12 In a recent case, the Ninth Circuit Court of Appeals, applying Nevada law, concluded that
13 the failure to give the instruction that FTB requested constituted a violation of the Due Process
14 Clause of the Fourteenth Amendment and was **reversible error**. White v. Ford Motor Co., 500
15 F.3d 963 (9th Cir. 2007). Similarly, this Court’s refusal to give the instruction mandates that the
16 award of punitive damages be vacated and that a new hearing on punitive damages be conducted.

17 The White court, citing to the United States Supreme Court’s decision in Philip Morris
18 USA v. Williams, 127 S.Ct. 1057 (2007), stated that “the Due Process Clause ‘forbids a State to
19 use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or
20 those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially,
21 strangers to the litigation.’” Id. at 971-72. Moreover, “[a] jury may consider evidence of actual
22 harm to nonparties as part of its reprehensibility determination, but may not ‘use a punitive
23 damages verdict to punish a defendant directly.’ Where there is a significant risk that jurors will
24 misapprehend the distinction, the court must upon request protect against that risk by ‘avoid[ing]
25 procedure that unnecessarily deprives juries of proper legal guidance.’” Id. (internal citations
26 omitted).

27 That “significant risk” existed here, and it was error for the Court to not give the
28 instruction. In fact, Hyatt specifically argued the “harm to others” in the punitive damages phase:

1 Who are the victims of the Franchise Tax Board? Who is Mr. Hyatt when he was
2 a victim of the Franchise Tax Board? He was a taxpayer. They say their conduct
3 was the same for Mr. Hyatt as it has been for others. **Who has been the victims**
4 **of their misconduct and their abusive tactics? You think that these taxpayers**
5 **who have had this happen to them in the past that haven't had the resource**
6 **that is Mr. Hyatt has had** or people in the future are going to think, wow, I may
7 be audited at some point in the future are going to be sad because there was a
8 message sent by way of punitive damages imposed against the Franchise Tax
9 Board?

.....

10 You have people in the State of California who quake in their boots when they get
11 a letter from the Franchise Tax Board **and have in the past** and will in the future
12 what they are telling you is don't impose punishment against those people, they
13 won't like it. Are you kidding? They will do cartwheels down the sidewalk
14 because maybe they won't be a victim now.

15 Rough Trial Tr., Aug. 13, 2008, 100-101 (emphasis added).

16 While Hyatt's lawyers claim that they were arguing about deterrence and not about using
17 harm to others to support a claim for punitive damages, there is a "substantial risk" that the jury
18 misapprehended the distinction. Hyatt clearly talked about past "victims" (plural) of FTB's
19 "misconduct" and "abusive tactics." Rough Trial Tr., Aug. 13, 2008, 100. FTB was concerned
20 about this before the punitive damage phase began, and even interjected the same objection
21 during Hyatt's argument. Id. at 102. This Court still refused to give the instructions that White
22 required.

23 Just as the courts found in Williams and in White, there was a significant risk that the jury,
24 in arriving at its punitive damage award, punished FTB for harm to nonparties. Absent a proper
25 limiting instruction, the jury could have mistakenly understood Hyatt's argument that FTB has
26 engaged in similar "misconduct" and "abusive tactics" against other taxpayers in the past to
27 justify not just a finding of reprehensibility, but also to consider those other injuries in calculating
28 the amount of damages warranted to punish FTB's conduct. See White, 500 F.3d at 972;
Williams, 127 S.Ct. at 1063-65. The award of punitive damages must be set aside and a new trial
on punitive damages must be conducted.

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e. Hyatt Waived His Right to Submit His Punitive Damage Claims to the Jury

Even if the Court rejects the above arguments, Hyatt was not entitled to an award of punitive damages because he waived his right to claim these damages when he failed to request the jury be instructed on these issues at the conclusion of phase one of trial. In spite of Hyatt's unequivocal waiver, the Court improperly allowed the trial to proceed to the punitive damage phases of trial, in direct violation of NRS 42.005(3) and the Court's previous orders. These errors were legal errors that mandate a new trial. NRCP 59(a)(7).

i. Pretrial Procedural Background regarding Punitive Damages

In order to fully appreciate this assignment of error, it is important for FTB to remind the Court of the historical background related to this issue.

a. FTB's Motion in Limine re: Bifurcation of Punitive Damages

Prior to trial, FTB filed a motion in limine specifically requesting that the Court institute a bifurcated procedure during trial for the presentation of Hyatt's punitive damage claims. See FTB's Mot. in Limine re: Procedure to Bifurcate Punitive Damages Claims Pursuant to NRS 42.005 filed 1/7/2008. In this motion, FTB argued that NRS 42.005 mandated that trials involving claims of punitive damages must proceed in two phases. Id. at 4.

FTB argued that during the first phase or "liability phase" of trial, the parties should only be permitted to present evidence of compensatory damages and liability. The parties could not, however, reference or mention punitive damages nor could the parties present any evidence related to the wealth of the defendant. Id. FTB asserted that at the conclusion of the liability phase of trial, during the settling of jury instructions, the Court would then be required to determine if a prima facie showing had been made by Hyatt for the imposition liability for punitive damages. Id. If the Court determined that a prima facie case has been made for punitive damage liability, the Court would then adopt any necessary punitive damage jury instructions which would be read to the jury prior to the parties' closing arguments during the liability phase

1 of trial. Based on Nevada law, however, the jury would only be asked to determine if punitive
2 damages should be assessed against FTB at that time. NRS 42.005(3).

3 If the jury determined that punitive damages should be assessed, FTB asserted that the
4 trial would then proceed to the second phase, where the only evidence presented to the jury would
5 be related to the wealth of FTB. The jury would then be required to determine the amount of
6 punitive damages to be assessed. Id.

7 Hyatt generally agreed with this procedure. See Hyatt's Opp'n to FTB's Mot. in Limine
8 re: Procedure to Bifurcate Punitive Damages Claims Pursuant to NRS 42.005 filed 1/22/2008.
9 Hyatt's Opposition took the position, however, that the Court was not required to determine that
10 Hyatt had made a prima facie showing for the imposition of punitive damages before the Court
11 could instruct the jury regarding these damages. Ultimately, the Court granted FTB's Motion in
12 its entirety. Ct.'s Order Granting Mot. filed 3/27/2008; Hr'g Tr., Feb. 28, 2008 (FTB's Mot. in
13 Limine re: Bifurcation of Punitive Damages), 72:16-20 (hereinafter "the Bifurcation Order.>"). As
14 a result, the Court expressly adopted the bifurcated procedure outlined by FTB.

15 b. Submission of Proposed Jury Instructions
16 and Objections

17 On March 17, 2008, the parties each simultaneously filed their proposed jury instructions.
18 See FTB's Proposed Jury Instructions filed 3/17/2008; Hyatt's Proposed Jury Instructions filed
19 3/17/2008. On March 31, 2008, the parties then filed written objections to the opposing party's
20 proposed instructions. FTB's Objections to Hyatt's Proposed Jury Instructions filed 3/31/2008;
21 Hyatt's Objections to FTB's Proposed Jury Instructions filed 3/31/2008.

22 In his proposed jury instructions, Hyatt offered a punitive damage instruction that was
23 identical to the Nevada pattern jury instruction, Number 10.20. See Hyatt's Proposed Jury
24 Instructions, at 58. FTB objected to this instruction on several grounds. See FTB's Objections, at
25 87. Principally, FTB argued that the instruction expressly violated the Bifurcation Order because
26 it asked the jury to determine the amount of punitive damages to be assessed during the liability
27 phase of trial. Id.

1 In its objections, FTB made it abundantly clear that the Bifurcation Order required a
2 multiple step process: (1) at the end of the liability phase of trial (the first phase), the Court was
3 required to make a prima facie determination that the issue of punitive damages should be
4 submitted to the jury; (2) if the Court determined that a prima facie showing had been made, at
5 the conclusion of the liability or first phase of trial, the jury would be instructed on punitive
6 damages and asked **only** to decide if punitive damages should be assessed by a single
7 interrogatory question on the special verdict form; and (3) if the jury determined that punitive
8 damages should be assessed, the case would then proceed to the second phase, where the jury
9 would be asked to determine the amount of punitive damages to be assessed. Id.

10 c. Settlement of Jury Instructions

11 At the conclusion of trial, the parties and the Court began the process of settling jury
12 instructions. By Friday, July 18, 2008, the parties had settled all of the jury instructions with the
13 exception of the proposed damage and final form instructions. Thus, when the parties left for the
14 weekend, the Court had not made a prima facie determination regarding whether Hyatt had met
15 his burden of establishing a prima facie case for punitive damages, as required by the Bifurcation
16 Order. At that time, no argument or discussion had yet occurred between the parties and the Court
17 regarding what, if any, punitive damage jury instruction should be adopted by the Court. See
18 Rough Trial Tr., July 18, 2008, 176-178.

19 On Sunday, July 20, 2008, FTB counsel sent an email communication to Hyatt's counsel
20 reiterating **in great detail** the bifurcation process that would be required under the Bifurcation
21 Order and proposing two alternative punitive damage jury instructions FTB intended to present to
22 the Court the following day. Exhibit 8, 7/20/2008 Email from Carla Higginbotham to Michael
23 Wall re: Punitive Damages with Attachments. FTB's counsel re-iterated the three-step procedure
24 outlined by the Bifurcation Order and previously outlined in FTB's objections to Hyatt's
25 proposed jury instructions. Id.; see also FTB's Objections to Hyatt's Proposed Jury Instructions,
26 p. 86-87. Hyatt's only response to this email and the attached alternative instructions was a polite
27 "Thank you." See Exhibit 8, Reply Email Michael Wall to Carla Higginbotham dated 7/20/2008.
28

1 The following day, July 21, 2008, the parties and the Court reconvened to settle the
2 remaining jury instructions. When Hyatt's proposed punitive damage instruction was reached,
3 **Hyatt's counsel indicated that he would not be offering a punitive damage instruction**
4 **during the first phase of trial.** Rough Trial. Tr., July 21, 2008, 82-84. Specifically, Hyatt's
5 counsel stated:

6 MR. WALL: The next we have are some instructions that have been proposed
7 from both sides for punitive damages. My understanding is the punitive damages
8 has been bifurcated. I don't think you can bifurcate punitive damages and still talk
9 to the jury. Our understanding is punitive damages will not be mentioned to the
10 jury until after they come back with a verdict in favor of Hyatt with respect to one
11 of his claims so we would have a support for that and we would have a separate
12 punitive damages stage and we present evidence, argue to the jury and they be
13 instructed to the jury on punitive damages.

14 At that point if we try to instruct on punitive damages, there maybe
15 problems. Part of that instruction may not be appropriate. In a case where it's
16 handled at once I suspect there'd have to be instructions and argument so the jury
17 doesn't get confused. I think by bifurcating damages the position is the jury
18 doesn't hear about punitive damages during this stage.

19 THE COURT: That's my experience.

20 MS. LUNDVALL: From my understanding I hear Mr. Wall to be saying that any
21 of our discussion that we have as to what punitive damage instruction that could be
22 given would not come until phase two so we don't have to resolve these at this
23 point in time.

24 Rough Trial Tr., July 21, 2008, 82:5-83:5.

25 What the transcript does not reflect, however, is the long pause between FTB's response
26 and Hyatt's statement. FTB's counsel was **shocked** at Hyatt's position given the Bifurcation
27 Order and the repeated statements by the parties outlining the bifurcation procedure which
28 mandated that the jury to be instructed on punitive damages at the end of the liability or first
phase of trial, **if at all**. Based on these statements, FTB was led to believe that Hyatt was waiving
or abandoning his claims to punitive damages. As a result, FTB did not object to Hyatt's
withdrawal. FTB did make clear, however, that FTB was not waiving any of its previous
objections or arguments that punitive damages could not be assessed against FTB under any
circumstances. Id. at 83:23-84:17.

1 FTB's understanding of Hyatt's waiver was reinforced by Hyatt's rebuttal closing
2 argument, wherein he unequivocally stated to the jury:

3 Well, you are the survivors. We lost three. Been through 15 weeks of trial
4 and we're at the end. Today's a good day. It's actually better than the day I started
5 closing because today you'll get the case. Today you will begin deliberations.
6 You'll be able to put together all the pieces and the evidence and apply the law that
7 we started 15 weeks ago, April 14th.

8 It's also a good day because when you woke up this morning it's the last
9 day that you will be compelled to listen to the voice of a lawyer. After today,
10 after I'm finished, there are no more lawyer arguments. That's it. No more
11 lawyers. No other lawyer will have a chance to address you. You can go
12 deliberate. If you choose, never listen to a lawyer again your entire life. You
13 can ignore them at social gatherings. You can do whatever you want to do
14 because you're not compelled to be here for 15 weeks listening to the lawyers.

15 Rough Trial Tr., July 30, 2008, 10:15-11:8. (emphasis added). Following this argument, there
16 was little doubt that Hyatt was not seeking punitive damages in this case.

17 d. Jury's Verdict and Ensuing Arguments related to
18 Punitive Damages

19 On August 6, 2008, the jury returned its verdict in the first phase of trial. The jury found
20 in favor of Hyatt on all claims and awarded an unconscionable amount of damages. Immediately
21 following the reading of the verdict, the parties and the Court addressed the issue regarding what
22 steps, if any, needed to be taken next. Rough Trial Tr., Aug. 6, 2008, 7:8-10. Hyatt immediately
23 asserted that the case must proceed to the punitive damage phase of trial. FTB immediately
24 objected, asserting that there should not and could not be any additional phases of trial related to
25 punitive damages. FTB made clear that before the Court could proceed to a punitive damage
26 phase of trial, the Court must make three threshold determinations which FTB was prepared to
27 present at that time. Id. at 7:15-8:17.

28 First, FTB argued that the Court was required to determine whether the punitive damage
claims could be legally submitted to the jury. FTB argued that under common law, California,
and Nevada law punitive damages could not be assessed against a state agency. Id. Second, the
Court was required, based on the Bifurcation Order, to make a determination of whether Hyatt
had established a prima facie showing for an entitlement to punitive damages. Id. Third, FTB
argued that the Court was required to determine whether Hyatt had waived his right to