IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/Cross-respondent,

v.

GILBERT P. HYATT,

Respondent/Cross-appellant.

Supreme Court Case No. 53264

District Court Case No. A382999

Notice of Cross-Appeal Filed March 4, 2009

APPEAL

from the Eighth Judicial District Court, Clark County
THE HONORABLE JESSIE WALSH, District Judge

RESPONDENT'S REPLY CROSS-APPEAL BRIEF

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RESPONDENT'S REPLY CROSS-APPEAL BRIEF

Respondent Gilbert P. Hyatt ("Respondent" or "Hyatt") submits his reply in support of his cross-appeal and in response to Appellant and Cross-Respondent Franchise Tax Board of California's ("FTB") answering cross-appeal brief.

I. Introduction.

The FTB's Answering Brief attempts to shift the actual issue presented in this cross-appeal by misstating the basis of the District Court's ruling and trying to avoid the very issue presented. The District Court did not rule that Hyatt's expert testimony in support of the circumstantial evidence he presented was inadmissible to prove causation of his economic damages. Rather, the District Court ruled Hyatt needed direct evidence to establish causation. Despite the other evidence presented to support other elements of Hyatt's economic damages claim,[1] the District Court erroneously required direct evidence of the causation element, rather than allowing circumstantial evidence to establish that link. Although the District Court's order states that Hyatt had no admissible evidence to prove causation, based on the District Court's comments during the hearing on the motion, it is clear the Court meant that Hyatt had no *direct evidence* to prove causation. The issue in this cross-appeal is not an evidentiary issue, but rather a legal issue as to whether Hyatt was required to support his circumstantial and expert testimony with direct evidence. The answer is no, and the District Court erred in ruling to the contrary.

In addition, as addressed below, the FTB sets forth a false, and certainly a disputed, factual basis in support of its Answering Brief. First, the FTB already had the information it was purportedly seeking from the Japanese licensees, and the disclosures to those companies were not innocent and benign. The FTB disclosed to those companies that Hyatt had produced to the FTB highly confidential information Hyatt had committed to the companies he would keep confidential. Further, substantial facts support the circumstantial evidence upon which Hyatt relies for his economic damages claim. Further, Hyatt discovered that the FTB was litigating against and

[1] This other evidence is discussed at pp. 5-10, below, and must be taken as true in the District Court's evaluation under NRCP 56.

routinely auditing the same Japanese companies Hyatt had previously licensed or was trying to license at the time the FTB letters were sent.[2] Certainly triable issues of fact exist in regard to these claims that preclude entry of summary judgment. The District Court's order should be reversed and Hyatt should be awarded a new, limited trial only on the issue of the amount of his economic damages stemming from the FTB's already established intentionally tortious conduct.

II. Contrary to the FTB's attempt to distort the ruling of the District Court, the District Court erroneously ruled that Hyatt needed to produce direct evidence that FTB's letters were disseminated among other Japanese companies and could not rely only on circumstantial evidence to prove that the FTB's letters caused damage to his Licensing Program.

In describing the District Court's ruling, the FTB avoids addressing the District Court's own explanation for the basis of the ruling as stated on the record during the hearing on the FTB's summary judgment motion. Hyatt therefore repeats the District Court's ruling at issue in this cross-appeal:

> The Court's view of it is this.
>
> That the plaintiff has no real evidence that the letters sent by defendant caused any economic damage. The plaintiff has circumstantial evidence, since the business went downhill after the letters were sent, this must have been the reason. And plaintiff seeks to prove this by bringing in experts on Japanese culture to offer their opinion that the Japanese would've shared this information. Plaintiff counsel argues that this is a reasonable inference to make, that it may very well be a reasonable inference to make, I don't know.
>
> However, these particular experts, it's the Court's understanding have no actual knowledge of anything that occurred. It seems to me that while it is true that plaintiff's counsel can argue circumstantial evidence that plaintiffs ought to have some witness or some evidence with direct knowledge of the economic damages.
>
> So I'm inclined to grant the motion for partial summary judgment as it relates to economic damages.[3]

The District Court ruled that although Hyatt has circumstantial evidence to support his causation theory for economic damages, he also needs to have "some witness or some evidence with direct knowledge of the economic damages."[4] That is an incorrect statement of the law.

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[2] *See* discussion, *infra,* at 10.
[3] 12 AA 2904-2905.
[4] *Id.*

While the FTB argues factual distinctions with this Court's decision in *Frantz v. Johnson*,[5] it cannot distinguish the apposite legal holding that direct evidence of causation is not necessary and harm in terms of economic loss can be established solely with "indirect circumstantial evidence." The District Court ruled to the contrary as set forth above.

Instead of addressing this unambiguous holding of the District Court, the FTB quotes and references part of the language from the formal order entered by the Court after the hearing. But even that language cannot be interpreted as the FTB argues. The District Court's order succinctly read that:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant California Franchise Tax Board's Motion for Partial Summary Judgment Re: Hyatt's Economic Damage Claims is GRANTED because *Plaintiff failed to come forward with admissible evidence to demonstrate that Defendant's actions were a cause in fact of Plaintiff's alleged economic damages.*[6]

The District Court was not making an evidentiary ruling regarding the expert testimony submitted by Hyatt. Rather, the District Court was making a legal ruling, as it explained on the record as quoted above, that Hyatt was required to come forward with direct evidence of causation of the economic damages he claimed. The language in the order must be read consistently with the District Court's own explanation of her ruling during the hearing as fully quoted above. Failure to put forth admissible evidence is a reference to Hyatt's failure to put forth direct evidence in addition to the circumstantial evidence he did offer. Again, the District Court was wrong as a matter of law on this point. The issue on this appeal is the District Court's ruling dismissing Hyatt's economic damages claim on the basis that he purportedly needed direct evidence of causation, in addition to the circumstantial evidence.[7]

The FTB then quotes comments made by the District Court at subsequent hearings that "the only evidence to substantiate that claim was based on speculation" and later "this Court viewed that

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[5] 116 Nev. 455, 467-68, 999 P.2d 351, 359 (2000).

[6] 12 AA 3000 – 13 AA 3001 (emphasis added).

[7] In fact, as set forth below, Hyatt put forth direct evidence that supported the circumstantial evidence on which he relied to establish causation. *See, infra* at 10. But the issue on this appeal is the District Court's ruling dismissing Hyatt's economic damages claim on the basis that he purportedly needed direct evidence of causation in addition to the circumstantial evidence.

claim [for economic damages] to be speculative."[8] But these comments did not turn the District Court's legal ruling into an evidentiary ruling as the FTB asserts. Again, the District Court did not find the expert evidence proffered was somehow incompetent. The District Court did not find the fact in issue—causation—was not material or was not in dispute. The District Court did not suggest or rule that Hyatt's circumstantial and expert testimony was being excluded at all, certainly not on the District Court's stated opinion that direct evidence was required.

The District Court made the wrong legal ruling regarding the type of evidence that is needed to establish causation in the context of damages claimed. As this Court held and Hyatt cited in his opening brief, in *Frantz v. Johnson,* causation of damages may be proven by circumstantial evidence *alone*, in the complete absence of direct evidence.[9] The FTB does not actually dispute this legal point; rather it tries to make the District Court's ruling into something that it was not. But the District Court did not hold Hyatt's expert testimony inadmissible from an evidentiary standpoint. It held that Hyatt was required to present something more than the circumstantial evidence he submitted, *i.e.*, as a matter of law the District Court ruled that direct evidence was required for Hyatt to meet his burden of proof. But that is not the law.

The FTB's discussion of legal authorities regarding review of evidentiary rulings is therefore inapposite. The correct standard of review, as addressed in Hyatt's Opening Brief on his cross-appeal, is the *de novo* standard used to review summary judgment motions relative to whether a triable issue of fact exists. When Hyatt's expert testimony and circumstantial evidence is properly considered, a triable issue of fact exists as to the cause of Hyatt's economic damages. Hyatt says it was the FTB's conduct directed at his two key Japanese licensees, but the FTB claims it was other events.[10] This disputed fact should have been presented to the jury.

III. The FTB'S Answering Brief is based on false, or at least disputed, facts.

The FTB makes a number of misstatements regarding the record and facts upon which Hyatt based his claim for economic damages. For example, the FTB misstates the timing on the

[8] FTB Answering Brief, at 151, citing 13 ARA 3074 and 17 ARA 4027-28.
[9] *Id.* at 467, 999 P.2d at 359.
[10] FTB Answering Brief, at 156 fn. 72 and 158.

receipt of income, implying at the outset of its brief that Hyatt received virtually all of his patent royalty income immediately after moving to Nevada in September 1991. As the chart set forth below shows,[11] Hyatt received a steady stream of royalty fees starting in late 1991 and lasting until late March, 1995, when the FTB sent its letters.

Most significantly, the FTB misstates that Hyatt failed to produce the information the FTB sought directly from the two Japanese sublicensees Fujitsu and Matsushita. The FTB already had the information it claims was needed from the two Japanese companies, and the FTB's disclosures to these two important sublicensees were not limited and innocent as the FTB portrays.

Hyatt had long since provided the FTB with the information on the timing of the income and copies of the license agreements.[12] The license agreements provided the FTB with information regarding the amount of the payment, the signature date, the effective date, and the deadline for payment (*e.g.*, one day after the effective date for the Matsushita agreement).[13] Hyatt had also produced mutual fund statements to the FTB which evidenced the amounts and the dates of the wire transfers, even though the FTB had failed to ask for this investment information and had requested trust account records that included unrelated clients of the law firm.[14]

Further, the FTB had asked Hyatt's representative for "account statements" for the entire attorney-client trust account of the law firm that was then representing Philips and receiving the payments from the sublicense. An objection was made based on the privileged nature and the breadth of the request.[15] But unbeknownst to Hyatt at the time, the FTB asked Matsushita and Fujitsu for information as to one specific wire transfer to one specific individual (Hyatt) which was not privileged to Hyatt and could have been produced if the FTB had asked Hyatt for such information.[16] The FTB made no such specific request to Hyatt.[17] This is despite the fact that under California law and the FTB's own procedures the FTB was required to first seek the

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[11] *See*, *infra* at 7-8.
[12] 9 AA 2031-2032; 10 AA 2440-2453; 10 AA 2454-2468.
[13] *Id.*
[14] 9 AA 2031-2032; 10 AA 2469-2474.
[15] 84 RA 020985.
[16] 9 AA 2031-2032.
[17] 9 AA 2031-2032.

information from Hyatt.[18] The fact that the letters were sent to the Assistant Director of Matsushita and to the President of Fujitsu emphasized the importance of this issue to those companies with an implied threat, particularly since the FTB was litigating against and routinely auditing these companies and since the FTB's letters attached important confidential information that was submitted to the FTB in confidence.

Despite having the relevant information-described above, the FTB wrote to Fujitsu and Matsushita, whose identities and addresses Hyatt had provided to the FTB under a direct promise of confidentiality.[19] The FTB's contacts with these companies attached or referenced the confidential documents-Hyatt had provided to the FTB in confidence—thereby putting the Japanese companies on notice that Hyatt had produced to the FTB the licensing agreements he had agreed to keep confidential. Again, Hyatt had previously informed the FTB that all of his licensing information was very sensitive and had received from the FTB promises that it would keep this information confidential.[20]

The FTB's letters were not simple inquiries. They were formal investigative letters to high-level executives at Japanese companies.[21] In addition, attached to each of these letters was a confidential document that Hyatt had produced to the FTB in strict confidence.[22] The sublicense agreements with Fujitsu and Matsushita, respectively, expressly stated, "HYATT and his agent … shall keep strictly in confidence the identity of COMPANY as a licensee" and required that various other information be kept confidential.[23] But the FTB attached confidential licensing information to each of its two letters that violated the spirit and intent of the confidentiality clause in the two sublicense agreements.[24] The FTB letter to Fujitsu attached the signature page of the confidential

[18] *See* Cal. Civ. Code ¶ 1798.15 (requiring the FTB to first seek requested information from the taxpayer); *see also* FTB Security & Disclosure Manual, 10 AA 2475-2476.
[19] 9 AA 2031-2032.
[20] 9 AA 2030-2031.
[21] 65 AA 16187-16190.
[22] 65 AA 16187-16190.
[23] 10 AA 2449, 2465.
[24] 65 AA 16187-16190.

license agreement.[25] The FTB letter to Matsushita attached a confidential private letter from an executive of Matsushita to Hyatt.[26]

In sum, the FTB made premature, unnecessary, and improper disclosures to two of the important sublicensees in Japan. These events resulted in a cessation of new sublicense agreements in Japan and Hyatt's loss of significant licensing revenue from Japan.

The FTB's Answering Brief also challenges facts upon which the underlying summary judgment was based, thereby creating material issues of fact. First and foremost the FTB challenges the fact that the Licensing Program in Japan stopped virtually overnight when the FTB made the improper disclosures to Fujitsu and Matsushita in April of 1995. The most obvious and unavoidable evidence are the numbers themselves. Starting in late 1991 and continuing through March of 1995, Philips obtained a steady stream of new sublicensees for Hyatt's patents. Then abruptly, as indicated in the chart below, no more licensing agreements were obtained from Japanese companies:[27]

Company	Total Payment	Effective Date
Fujitsu	$15,000,000	October 24, 1991
Matsushita	$25,000,000	November 14, 1991
Sony	$22,000,000	December 17, 1991
NEC	$16,500,000	December 26, 1991
Sharp	$17,800,000	November 20, 1991
Sharp "PCT"	$ 250,000	December 25, 1991
OKI	$10,000,000	January 31, 1992
Sanyo	$36,100,000	July 23, 1992
Hitachi	$56,000,000	August 6, 1992
Omron	$ 1,400,000	September 30, 1992
Nippon Columbia	$ 3,250,000	December 15, 1992
Kenwood	$ 9,150,000	December 22, 1992
Nikon	$ 6,750,000	December 28, 1993
Canon	$58,000,000	December 30, 1993
Casio	$ 9,500,000	April 1, 1994
Minolta	$13,748,000	May 24, 1994
Onkyo	$ 2,100,000	June 3, 1994

[25] *Id.*
[26] *Id.*
[27] 9 AA 2021-2022, 2074.

Toshiba	$42,900,000	June 3, 1994
Seiko Epson	$18,500,000	March 31, 1995[28]

Something obviously happened after March of 1995 that caused the Japanese market to close tightly. The FTB's disclosures about Hyatt in Japan—in violation of the FTB's professed commitments to keep such information confidential—occurred on April 12, 1995 (only two weeks later).

Hyatt had more than 35 years experience with Japanese companies, engineers, and executives. Hyatt began working with Japanese companies in 1969, and since that time he has worked with Japanese executives and engineers, and studied Japanese companies, culture, and government.[29] From 1969 to 1971, while vice president of a company he founded, Hyatt worked closely with executives and engineers from Di Nippon Screen, Ltd., and its U.S. subsidiary, DS America. In 1971, Hyatt filed his first patent application in Japan.[30] In the late 1980s, Hyatt worked with various Japanese companies to license some of his patents, but without success.[31]

In 1991, Hyatt worked closely with Pioneer executives both in Japan and through its U.S. affiliate, DVA.[32] In the Spring of 1991, Nikkei Electronics invited Hyatt to give a seminar on his patents to the Japanese business community. He traveled to Japan at Nikkei's expense, and met with executives and engineers of many Japanese companies and government agencies.[33] Pioneer also hosted Hyatt in Japan in 1991. During this visit Hyatt traveled by a Pioneer company helicopter, toured the Pioneer automated factory, met with the president and other senior Pioneer executives, and obtained an intellectual property agreement.[34]

After Hyatt moved to Las Vegas in September 1991, Japanese executives, engineers, and inventors first visited him in Las Vegas in 1992 and continued to visit him thereafter. For example, the noted Japanese inventor, Dr. Shumpei Yamasaki, and his associate visited Hyatt in

[28] This agreement was formally signed on April 18, 1995, while the effective date was March 31, 1995.
[29] 9 AA 2022.
[30] 9 AA 2022.
[31] 9 AA 2023.
[32] 9 AA 2023.
[33] 9 AA 2023.
[34] 9 AA 2023.

Las Vegas in April 1992.[35] Japanese reporters from Japanese publications traveled to Las Vegas in 1992 to interview Hyatt for stories that they published in Japanese publications.[36] A number of Japanese executives also traveled to Las Vegas in 1992 to work with Hyatt regarding his Liquid Crystal Device research and development (R&D) projects.[37]

Also in 1992, Nevada Governor Bob Miller hosted Hyatt and his Japanese and Korean visitors in Governor Miller's offices in Las Vegas to discuss location of factories of Japanese and Korean companies in Nevada and to produce products licensed under Hyatt's patents.[38] Hyatt worked with Governor Miller, with Nevada Senator Richard Bryan, with his associates at the Nevada Development Agency (NDA), and with his Las Vegas business associates (*e.g.*, Mr. Schulman and Mr. Kern) in 1992 and thereafter on the use of the Nevada International Trade Zone in conjunction with licenses to his patents to attract high technology Japanese and Korean businesses to Nevada.[39]

Hyatt was therefore far from an unknown figure in Japan when, during April 1995, the FTB made improper disclosures about Hyatt to top executives of two key Japanese sublicensees. All of this direct evidence lays the factual foundation for the circumstantial evidence upon which Hyatt's claim for economic damages in Japan is based.

As discussed, once the FTB made this disclosure in Japan, the licensing successes stopped totally. It is with this backdrop that Hyatt offered substantial expert testimony on the issue of causation as described above.

The effect of the FTB's disclosures about Hyatt in Japan *in April 1995* was, and is, a disputed material fact. Hyatt presented to the District Court, and would have presented at trial, the expert testimony confirming *to a reasonable degree of professional certainty* (as described in each affidavit) that the information the FTB improperly disclosed about Hyatt in Japan would have been widely disseminated in Japan and would have negatively affected the sublicensing of the Patent

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[35] 9 AA 2023.
[36] 9 AA 2023.
[37] 9 AA 2023.
[38] 9 AA 2023-2024.
[39] 9 AA 2023-2024.

Portfolio to Japanese companies. Hyatt's proffered evidence of the cause of these economic damages in Japan more than meets the applicable standard for causation used for intentional tort claims.

IV. The FTB incorrectly argues that there was no foundation supporting the circumstantial evidence submitted by Hyatt.

The FTB argues that Hyatt's circumstantial evidence was not supported because the asserted links in the circumstantial evidence were too speculative. First, the FTB overstates the law on this point. The authority cited by the FTB (page 153 of the FTB's answering brief) is consistent with the evidence and facts presented by Hyatt in his opening brief. Hyatt's circumstantial evidence and the causal chain that resulted in him suffering economic damages were based on facts, not speculation. Hyatt's proffered expert testimony is based on facts. Hyatt's experts have set forth the facts upon which their opinions are based. This includes: their experiences with Japanese companies and the Japanese government;[40] the FTB's sending of the letters to the Japanese companies;[41] and the FTB's litigating against Japanese companies and the FTB's auditing of Japanese companies.[42] One undisputed fact permeates the expert opinions offered by Hyatt. For the type of licensing agreements that Hyatt, through Philips, was seeking with these Japanese companies, approval of the Japanese government was required.[43]

The above described facts constitute the causal chain that supports the expert testimony offered by Hyatt. The manner in which Japanese companies and the Japanese government operate are facts, or at least disputed facts which must be presumed in Hyatt's favor in opposing summary judgment.

Reasonable inferences can and are drawn from the above foundational facts, establishing the causation link required in intentional tort cases. The following summarizes the expert testimony on causation gathered by Hyatt. Each of these experts has substantial experience and

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[40] 8 AA 1953-1956, 1965-1967; 9 AA 2226-2227, 2236-2237.
[41] 65 AA 16187-16190.
[42] See, e.g., *Nissen Foods (USA) Co., Inc. v. FTB*, 1190 Cal. Tax LEXIS (August 14, 1990); *In the Matter of the Appeals of The Bank of Tokyo, Limited, and Union Bank (formerly California First Bank)*, 95-SBE-006, 1995 Cal. Tax LEXIS 27 (Cal. S.B.E. August 2, 1995).
[43] 9 AA 2240; 10 AA 2436-2437, 2440, 2454; 82 RA 020339.

background in Japanese culture and/or business practices. Their respective qualifications to provide the opinions at issue were set forth in detail in their affidavits submitted to the District Court.[44]

1. Professor Woo-Cumings:

> Japanese companies share patent, licensing, and technology information, and interact incessantly amongst themselves and with relevant government agencies. Thus when the FTB Letters were received, their contents would have been shared with officials in relevant government bureaus and other company officials. In the following section I explain how this interaction and sharing of information occurs.
>
> The FTB Letters would have raised red flags immediately, and given the nature of Japan's political economy as described above, the alleged bad news about Mr. Hyatt would have traveled around with the speed of light. Amid a very complicated and threatened business culture, Japanese companies would have instantly jettisoned business relationships with Mr. Hyatt.
>
> Suddenly, after receipt of the FTB Letters, these business opportunities disappeared. Mr. Hyatt had a broad array of licensing agreements prior to the receipt of the FTB Letters, yet he could not close a single deal after the letters were received by Matsushita and Fujitsu. Likewise the Japanese companies with whom he dealt and with whom Philips wanted to deal in the future had high stakes in maintaining good relations with the California FTB, and were subject to potential litigation and audits. Therefore it is my considered opinion, to a reasonable degree of certainty, that the FTB Letters caused the destruction of the Licensing Program. The letters were akin to spreading a nasty rumor among businesses in constant-and collusive-communication, something that in the Japanese business culture would be fatal for foreigners like Mr. Hyatt and for Philips.[45]

2. Professor Keegan:

> In the context of the unique Japanese business culture, it is likely that the FTB's letters caused material concern among executives at Fujitsu and Matsushita. The FTB's letters requested information regarding specific wire transfers each company made regarding Hyatt's patents. The FTB's requests would have reasonably raised a question by the recipients that Hyatt may have engaged in questionable business dealings and would have reasonably been a signal to a Japanese firm that may have suggested that Hyatt was under investigation.
>
> News of such magnitude would not have been kept confidential. There is more communication among Japanese companies than in other countries. Companies typically maintain open channels of communication among each

[44] 8 AA 1953-1956, 1965-1967; 9 AA 2226-2227, 2236-2237.
[45] 9 AA 2240, 2242-2244.

other and governmental agencies. Such open channels between companies and government agencies results in information traveling swiftly throughout the business community.

With open communication among Japanese businesses and between Japanese businesses and the government, a concern about Hyatt would have prompted executives at these two companies to share the information about the FTB's letters with the Ministry of Finance ("MF") or the Ministry of International Trade & Industry ("MITI"). When these agencies learned of the FTB's investigation of Hyatt, it is reasonable to assume that the MF or MITI would have communicated such information to the wider Japanese business community in an effort to promote the best interests of Japanese industry.

The content of the FTB letters and the subsequent sharing of this content with other Japanese businesses would have had an impact on the licensing of Hyatt's patents in Japan to other Japanese companies.

The FTB letters likely affected Japanese companies' perception of Hyatt as a licensor. Based on the open communication among Japanese companies, it is likely that the FTB letters were widely shared among Japanese businesses.

My continuing investigation and analysis of this case will quantify in greater detail the extent to which the FTB letters were shared with Japanese businesses, impacted the Japanese business environment, and ultimately extinguished the licensing program's capacity to license Hyatt's patents in Japan.[46]

3. Mr. Unkovic:

Neither of the FTB Letters provided any details concerning the purpose of the FTB Letter or why it was sent. It is unclear whether the FTB Letters were indicating a criminal investigation, a tax audit, the opening of a proceeding against the Japanese company, or some other purpose.

Based upon information supplied to me, neither Matsushita nor Fujitsu filed documentation with U.S. tax authorities regarding the wire transfer payments to Hyatt, such as 1099 forms. It is my opinion that the senior executives at Matsushita and Fujitsu could reasonably have experienced concerns that the FTB Letters would result in charges being filed specifying that Matsushita and Fujitsu had violated U.S. tax laws. This would have been a cause of major concern within those Japanese entities.

It is my view that during the time of the activities in question (1991 to 1998), information such as that which was contained in the FTB Letters would be shared not just within the corporations where they were received but certainly to related companies and even potential competitors by interested parties. Finally, it is my opinion that there is a general aversion in Japan and among its corporate community to litigation, particularly litigation involving the United States and its tax authorities. This general aversion and the real concern raised by the FTB Letters in question would have exacerbated the

[46] 8 AA 1962-1964.

problems described above. Therefore, Japanese companies would be reluctant for a variety of reasons to have an ongoing or future business relationship with Hyatt.

It is my opinion that the FTB Letters caused the termination of the Licensing Program with Japanese companies and prevented the Licensing Program from successfully concluding additional licenses of the Patent Portfolio with Japanese companies. It is also my opinion that the timing of the FTB Letters and the cessation of the Patent Program, both in April 1995, are related by cause and effect.[47]

4. Mr. Toyama:

It is my belief that the Licensing Program was very well known among Japanese electronics, automotive and information technology industries during the time when the FTB sent the FTB Letters to Matsushita and Fujitsu.

It is my understanding that Mr. Hyatt's patent portfolio was extensive with about 24 patents, and that Philips was negotiating with Japanese companies based on the patent portfolio. Based on this, it is my opinion that information on the License Program would have been well disseminated among the Japanese electronics, automotive and information technology companies at that time.

It is also my opinion that the fact the FTB had sent the FTB Letters to Matsushita and Fujitsu came to be known among other Japanese companies in the electronics, automotive and information technology industries soon after the delivery of the FTB Letters. It is also my opinion that when the FTB's investigation was known to the potential licensees of Mr. Hyatt's patents, they would have suspected that Mr. Hyatt had problems with the government and as a consequence his credibility would have been damaged. It is also my opinion that the Licensing Program would have been damaged by the FTB Letters.

Based upon my review of the documents listed in Exhibit A, my analysis as described herein, my education, my experience, and my training, it is my opinion that the FTB Letters sent by the FTB to Matsushita and Fujitsu would have resulted in Japanese companies deciding not to take licenses on Mr. Hyatt's patent portfolio.[48]

Hyatt should have been allowed to present this at trial via expert witness testimony, along with the circumstantial evidence regarding the timing of the downfall of the Licensing Program.

[47] 8 AA 1970, 1972-1973.
[48] 9 AA 2228-2229.

V. Hyatt also offered expert testimony consistent with the *Jones* case that ruled-out any other potential cause of his asserted economic damages and consistent with *Frantz* that causation can be established without direct evidence.

The FTB argues that the holding and example from *Jones v. United States* [49] is not applicable because in *Jones*, the testifying expert was able to rule out all other possible causes of the plaintiff's economic damages, leaving only defendant's conduct as the cause of the harm.[50] Not only did Hyatt affirmatively submit this very type of evidence that the FTB recognizes was accepted in *Jones*, Hyatt presented the same damages expert who testified in *Jones*, John N. Chapin, Jr. Mr. Chapin testified that "it is my preliminary opinion to a reasonable degree of certainty that there is nothing other than the alleged illegal unauthorized disclosure of confidential taxpayer information, either externally or internally prior to or following April 11, 1995, which caused the demise of the Licensing Program re Hyatt's patents."[51] While Mr. Chapin had not completed his analysis, it cannot be said, as the FTB argues, that Hyatt has no evidence eliminating other possible causes of the harm to the Licensing Program. This, too, creates at a minimum a disputed genuine issue of material fact.

The court in *Jones* recognized that reasonable inferences are appropriate in determining causation of economic damages:

> Regarding the government's second argument, I do not believe that Chapin's analysis was flawed because it assumed causation. In fact, Chapin followed an accepted methodology in his field. He examined Jones Oil and the related market in great detail before the unlawful disclosure and tip and after the unlawful disclosure and tip. In so doing, he carefully reviewed every facet of the Jones Oil business and related market.
>
> By ruling out other causes for failure of Jones Oil, Chapin was able to pinpoint the unlawful disclosure and tip as the factual cause of the injury, as opposed to some other factor. Put simply, this "rule out" method does not assume causation; it tends to prove it. *See, e.g., Federal Judicial Center, Reference Manual on Scientific Evidence*, 512 (West 1994) (discussing the question of whether there is causal link between the alleged misconduct and the measured damages in antitrust cases; stating that "experts sometimes compare market conditions in a period affected by the misconduct with

[49] 9 F.Supp. 2d 1119 (D. Neb. 1998).
[50] FTB Answering Brief, at 156, fn. 72.
[51] 10 AA 2288.

conditions in another period, during which the misconduct is known to be absent").[52]

Jones is consistent with this case. A tax agency's abusive actions devastated a thriving business. Mr. Chapin would have testified here, as he did in *Jones,* that through his Rule-Out methodology using *The 21 Factor Analysis,* it was the FTB's actions that caused the economic damages suffered by Hyatt.[53]

The FTB's attack on *Frantz v. Johnson* [54]is also not availing. The FTB argues the chain of events in *Frantz* supporting the circumstantial evidence of causation was "solid" and supported a "strong inference" that the defendant had caused the damages asserted. As detailed above, Hyatt has put forth undisputed facts upon which his circumstantial evidence is based. The facts supporting Hyatt's circumstantial evidence here require that the issue of causation be presented to a jury.

The FTB's argues essentially that in *Frantz* there was stronger evidence. But summary judgment is not a time to weigh evidence. To the extent the FTB disputes Hyatt's foundational evidence and therefore his circumstantial evidence of causation, as the FTB clearly does, the matter must be presented to a jury for resolution. The District Court's order dismissing Hyatt's claim for economic damages should therefore be reversed.

VI. The FTB misconstrues and misstates Hyatt's argument regarding the causation standard in intentional versus negligence cases.

As Hyatt set forth in his opening brief, in negligence cases, the proximate cause limitations on the damages recoverable by the plaintiff are generally limited to the "foreseeable consequences" of the negligence.[55] But proximate cause in intentional torts cases, particularly as here where the FTB's bad faith and fraud are established, is given a broader scope allowing a broader recovery to fully compensate the victim of the intentional misconduct. It is not a lesser standard. It is a reflection that negligent acts are different from intentional wrongdoing. As the Fifth Circuit

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[52] *Id.* at 1142 (footnote omitted).
[53] 10 AA 2284-2287.
[54] 116 Nev. 455, 999 P.2d 351 (2000).
[55] *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98 (1998).

described, "the aggravated nature of his action is a matter which should be taken into account in determining whether there is a sufficient relationship between the wrong and plaintiff's harm to render the actor liable. Specifically, the factors to be taken into account are the tortfeasor's intention to commit a wrongful act, the degree of his moral wrong in so acting, and the seriousness of the harm intended."[56]

Causation of the damages suffered from the alleged intentional acts must be established. The cases the FTB now cites, holding that a plaintiff must show that his damages ware actually and proximately caused by the defendant's intentional acts, are entirely consistent with Hyatt's point that there is a distinction between negligence claims and intentional tort claims relative to causation. The cases cited by the FTB do not hold to the contrary.

VII. Conclusion.

The District Court incorrectly applied the law in holding that Hyatt's economic damages claim must be supported by direct evidence, in addition to the circumstantial evidence he presented. That evidence established that the highly successful patent Licensing Program in Japan ground to a halt immediately after the FTB made improper, unauthorized disclosures to the two earliest and most significant sublicensees in Japan, after his exclusive sublicensor, Phillips Electronics, had developed a successful Licensing Program for Hyatt's patented technology. These disclosures of private information about him cast him in a false and highly unflattering light, constituting further circumstantial evidence that the Licensing Program would be damaged. The Licensing Program had generated hundreds of millions of dollars in royalties in the few years before the FTB's disclosures. It ground to a halt with no new licensing agreements entered into after the FTB's disclosures. The cause of the demise of the Licensing Program and Hyatt's resulting economic loss should be presented to the jury for a determination of this highly disputed fact on what caused the destruction of the Licensing Program.

Hyatt therefore respectfully requests that the Court reverse the District Court's order granting the FTB's motion for summary judgment re economic damages and remand the matter to

[56] *Johnson v. Greer*, 477 F.2d 101, 106-07 (5th Cir. 1973), as quoted in *Shades Ridge,* 390 So. 2d at 609-10 (alteration in original).

the District Court for trial on the limited issue of the cause of Hyatt's economic damages and the amount of those damages.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **RESPONDENT'S REPLY CROSS-APPEAL BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, and in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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Pursuant to NRAP 25, I certify that I am an employee of KAEMPFER CROWELL RENSHAW GRONAUER& FIORENTINO and that on this 13th day of August, 2010, I caused the above and foregoing document entitled **RESPONDENT'S REPLY CROSS-APPEAL BRIEF** to be served by the method(s) indicated below:

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