

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 **FRANCHISE TAX BOARD OF THE**  
3 **STATE OF CALIFORNIA,**

4 Appellant/Cross-respondent,

5 v.

6 **GILBERT P. HYATT,**

7 Respondent/Cross-appellant.

Supreme Court Case No. 53264

District Court Case No. 2009-00011  
Notice of Cross-Appeal Filed March 4, 2009  
Tracie K. Lindeman  
Clerk of Supreme Court

Electronically Filed  
Oct 23 2014 10:44 a.m.

9 **APPEAL**

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

12  
13 **RESPONDENT GILBERT P. HYATT'S ANSWER TO APPELLANT**  
14 **FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA'S PETITION**  
15 **FOR REHEARING**

16 MARK A. HUTCHISON, Nev. Bar No. 4639  
17 MICHAEL K. WALL, Nevada Bar No. 2098  
18 HUTCHISON & STEFFEN, LLC.  
19 10080 Alta Drive, Suite 200  
20 Las Vegas, NV 89145  
21 Telephone: (702) 385-2500  
22 Facsimile: (702) 385-2086

23 PETER C. BERNHARD, Nev. Bar No. 734  
24 KAEMPFER CROWELL RENSHAW  
25 GRONAUER & FIORENTINO  
26 8345 West Sunset Road, Suite 250  
27 Las Vegas, NV 89113  
28 Telephone: (702) 792-7000  
Facsimile: (702) 796-7181

DONALD J. KULA, Cal. Bar No. 144342  
PERKINS COIE LLP  
1888 Century Park East, Suite 1700  
Los Angeles, CA 90067-1721  
Telephone: (310) 788-9900  
Facsimile: (310) 788-3399

*Attorneys for Respondent/Cross-  
Appellant Gilbert P. Hyatt*

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO

KAMPPER CROWELL RENSHAW GRONAUER & FIORENTINO

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**ANSWER TO PETITION FOR REHEARING**

Pursuant to this Court’s order of October 7, 2014, Respondent Gilbert P. Hyatt (“Respondent” or “Hyatt”) submits this Answer to the Petition for Rehearing filed by Appellant Franchise Tax Board of California seeking a rehearing in regard to this Court’s September 18, 2014, Opinion.

**I. Issues presented:**

- 1. Did this Court overlook or misapprehend the facts or law in affirming the judgment as to liability on the Intentional Infliction of Emotional Distress (IIED) claim and remanding the claim to the district court for a retrial on damages?
- 2. Did this Court overlook or misapprehend the facts or law in affirming the judgment as to the fraud claim, including the damages awarded?

**II. Summary of Answer.**

No. Substantial evidence supports the jury’s finding that FTB intentionally inflicted emotional distress on Hyatt and made actionable misrepresentations to Hyatt. This Court accurately listed multiple examples of this evidence, which is different from and independent of the evidence this Court ruled was improperly admitted.

After adopting the “sliding-scale” approach to proving a claim for IIED, this Court concluded there was sufficient evidence from which a jury could reasonably find Hyatt suffered severe emotional distress. (Opinion, 48.) In so doing, this Court specifically cited to (1) evidence of FTB’s disclosure of personal information, despite promises to keep it confidential and knowing Hyatt’ unique need for confidentiality; (2) the 11-year delay in the protests caused by FTB and the resulting \$8,000 a day interest assessed to Hyatt; (3) the disparaging remarks made about Hyatt and his religion by the main auditor, as well as her determination to impose

1 tax assessments on Hyatt; and (4) FTB fostering an environment in which imposing  
2 taxes was the objective in audits. (Opinion, 47.)

3 This Court cited almost identical evidence in affirming the fraud claim.  
4 (Opinion, 38.) This substantial evidence cited by this Court supports the jury's  
5 finding of FTB's fraudulent intent from the outset, thereby rebutting the FTB  
6 temporal argument on the fraud claim. Intent is a jury issue and is determined based  
7 on the totality of the evidence of fraud. The jury in this case found the FTB's  
8 actions fraudulent, and this Court correctly affirmed based on the evidence cited.

9 Rarely does the perpetrator explicitly acknowledge its fraudulent intent.  
10 Contrary to FTB arguments, an explicit admission of intent is not needed nor  
11 expected. Yet, in this case there was explicit evidence of fraudulent intent from the  
12 outset as the first auditor testified that the only issue that "popped" in his mind upon  
13 first reading the newspaper article about Hyatt that started the audit was the amount  
14 of money he made. This along with the evidence that FTB promoted a culture in  
15 which a tax assessment was the end goal of an audit is further substantial evidence of  
16 fraudulent intent from the outset.

17 The evidence from trial therefore for both the IIED claim and the fraud claim  
18 cited by this Court is "substantial evidence," meaning sufficient that a reasonable  
19 jury could so find. (*See* Opinion, 25 (*citing Prabhu v. Levine*, 112 Nev. 1538, 1543,  
20 930 P.2d 103, 107 (1996)). This Court did not overlook or misapprehend any facts  
21 or the law in affirming the judgment as to Hyatt's IIED claim on liability and fraud  
22 claim on both liability and damages.

23 Regarding FTB's harmless error argument in which FTB complains of this  
24 Court's ruling in ordering a new trial on damages but not liability for the IIED claim,  
25 FTB fails to recognize this Court's reasoning in limiting the new trial to damages:  
26 the evidence found to be admitted in error may have affected the amount of damages  
27 awarded by the jury for emotional distress but not the fact that Hyatt did suffer  
28

1 severe emotional distress based on FTB’s conduct. The issue for retrial is what  
2 amount of emotional distress did Hyatt suffer due to the conduct of FTB, and  
3 whether events close in time caused additional distress for which Hyatt should not  
4 recover from FTB.

5 But the improperly admitted evidence does not change or affect the fact that  
6 the record contains more than sufficient evidence that Hyatt suffered severe  
7 emotional distress, resulting directly from the conduct of FTB as cited in this Court’s  
8 Opinion.<sup>1</sup> This Court clearly segregated the conduct that supported the two  
9 sustained claims from the conduct/evidence it found inadmissible.

10 FTB also attempts to emphasize the dismissal of the invasion of privacy  
11 claims. But the fact that Hyatt was found not to have a claim for invasion of privacy,  
12 because some of the personal information at issue was long ago placed in one or  
13 more court records, does not mean that dissemination of personal information after  
14 promising to keep it confidential was not otherwise actionable. FTB’s act of  
15 publishing and re-publishing the personal information on a massive scale after  
16 promising to keep it confidential was extreme and outrageous. This publication of  
17 personal information, in direct violation of representations made to and relied on by  
18 Hyatt was outrageous and fraudulent.

19 Finally, FTB’s repeated, erroneous legal arguments on “garden variety”  
20 emotional distress, the statute of limitations for the IIED claim, the specificity of the  
21 fraud representations, and every other repeated legal argument raised by FTB’s  
22 petition, fail to demonstrate that this Court overlooked or misapprehended the facts  
23 or law on Hyatt’s IIED claim on liability or fraud claim. FTB’s petition for rehearing  
24 should therefore be denied in its entirety.

25  
26  
27  
28

---

<sup>1</sup>See Respondent’s Answering Brief (RAB), 128-32.

1 **III. This Court correctly affirmed the judgment as to FTB’s liability on the**  
2 **IIED claim.**

3 **A. The evidence cited by this Court established that FTB’s conduct was**  
4 **extreme and outrageous.**

5 FTB’s arguments to the contrary fail to show that this Court overlooked or  
6 misapprehended the facts, the law or its own Opinion on this point.

7 **1. FTB’s wide ranging dissemination of Hyatt’s personal information,**  
8 **despite promises to keep it confidential, was extreme and**  
9 **outrageous.**

10 A principal theme of FTB’s petition is that, because this Court reversed the  
11 judgment as to the invasion of privacy claims on the basis Hyatt did not have an  
12 objective expectation of privacy in the information disclosed, FTB’s disclosures  
13 cannot be considered extreme and outrageous. FTB is wrong.

14 Even if a party cannot recover for invasion of privacy because some of the  
15 personal information could, with great effort, be found in the public records, the  
16 underlying disclosures still can, and here do, establish other torts. For example,  
17 Hyatt sought and obtained assurances that FTB would keep and treat his personal  
18 information as confidential. FTB then acted directly contrary to its promises and  
19 stated policies. FTB’s engagement in wide-ranging disclosures of Hyatt’s personal  
20 information can be, and was here, independently wrongful regardless of the  
21 determination of this Court that some of the personal information is in the public  
22 record and there can be no objective expectation of privacy in that information.

23 But providing assurance that a party will not disclose personal information in  
24 order to gain the trust and confidence of another party, only to turn around and  
25 publish and re-publish that information on a wide scale, is evidence of extreme and  
26 outrageous conduct by the first party.<sup>2</sup> The jury found it outrageous (and fraudulent)

27 <sup>2</sup> As Hyatt presented in his Petition for Rehearing, FTB disseminated Hyatt’s  
28 confidential Nevada address on Tara Avenue that was not in the public records until

1 that FTB would do such a thing. This Court has not overlooked or misapprehended  
2 anything on this point.

3 As the jury found, FTB made disclosures with the intent not to comply with  
4 past promises, policies and procedures, knowing that the disclosures would be highly  
5 sensitive and distressful to Hyatt. This established something much worse than  
6 invasion of privacy. And that is what the jury found, and this Court then affirmed as  
7 to both the fraud claim and the IIED claim as to liability, even though it found that  
8 the invasion of privacy claim could not be affirmed. *See, e.g., Tarka v. Filipovic*, 45  
9 Conn. App. 46, 54 (Conn. App. Ct. 1997)(affirming judgment for IIED claim based  
10 on disclosure of private facts but not invasion of privacy); *Crain v. Krehbiel*, 443 F.  
11 Supp. 202, 2124-15 (N.D. Cal. 1977)(holding that claim for IIED based on  
12 threatened disclosure of private information should be tried even though invasion of  
13 privacy claim not stated).

14 On pages 2 and 3 of its petition, FTB argues confusingly that the Opinion  
15 shows that FTB did not engage in extreme conduct because this Court found in  
16 regard to the false light claim that FTB's contacts with third parties were not highly  
17 offensive to a reasonable person. (FTB Petition, 2, 3.) But this Court did not cite  
18 such conduct in support of the IIED claim (or the fraud claim). There is nothing  
19 inconsistent with finding insufficient evidence to support the elements of one claim,  
20 while at the same time relying on the same and different evidence as sufficient to  
21 support a different claim.

22 This Court did not overlook or misapprehend the facts or law by, on the one  
23 hand, reversing the invasion of privacy claims, and on the other hand, affirming the

24  
25  
26  
27  
28

---

FTB's disclosures. This too supports the finding that FTB engaged in extreme and  
outrageous conduct.

---

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO

1 IIED claim on liability (and the fraud claim).<sup>3</sup> This Court clearly concluded that the  
2 facts regarding FTB's knowing and intentional disclosure of Hyatt's personal  
3 information helped establish certain claims, but failed to establish other claims.  
4 There is nothing novel about this result, and it certainly does not establish that this  
5 Court overlooked or misapprehended any facts or law on the IIED claim (or the  
6 fraud claim).

7 **2. FTB's 11-year bad faith delay of the protests while Hyatt was**  
8 **assessed \$8,000 a day in interest was extreme and outrageous.**

9 This Court's Opinion cited FTB's 11-year delay in the protests and the \$8,000  
10 a day interest as part of the substantial evidence Hyatt put forth to establish the IIED  
11 claim (and the fraud claim). (Opinion, 47.) FTB attacks this finding, arguing that  
12 the district court made erroneous evidentiary rulings and that Hyatt and his attorneys  
13 caused the 11-year delay, citing its prior arguments. (FTB Petition, 4.)

14 FTB makes no attempt to explain what this Court allegedly overlooked or  
15 misapprehended in regard to the evidentiary ruling, but rather merely cites the  
16 district court order and tries to reargue it. Nor does FTB cite to where it argued this  
17 issue in its briefing.

18 FTB's petition suggests that at trial it did not have the opportunity to present  
19 its view that Hyatt and his attorneys caused the delay. FTB most assuredly did have  
20 this opportunity and took advantage of it, including having *four* of its in-house  
21 attorneys testify as to why FTB put a hold on the protests and how this was allegedly  
22 Hyatt's fault. (RAB, 48-51.) FTB was allowed to fully present evidence that the  
23 delay was allegedly caused by the district court's protective order that it claimed  
24 delayed it from obtaining discovery materials from this case for use in the tax

25 <sup>3</sup> The same conduct that may not establish one tort, may establish a different tort.  
26 *See Falline v. GNLV Corp.*, 107 Nev. 1004, 1007-08, 823 P.2d 888, 890 (Nev.  
27 1991)(finding one claim properly supported by facts, but other related torts not  
28 established by same facts).

KAEMPFER CROWELL KENSHAW GRONAUER & FIORENTINO

1 proceedings. *Id.* But the jury rejected those arguments as to the cause of delay in  
2 the tax proceedings.<sup>4</sup>

3 Indeed, Hyatt also presented evidence as to the cause of the 11-year delay,  
4 demonstrating that FTB’s internal documents and its own witnesses’ testimony  
5 confirmed an intentional hold by FTB. (RAB, 43-46.) The jury then heard from  
6 Hyatt and others as to what the delay did to him, how he reacted to it, and how he  
7 became obsessed with the proceeding being pursued against him. (RAB, 128-32.)  
8 This evidence directly tied FTB’s actions to Hyatt’s emotional distress.

9 The cause of the 11-year delay, not the merits or correctness of the protests,  
10 was therefore a major issue at trial, and each side put on a great deal of evidence on  
11 the issue. It was a classic jury issue that needed to be and was decided by the jury.  
12 There was substantial evidence as cited above supporting Hyatt’s position, and the  
13 jury’s verdict demonstrates it decided the delay issue in favor of Hyatt. Hyatt  
14 demonstrated this in his briefing to this Court. (*See* RAB, 43-51.)

15 This Court therefore did not overlook or misstate any facts or law in finding  
16 that the 11-year delay and \$8,000 in interest per day supported the finding that FTB  
17 engaged in outrageous conduct.

18 **3. The main auditor’s disparaging remarks and obsession to “get”**  
19 **Hyatt was extreme and outrageous.**

20 As part of the substantial evidence Hyatt put forth to establish the IIED claim  
21 (and the fraud claim), this Court also cited the disparaging remarks about Hyatt’s  
22 religion by the main auditor, Ms. Cox, and the evidence of her determination

23  
24 \_\_\_\_\_  
25 <sup>4</sup> The evidence the trial court disallowed and of which the FTB now complains was  
26 not on the issue of delay in the protest. Rather, the trial court did not allow evidence  
27 from either side on the merits of the protest decision, *i.e.*, neither side could present  
28 evidence and argue whether the protest decision was correct. Hyatt briefed this  
issue. (RAB, 79-80.)



1 (obsession per the trial testimony) to impose tax assessments on Hyatt. (Opinion,  
2 47.)

3 On this point, FTB reargues the evidence asserting its position. But  
4 substantial evidence supports Hyatt’s contrary position, and the jury found for Hyatt.  
5 Evidence supporting Hyatt’s claims must be accepted in this appeal based on the  
6 jury’s verdict and its finding in favor of Hyatt. Indeed, FTB does not argue that this  
7 Court overlooked or misapprehended any facts or law on this point, nor does FTB  
8 argue there is no evidence supporting Hyatt’s position. FTB simply reargues its  
9 position. (FTB Petition, 4-5.) This is improper in a petition for rehearing, and no  
10 further consideration should be given to the argument by FTB.

11 Nonetheless, there is substantial evidence of Ms. Cox’s disparaging remarks  
12 and obsession with “getting” Hyatt that cannot be ignored. Hyatt briefed this in  
13 detail. In sum, the witness, Ms. Les, confirmed when cross-examined by FTB  
14 counsel that she heard Ms. Cox use racial slurs “maybe 20 times” and that while the  
15 witness understood “these racial slurs that Sheila [Ms. Cox] made in a joking sense  
16 like to say the way [Ms. Cox] talks out of the side of her mouth, ‘That Jew bastard,’”  
17 the witness “knew it was intended as a joke because she [Ms. Cox] was upset with  
18 him [Hyatt]” but felt “that she [Ms. Cox] cross (sic) the line.” (RAB, 15-16.)

19 And to be clear, Ms. Les, a co-worker at FTB with Ms. Cox, never  
20 backtracked and had unique access to the private and unvarnished views Ms. Cox  
21 expressed during their frequent time together outside of the office. Ms. Cox even  
22 gave this witness access off premises to the confidential Hyatt audit file. (RAB, 16  
23 (See testimony cited therein).) FTB’s request in footnote 1 of its petition asking that  
24 Ms. Cox’s name be redacted from the Opinion further flies in the face of the jury’s  
25 unmistakable findings against FTB and Ms. Cox on this point and in favor of Hyatt.  
26 FTB’s argument on this point should be disregarded, as well as its request to redact  
27 Ms. Cox’s name.

28

1 Lastly, FTB argues that Hyatt did not learn of Ms. Cox’s disparaging remarks  
2 until after the case was filed. Nevertheless, the emotional distress Mr. Hyatt  
3 suffered did not stop when he filed suit in 1998. In fact, the protests were not  
4 decided until 2007 and, as this Court noted in its Opinion, part of the extreme  
5 conduct by FTB and severe emotional distress suffered by Hyatt was the 11-year  
6 delay in the protests (1996 to 2007). In this regard, Ms. Les first testified to Ms.  
7 Cox’s disparaging remarks and obsession to get Hyatt in deposition in 2000.<sup>5</sup> It was  
8 therefore early during that long protest period in which Hyatt suffered increasingly  
9 severe emotional distress that he also learned of Ms. Cox’s disparaging remarks and  
10 experienced severe distress from that as well. (RAB, 129, FN 483.)

11 Hyatt therefore first experienced emotional distress after receiving FTB’s  
12 audit file in the fall of 1996, and the distress continued and grew during the very  
13 period he learned of the disparaging remarks. (RAB, 124-127.) FTB’s reference to  
14 the timing of Hyatt’s knowledge of the disparaging remarks is therefore of no  
15 consequence and certainly provides no basis for a rehearing on any issue in this  
16 Court’s Opinion.

17 **4. The environment fostered by FTB making the imposition of tax**  
18 **assessments the objective of audits was extreme and outrageous.**

19 This Court’s conclusion that FTB fostered an environment in which imposing  
20 taxes was the objective (Opinion, 47) — as opposed to acting in a fair and impartial  
21 manner in determining if in fact taxes are owed — did not contradict other portions  
22 of the Opinion, is supported by substantial evidence and was properly cited by this  
23 Court in finding that FTB engaged in extreme and outrageous conduct. FTB’s  
24 argument on this point misses the mark by a wide margin.

25 FTB argues that under the breach of confidentiality claim this Court found  
26 that the FTB was not required to act with Hyatt’s interest in mind. (FTB Petition, 5.)

27 <sup>5</sup> See 27 RA 006623 (showing date of Les deposition, January 11, 2000).  
28

KAEMPFER CROWELL RENSHAW CROMBAUER & FIORENTINO

1 But that is quite different from FTB making representations and promises of  
2 fairness, courteous treatment, confidentiality, *etc.*, but then acting directly contrary  
3 and asserting it cannot be held to its representations FTB made these representations,  
4 and Hyatt relied on them. (RAB, 89-90, 92-93.)

5 There was substantial evidence, as Hyatt briefed in detail, that despite its  
6 repeated professions of fairness, courteous treatment, confidentiality, *etc.*, FTB was  
7 “numbers driven” and auditors were motivated to over-assess. There was evidence  
8 that FTB employed a Cost-Benefit Ratio (referred to as “CBR”) in a manner that  
9 required certain returns from audits consuming large amounts of time and resources.  
10 (RAB, 32-35.) Indeed, the lead auditor sought to use the Hyatt audit to advance her  
11 career, and she succeeded. (RAB, 17-18.) This conduct is very different from the  
12 courteous treatment FTB promised to Hyatt, treatment that FTB auditors understood  
13 required it to treat taxpayers fairly. (RAB, 89-90.) Substantial evidence therefore  
14 supports this Court’s finding that the environment fostered by FTB amongst auditors  
15 in which assessments were expected when an audit was undertaken was extreme and  
16 outrageous. This supports this Court’s affirmance of Hyatt’s IIED claim on liability.

17 And contrary to FTB’s representation, this Court did not say “much of the  
18 conduct” complained of by Hyatt “was not highly offensive to a reasonable person.”  
19 (FTB Petition, 6.) These are FTB’s words interpreting a portion of the Opinion  
20 relating to the false light claim and referring to FTB’s conduct with third parties via  
21 letters, demands, or in-person visits. This Court’s language cited by FTB has no  
22 relation to this Court’s ruling on the IIED claim. (*See* Opinion, 35 (cited by FTB).)  
23 In this manner FTB’s petition consistently tries to mix and match, or mismatch,  
24 portions of this Court’s Opinion with unrelated other issues to falsely claim the  
25 Court’s Opinion is contradictory.

26 FTB in this section also attacks Hyatt’s position on the residency dispute in  
27 the tax proceedings arguing FTB was justified in having a goal to collect unpaid  
28

1 taxes from Hyatt. (FTB Petition, 5-6.)<sup>6</sup> FTB misses the point. The extreme and  
2 outrageous conduct was in fostering an environment in which auditors are expected  
3 upon opening an audit to make an assessment in order to ensure FTB meets its  
4 numbers, as opposed to acting in accord with FTB’s stated goals and representations  
5 that promise that FTB will act fairly and with an even hand in deciding whether  
6 taxes are owed (something every citizen would expect of their government). FTB is  
7 essentially saying it is okay to have had a goal oriented audit process with the intent  
8 to impose assessments, as long as the audit results in an assessment. This is the very  
9 attitude the jury found abhorrent and provides substantial support that FTB acted in  
10 an extreme and outrageous manner.

11 **5. Substantial evidence therefore supports this Court’s finding that**  
12 **FTB engaged in extreme and outrageous conduct.**

13 FTB’s petition fails to demonstrate that this Court overlooked or  
14 misapprehended the facts or law in regard to its affirmance of the district court  
15 judgment in favor of Hyatt on the IIED claim as to liability. Each example cited by  
16 this Court of extreme and outrageous conduct by FTB is supported by substantial  
17 evidence that was presented to the jury. That evidence was summarized and/or cited  
18 in Hyatt’s briefing to this Court.

19 FTB’s petition therefore failed to establish that this Court in its Opinion  
20 overlooked or misapprehended the facts or law in finding against FTB on the IIED  
21 claim as to liability.

22  
23  
24 \_\_\_\_\_  
25 <sup>6</sup> In footnote 2, FTB argues again that it should have been allowed to present its  
26 protest evidence on the merits of the tax question. This is a blunt admission as to the  
27 lack of supporting evidence in the audits wherein FTB assessed Hyatt millions of  
28 dollars in taxes and penalties despite not having “much” of the evidence. But that  
issue is not before this Court.

KAEMPFER CROWELL RENSHAW CROMAUER & FLORENTINO

**B. FTB’s re-argument of the “garden variety” issue again fails and was squarely rejected in this Court’s Opinion finding that medical evidence is not necessary to establish severe emotional distress.**

FTB reargues that “garden variety” emotional distress cannot be substantial as a matter of law. FTB raises no issue in terms of this Court overlooking or misapprehending the facts or law on this issue.

According to FTB’s argument, neither Hyatt nor any other plaintiff can establish severe emotional distress when seeking recovery for garden variety emotional distress. That is not the law, nor was it the intent of the district court’s ruling. The “garden-variety” cases FTB cited use the phrase as a term of art and have no application to the district court’s use of the term. Hyatt extensively briefed this issue. (RAB, 122-24, *citing* 15 AA 3538-39.)<sup>7</sup>

At trial, Hyatt was required to show he suffered severe emotional distress, as any IIED plaintiff must. This Court ruled that medical evidence is not necessary to recover for severe emotional distress. (Opinion, 44-46.) This Court also referenced the extensive trial evidence of Hyatt’s severe emotional distress, including specific testimony of friends and family that both document Hyatt’s severe emotional distress that was caused by the long-running tax proceeding. (Opinion, 47-48; *see* RAB, 128-31.)

FTB’s petition therefore does not establish that this Court overlooked or misapprehended the facts or law in regard to Hyatt suffering severe emotional distress or the district court’s ruling that used the term “garden variety” emotional distress.

---

<sup>7</sup> The district court’s ruling protecting Hyatt’s privacy in his medical records is consistent with the law. (RAB, 127-28.) While FTB now argues these records may contain evidence of residency, this unproven assertion is of no consequence in this case. FTB could have pursued such evidence in the tax proceedings, if appropriate there. Moreover, the fact that Hyatt traveled to California for cancer treatment, including surgery, after moving to Nevada was well known to FTB. (*See* 50 RA 012278.)

KAEMPER CROWELL RENSHAW GRONAUER & FIORENTINO

1 **C. The district court’s evidentiary and jury instruction errors were harmless**  
2 **in regard to the jury’s finding on liability for the IIED claim.**

3 This Court held that the district court’s evidentiary and jury instruction errors  
4 were harmless as to FTB’s liability for the IIED claim. However, this Court  
5 concluded that these errors were prejudicial only as to damages for the IIED claim,  
6 which warranted a new trial as to damages.

7 The erroneous district court rulings as found by this Court were not prejudicial  
8 to the finding of liability for the IIED claim because the evidence and instructions  
9 subject to those rulings are unrelated to the evidence supporting the liability finding.  
10 Based on consideration of the entire record, it is not probable that a different result  
11 might have been reached on the liability question even if the correct evidentiary jury  
12 rulings had been made by the district court. *Cook v. Sunrise Hospital and Medical*  
13 *Center, LLC*, 124 Nev. 997, 1008, 194 P.3d 1214, 1220 (2008)

14 The evidence is overwhelming that the FTB’s extreme and outrageous conduct  
15 did cause Hyatt to suffer severe emotional distress. For this reason, the jury’s  
16 liability finding on the IIED claims was properly affirmed by this Court.

17 **1. The evidence cited by this Court in affirming the liability finding on**  
18 **the IIED claim was substantial and unrelated to the erroneous**  
19 **evidentiary and jury instruction rulings.**

20 **a. Evidence challenging audit conclusions.**

21 This Court’s Opinion was careful and precise in identifying and listing the  
22 substantial admissible evidence that demonstrated support for the IIED liability  
23 finding, including the extreme and outrageous conduct of FTB (Opinion, 47) and the  
24 severe emotional distress suffered by Hyatt (Opinion, 47-48). In contrast, this Court  
25 discussed separately the inadmissible evidence on the issue of whether FTB’s  
26 conclusions in the audit were correct (Opinion, 49-51). There was nothing  
27 contradictory in doing so.

28 This Court supported its liability finding on the IIED claim with reference to  
(i) FTB’s breaches of its promises of confidentiality of Hyatt’s personal information

1 despite repeated assurances to Hyatt and Hyatt's sensitivity and need for  
2 confidentiality, (ii) FTB's 11-year delay in the protests and the \$8,000 a day in  
3 interest suffered by Hyatt, (iii) the disparaging remarks of the main auditor and that  
4 she was determined to impose taxes on Hyatt, and (iv) the environment fostered by  
5 the FTB in which auditors were expected to make assessments in their audits. This  
6 evidence is independent of any evidence or argument presented by Hyatt that  
7 addressed directly or indirectly the audit conclusions.

8 This Court therefore acted well within its discretion in affirming the finding on  
9 liability for the IIED, as FTB suffered no prejudice on this issue from the  
10 inadmissible evidence related to the correctness of the audit conclusion.

11 **b. Jury instruction on audit conclusions.**

12 FTB argues the related issue of Jury Instruction No. 24 and its reference to Mr.  
13 Jumelet's testimony as to correctness of the audit conclusions. For the same reason  
14 discussed in the above section on evidence as to the audit conclusions, there was no  
15 prejudice to FTB in regard to the jury's finding on liability for the IIED claim. The  
16 substantial evidence supporting that claim was outlined by this Court and is wholly  
17 unrelated to the issue of the correctness of the audit conclusions or Hyatt's arguments  
18 related to the audit conclusions. FTB therefore was not, and could not have been,  
19 prejudiced by this jury instruction.

20 This Court therefore also acted well within its discretion in affirming the  
21 finding on liability for the IIED, as FTB suffered no prejudice on this issue from the  
22 jury instruction on the correctness of the audit conclusion.

23 **c. Adverse inference instruction.**

24 This Court ruled that FTB should have been allowed, and will be allowed at  
25 the retrial on damages for the IIED claim, to offer evidence on steps it took to collect  
26 the lost evidence to try and show that the lost evidence was not adverse to FTB. But  
27 evidence of FTB efforts to collect emails during a time period after the litigation was  
28

1 filed does not relate to, nor could it even arguably rebut or contradict, the substantial  
2 evidence outlined above and referenced by this Court as supporting the finding on  
3 liability for the IIED claim. As outlined above, there was substantial evidence  
4 supporting the elements of the IIED claims. The adverse inference was not needed to  
5 find or sustain the finding of liability for the IIED claim.

6 Further, while FTB argues that Hyatt argued at trial that the adverse inference  
7 could specifically be used to establish intent, Hyatt in fact presented substantial  
8 evidence to the jury on the issue of intent. Specifically as to intent, and as addressed  
9 in more detail below regarding the fraud claim, Hyatt pointed the jury to substantial  
10 evidence of FTB's bad faith intent from the outset of the audit. *Infra*, 18. In  
11 particular, this included the testimony from FTB's first auditor, Mr. Shayer and how,  
12 on reading the newspaper article about Hyatt before the audit commenced, the first  
13 thing that "popped in his head" was how much money Hyatt made and will make.

14 This Court acted well within its discretion in affirming the finding on liability  
15 for the IIED as FTB suffered no prejudice on the finding of liability for the IIED  
16 claim due to the adverse inference instruction.

17 **d. Patent interference proceeding and federal tax audit.**

18 FTB makes a brief argument regarding the exclusion of evidence of a patent  
19 interference proceeding and Hyatt's federal tax audit. This evidence would not and  
20 does not change, rebut or refute the substantial evidence that establishes that FTB  
21 engaged in extreme and outrageous conduct that caused Hyatt severe emotional  
22 distress. The evidence outlined above is specific as to FTB being the cause of the  
23 severe emotional distress.

24 This Court therefore correctly ruled that these other events, even if, as FTB  
25 argues, they may also have caused Hyatt further emotional distress, go only to the  
26 amount of damages caused by FTB and whether any of the distress can be attributed  
27 to these other events. These events do not change the fact that FTB's conduct did  
28



1 cause severe emotional distress to Hyatt. Hyatt is entitled to some recovery from  
 2 FTB for that severe emotional distress. The issue is how much, *i.e.*, whether other  
 3 events contributed to the distress such that FTB is not liable for all of the distress.

4 This Court acted well within its discretion in affirming the finding on liability  
 5 for the IIED but remanding the case for a new trial on damages as to that claim.

6 **2. FTB’s argument as to excluded evidence that it refers to as delay  
 7 evidence lacks merit because this Court did not conclude that the  
 8 evidence had been erroneously excluded.**

9 FTB again claims prejudice because certain evidence was excluded related to  
 10 the 11-year delay. (FTB Petition, 10.) But the excluded evidence referenced by the  
 11 FTB does not relate to the delay in the protests, but rather addresses the merits of the  
 12 protests and tax proceedings. Neither party was allowed at trial to address the  
 13 correctness of the protest results. FTB could not have been prejudiced by the  
 14 exclusion of this evidence.

15 Further, and most on point here, the protest evidence about which FTB argues  
 16 has not been ruled by this Court to have been improperly excluded. In other words,  
 17 FTB claims prejudice from excluded evidence that is still inadmissible. FTB  
 18 therefore fails to establish this Court overlooked or misapprehended the facts or law,  
 19 and in fact makes no discernible point in addressing this excluded evidence.

20 **D. FTB’s repeated erroneous argument on the statute of limitations for the  
 21 IIED claim must again be rejected.**

22 FTB’s petition raises no new issues as to its argument on the statute of  
 23 limitations. FTB is wrong on the issue, and its position if accepted would require a  
 24 proliferation of premature lawsuits. Hyatt substantially briefed this issue. (RAB,  
 25 137-44.)

26 The key fact as to the statute of limitations issue is that Hyatt filed his lawsuit  
 27 within two years of receiving FTB’s audit file. Hyatt’s first notice of FTB’s repeated  
 28 and unnecessary disclosures of Hyatt’s private and confidential information to third

1 parties was not until, at the earliest, his receipt of FTB audit file in late 1996. The  
2 audit file revealed for the first time that FTB was widely disclosing Hyatt's private  
3 and confidential information. Under FTB's theory for the statute of limitations,  
4 every citizen with mere notice of an ongoing government investigation would need to  
5 file a precautionary lawsuit from the two year notice of the investigation. That is not  
6 the law, and it would be bad public policy.

7 **IV. This Court correctly affirmed the judgment as to the fraud claim.**

8 **A. This Court did not overlook or misapprehend the clear and convincing**  
9 **standard for fraud.**

10 As to this Court's ruling on the fraud claim, FTB's petition first complains  
11 that this Court did not reference the clear and convincing standard for a fraud claim.  
12 But this Court cited *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588,  
13 592 (1992), in addressing the elements of a fraud claim and cited *Powers v. United*  
14 *Servs. Auto. Ass'n*, 114 Nev. 690, 697-98, 962 P.2d 596, 600-01 (1998), in  
15 addressing the jury's role in making findings necessary to establish a fraud claim.  
16 (Opinion, 37.) *Bulbman* notes the clear and convincing standard for fraud. This  
17 Court is familiar with these cases and with the clear and convincing standard for a  
18 fraud claim.

19 Indeed, the jury was correctly instructed on the need to find the fraud elements  
20 by clear and convincing evidence.<sup>8</sup> FTB does not question this. The findings  
21 affirmed by this Court were therefore based on clear and convincing evidence.  
22 Further, having found substantial evidence to support the fraud claim there was no  
23 reason for this Court to also specifically address FTB's related argument as to the  
24 district court's denial of FTB's motion for judgment as a matter of law. The district  
25 court properly let the jury answer the disputed facts as to the fraud claim and  
26 properly instructed the jury as to the clear and convincing standard.

27 <sup>8</sup> RT: July 21, 2008, 137:5-17.  
28

KAEMPER CROWELL RENSHAW GRONAUER & FLORENTINO

1 This Court did not overlook or misapprehend the law in regard to the clear and  
2 convincing standard for a fraud claim.

3 **B. The FTB’s fraudulent intent is established by the trial record.**

4 **1. FTB’s fraudulent intent was established by the jury’s finding.**

5 Clear and convincing evidence of FTB’s fraudulent intent was presented at  
6 trial. Hyatt briefed this issue demonstrating the evidence of intent. (RAB, 14-15,  
7 32-35, 56-60, and 91-92.) FTB does not even address this evidence in its petition.

8 However, the jury clearly found fraudulent intent in rendering its verdict.  
9 Intent is not a legal question, it is a disputed factual issue to be resolved by the fact  
10 finder. *See Epperson v. Roloff*, 102 Nev. 206, 212-13 (1986)(holding intent element  
11 of fraud claim is a jury question and no express misrepresentation need be made);  
12 *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260-61 (Nev. 1998) (holding  
13 jury could have concluded deliberate misrepresentation by drawing reasonable  
14 inference from evidence presented). Rarely is there a smoking gun in which a  
15 perpetrator of fraud says “I intend to defraud you.” Rather, the jury determines  
16 based on the actions of the perpetrator whether there was a fraudulent intent. *See*  
17 *Tognini v. Kyle*, 15 Nev. 464, 468-69 (Nev. 1880)(“An intent to defraud is not  
18 published to the world . . . hence fraud can generally be shown only by facts and  
19 circumstances which tend directly or indirectly to establish it.”) The evidence at  
20 trial supported the finding of the jury that FTB acted with fraudulent intent from the  
21 outset.

22 Moreover, in this case there was clear affirmative evidence of fraudulent  
23 intent from the outset of the first audit, akin to the proverbial smoking gun. FTB’s  
24 initial audit of Hyatt was triggered by a newspaper article that reported Hyatt’s new  
25 wealth from patent royalties after moving to Nevada. The first auditor, Mr. Shayer,  
26 testified that what “popped” into his mind in reading the article was how much  
27 money Hyatt had made. Mr. Shayer recalls that he read that Hyatt stood to make  
28

1 “hundreds of millions” of additional dollars from his patents. This prompted Mr.  
2 Shayer to request Hyatt’s state tax return records and open an audit of Hyatt’s 1991  
3 tax-year return. (RAB, 14.)

4 Mr. Shayer later wrote a memo very early in the audit pointing out that if FTB  
5 could reclassify Hyatt’s income as “sourcing” income instead of “residency”  
6 income, it would result in \$1.8 million in more taxes for FTB from Hyatt. From the  
7 outset of the audit, therefore, the jury could and did conclude that FTB was not  
8 impartially gathering the facts to make a fair determination of whether any tax was  
9 owed. Rather, operating in an environment in which auditors understood  
10 assessments were supposed to be imposed, FTB viewed the audit as a means to  
11 assess and collect taxes from Hyatt. (RAB, 15.) This is directly contrary to FTB’s  
12 representations to Hyatt upon commencing the audit. Mr. Shayer himself sent the  
13 representations to Hyatt, and he testified that he was therein promising to conduct a  
14 fair and unbiased audit and that his first communication to Hyatt was intended to  
15 convey that FTB would be fair and impartial. (RAB, 89; Opinion, 37-38.)

16 The jury’s finding on the fraud claim, under the evidence presented,  
17 established the fraudulent intent of FTB at the outset and throughout the audit.

18 **2. FTB’s temporal argument misses the point that the evidence cited**  
19 **by this Court and other evidence supports the jury’s finding that**  
20 **FTB had fraudulent intent from the outset.**

21 FTB argues that the evidence this Court cited in support of affirming the fraud  
22 claim fails to establish FTB’s fraudulent intent at the outset of the audit as the  
23 evidence cited is from later in the audit. No plaintiff could ever prove fraud if he/she  
24 needed an email or recorded admission from the defendant confessing to the intent to  
25 do wrong before he/she undertook the wrongful act. That is not how intent is  
26 established. Intent is established when the jury views all the evidence of the actions  
27 of the defendant and concludes the defendant never intended to fulfill the  
28

KAEMPER CROWELL RENSHAW GRONAUER & FIORENTINO

1 representations made. *Albert H. Wohlers & Co.*, 114 Nev. at 1260-61; *Tognini*, 15  
2 Nev. at 468-69.

3 Here, the evidence cited by this Court is more than sufficient for a jury to  
4 conclude that FTB had a fraudulent intent from the outset. That evidence is nearly  
5 identical to the evidence detailed above supporting the liability finding for the IIED  
6 claim: (i) FTB's breaches of its promises of confidentiality of Hyatt's personal  
7 information despite repeated assurances to Hyatt the information would be kept  
8 confidential; (ii) FTB's 11-year delay in the protests and the \$8,000 a day in interest  
9 suffered by Hyatt; (iii) the disparaging remarks of the main auditor and her obsession  
10 to get Hyatt; and (iv) FTB's promotion of a culture in which tax assessments were  
11 the end goal. (Opinion, 38.) This evidence, along with additional evidence, such as  
12 the testimony of the first auditor Mr. Shayer concerning his thoughts and actions at  
13 the outset of the audit, constituted substantial evidence of FTB's fraudulent intent.

14 FTB's violation of its promises of confidentiality support the jury's finding of  
15 fraudulent intent. Similarly, the other evidence referenced by this Court, including  
16 the letters to multiple doctors with the same last name and the main auditor's  
17 disparaging comments, evidence fraudulent intent throughout the audit. The fact that  
18 the bad faith actions of FTB were carried out by more than one auditor makes FTB's  
19 action that much more egregious. There was not just one rogue employee, but a  
20 culture at FTB that made assessing taxes the end goal of an audit. The evidence put  
21 forth from the outset of the audit and continuing through the audit and protest as  
22 identified by this Court is more than sufficient to sustain the jury's finding of  
23 fraudulent intent.

24 **3. This Court's Opinion does not contain any internal inconsistencies**  
25 **relative to its treatment and reliance on expert testimony presented**  
26 **by Hyatt at trial.**

27 FTB's petition misstates the holdings from this Court's Opinion on Hyatt's  
28 expert testimony regarding the budgeting process in California used by the state and

1 FTB, in particular its improper use of CBR, to evaluate auditors and the culture this  
2 fostered at FTB (RAB, 32-34). This evidence supports Hyatt's fraud and IIED  
3 claims.

4 Specifically, in support of those two claims, this Court referenced that FTB  
5 had fostered an environment in which auditors were expected to return audits with  
6 assessments (Opinion, 47 (IIED claim)) and promoted a culture in which tax  
7 assessments were the end goal of an audit (Opinion, 38 (fraud claim)). This is  
8 directly contrary to encouraging auditors to act in a fair and impartial manner in  
9 determining if in fact taxes are owed.

10 There was no inconsistency therefore in this Court affirming the fraud claim  
11 in part on the basis of the culture promoted by FTB as demonstrated by Mr.  
12 Sjoberg's expert testimony and other evidence (RAB, 32-35), while also holding  
13 inadmissible other expert evidence as to the correctness of the actual audit  
14 conclusions.<sup>9</sup>

15 **C. This Court did not overlook or misapprehend the law in regard to**  
16 **actionable representations.**

17 FTB reargues its losing position on actionable misrepresentations. It argues  
18 that it need not stand behind what it promises and no one should claim reliance on its  
19 representations. That is not the law, particularly in this case with the evidentiary  
20 record established by Hyatt at trial. Hyatt again extensively briefed this issue.  
21 (RAB, 86-91.)

22 In particular, the first communication by FTB to Hyatt giving notice of the  
23 audit included what was at that time termed the "Taxpayer's Bill of Rights" as well

---

24 \_\_\_\_\_  
25 <sup>9</sup> The fact that Mr. Sjoberg testified that in the limited "sampling" of audits he  
26 reviewed, he saw no instances in which FTB made bogus or phony assessments, is in  
27 no way inconsistent with his testimony on FTB's budgeting, improper use of CBR,  
28 and FTB's false certifications to the state legislature regarding CBR. (*See, e.g.*, RT:  
April 22, 2008, 89:3-90:19, 95:21-98:11.)

1 as a "Privacy Notice." FTB's first auditor, Mr. Shayer, who sent the notice and  
2 accompanying attachments, testified that he promised to conduct a fair and unbiased  
3 audit and that this very first communication by FTB to Hyatt was intended to convey  
4 that FTB would be fair and impartial. (RAB, 89.)

5 These were not vague and ambiguous statements. These were clear  
6 representations on which Hyatt relied. As briefed, where there has been deceptive  
7 conduct by a government actor using its position of authority, courts do not find  
8 themselves powerless to provide relief.<sup>10</sup> See *SEC v. ESM Government Securities,*  
9 *Inc.*, 645 F.2d 310, 316 (5th Cir. 1981) ("We believe that a private person has the  
10 right to expect that the government, when acting in its own name, will behave  
11 honorably. When a government agent presents himself to a private individual, and  
12 seeks that individual's cooperation based on his status as a government agent, the  
13 individual should be able to rely on the agent's representations.")<sup>11</sup>

14 FTB also argues here that Hyatt never contended that FTB did not act with  
15 courtesy. FTB's statement ignores the record in the case. Again, the first auditor,  
16 Mr. Shayer, acknowledged that he intended to convey that FTB would be fair and  
17 impartial, as he understood FTB was obligated to be. (RAB, 89-90.) But substantial  
18 evidence supports the jury's finding of FTB's fraudulent intent.

19 \_\_\_\_\_  
20 <sup>10</sup> FTB makes an argument that as a matter of public policy it should not be held to  
21 its representations. Any considerations of public policy favor Hyatt's position and  
22 holding a government agency accountable for its actions, not allowing it to make  
23 representations of fairness and unbiased treatment with no recourse if those  
24 representations prove false.

25 <sup>11</sup> The *Bulbman* case cited by FTB had nothing to do with government misconduct  
26 and misrepresentations. The FTB also cites *Minehan v. United States*, 75 Fed. Cl.  
27 249 (2007), but that case was in fact a tax refund case against the IRS that was  
28 untimely filed. The *pro per* plaintiff attempted to convert it to a tort case, and the  
Court of Federal Claims found in any event it had no jurisdiction over the late  
asserted tort claims. The language cited by FTB is therefore at best *dicta* and  
without application to this case.

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO

1 Hyatt most assuredly did contend, and prove, that FTB did not act in accord  
2 with its representations, as to courtesy and otherwise. This Court’s Opinion ruled  
3 that “a reasonable mind could conclude that FTB made fraudulent representations.”  
4 (Opinion, 39.)<sup>12</sup> This Court did not therefore overlook or misapprehend the facts or  
5 law on this point.

6 **V. Conclusion.**

7 This Court sustained the jury’s verdict and resulting entry of judgment on  
8 Hyatt fraud claim and on his IIED claim as to liability. Substantial evidence  
9 supports this Court’s Opinion on these two points. FTB has failed to establish that  
10 this Court overlooked or misapprehended the facts or law in affirming the jury on  
11 those two claims and ordering a new trial on damages for the IIED claim.

12 \ \ \  
13 \ \ \  
14 \ \ \  
15 \ \ \  
16 \ \ \  
17 \ \ \  
18 \ \ \  
19 \ \ \  
20 \ \ \  
21 \ \ \

---

22 <sup>12</sup> FTB notes that its representation of the audit being completed in a reasonable time  
23 should only apply to the audit, not the protest which lasted 11 years. But the protest  
24 is an extension of the audit, and most significantly, a taxpayer is at the will and  
25 whim of FTB during the audit and protest as no “final” assessment is issued and no  
26 administrative appeal can be pursued to the California State Board of Equalization  
27 until the protest is complete. See Cal. Rev. & Tax Code § 19045. This was one of  
28 the bad faith delay facts that Hyatt argued to the jury: FTB was sitting on the protest  
for 11 years so that Hyatt could not pursue his administrative appeal. (RT: July 30,  
2008, 31:4-23.)



KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO

1 FTB's petition is nothing more than re-argument of issues already lost and should be  
2 denied in its entirety.

4 DATED: October 22, 2014.

5 MARK A. HUTCHISON, Nev. Bar No.  
6 4639

7 MICHAEL K. WALL, Nev. Bar No. 2098  
8 HUTCHISON & STEFFEN, LTD.



9 PETER C. BERNHARD, Nev. Bar No. 734  
10 KAEMPFER CROWELL RENSHAW  
11 GRONAUER & FIORENTINO

12 DONALD J. KULA, Cal. Bar No. 144342  
13 PERKINS COIE LLP

14 *Attorneys for Respondent/Cross-Appellant*  
15 *Gilbert P. Hyatt*

28

1                   **CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 40(b)(3)**

2   I certify that:

3                   Pursuant to NRAP 40(b)(3), the attached *Respondent Gilbert P. Hyatt's*  
4 *Answer to Appellant Franchise Tax Board of the State of California's Petition for*  
5 *Rehearing* is proportionately spaced, has a typeface of 14 points or more and  
6 contains 8,072 words as determined by the Word Count feature of the Microsoft  
7 Word software program used to create this document.

8   DATED this 22nd day of October, 2014.

9  
10   MARK A. HUTCHISON, Nev. Bar No.  
11   4639

12   MICHAEL K. WALL, Nev. Bar No. 2098  
13   HUTCHISON & STEFFEN, LTD.

14   

15   PETER C. BERNHARD, Nev. Bar No. 734  
16   KAEMPFER CROWELL RENSRAW  
17   GRONAUER & FIORENTINO

18   DONALD J. KULA, Cal. Bar No. 144342  
19   PERKINS COIE LLP

20   *Attorneys for Respondent/Cross-Appellant*  
21   *Gilbert P. Hyatt*

**CERTIFICATE OF SERVICE**

Pursuant to NRAP 25, I certify that I am an employee of KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO and that on this \_\_\_\_ day of \_\_\_\_\_, I caused the above and foregoing document entitled **RESPONDENT GILBERT P. HYATT'S ANSWER TO APPELLANT FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA'S PETITION FOR REHEARING** to be served by the method(s) indicated below:

- \_\_\_\_\_ via U.S. mail, postage prepaid;
- X   via Federal Express;
- \_\_\_\_\_ via hand-delivery;
- \_\_\_\_\_ via Facsimile;

upon the following person(s):

James A. Bradshaw, Esq.  
MCDONALD CARANO WILSON  
LLP  
100 West Liberty Street, 10th Floor  
Reno, NV 89501

Patricia K. Lundvall, Esq.  
MCDONALD CARANO WILSON  
LLP  
2300 West Sahara Avenue, Suite 1000  
Las Vegas, NV 89102

*Attorneys for Appellant  
Franchise Tax Board of the State of  
California*

*Attorneys for Appellant  
Franchise Tax Board of the State of  
California*

Robert L. Eisenberg, Esq.  
LEMONS, GRUNDY & EISENBERG  
6005 Plumas Street, Suite 300  
Reno, NV 89519

C. Wayne Howle, Solicitor General,  
State of Nevada  
Local Counsel  
100 North Carson Street  
Carson City, NV 89701

*Attorneys for Appellant  
Franchise Tax Board of the State of  
California*

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Clark L. Snelson  
Utah Assistant Attorney General  
160 East 300 South 5th Floor  
Salt Lake City, Utah 84114

  
An employee of KAEMPFER CROWELL RENSHAW  
GRONAUER & FIORENTINO

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO