

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. A382999

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8 **APPEAL**

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

11 **RESPONDENT GILBERT P. HYATT'S**
12 **SUPPLEMENTAL APPENDIX**
13 **Volume 2 of 2 (Pages 81 - 179)**

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SUPPLEMENTAL APPENDIX - VOLUME 2 OF 2

Date	Prior Briefing	Tab No. / Page No.
July 2, 2001	Real Party in Interest Gilbert P. Hyatt's Petition for Rehearing re the Court's June 13, 2001 Order Granting Petition for Writ of Mandamus, filed in the Supreme Court of Nevada	1 SRA081- SRA093
July 23, 2001	Real Party in Interest Gilbert P. Hyatt's 15 Page Supplement to His Petition for Rehearing re the Court's June 13, 2001 Order Granting Petition for Writ of Mandamus, filed in the Supreme Court of Nevada	2 SRA094- SRA111
August 7, 2001	FTB Answer to Hyatt's Petition for Rehearing and Supplemental Petition for Rehearing, filed in the Supreme Court of Nevada	3 SRA112- SRA144
August 14, 2001	Errata to Real Party in Interest Gilbert P. Hyatt's 15 Page Supplement to His Petition for Rehearing re the Court's June 13, 2001 Order Granting Petition for Writ of Mandamus, filed in the Supreme Court of Nevada	4 SRA145- SRA169

Date	Prior Briefing	Tab No. / Page No.
August 22, 2001	FTB Response to Errata, filed in the Supreme Court of Nevada	5 SRA170- SRA179

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10 **IN THE SUPREME COURT OF THE**
11 **STATE OF NEVADA**

12 FRANCHISE TAX BOARD OF THE STATE
13 OF CALIFORNIA,

14 Petitioner,

15 vs.

16 EIGHTH JUDICIAL DISTRICT COURT of
the State of Nevada, in and for the County of
17 Clark, Honorable Nancy Saitta, District Judge,

18 Respondent,

19 and

20 GILBERT P. HYATT,

21 Real Party in Interest.
22
23
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27
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Case No. 36390

**REAL PARTY IN INTEREST
GILBERT P. HYATT'S PETITION
FOR REHEARING RE THE
COURT'S JUNE 13, 2001 ORDER
GRANTING PETITION FOR WRIT
OF MANDAMUS**

**CONFIDENTIAL INFORMATION
TO BE FILED UNDER SEAL**

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1 **I. Issues presented.**

2 **A. Did the Court overlook or misapprehend genuine, material facts at issue when it**
3 **concluded “that there is no probative evidence to support Hyatt’s [tort] claims?”**

4 **B. Did the Court overlook or misapprehend the law when it granted the FTB’s petition**
5 **“on grounds other than those alleged in the petition?”**

6 **II. Summary of argument and relief requested.**

7 Hyatt sued the FTB for torts based on its invasion of his privacy and its fraudulent conduct.
8 Since the Court decided the Writ Petition on issues not raised, briefed or argued, Hyatt has minuscule
9 space to describe – *for the first time to this Court* – his specific claims and the evidence that has been
10 overlooked or misapprehended by the Court. Despite an enormous record, he has space here to address
11 a scant portion of the sufficient probative evidence *in the record* of prima facie claims regarding: (i) a
12 single invasion of privacy claim – disclosure of private facts – and (ii) his fraud claim. Hyatt has
13 equally strong supporting evidence for his various other related tort claims, but no space to address
14 them. Hyatt therefore requests rehearing on all of his tort claims. Surely this Court must accord respect
15 for the fact that the district court twice validated Hyatt’s tort claims, the discovery commissioner saw
16 and heard sufficient evidence to indicate that the FTB may be guilty of fraud, and even the FTB did not
17 challenge in its writ petition the sufficiency of Hyatt’s evidence. Indeed, the record is irrefutably alive
18 with supportive evidence.

19 **III. The Court has overlooked or misapprehended Hyatt's substantial evidence**
20 **of the FTB's invasion of Hyatt's privacy by its illegal disclosures of Hyatt's**
21 **private facts.**

22 **A. Elements of claim:** (i) disclosure or publicity of private facts; and (ii) a reasonable
23 expectation of privacy in regard to the disclosed facts.¹

24 **B. Supporting evidence:**

25 The evidence establishes beyond any doubt that the FTB violated its own non-discretionary

26 ¹ This claim is really two: the more recently emerged invasion of informational/constitutional privacy and the more
27 traditional branch of disclosure of private facts. Each claim involves the disclosure of private facts for which an expectation of
28 privacy had been created and for which a reasonable person would find offensive – particularly informational/constitutional
privacy under which disclosure of private, personal information gathered by the government is *per se* unlawful. See detailed
discussion in Hyatt's opposition to the FTB's motion for summary judgment on pages 21-26 and 31-33, respectively, [Appdx.,
Exh. 27]. See also Cal. Const., Art. I, Sec. 1. For the Court's convenience and for clarity in this petition, Hyatt has attached an
Appendix hereto containing copies of all exhibits cited herein. Hyatt cites to the attached Appendix in the following format:
[Appdx., Exh. "x'"]. All exhibits included in the attached Appendix are materials from the record before the Court, and the record
cite for each exhibit is set forth in the table of contents for the Appendix.

1 rules, regulations, and procedures in illegally disclosing Hyatt's private information and thereby injuring
2 Hyatt. Regardless of whether an individual owes taxes to California, the FTB has no right to ignore its
3 own confidentiality requirements and commit actionable privacy torts under the guise of a tax audit.
4 This claim, and all of Hyatt's claims, are for torts committed by the FTB irrespective of the independent
5 tax proceeding in California.

6 The Court incorrectly concluded that Hyatt's only evidence in support of this claim (and all
7 others) consisted of his own allegations. The Court overlooked a record replete with documentary
8 evidence, affidavits, and depositions of third persons that establish this claim.

9 **1. Hyatt reasonably expected an audit by the FTB with no public disclosure of
his private information.**

10 As addressed below, based on the FTB's own published regulations, statutory requirements, and
11 explicit representations to Hyatt and his representatives, Hyatt rightly and reasonably expected that the
12 FTB would keep his private information confidential. Hyatt's heightened privacy concerns were, he
13 thought, allayed by the FTB's explicit promises to Hyatt and citations of law mandating confidentiality.

14 There are numerous examples of FTB publications mandating confidentiality. "It is the *auditor's*
15 responsibility to maintain the security of *all* confidential data during the audit process and to prevent *any*
16 unauthorized disclosure."² The FTB is forbidden from providing "confidential information to persons to
17 whom issuance of this information has not been authorized."³ The FTB emphasizes: "It is the
18 responsibility of FTB agents to ensure that confidential information is not disclosed to unauthorized
19 persons."⁴ Auditors are instructed: "*If in doubt, don't disclose*," repeating this mandatory, non-
20 discretionary requirement 16 times in 14 pages in one manual.⁵ The FTB even warns its auditors of
21 possible private lawsuits for unauthorized disclosures.⁶ Yet, included in the FTB's definition of
22 confidential information is the very type of information it disclosed regarding Hyatt.⁷

23 The record is overflowing with evidence, testimonial and documentary, that provided Hyatt with

24 ² FTB Field Audit Manual, at FTB 3762 [Appdx., Exh. 1].

25 ³ FTB Statement of Incompatible Activities and Rules of Conduct, at (1), paragraph I(3) [Appdx., Exh. 2].

26 ⁴ FTB Disclosure Education Manual, at 11 [Appdx., Exh. 3].

27 ⁵ FTB Disclosure Education Manual, emphasis in original [Appdx., Exh. 3].

28 ⁶ FTB Disclosure Education Manual, at 14 [Appdx., Exh. 3].

⁷ FTB Statement of Incompatible Activities and Rules of Conduct, at (3), paragraph II(2), at (5), paragraph IV, and at (7), paragraph IX [Appdx., Exh. 2]; FTB Disclosure Education Manual, at 4 (emphasis added), at 5, and at 13 [Appdx., Exh. 3]; and FTB Security and Disclosures Manual, at H 06603, H06659 [Appdx., Exh. 4].

1 an absolute, reasonable expectation that his unique need for privacy would be strictly honored by the
2 FTB as stated verbally and in writing, and as required by its own rules. In its initial audit letter, the FTB
3 promised "confidential treatment of any personal and financial information from the auditor assigned to
4 you."⁸ In the same document, the FTB sent Hyatt its Privacy Notice, FTB Form #1131,⁹ that
5 represented to Hyatt that the FTB was subject to the California privacy act¹⁰ and was required to
6 disclose "why we ask you for information." The FTB indicated that it would only share information
7 with the IRS and other governmental agencies. *It uttered no hint that it intended to divulge Hyatt's*
8 *private information to non-governmental third parties at the unfettered discretion of its auditors.* It
9 nonetheless did so on a grand scale as summarized below.

10 The affidavit of Eugene Cowan, Hyatt's tax attorney, explained in great detail the lengths Hyatt
11 and his representatives went to obtain assurances from the FTB regarding confidentiality.¹¹ The FTB
12 clearly understood Hyatt's compelling need for keeping not only his private information confidential but
13 also the fact that he was being audited to the point that Hyatt's insistence upon confidentiality was so
14 non-negotiable that the FTB promised strict confidentiality as a *quid pro quo* for obtaining the
15 information and documents its auditors claimed it needed to complete the audit.¹²

16 Hyatt is by all accounts, a recognized world-class inventor, researcher and licensor whose
17 demands for strict confidentiality were solidly based upon concerns of industrial espionage and theft of
18 trade secrets.¹³ Having previously experienced the disastrous effects of security leaks early in his
19 career,¹⁴ Hyatt's need for confidentiality was paramount, as he had licensed many of the world's largest
20 corporations on crucial technologies and was negotiating with many others.¹⁵ The FTB was keenly
21 aware that Hyatt's privacy concerns were both reasonable and non-negotiable, as his secret research lab
22 and secret document files were located in a highly confidential setting not available or discernible as
23

24 ⁸ FTB Form #1131[*Appdx., Exh. 5*].

25 ⁹ FTB Form #1131 [*Appdx., Exh. 5*].

26 ¹⁰ Officially known as the California Information Practices Act of 1977("IPA"), Cal. Civ. Code §§ 1798 *et seq.*

27 ¹¹ Cowan Affid., ¶¶ 9-26 [*Appdx., Exh. 6*], submitted in opposition to the FTB's motion for summary judgment.

28 ¹² Cowan Affid., ¶¶ 9-26 [*Appdx., Exh. 6*].

¹³ Hyatt Affid., ¶¶ 18b, 131, 137 [*Appdx., Exh. 7*].

¹⁴ Hyatt Affid., ¶¶ 80, 130-31, 137 [*Appdx., Exh. 7*].

¹⁵ Hyatt Affid., ¶¶ 44, 67, 85, 86 [*Appdx., Exh. 7*].

1 such to the public.¹⁶ Security was so important to Hyatt that he even purchased the facility containing
2 his research lab and invaluable documents through the Kern trust¹⁷ to avoid public disclosure.

3 **2. The FTB unreasonably and illegally divulged Hyatt's private facts.**

4 In violation of the FTB's non-discretionary regulations and statutory requirements, as well as its
5 explicit representations to Hyatt, and contrary to this Court's "findings" that the FTB "complied with its
6 internal operating procedure" and acted "in line with a standard investigation . . . pursuant to its statutory
7 authority," the FTB publicly, repeatedly, and defiantly disclosed Hyatt's private information.

8 **i. The FTB wrongly disclosed the address of Hyatt's secret research lab.**

9 The FTB's disclosure of Hyatt's highly secret Las Vegas address to third parties was a calculated
10 outrage.¹⁸ Despite express assurances that it would not reveal Hyatt's secret information, the FTB
11 violated its own regulations and disclosed Hyatt's secret Las Vegas address to utility companies,
12 including Southwest Gas Corp., Silver State Disposal Service, and Las Vegas Valley Water District¹⁹
13 and to three separate newspapers.²⁰ As a result, Hyatt's painstaking care in locating, securing, and
14 protecting a secret facility was all for naught, as the FTB made it available to public knowledge, a fact
15 that is of the utmost concern and disgust to Hyatt for reasons that any reasonable person in his situation
16 would consider to be of compelling importance.²¹

17 This reprehensible effort to publicly expose Hyatt's secret address resulted in a major security
18 risk and loss of time and money. As a direct result of the FTB's deliberate privacy violation, Hyatt was
19 forced to purchase another Nevada property, under another trust, and move the research lab, his
20 sensitive documents, and intellectual property to this new location.²² Since 1995 when the FTB
21 publically disclosed the secret research lab address, various ones of Hyatt's most sensitive trade secrets
22 have appeared in commercial products and in publications.²³

24 ¹⁶ Hyatt Affid., ¶¶ 10-133, 137 [Appdx., Exh. 7].

25 ¹⁷ Michael Kern is a prominent Certified Public Accountant in Las Vegas.

26 ¹⁸ Portions of FTB 1991 tax year audit file: H01639, H01614, H01643, H01853, and FTB 01992 [Appdx., Exh. 8].

27 ¹⁹ Portions of FTB 1991 tax year audit file: H 01639, 01641, 01643 [Appdx., Exh. 9].

28 ²⁰ Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [Appdx., Exh. 10].

²¹ Hyatt Affid., ¶ 137-138 [Appdx., Exh. 7].

²² Hyatt Affid., ¶ 138 [Appdx., Exh. 7].

²³ Hyatt Affid., ¶¶ 80, 130-31, 137 [Appdx., Exh. 7].

1 **ii. The FTB wrongly disclosed Hyatt's social security number.**

2 Hyatt had strong reasons to expect that the FTB would respect his right to keep his social
3 security number confidential given FTB representations and published policies. Yet, the FTB made over
4 *40 unauthorized and illegal disclosures to third parties.*²⁴ None of the recipients were disclosed to Hyatt
5 in advance, as was required by law and FTB regulation, before the FTB disclosed a taxpayer's social
6 security number.²⁵

7 **iii. The FTB wrongly disclosed to Hyatt's Japanese licensees that he was being**
8 **investigated, thereby destroying Hyatt's patent licensing business.**

9 After assurances of strict confidentiality, Hyatt reluctantly agreed to provide excerpts of his
10 agreements with his Japanese patent licensees, Hitachi and Matsushita, and his membership in the
11 Licensing Executives Society.²⁶ Hyatt contractually committed to his Japanese licensees that the
12 agreements would remain strictly confidential.²⁷ The FTB violated Hyatt's privacy rights by sending
13 excerpts of the licenses to his Japanese licensees, making clear that Hyatt was under investigation by the
14 FTB, and disclosing that the licensing agreements had been disclosed by Hyatt in violation of the
15 agreements' confidentiality provisions.²⁸

16 The effect of the licensing disclosures by the FTB in breach of its commitment to Hyatt and the
17 confidentiality clause of the licenses, was significant. Hyatt's patent licensing business was destroyed.
18 From the time of the FTB's unlawful disclosure, Hyatt has obtained no new licensees at all, and his
19 royalty income from new licensees dropped to zero.²⁹

20 The record thus reflects, irrefutably, that there was widespread, unlawful dissemination of
21 Hyatt's personal and confidential information by the FTB. At least 90 pieces of correspondence were
22 disseminated by the FTB to individuals, businesses, trade groups, licensees, etc., whose collective
23 membership totaled in the thousands.³⁰

24
25 ²⁴ Portions of FTB 1991 tax year audit file [*Appdx., Exh. 8*].

26 ²⁵ IPA, § 1798.15 [*Appdx., Exh. 12*]; FTB Security and Disclosure Manual, at H 06706 [*Appdx., Exh. 4*].

27 ²⁶ Hyatt Affid., ¶ 138 [*Appdx., Exh. 7*].

28 ²⁷ Cowan Affid., ¶¶ 8-26 [*Appdx., Exh. 6*].

²⁸ FTB 02143 and 02147 [*Appdx., Exh. 11*].

²⁹ Hyatt Affid., ¶¶ 136, 162 [*Appdx., Exh. 7*].

³⁰ Cox Narrative Report, at H00039-00078, [*Appdx., Exh. 13*].

1 **IV. The Court has overlooked or misapprehended substantial evidence of the**
2 **FTB's fraud.**

3 **A. Elements of claim:** One or more knowingly false representations, made with the intent
4 it be relied upon, and it is reasonably and detrimentally relied on by a party, resulting in
5 damage to that party.³¹

6 **B. Supporting evidence:**

7 The FTB made two types of false promises to induce Hyatt's cooperation with the audit: (i) that
8 the FTB would keep Hyatt's information confidential, and (ii) that the FTB would conduct a fair,
9 unbiased review. The FTB not only breached its promises, but it sought an extorted settlement from
10 Hyatt by overtly threatening further disclosure and publicity. The evidence and damages regarding the
11 first false promise are essentially the same as that addressed in the above section on the closely-related,
12 but separate, invasion of privacy claim. This section therefore addresses the second false promise.

13 As summarized below, Hyatt has established that the lead auditor created false evidence – which
14 is a criminal offense under California law³² – and used it to try to extort a settlement from Hyatt.

15 **1. The one-sided fraudulent audit.**

16 The FTB publicly claims to be fair and impartial in its dealings with taxpayers. It professes to
17 interpret the law evenly and fairly with neither a state nor a taxpayer point of view. FTB personnel have
18 testified to this in depositions.³³ Hyatt's first auditor, Marc Shayer, even testified that he promised to
19 conduct a fair and unbiased audit.³⁴

20 Yet, the record shows that the FTB's methods at that time targeted high-income, former
21 California residents, rewarded its own auditors based on the amount they could assess (measured by a
22 cost-benefit ratio), penalized auditors who found "no change" in their audits, and used penalties as
23 "bargaining chips" to induce settlements, making the Hyatt audit the biggest potential boost to any
24 auditor's career.³⁵

25 The FTB's third auditor, Sheila Cox, fully acknowledged in deposition testimony that she
26 focused exclusively on information obtained which could be construed as supporting the FTB's
27

28 ³¹ See, e.g., *Albert H. Wohlers and Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (Nev. 1998).

³² See, e.g., Cal. Rev. & Tax Code § 461, Cal. Pen. Code § 134.

³³ Illia depo., p. 303 [Appdx., Exh. 14]. See also the FTB Mission Statement [Appdx., Exh. 28].

³⁴ Shayer depo., pp. 474, 476, 482-83 [Appdx., Exh. 15].

³⁵ See supporting deposition excerpts and documents cited and included in Hyatt's *Crime/Fraud* brief to the discovery
commissioner [Appdx., Exh. 29]; see also Les depo., pp. 226-228, 615, 674, 678, 684-687 [Appdx., Exh. 17].

1 position.³⁶ She completely ignored documentary evidence and witness statements directly contrary to
2 the FTB's preordained conclusion.³⁷ She did not investigate the most relevant information. If she had,
3 she would have had to conclude Hyatt was a Nevada resident from September 26, 1991 to the present.

4 The FTB did not conduct a legitimate, bona-fide audit. Instead, the FTB conducted a biased,
5 fraudulent investigation in which Cox destroyed key evidence that supported Hyatt (e.g., her
6 contemporaneous handwritten notes and computer records of bank account analysis).³⁸ Relevant to her
7 intent, Cox told her husband and others during the Hyatt audits that she was "going to get the Jew
8 bastard."³⁹ After the audit was concluded and she had assessed Hyatt millions of dollars in trumped-up
9 taxes and penalties, she *telephoned* Hyatt's bitter ex-wife from whom he had been divorced for many
10 years and bragged about the "conviction."⁴⁰ Cox was hardly a fair and unbiased auditor. The discovery
11 commissioner even declared that the FTB may have committed fraud and accordingly ordered that Hyatt
12 was entitled to further discovery on this point.⁴¹

13 The FTB disregarded, refused to investigate, ignored, and "buried" the facts favorable to Hyatt
14 which it uncovered during its invasive "audit." For example, the FTB simply ignored:

- the current neighbors in Nevada who supported Hyatt's Nevada residency claim;
- the former neighbors in California who told of Hyatt's move to Nevada;
- the friends and business associates who knew of Hyatt's move to Nevada;
- the adult son who knew of Hyatt's move to Nevada;
- Nevada rent, utilities, telephones, and insurance payments of Hyatt;
- Nevada voter registration and driver's license of Hyatt;
- Nevada home purchase offers and escrow papers of Hyatt;
- Nevada religious, professional, and social affiliations of Hyatt; and
- Hyatt's changes of address from California to Nevada address.⁴²

19 The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages which
20 supposedly detail the evidence in favor of its conclusion concerning Hyatt's residency as well as
21 asserting fraud penalties against Hyatt.⁴³ The depositions conducted to date establish that the FTB
22 ignored substantial evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt
23

24 ³⁶ Cox depo., pp. 168-69, 1618-19 [Appdx., Exh. 16].

25 ³⁷ Cowan Affid., Exhibit 14 thereto [Appdx., Exh. 6].

26 ³⁸ Cox depo., pp. 17, 174-175, 190, 341, 342, 423-24, 569, 605, 661, 861, 971 [Appdx., Exh. 16].

27 ³⁹ Les depo., p. 10 [Appdx., Exh. 17].

28 ⁴⁰ Maystead depo., pp. 182-84 [Appdx., Exh. 18].

⁴¹ November 9, 1999 hearing transcript (excerpt), pp. 55-56 [Appdx., Exh. 26].

⁴² Cowan Affid., Exhibit 14 thereto [Appdx., Exh. 6].

⁴³ Cox Narrative Report, at H00039-00078 [Appdx., Exh. 13].

1 and contrary to the FTB's pre-determined conclusion.⁴⁴ It never even interviewed Hyatt. The FTB did
2 not even speak with Hyatt's son, Dan, with whom Hyatt had a close ongoing relationship, who loaned
3 Hyatt his utility trailer for Hyatt's move to Las Vegas, and who visited with Hyatt in Las Vegas during
4 April 1992. Rather than interviewing two of Hyatt's long-time business associates, the FTB proceeded
5 to audit them, seeking through intimidation to separate them from Hyatt.⁴⁵

6 Instead, the FTB interviewed and obtained statements from estranged relatives and an ex-wife
7 that were falsely termed "affidavits," and which formed the cornerstone of the FTB's "case" despite the
8 complete lack of credibility and relevance of the statements.⁴⁶ More importantly, the statements
9 contained in the "non-affidavits" were nothing more than vague and general attacks on Hyatt and
10 provided no specific evidence supporting the FTB's conclusions. The only specific statements in the
11 unsworn "affidavits" were expressly disclaimed by the declarant in concluding that she could not be
12 held to what is stated therein in a court of law.⁴⁷ In other words, the "cornerstone" of the FTB's case
13 was built on sand that crumbles upon even mild cross-examination.

14 **2. The \$9 million fraud penalty and the FTB's urging Hyatt to settle.**

15 The FTB not only assessed Hyatt taxes for a period after which he had moved to Nevada based
16 on its trumped-up investigation, it assessed Hyatt penalties for alleged fraud in regard to his Nevada
17 residency. The penalties amounted to an additional 75% of the alleged taxes. The FTB teaches its
18 auditors to use the fraud penalty as a "bargaining chip" to obtain "agreement" from the taxpayer to pay
19 the assessed tax.⁴⁸ To make its point, the FTB's penalties training manual has on its cover a menacing
20 "skull and cross-bones,"⁴⁹ an attitude of intimidation directed at Hyatt through tortious conduct.

21 In classic extortion form, Jovanovich boldly "suggested" to Hyatt's representative that settling at
22 the "protest stage" would avoid public revelation of Hyatt's personal and financial information.
23 Deposition testimony has confirmed that Jovanovich, the FTB's first protest officer, told Hyatt's tax
24 representative that if he did not settle at the outset of the protest stage,⁵⁰ the privacy and confidentiality

25 ⁴⁴ Cox depo., pp. 1181, 1187-1188 [Appdx., Exh. 16]; Cowan Affid., Exhibit 14 [Appdx., Exh. 6].

26 ⁴⁵ Cox depo., pp. 29, 168-69, 181, 1460-61, 2021 [Appdx., Exh. 16]; Hyatt Affid., ¶ 164 [Appdx., Exh. 7].

27 ⁴⁶ Maystead depo., pp. 182-84 [Appdx., Exh. 18]; Hyatt affid., ¶¶ 63, 164, 174, 175, 181 [Appdx., Exh. 7].

28 ⁴⁷ H 00302-07 [Appdx., Exh. 19].

⁴⁸ Ford depo., pp. 128-29 [Appdx., Exh. 20].

⁴⁹ FTB H 08950 [Appdx., Exh. 21].

⁵⁰ Cowan Affid., ¶ 32 [Appdx., Exh. 6].

1 that Hyatt so valued would be lost.⁵¹

2 Specifically, she told Hyatt's tax representative that it would be necessary for the FTB to engage
3 in extensive additional requests for information from Hyatt as that is its practice "in high profile, large
4 dollar" residency audits. In fact, Ms. Jovanovich's own hand-written notes confirm that she told Hyatt's
5 tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "of
6 many unresolved facts and questions" related to Hyatt.⁵² Jovanovich also testified that she understood
7 Hyatt had a unique and special concern regarding his privacy⁵³ and that he was "paranoid" about his
8 privacy – an understanding shared among the FTB auditors and the FTB residency unit.⁵⁴

9 **3. Hyatt was damaged by the FTB's fraud.**

10 Hyatt, having no reason to suspect that the FTB, as an organ of California government, would
11 act in a false, predatory manner, reasonably relied on the truthfulness of the assurances and
12 representations (both explicit and implied) by the FTB and its agents.⁵⁵ Thus relying, Hyatt agreed to
13 cooperate with the FTB and provide it with his highly sensitive and confidential information and
14 documents.⁵⁶ Hyatt in fact relied upon the false representations and assurances of the FTB and its agents
15 to his extreme detriment, as explained above.

16 Two simple facts demonstrate the potential magnitude of the damages.

- 17 1. In the past four years prior to the FTB's early-1995 tortious invasions of Hyatt's privacy,
18 he closed license agreements for hundreds of millions of dollars.
- 19 2. After the FTB's early-1995 tortious invasions of Hyatt's privacy, he was not able to close
20 a single new license agreement.⁵⁷

21 If Hyatt's right to a trial is not taken from him, he will prove that the timing of the FTB's tortious
22 conduct and the total destruction of his licensing program is not coincidental, but rather the former
23 caused the latter. In addition to his economic damages, Hyatt suffered emotional distress.⁵⁸

24 ⁵¹ Jovanovich depo., pp. 50-52, 168, 185-186 [Appdx., Exh. 23].

25 ⁵² Jovanovich notes from June 12, 1997 [Appdx., Exh. 24].

26 ⁵³ Jovanovich depo., p. 125, lns. 20-24 [Appdx., Exh. 23].

27 ⁵⁴ Jovanovich depo., p. 126, lns. 4-8 [Appdx., Exh. 23].

28 ⁵⁵ Hyatt Affid., ¶¶ 10-12 [Appdx., Exh. 7].

⁵⁶ Cowan Affid., ¶¶ 9-26 [Appdx., Exh. 6].

⁵⁷ Hyatt Affid., ¶ 136 [Appdx., Exh. 7].

⁵⁸ This Court has upheld a compensatory damages award for emotional distress "as a result of [a defendant's] fraudulent misrepresentations, concealment, and a bad faith course of conduct." *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949, 958 (1998).

1 **V. The Court overlooked or misapprehended the law when it granted the FTB's**
2 **petition "on grounds other than those alleged in the petition."**

3 First, the Court's order violates Hyatt's due process rights by denying Hyatt his day in court
4 without even a hearing before this Court on an issue never raised in the FTB's writ petition. Second, the
5 order is contrary to this Court's own line of cases reversing district court orders that mistakenly grant
6 summary judgment when material issues of fact are in dispute and that require all reasonable inferences
7 to be drawn in favor of the non-moving party, as well as its line of cases refusing to review denials of
8 summary judgment.

9 These propositions are self evident and very familiar to this Court. Hyatt has no more space in
10 this petition to further develop these points, except to emphasize that the Court is not only unfairly
11 denying him his day in court but is doing so prematurely before he has completed discovery. A
12 substantial part of discovery, including court-ordered discovery, was pending when the Court stayed the
13 action. The remaining discovery was detailed in an affidavit submitted to the district court as an
14 alternative ground for denying the FTB's summary judgment motion.⁵⁹ Given this Court's disagreement
15 with the district court regarding the sufficiency of the evidence after its own review and reweighing,
16 Hyatt renews his request to complete discovery before his case is dismissed on such grounds.


17 **VI. Hyatt again requests leave to file an additional briefing specifically**
18 **addressing the evidentiary support for his claims.**

19 Hyatt requested leave of court to file a petition in excess of the Court's ten- page limit.⁶⁰ Hyatt
20 again renews this request. Whether the Court is inclined to grant or deny the petition, Hyatt should be
21 given a full and fair opportunity to demonstrate the adequacy of his evidence to date. It may be his only
22 "day in court."

23 DATED this 2 day of July, 2001

HUTCHISON & STEFFEN

BERNHARD & LESLIE, CHTD.

24 By: 
Peter C. Bernhard, Esq.
Bryan Murray, Esq.

25 Attorneys for Gilbert P. Hyatt

26
27 ⁵⁹ Bourke Affidavit, ¶¶ 182, 183, and 186 [Appdx., Exh. 25].

28 ⁶⁰ Hyatt filed his request to exceed the ten page limitation for petitions for rehearing and to extend the time for filing
such petitions on June 18, 2001. As of the filing of this petition, the Court had not ruled on this request.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Bernhard & Leslie, and that on this 7th day of July, 2001, I served a true and correct copy of the foregoing **REAL PARTY IN INTEREST GILBERT P. HYATT'S PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** via regular mail, in a sealed box(s) upon which postage was prepaid, to the addresses noted below, upon the following:

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Honorable Nancy Saitta
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Eighth Judicial District Court of the State of Nevada
in and for the County of Clark
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10 **IN THE SUPREME COURT OF THE**
11 **STATE OF NEVADA**

12 FRANCHISE TAX BOARD OF THE STATE
13 OF CALIFORNIA,

14 Petitioner,

15 vs.

16 EIGHTH JUDICIAL DISTRICT COURT of
the State of Nevada, in and for the County of
Clark, Honorable Nancy Saitta, District Judge,

17 Respondent,

18 and

19 GILBERT P. HYATT,

20 Real Party in Interest.
21 _____

Case No. 36390

**REAL PARTY IN INTEREST
GILBERT P. HYATT'S 15 PAGE
SUPPLEMENT TO HIS PETITION
FOR REHEARING RE THE
COURT'S JUNE 13, 2001 ORDER
GRANTING PETITION FOR WRIT
OF MANDAMUS**

**CONFIDENTIAL INFORMATION TO
BE FILED UNDER SEAL**

22 Pursuant to this Court's order, Petitioner Gil Hyatt submits this Supplement to his Petition for
23 Rehearing, timely filed on July 2, 2001 (the "Petition"). The Petition addressed the substantial evidence
24 supporting Hyatt's most significant invasion of privacy claim and his fraud claim. This Supplement first
25 demonstrates that there are material facts in dispute in regard to the four issues upon which the Court
26 based its order granting the FTB's petition and then discusses additional facts, evidence and law that the
27 Court overlooked or misapprehended in its order granting the FTB's petition.
28

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1 **I. Genuine issues as to material fact exist as to the four conclusions reached by the**
2 **Court in footnote 12 of the June 13 Order.¹**

3 The Court's June 13 Order concluded that the FTB had met its burden that at least one element
4 of each of Hyatt's claims had not been shown. The Order said the FTB did that "...by demonstrating
5 undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its
6 investigation or findings outside the scope of the investigation, (3) complied with its internal operating
7 procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its
8 investigation through phone calls and letters."² Based on this, the Court then found no genuine dispute
9 "that Franchise Tax Board's acts during its investigation constituted intentional torts[.]" citing Nevada
10 law as to Hyatt's causes of action, at footnote 13. The evidence cited throughout the Petition and this
11 Supplement refutes this. A brief summary of the evidence, and reasonable inferences which can be
12 derived therefrom, contradicts each of these allegedly undisputed issues."³

13 **A. Evidence of record shows that the FTB "produced false statements".** Genuine
14 issues of material fact exist as to issue (1) in footnote 12. Evidence of the FTB's false statements
15 include:

- 16 (1) FTB written confidentiality promises contained in its communications to Hyatt;⁴
- 17 (2) FTB verbal confidentiality promises, given when Hyatt's representatives insisted on specific
18 pledges of confidentiality in return for Hyatt providing additional information;⁵
- 19 (3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but
20 instead buried all evidence favorable to Hyatt;⁶
- 21 (4) Audit narrative report re Hyatt was "fiction" according to a former FTB employee;⁷

22 ¹ The Petition cited to an Appendix of Exhibits 1 through 29 attached thereto in the following format: [*Appdx., Exh. "x"*]. For
23 clarity, this Supplement cites to exhibits in the same manner, with additional exhibits attached to a Supplemental Appendix.
24 Citations to the record for the exhibits attached to the Supplemental Appendix are set forth in its table of contents.

25 ² See footnote 12 of June 13 Order. In addition, Hyatt urges the Court to review pages 21 through 26 of Hyatt's opposition to
26 the FTB's motion for summary judgment [*Appdx., Exh. 27*] that discusses the Constitutional and statutory basis and origin of the
27 invasion of informational privacy alleged by Hyatt. The informational privacy rights of Hyatt, and corresponding obligations of
28 the FTB, establish in great part the objective reasonableness of Hyatt's invasion of privacy claims. Moreover, and as discussed
below, the FTB is not immune under California law for the invasions of privacy, particularly, the informational privacy, asserted
by Hyatt.

³ These facts represent, at a minimum, sufficient evidence to refute the four "undisputed" facts. Because of the FTB's invocation
of the "deliberative process" privilege, Hyatt was prevented from getting further facts from the FTB (this was the subject of the
FTB's other writ, declared moot in this Court's June 13 order). Since discovery was stayed by this Court's earlier order, Hyatt
has not been able to complete his investigation of these and other relevant facts.

⁴ Petition, at 2-3. (Hyatt cites to the Petition or this Supplement, *infra*, when the supporting evidence is summarized therein).

⁵ Petition, at 3.

⁶ Petition, at 6-8.

⁷ Les Depo., pp. 10, 25, 172, 176 [*Appedx., Exh. 17*].

1 (5) Auditor Cox's statements re interviews with Hyatt's Las Vegas apartment managers, directly
2 contradicted by deposition testimony of the apartment manager;⁸

3 (6) FTB "Demand for Information" form, which falsely represented to Nevada respondents that
4 they were required by California law to comply with these demands;⁹

5 (7) FTB false "affidavits," which were not even sworn to, and which were falsely represented by
6 Auditor Cox as containing damaging information about Hyatt;¹⁰

7 (8) The FTB falsely stated that the audit file had been through extensive levels of review by
8 FTB reviewers: "The reviewers in Sacramento have finished their extensive examination of the
9 audit file and all of the information regarding Mr. Hyatt's residency status." However, in
10 deposition, the reviewers expressly admitted that they simply relied upon Cox's work in their
11 review of her assessment.¹¹ This cursory review also led to the assessment of an additional \$6.4
12 million in taxes and penalties for a total assessment of \$9.9 million.¹²

13 Therefore, this Court cannot say that the FTB "never produced false statements". If the Court believes
14 that these false statements are *de minimus*, it is performing, inappropriately, a fact-finder's function.

15 **B. Evidence of record shows that the FTB publicized its investigation or findings**
16 **outside the scope of the investigation.** Genuine issues of material fact exist as to issue (2) in footnote

17 12. Evidence of the FTB's publication of its investigation or findings outside the scope of its
18 investigation include:

19 (1) Auditor Cox's publication of her investigation and findings, and personal defamatory
20 opinions of Hyatt, to Candace Les who had no "need to know."¹³

21 (2) Auditor Cox's publication of her investigation and findings, and personal defamatory
22 opinions of Hyatt, to non-FTB personnel;¹⁴

23 (3) Auditor Cox's publication of her work and findings to Priscilla Maystead, Hyatt's ex-wife
24 when Cox boasted, "We got him."¹⁵

25 (4) Disclosure to Hyatt's Japanese customers that he was under investigation, and revealing that
26 Hyatt had provided the FTB with copies of their confidential agreements;¹⁶ and

27 ⁸ Kopp Depo., pp. 75 - 76 [Supp. Appdx., Exh. 39]; Lewis Depo., pp. 29, 45, 51 [Supp. Appdx., Exh. 30].

28 ⁹ *Infra*, at 8-9.

¹⁰ Bourke Affid., ¶¶ 15, 16, 51, 73 (evidence is cited and summarized therein) [Appdx., Exh. 25]. The FTB knew that what it
labeled as an affidavit was indeed not a true affidavit – the FTB has reverted to calling them "interview summaries." However,
Cox clearly intended to misrepresent these "interview summaries" in her Narrative Report because they served as the foundation
for Cox's assessment of fraud penalties (an extremely serious penalty requiring clear and convincing evidence to support): "[A]s
evidence of the taxpayer's specific intent to defraud the government, we have gotten affidavits from several individuals that the
taxpayer may have cheated on his taxes in the past." See FTB audit work-papers, at H 01892. [Supp. Appdx., Exh. 45].

¹¹ Lou Depo., p. 81 [Supp. Appdx., Exh. 44].

¹² Ford Depo., p. 90-92 [Supp. Appdx., Exh. 43].

¹³ *Infra*, at 7-8.

¹⁴ *Infra*, at 7-8.

¹⁵ Maystead Depo., pp. 182-84. [Appdx., Exh. 18].

¹⁶ Petition, at 9.

1 (5) Disclosure of Hyatt's private information to three newspapers.¹⁷

2 Again, this Court cannot say that the FTB never publicized its investigation or findings outside the
3 scope of the investigation. If the Court believes that these publications are *de minimus*, it is performing,
4 inappropriately, a fact-finder's function.
5

6 **C. Evidence of record shows that the FTB did not comply with its internal operating**
7 **procedures with regard to contacting individuals.** Genuine issues of material fact exist as to issue
8 (3) in footnote 12. Evidence of the FTB's failure to comply with its internal operating procedures with
9 regard to contacting individuals include violating its policies, rules and procedures:

10 (1) Despite talking to Hyatt's adversaries, Auditor Cox never interviewed or spoke with Hyatt,
11 or his close associates and close family members, thereby failing to conduct a fair, unbiased
audit;¹⁸

12 (2) Failure to notify Hyatt or obtain the requested information from Hyatt before disclosing
social security numbers and other confidential Hyatt information to individuals or businesses;¹⁹

13 (3) Failure to contact Hyatt before contacting third parties;²⁰

14 (4) Sending "Demands for Information" to individuals outside the State of California, absent
15 special circumstances;²¹

16 (5) Advising Hyatt that other taxpayers usually settle to avoid further dissemination of private
information, inferring that "this could happen to you, too, if you don't agree to settle".²²

17 Therefore, this Court cannot say that the FTB complied with its internal operating procedures with
18 regard to contacting individuals. If the Court believes that these false statements are *de minimus*, it is
19 performing, inappropriately, a fact-finder's function.

20 **D. Evidence of record shows that the FTB did more than "merely visit Hyatt's house**
21 **and conduct its investigation through phone calls and letters."** Genuine issues of material fact exist
22 as to issue (4) in footnote 12. Evidence of the FTB's additional actions include:

23 (1) Visits to Las Vegas apartment complexes and making records of questionable accuracy
24 regarding interviews with apartment managers;²³

25 ¹⁷ Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [Appdx., Exh. 10].

26 ¹⁸ Petition, at 6-8.

27 ¹⁹ Petition, at 5.

28 ²⁰ Cal. Civ. Code 1798.15; FTB Security and Disclosure Manual, at H06706 [Appdx., Exh. 4].

²¹ *Infra*, at 9-10.

²² Jovanovich Depo., 50-52, 268, 185-86 [Appdx., Exh. 23]; Cowan Affid., ¶¶ 38 to ¶¶ 41 [Appdx., Exh. 6].

²³ Kopp Depo., pp. 75-76 [Supp. Appdx., Exh. 39]; Lewis Depo., pp. 29, 45, 51 [Supp. Appdx., Exh. 30]

1 (2) Sending an unprecedented number of "Demands for Information" to individuals outside the
2 State of California;²⁴

3 (3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but
4 instead buried all evidence favorable to Hyatt;²⁵

5 (3) Searching through Hyatt's Las Vegas trash and mail;²⁶

6 (4) Taking a "trophy" picture in front of Hyatt's Las Vegas home;²⁷

7 (5) Initiating tax audits of close Hyatt associates;²⁸

8 (6) Acknowledging that the FTB believed Hyatt was "paranoid" about privacy, then warning his
9 tax attorney that without a settlement, Hyatt's finances would become public;²⁹

10 (7) Vowing to "get that Jew bastard."³⁰

11 Therefore, this Court cannot say that the FTB did nothing more than visit Hyatt's house and conduct its
12 investigation through phone calls and letters. If the Court believes that these actions are *de minimis*, it
13 is performing, inappropriately, a fact-finder's function.

14 In effect, the June 13 Order has validated, for all Nevada residents, that the FTB's predatory
15 conduct against Hyatt is reasonable and free of falsity as a matter of law – a cause for celebration at the
16 FTB since such treatment of a California resident would be unlawful and subject to redress under
17 California's Constitution and statutes. The FTB conduct reflected in the record against Hyatt now
18 becomes a "hunting license" for the FTB, where everything it has done against Hyatt may be done with
19 impunity against other Nevada residents. Even deceptive, unauthorized, quasi-subpoenas may now be
20 directed at Nevadans with this Court's blessing in the FTB's most-certain future efforts to target former
21 California residents who have moved to Nevada. Private addresses for celebrities living in Nevada,
22 along with their social security numbers and allegations of possible criminal accountability to
23 California, are now Nevada Supreme Court-approved methods to achieve the FTB's objectives against
24 wealthy Nevada residents, as the June 13 Order has determined that these are reasonable invasions of a
25 Nevada citizen's privacy rights as a matter of law. And under this Court's new standard, any tort claims
26 brought by a Nevada citizen against the FTB will, if not summarily dismissed at the district court level,

27 ²⁴ *Infra*, at 9-10.

28 ²⁵ Petition, at 6-8.

29 ²⁶ Cox Depo., pp. 1077 [Appdx. Exh. 16]; Les Depo., pp. 268-69, 405 [Appdx., Exh. 17].

30 ²⁷ Les Depo., pp. 264, 402 - 03 [Appdx., Exh. 17].

²⁸ Hyatt Affid., ¶ 164 [Appdx., Exh. 7].

²⁹ Jovanovich Depo., pp. 50-52, 168, 185-86 [Appdx., Exh. 23]; Cowan Affid., ¶¶ 38 to ¶¶ 41 [Appdx., Exh. 6].

³⁰ Les depo., p. 10 [Appdx. Exh. 17].

1 enjoy a *de novo* review by this Court as to the facts, and, unless they are found to be more egregious
2 than those against Hyatt, be ordered dismissed in the district courts.

3 **II. Substantial, probative evidence supports Hyatt's invasion of privacy claims.**

4 **A. Substantial evidence of the FTB's illegal disclosures of Hyatt's private facts.**

5 As Hyatt briefly addressed in footnote 1 of the Petition, Hyatt's invasion of privacy claim for
6 disclosure of private facts encompasses both the newer, well-recognized claim for invasion of
7 informational privacy as well as the more traditional claim of public disclosure of private facts. The
8 district court so found in liberally construing Hyatt's claims as consistent with Nevada's notice-
9 pleading standard.³¹ Hyatt summarized the supporting evidence in the Petition and through various
10 exhibits attached to the appendix submitted with the Petition.³² Hyatt's additional invasion of privacy
11 claims are interrelated with this claim, and each is supported by the evidence summarized in the
12 Petition, and further by the additional evidence summarized below.

13 **B. Substantial evidence of the FTB's intrusion upon Hyatt's seclusion.**

- 14 **1. Elements of claim:** (1) an intentional intrusion (physical or otherwise);
15 (2) on the solitude or seclusion of another; and (3) that would be highly
16 offensive to a reasonable person."
17 **2. Supporting evidence:**

18 In addition to the evidence summarized in the Petition, affidavits and depositions have
19 established the following facts, which give rise to the inference that the FTB unreasonably intruded
20 upon Hyatt's seclusion. First, FTB auditor Sheila Cox made at least three trips to Las Vegas to
21 investigate Hyatt. During these visits, Cox contacted neighbors and other fellow Nevada residents with
22 whom Hyatt either in the past or in the future has had or might reasonably expect to have social or
23 business interactions, and she either disclosed or implied to them that Hyatt was under investigation in
24 California.³³ On one trip she took a colleague, Candace Les, on a covert visit to Hyatt's Las Vegas
25 home³⁴ — after the audit was over³⁵ — and took a trophy photograph of Les standing on Hyatt's
26 property in front of Hyatt's residence.³⁶ This corroborates Les' testimony that Cox was obsessive in her
27 zeal to "get" Hyatt, personalizing the audit in ways that were clearly not "standard" and should be found
28

³¹ Nev. R. Civ. P. Rule 8(a).

³² Petition, at 1-5.

³³ Cox Depo., pp. 426-27, 957, 1329-30, 1873 [Appdx., Exh. 16]; Hyatt Affid., ¶ 129 [Appdx., Exh. 7].

³⁴ Les Depo., p. 42 [Appdx., Exh. 17].

³⁵ Les Depo., pp. 54 - 55 [Appdx., Exh. 17].

³⁶ Les Depo., pp. 264, 402 - 03 [Appdx., Exh. 17].

1 tortious. Because the audit was closed, FTB policies forbade this curiosity-driven visit as unauthorized
2 stalking.³⁷ Because the visit was for a nontax purpose, the surveillance was forbidden by the Taxpayers'
3 Bill of Rights.³⁸ Because the visits were forbidden by FTB policies, Cox's surveying of Hyatt's former
4 apartment and his Las Vegas home violated California's privacy act and published FTB procedures.³⁹
5 Cox also made three or more trips to the neighborhood of Hyatt's prior residence in La Palma, which
6 trips included unannounced visits with residents of Hyatt's former neighborhood and questions about
7 private details of Hyatt's life.⁴⁰ All of these facts and circumstances, taken together, support Hyatt's
8 claims that he was singled out, by FTB actions which should be found tortious, for unlawful purposes,
9 to further ambitions of FTB auditors and the revenue-enhancing goals of the FTB.

10 The FTB contacted over one hundred sources, including three newspapers, a dozen neighbors,
11 the Licensing Executive Society, and Hyatt's Japanese licensees, causing the inference that Hyatt was
12 under a cloud of suspicion.⁴¹ The FTB, through its investigative actions, and in particular the manner in
13 which they were carried out in California, Nevada and Japan, intruded into Hyatt's solitude and
14 seclusion. The intrusions by the FTB support the inference that any reasonable person, including Hyatt,
15 would find them to be highly offensive.⁴² Even if these intrusions were part of a "standard" FTB
16 investigation, this is not a defense to this tort, which only requires that the intrusions be intentional,
17 affect the seclusion of another, and be highly offensive to a reasonable person. Clearly, the intrusions
18 were intentional; they affected Hyatt's seclusion; and would be highly offensive to a reasonable person
19 under the circumstances.

22 ³⁷ Les Depo., pp. 54 - 55 [Appdx., Exh. 17].

23 ³⁸ California Revenue & Taxation Code § 21014, *forbidding* any FTB employee from conducting an investigation or surveillance
24 of any person except for tax purposes. For purposes of the prohibition, the Legislature defined investigation as "any oral or
25 written inquiry" and surveillance as "the monitoring of persons, places, or events by means of . . . overt or covert observations,
26 or photography, or the use of informants."

25 ³⁹ California Information Practices Act of 1977, Civil Code § 1798.14; Disclosure Manual, Exhibit 118 at H 06708 [Appdx.,
26 Exh. 3] ("employees *shall not access or use* personal or confidential information about individuals maintained by the department
27 without a legal right to such information as provided by law and a 'need to know' to perform his/her official duties.") (Emphasis
28 added.)

27 ⁴⁰ Cox Depo., pp. 1158, 1161, 1165, 1176 [Appdx., Exh. 16]; Les Depo., pp. 24-25, 385-86 [Appdx., Exh. 17].

28 ⁴¹ Cox Narrative Report [Appdx., Exh. 13].

⁴² See, e.g., Hyatt Affid., ¶ 129-138 [Appdx., Exh. 7].

1 **C. Substantial evidence of the FTB's casting Hyatt in a false light.**

2 **1. Elements of claim:** (1) giving publicity to a matter concerning another; (2) that
3 places the person in a false light; (3) that would be highly offensive to a
4 reasonable person; and (4) that the actor had knowledge of or acted in reckless
5 disregard as to the falsity of the publicized matter and the false light in which the
6 other would be placed.⁴³

7 **2. Supporting evidence:**

8 The evidence summarized above and in the Petition is fully applicable to this claim as well.
9 Moreover, the California Revenue and Taxation Code, and the laws and regulations compiled in the
10 FTB disclosure education materials, forbid disclosure of personal information about a taxpayer to
11 anyone, even to other auditors, who have *no* need to know. But Cox told Les about the murder of
12 Hyatt's son — and called him a "freak" because of it. She disclosed to Les her unsuccessful attempts to
13 start special investigations to investigate Hyatt for fraud, showed Les the narrative report, audit papers,
14 and position letters that lay out extensive detail about Hyatt's personal life and finances, disclosed to Les
15 alternative theories to tax Hyatt, told Les of her meetings with higher-ups on the Hyatt case, and talked
16 about Hyatt incessantly.⁴⁴ Cox talked about the case "constantly," "year after year." She talked about
17 the Hyatt case so much and was so unwilling to let it go — even after it was closed — that Les
18 concluded she was so "fixated" and "obsessed" with it that she was beginning to create a fiction in her
19 own head about it.⁴⁵

20 She told Les about Hyatt's Las Vegas apartment, and his Las Vegas home and his former
21 California house — referring to his old house as a "dump," falsely stating it contained a "dungeon," and
22 calling Hyatt "a bad man." She falsely alleged to Les that he had several Californians on the lookout for
23 the FTB: a "secret" Chinese "gook" girlfriend named Grace Jeng, a "one-armed man," and other
24 "ghouls."⁴⁶ She disclosed facts to her friend about his family members, his colon cancer, his patent
25 business, the amount of taxes at issue, her first trip to Las Vegas, her several trips to La Palma, her
26 interviews with Hyatt's Nevada landlord, the tenor of her dealings with Hyatt's tax representatives, and

27 ⁴³ See *Restatement (Second) of Torts* § 652E (1977). Courts have held, however, that to recover for false light, the subject of
28 the publication need not necessarily be false. See, e.g., *Douglass v. Hustler Magazine*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*,
475 U.S. 1094 (1986) (reasoning that use of a photograph out of context was grounds for recovery on false light theory even
though photograph was not "false.")

29 ⁴⁴ See Les Depo., pp. 10-11, 24-26, 42, 49-51, 94-95, 103 - 104 - 105, 113-114, 125-126, 140-141, 141-142, 143-144, 167-168
30 171-172, 176; 181-82, 245-246; 253-255, 263, 268-269; 275, 345-56, 357-358, 371, 375-376, 385-389, 391 respectively
31 [Appdx., Exh. 17].

32 ⁴⁵ See Les Depo., pp. 59 - 60, 61 -63, 167 - 168 [Appdx., Exh. 17].

33 ⁴⁶ Les Depo., pp. 10, 25, 172, 176 [Appdx., Exh. 17].

1 that the Hyatt audit was one of the largest, if not the largest, in history.⁴⁷ Cox obtained written
2 statements only from Hyatt's estranged relatives and not from his friends, associates and other family
3 members.⁴⁸

4 During the FTB's contacts with Hyatt's neighbors, trade association, licensees, employees of
5 patronized businesses, and governmental officials in Nevada, the FTB disclosed that Hyatt was under
6 investigation in California,⁴⁹ and engaged in other conduct that would reasonably cause these persons to
7 have doubts as to Hyatt's moral character and his integrity.⁵⁰ In short, the FTB's actions in conducting
8 interviews and interrogations of Hyatt's neighbors, business associates, and other Nevada residents, and
9 its conduct in issuing deceitful, unauthorized "Demands to Furnish Information" gave the false, yet
10 distinct, appearance that Hyatt was a fugitive from California being investigated as a tax cheater.⁵¹

11 In so doing, the FTB: (1) gave publicity to a matter concerning Hyatt; (2) placed Hyatt in a false
12 light; (3) which was highly offensive to Hyatt, as it would be to any reasonable person; and (4) which
13 the FTB had knowledge of or acted in reckless disregard the false light in which it would place Hyatt.

14 **III. Substantial evidence supporting Hyatt's abuse of process claim.**

15 **A. Elements of claim:** Government agencies commit abuse of process when their demands
16 for information are motivated by an improper purpose, such as to harass the taxpayer or
17 put pressure on him to settle a collateral dispute, or for any other purpose reflecting on
the good faith of the particular investigation.⁵² An agency that acquires information in
an investigation by fraud, deceit, or trickery commits an abuse of process.⁵³

18 **B. Supporting evidence:**

19 The FTB sent numerous Nevada business and professional entities and individual residents
20 "quasi-subpoenas" entitled "Demand to Furnish Information," which cited the FTB's authority *under*
21 *California law* to issue subpoenas and demanded that the recipients thereof produce the information
22 concerning Hyatt.⁵⁴ Moreover, these Demands were captioned on behalf of the "People of the State of
California" and were prominently identified as relating to "In the Matter of: Gilbert P. Hyatt", thus

23 ⁴⁷ Ford Depo., pp. 148-55 [Supp. Appdx., Exh. 43].

24 ⁴⁸ Hyatt Affid., ¶¶ 117, 118, 174, 175 [Appdx., Exh. 6].

⁴⁹ Appdx., Exhs. 9-10.

25 ⁵⁰ E.g., Chang Depo, pp. 32-33 [Supp. Appdx., Exh. 32].

⁵¹ See, e.g., Hyatt Affid. ¶¶ 129, 143-44 [Appdx., Exh. 6].

26 ⁵² *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977).

27 ⁵³ *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 317 (5th Cir. 1981).

28 ⁵⁴ FTB 01882, 01888, 01890, 01892, 01894, 01896, 01897, 01908, 01910, 01912, 01914, 01938, 01940, 01964, 01992, 02043, 02054, 02069, 02081, 02083, 02085, 02087, 02098, 02100, 02294, 02296 [Appdx., Exhs. 9-10].

1 creating a reasonable inference that a tax, criminal or punitive investigation of Hyatt had been
2 instituted. The FTB has never claimed that it sought or received permission from any Nevada court or
3 any Nevada government agency to send such "quasi-subpoenas" into Nevada. Many Nevada residents
4 and business entities responded with answers and information concerning Hyatt. These "quasi-
5 subpoena" Demands on their face support the inference that they were calculated to coerce Nevada
6 residents into responding through deception, fear and intimidation. In contrast, more polite
7 correspondence requesting, rather than demanding, information, was sent to Nevada officials such as
8 Governor Bob Miller, Senator Richard Bryan and others who were not sent the illicit "Demands". The
9 inference can be drawn that these individuals would have recognized the absence of any authority for a
10 California tax agency to "Demand" information from a Nevada resident and would have taken offense at
11 such a "Demand."⁵⁵

12 The Demands wrongfully disclosed Hyatt's social security number and in some instances his
13 private address. Contrary to the requirements of the California privacy act, the FTB did not first go to
14 Hyatt; instead, the Demands were sent without his knowledge. Contrary to the same act, the Demands
15 did not disclose to the Nevada recipients that they were voluntary, since California has no power to
16 subpoena information directly from Nevadans. Contrary to the same act, the Demands did not require
17 the recipients to agree to keep Hyatt's personal information confidential. Contrary to the California
18 Financial Privacy Act and the Discovery Statute in California, Cox questioned Hyatt's lawyers,
19 accountants, and financial institutions without Hyatt's knowledge or consent and without first sending
20 Hyatt the required Notice to Consumer. And Cox wrote to two of Mr. Hyatt's most sensitive Japanese
21 customers, enclosing portions of sensitive, confidential multi-million dollar patent licensing
22 agreements, showing that he may have violated the confidentiality clause of the agreements. A
23 reasonable inference is that these actions were intended to damage Hyatt's business relationships.

24 Moreover, after consulting with Anna Jovanovich,⁵⁶ Cox began sending out the Demands For
25 Information. She sent out more Demands to third parties on the Hyatt audits than some auditors sent
26 out in their entire careers.⁵⁷ She did so without first ascertaining that the third party was uncooperative,

27 ⁵⁵ FTB H 01715, 01716 [Supp. Appdx., Exh. 35].

28 ⁵⁶ 1991-tax-year audit workpapers, FTB 100139 [Supp. Appdx., Exh. 34].

⁵⁷ Ford Depo., pp. 91-92 [Supp. Appdx., Exh. 43]; Shigemitsu Depo., p. 187 [Supp. Appdx., Exh. 41]; Alvarado Depo., p. 44, [Supp. Appdx. Exh. 35], S. Semana Depo., pp. 82-83 [Supp. Appdx., Exh. 36], B. Gilbert Depo., pp. 35-36 [Supp. Appdx. Exh.

1 as required by the FTB's Residency Manual.⁵⁸ She did so without first seeking the information from the
2 taxpayer, as required by law.⁵⁹ This invasion of Hyatt's privacy has been condemned by the auditors
3 who have been asked about it.⁶⁰ A reasonable inference can be drawn that these actions were
4 undertaken with an illegitimate purpose, to further personal and institutional goals at Hyatt's expense,
5 rather than for legitimate, residency audit purposes.

6 **IV. The Court has overlooked or misapprehended the law in considering an issue never**
7 **raised in the FTB's petition for extraordinary relief.**

8 Since *State v. Thompson*⁶¹ was decided in 1983, Hyatt has not found any instance like this one,
9 where the Court granted a petition for extraordinary relief, on the ground that the district court erred in
10 denying summary judgment because the plaintiff did not establish sufficient probative evidence. Here,
11 the Court specifically stated that "[b]ecause this case implicates the principles of Full Faith and Credit
12 and comity, which are of great importance with respect to interpreting each state's sovereign
13 responsibilities and rights, we elect to exercise our extraordinary writ powers."⁶² Despite the Court's
14 stated ground for entertaining the FTB's petition, the Court has granted the FTB relief on grounds never
15 raised in its petition.⁶³ Hyatt is similarly unaware of any opinion in which this Court granted
16 extraordinary relief on a ground which was never raised by the petitioner. Such a notion is contrary to
17 established precedent holding that "the burden on the party seeking extraordinary relief is a heavy
18 one."⁶⁴ By granting the FTB's petition on grounds never raised in the petition, the Court has
19 disregarded its own precedent and completely relieved the FTB from its heavy burden.

20 If, in fact, the Court intended to establish new policy related to writ practice and return to pre-
21 1983 authority under which the Court reviewed denials of summary judgment motions based on

22 37], Illia Depo., pp. 178-179 [Supp. Appdx. Exh. 42].

23 ⁵⁸ FTB 00844 [Supp. Appdx., Exh. 38] (To obtain information from *uncooperative* third parties, the auditor should use the
Demand for Information Form (FTB Form 4973).) (Emphasis added.)

24 ⁵⁹ Information Practices Act of 1977, California Civil Code § 1798.15 ("Each agency shall collect personal information to the
greatest extent practicable directly from the individual who is the subject of the information rather than from another source.")

25 ⁶⁰ Illia Depo., p. 248 [Appdx., Exh. 42]; Bauche Depo. p. 439 [Supp. Appdx., Exh. 40].

26 ⁶¹ 99 Nev. 358, 662 P.2d 1338 (1983).

27 ⁶² Order, June 13, 2001, at 3.

28 ⁶³ *Id.*, at 3 (The Court specifically recognized that neither party addressed the sufficiency of Hyatt's evidence.).

⁶⁴ *Poulos v. District Court*, 98 Nev. 453, 652 P.2d 1177 (1982). In *Poulos*, although the plaintiff failed to support his opposition
to summary judgment with *any* affidavits or other evidence as required, the district court did not grant the defendant's motion for
summary judgment. This Court denied the defendant's petition for a writ of mandamus concluding that extraordinary relief was
unwarranted because there was "no substantial issue of public policy or precedential value in this case, and . . . no compelling
reason why [the Court's] intervention by way of extraordinary writ is warranted." *Id.* at 455-56, 652 P.2d at 1178.

1 sufficiency of the evidence, it should simply deny the FTB writs on the grounds advanced by the FTB,
2 then remand this matter to the district court for further proceedings. Then, an appeal can be taken with
3 an appropriate lower court record, appellate court briefing and argument, and ultimate decision by this
4 Court. This process would avoid what happened here: this Court essentially acting as a super trier-of-
5 fact through its independent review of a record, which, although large, was not complete (the parties
6 had not completed discovery, which was stayed by this Court). Moreover, the court's duty regarding
7 appeals from summary judgment has always been to scour the record to see *if there are material issues*
8 *of fact in dispute that would entitle the non-moving party to a trial on the merits, which is always*
9 *avored.* And it is well-established that an appellate tribunal may not weigh the facts, as the court has
10 done here.

11 **V. The Court has overlooked or misapprehended its own standards regarding review**
12 **of denials of summary judgment motions.**

13 The essential test for this Court in reviewing Hyatt's Petition for Rehearing is whether the
14 evidence presented on the FTB's summary judgment motion *and reasonable inferences from that*
15 *evidence, which must be drawn favorably to Hyatt,*⁶⁵ meet all the elements of one or more of the claims
16 in Hyatt's First Amended Complaint.⁶⁶ Hyatt's facts and the reasonable inferences drawn therefrom
17 entitle him to his day in court to argue that the FTB, in and after 1993, undertook a concerted effort to
18 illicitly exact funds from him through fraud and the commission of the other torts that were all utilized
19 to achieve its ultimate, unlawful objectives. As part of the FTB's outrageous attempt to develop a
20 colorable claim against Hyatt, the FTB implemented a strategy which resulted in all Hyatt-adverse
21 facts accepted as true, and the disregard of all Hyatt-supportive facts. The results of this strategy were
22 two FTB audit assessments of enormous amounts. Hyatt is entitled to show that the FTB audits were

23 ⁶⁵*NGA #2 Limited Liability Co. v. Rains*, 113 Nev. 1151, 1157, 96 P.2d 163, 167 (1997) ("In deciding whether summary judgment
24 is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought;
the factual allegations, evidence, and all reasonable inferences in favor of that party must be presumed correct. . . . A litigant has
a right to trial when there remains the slightest doubt as to remaining issues of fact.").

25 ⁶⁶As the Court is aware, Judge Saitta dismissed the declaratory relief count from Hyatt's First Amended Complaint when she
26 granted that aspect of the FTB's Motion for Judgment on the Pleadings. In that count, Hyatt had sought a declaration as to when
27 he became a Nevada resident in September, 1991 (per Hyatt) or April 1992 (per the FTB). Therefore, the FTB's references to
28 facts in Hyatt's First Amended Complaint and its assertions as to "undisputed" facts which pertain to Hyatt's residency in 1991
and 1992 are no longer part of Hyatt's claims for relief, the district court having properly exercised her function as a gate-keeper
to make sure that sufficient evidence was presented on the claims which she allowed to proceed (no formal amended complaint
was filed, or needed to be filed, by Hyatt after Judge Saitta dismissed the declaratory judgment claim as to residency on the FTB
Motion for Judgment on the Pleadings).

1 invasions of his privacy, violations of the FTB's express promises and commitments to him, abuses of
2 process, and fraud. Even the U.S. Congress has criticized the FTB in the Congressional Record for the
3 types of acts complained of by Hyatt.⁶⁷ All Hyatt wanted was a fair audit, and the FTB promised that to
4 him. Hyatt is entitled to present to a jury his evidence and theories of the case, that the FTB's promises
5 were never intended to be kept and that Hyatt was singled out for extraordinarily unfair and damaging
6 treatment because of the FTB's institutional needs to justify its audit (and the auditors' personal goals of
7 advancement) by assessing large taxes, interest, and fraud penalties.

8 The FTB has repeatedly accused Hyatt of placing his own "spin" on the facts, and Hyatt fully
9 expects the FTB's answer to Hyatt's petition for rehearing to again attack the facts which support each
10 element of Hyatt's claims. Of course, "spin" is just a derogatory expression for a party arguing its
11 version of the facts and the inferences which those facts support, an essential part of our adversary
12 system. If what the FTB derisively calls "spin" is, in fact, a reasonable inference which a fact-finder
13 can draw from the evidence, then this Court's June 13 Order adopts a new standard under which
14 inferences will no longer be permitted to satisfy the elements of a party's claim. In essence, any civil
15 case will require "smoking gun" direct evidence of each element of each claim, and circumstantial
16 evidence and reasonable inferences will not be available to establish such elements for the fact-finder.
17 Clearly, such a drastic change in civil practice should come only after an appropriate district court
18 proceeding and appellate record made with an understanding that those are the rules which now govern
19 civil practice. Hyatt should not be the one to suffer when his case is used as the vehicle for
20 implementing, in an unpublished order, such major changes in civil practice.

21 Of course, the FTB has and will undoubtedly put forth its own version of the facts, based on its
22 own inferences which it wants this Court to draw (i.e., that it conducted a "standard", fair investigation
23 perfectly within the bounds of its authority). But our adversarial system has always relied on the fact-
24 finder to resolve those issues: does the fact-finder accept Hyatt's evidence that the FTB was motivated
25 to and did conduct a biased, unlawful and tortious investigation resulting in great personal and
26 professional benefits to the FTB and its auditors, all at Hyatt's expense? Or does the fact-finder accept
27 the FTB's contention that its auditors merely followed their procedures in conducting a standard

28 ⁶⁷ Vol. 145 No. 114 - Part III Congressional Record (pp. E1773-75) [Supp. Appdx. Exh.46].

1 investigation? This Court stepped into that fact-finder role, as if it were a panel of jurists, and decided
2 to accept the FTB's version of the facts over Hyatt's.⁶⁸ Again, such a change in this Court's appellate
3 role should be pronounced in a published opinion, followed by a remand to let the district court review
4 the evidence under this new standard governing the relationship between the district courts and the
5 Supreme Court.

6 **VI. The Court has overlooked or misapprehended the law regarding the FTB's**
7 **immunity in California for the conduct at issue.**

8 In footnote 7 of its June 13, 2001 order, the Court cites to Section 860.2 of the California
9 Government Code and *Mitchell v. Franchise Tax Board*⁶⁹ for the proposition that California accords its
10 government agency immunity for intentional torts. But the statute's plain language provides immunity
11 in California to the FTB and its employees in regard to "instituting" a tax proceeding. It does not apply
12 in this tort case because Hyatt's claims are not based on the FTB *instituting* a procedure or action to
13 collect taxes. Moreover, *Mitchell* held that the plaintiff's claims were all *directly* based on the FTB's
14 institution of an action or proceeding to collect taxes against the taxpayer and placement of a tax lien on
15 that individual's property. While the very fact that the FTB initiated an audit against an individual
16 cannot be the basis of a tort claim, this is not the basis of Hyatt's suit.⁷⁰ Here, as repeatedly stated
17 throughout this lawsuit, Hyatt is not attempting to nor is interfering with the tax protest proceeding in
18 California.⁷¹ Moreover, California's Constitution and California's privacy laws forbid the FTB from
engaging in the conduct now alleged by Hyatt and waive sovereign immunity for such conduct.⁷²

19 ⁶⁸The majority of the "facts" stated by the FTB relate to whether the FTB had good reason to initiate an audit of Hyatt. Hyatt
20 does not challenge the FTB's right to conduct residency audits, or its right to audit him. His tort claims, instead, deal with the
21 FTB's conduct in performing its audit. This Court's June 13 Order reaches the merits by deciding that the FTB's conduct was not
so bad that it gives rise to a tort claim, which is the traditional fact-finder role. This Court, then, is signaling its willingness to
evaluate whether the conduct of a particular FTB investigation was (or was not) ordinary and reasonable.

22 ⁶⁹183 Cal.App. 3d 1133, 228 Cal.Rptr.750 (1986).

23 ⁷⁰*Martinez v. City of Los Angeles*, 141 F.3d, 1373, 1379 (9th Cir. 1998) ("Here, [Plaintiff]'s allegations, go beyond the contention
that the LAPD officers acted improperly in deciding to seek his arrest. He alleges they acted negligently in conducting the
investigation . . . , and they caused his arrest and imprisonment in Mexico."); *see also Bell v. State*, 63 Cal.App. 4th 919, 929,
74 Cal.Rptr. 2d 541 (1998) (holding no immunity under Cal. Govt. Code § 821.6 to state investigators for conduct in executing
a search warrant). Section 821.6 of the California Government Code provides immunity for public employees for "investigating
or prosecuting any judicial or administrative proceeding."

25 ⁷¹The evidence is undisputed that this case has not interfered with the tax proceeding. Hyatt's Opp. to Mot. for Sum. Judg., pp.
55-56 [Appdx. Exh. 27] and Cowan affid., ¶¶ 43, 44 [Appdx. Exh. 6].

26 ⁷²California Constitution, Art. I, Sec. 1 (providing that dissemination of data gathered on or about an individual by state agencies
is illegal and actionable as invasion of privacy). The California Supreme Court has held that the primary purpose of the
27 Constitutional amendment was to provide protection against the encroachment on personal freedom caused by increased
surveillance and data collection. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975). The legislative history of the amendment
28 demonstrates that it was intended to prevent the improper use of information properly obtained for a specific purpose, for

1 California cannot therefore object if held liable in Nevada for conduct not protected by its own
2 immunity statute and for which its own laws provide relief to an aggrieved party.

3 Hyatt's invasion of privacy claims are interrelated and stem from the FTB's iron-clad,
4 Constitutionally-mandated requirement that it respect and not invade Hyatt's privacy. The Court's order
5 of June 13, 2001 properly cited to Nevada law relating to invasion of privacy,⁷³ but the analysis does not
6 stop there. When "auditing" Nevada residents, the FTB as a public agency of the State of California
7 must comply with its internal, statutory and Constitutional privacy obligations — obligations entirely
8 consistent with Nevada law on invasion of privacy.⁷⁴ Otherwise, Nevada residents targeted for audit by
9 the FTB have fewer rights and less privacy than their counterparts in California: a result that neither the
10 Court nor the citizens of Nevada would find palatable.

11 VII. Conclusion.

12 For the aforementioned reasons, rehearing and remand should be granted in order to afford
13 Hyatt the opportunity to be heard on what this Court found, *sua sponte*, to be the determinative issue.⁷⁵
14 Before the court rules in a writ petition on an issue which it declares as determinative of Hyatt's entire
15 case, and which he was not *allowed* to address (because under N.R.A.P. 21, Hyatt was ordered to file an
16 answer "directed solely to the issues of arguable cause against issuance of an alternative or peremptory
17 writ...") he should be given the right to be heard on the issue. Where this court thinks a writ may
18 appropriately issue on a ground not even raised, requested or addressed by the party requesting the writ
19 (the FTB), the appropriate remedy is *not* to grant the writ where the prevailing party in the lower court
20 (Hyatt) has been precluded from refuting that ground.

21 The effect of the Court's broad, sweeping Order is to close the doors of Nevada's courts and
22 prevent any Nevada resident from bringing an action in Nevada for torts committed by a sister state
23 agency. The facts discussed above show clearly that this is not a case built "on gossamer threads of

24 example, the use of it for another purpose or the disclosure of it to some third party. *Id.* at 234 n.11. California Information
25 Practices Act (Cal. Civ. Code § 1798 *et seq.*) (also providing that improper dissemination of information gathered by state
agencies is actionable against the state and allows claim to be brought in "any court of competent jurisdiction").

26 ⁷³ Order, June 13, 2001, n. 13.

27 ⁷⁴ See Hyatt Opp. to FTB Mot. for Sum. Judg., pp. 21-26 [*Appdx.*, *Exh.* 27].

28 ⁷⁵ At a subsequent hearing before Judge Saitta on July 10, 2001, she commented, with a smile, "I got reversed in the supreme
court on an issue that wasn't even raised in the appellate briefs." (Unofficial Transcript page 4, lines 21-23, attached hereto as
Supp. Appdx. Exh. 47, but this was not a formal part of the record, since this hearing took place after this Court's June 13 Order.)

1 speculation and surmise.”⁷⁶ None of the tortious acts committed against Hyatt, now a 10-year Nevada
2 resident, are triable in a Nevada court under this Court’s June 13 Order, even torts committed *entirely in*
3 *Nevada*, because that Order takes over the role traditionally (and appropriately) entrusted to the fact-
4 finder.

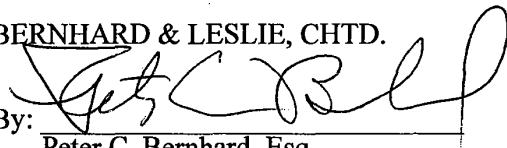
5 Finally, this is an extremely high profile matter,⁷⁷ and a decision like the June 13 Order which
6 appears to depart from established procedures and precedents of this Court on writ practice and
7 summary judgment standards should be fully argued and briefed before being resolved, before trial, by
8 this Court. As this Court recognizes, “the law favors trial on the merits.”⁷⁸ If Hyatt is to be denied a
9 trial on the merits, then at a *minimum* he should be allowed to fully argue and brief the issue under any
10 new summary judgment standards which this Court seems to enunciate and find determinative in its
11 June 13 Order.

12 Accordingly, Hyatt respectfully requests that this Court vacate its June 13 Order, issue an order
13 denying the FTB writ petition as to the grounds for relief asserted therein by the FTB, order the recall of
14 any summary judgment entered pursuant to the June 13 Order, and remand this matter for trial on the
15 merits. The Court should also review the extensive record of the Discovery Commissioner and the
16 district court on the second writ (Docket No. 35549, which would no longer be moot, as it was under
17 the Court’s June 13 Order) and deny that FTB writ petition as well, ordering the FTB to provide the
18 ordered discovery. Alternatively, Hyatt respectfully requests that this Court remand this matter to the
19 district court to evaluate Hyatt’s evidence in light of the standards for writ practice and summary
20 judgment review which the Court establishes in its order following rehearing.

21 DATED this 23 day of July, 2001

HUTCHISON & STEFFEN

22 BERNHARD & LESLIE, CHTD.

23 By: 
Peter C. Bernhard, Esq.

24 ⁷⁶ *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588 (1992).

25 ⁷⁷ For example, immediately after this Court’s order, the FTB was publicly touting it before its Franchise Tax Board Advisory
26 Board. “FTB Attorney Ben Miller . . . reported that the Nevada Supreme Court sustained FTB auditor efforts in the high-profile
27 *Hyatt* residency case. The taxpayer had asked the court to halt the FTB audit as ‘too intrusive.’ In a non-written opinion on June
13, the Nevada Supreme Court held that a Nevada trial court should have granted the FTB’s request for summary judgment. Mr.
Miller, who has been with the FTB for 31 years, expressed extreme satisfaction with the outcome.” (California Taxpayer’s
Association, *Caltaxletter*, Vol. XIV, No. 26, July 3, 2001, p. 3, [Supp. Appdx., Exh. 48].

28 ⁷⁸ *Home Sav. Ass’n Nev. Sav. & Loan Ass’n et al v. Aetna Casualty & Surety Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993).


1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that I am an employee of Bernhard & Leslie, and that on this 23rd day of July,
4 2001, I served a true and correct copy of the foregoing **REAL PARTY IN INTEREST GILBERT P.**
5 **HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE**
6 **COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** via
7 regular mail, in a sealed box(s) upon which postage was prepaid, to the addresses noted below, upon the
8 following:

9 Thomas R.C. Wilson, Esq.
10 McDonald, Carano, Wilson, McCune,
11 Bergin, Frankovich & Hicks
12 241 Ridge St., Fourth Floor
13 Reno, Nevada 89501

14 Felix E. Leatherwood, Esq.
15 California Attorney General
16 300 South Spring Street
17 Suite 5212
18 Los Angeles, California 90013

19 Honorable Nancy Saitta
20 Department XVIII
21 Eighth Judicial District Court of the State of Nevada
22 in and for the County of Clark
23 200 S. Third Street
24 Las Vegas, NV 89155

25
26
27
28

An employee of Bernhard & Leslie

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SEALED

FILED

AUG 7 2001

JANETTE M. ELCOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

12 IN THE SUPREME COURT OF THE STATE OF NEVADA

13 * * * * *

14
15
16 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

17 Petitioner,

18 vs.

19 EIGHTH JUDICIAL DISTRICT COURT of
20 the State of Nevada, in and for the County of
Clark, Honorable Nancy Saitta, District Judge,

21 Respondent,

22 and

23 GILBERT P. HYATT,

24 Real Party in Interest.
25
26
27
28

Case No.: 36390
Consolidated with Case No. 35549

Answer to Hyatt's Petition for Rehearing
and Supplemental Petition for Rehearing

**CONFIDENTIAL INFORMATION
FILED UNDER SEAL**

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AUG 6 7 2001

JANETTE M. ELCOM
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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Case No. 36390
Consolidated with Case No. 35549

Petitioner,

vs.

Answer to Hyatt's Petition for Rehearing
and Supplemental Petition for Rehearing

EIGHTH JUDICIAL DISTRICT COURT
of the State of Nevada, in and for the
County of Clark, Honorable
Nancy Saitta, District Judge,

Respondent,

and

GILBERT P. HYATT,

Real Party in Interest.

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1 This Court's June 13, 2001 Order concluded that the record proves FTB did nothing more
2 than conduct a standard investigation to determine Hyatt's residency status pursuant to its
3 statutory authority. Hyatt now has the burden to prove the Court overlooked or misapprehended
4 any material point of law or fact. Hyatt has failed to meet that burden. His Petition and
5 Supplemental Petition are nothing more than a condensed version of his Answers to FTB's two
6 writ petitions and provide nothing new.

7 Contrary to Hyatt's arguments, this Court has the authority to decide the case on Rule 56
8 grounds. He has not presented any fact or point of law that was overlooked or misapplied by the
9 Court to justify a rehearing under Nev. R. App. 40.

10 1. **THE COURT PROPERLY DECIDED THE CASE ON RULE 56**
11 **GROUND**

12 The Court decided the case in its June 13th order, admittedly not on the constitutional
13 challenges at the heart of FTB's writs, but on the adequate alternative state law ground that Hyatt
14 had failed to satisfy his burden under Nev. R. Civ. Rule 56. After all, a necessary threshold to
15 the FTB's constitutional and jurisdictional issues was any admissible evidence of actual tortious
16 misconduct. The factual issues and requirements are the same whether the remedy sought is a
17 writ precluding the district court from proceeding with the case on constitutional and
18 jurisdictional grounds or an order granting summary judgment on the merits. The Court saw no
19 reason to address the constitutional and jurisdictional issues because:

20 There is no evidence, aside from Hyatt's own conclusory allegations, that
21 Franchise Tax Board's investigation unreasonably intruded into his private life or
22 seclusion, published false information about him, or published information to
23 third parties that was not of a legitimate public concern. The myriad depositions
24 and documents submitted to this court are undisputed and indicate that Franchise
25 Tax Board's investigative acts were in line with a standard investigation to
determine residency status for taxation pursuant to its statutory authority. Merely
because a state agency is performing an investigation in the course of its duties
does not automatically render its acts an invasion of privacy or otherwise
intentionally tortious absent evidence of unreasonableness or falsity of statements.
No such evidence has been presented in this case.

26 There is also insufficient evidence of Hyatt's remaining claim of negligent
27 misrepresentation. As with Hyatt's claims for intentional torts, there is no
28 evidence that Franchise Tax Board supplied any false information regarding
confidentiality or business relations. Order at pages 4-5 (footnote omitted).
Since Hyatt is merely rearguing issues he previously argued, rehearing should be denied.

1 If, for some reason, the Court should decide to reverse its June 13th decision, then, of course, the
2 State of California respectfully requests the Court to decide the remaining constitutional and
3 evidentiary issues.

4 2. **THE COURT CORRECTLY HELD THAT FTB CONDUCTED A**
5 **STANDARD INVESTIGATION TO DETERMINE RESIDENCY STATUS**

6 As the FTB previously showed at pages 5-16 of its July 7, 2000 Jurisdiction Writ¹ (FTB
7 App. Ex. 1), and at pages 3-8 of its December 28, 2000 Reply in Support of Jurisdiction Writ,
8 (FTB App. Ex. 2), FTB employees took various actions during the audit to try to verify Hyatt's
9 change of residency claim. FTB auditors requested relevant information from Hyatt's taxpayer
10 representatives. Some FTB information requests required multiple request letters to Hyatt's
11 representatives; some FTB information requests were never satisfied despite repeated requests.
12 Some information that Hyatt provided raised more questions with FTB auditors than it answered.
13 (See Cox Affidavit, FTB App. Ex. 3 at ¶¶ 7-22).

14 The essential issue of the audit was the effective date of termination of Hyatt's California
15 residency. (Cal. Rev. & Tax Code §§17014, *et. seq.*). Critical to that was Hyatt's whereabouts
16 between September 24, 1991 (the final date he claimed to have moved to Nevada), and October
17 20, 1991 (the date his rental of his Las Vegas apartment began). The exact date of termination of
18 Hyatt's California residency was important because Cal.Rev. & Tax Code § 17016 raised a
19 presumption of full-year residency if the termination date was after September 30th, and Hyatt
20 had received \$40 million of income from two of his Japanese licensees during the fourth quarter
21 of 1991.

22 The auditor's attempt to verify Hyatt's claim of September 24th as the date he moved to
23 Nevada is at the heart of Hyatt's allegations of FTB misconduct. Contrary to Hyatt's conclusory
24 allegations, the undisputed evidence concerning the auditor's actions are as follows:

- 25 1. In her August 2, 1995 tentative position letter, the auditor explained her
26 understanding of the facts at that time and specifically informed Hyatt's taxpayer
27 representative that she had no information as to where Hyatt resided from
 September 24, 1991 through November 1, 1991. (FTB App. Ex. 4 at 05947,

28 ¹For the Court's convenience, copies of those portions of the record cited by FTB are submitted herewith in FTB's
Appendix of Exhibits in Answer to Rehearing Petition, hereafter "FTB App."

05952, 05954 and 05955). She concluded the letter with a request that, if her understanding of the facts was incorrect, she be provided with additional information since her position was still only tentative. (*Id.* at 05975).

2. On August 29, 1995, Hyatt's representative responded *only* that while Hyatt's lease commenced on November 1, 1991, he actually moved in on a paid pro-rated rent on October 20, 1991. (FTB App. Ex. 5 at 05992 at fn. 3).
3. On August 31, 1995, the auditor responded, *again* specifically asking where Hyatt lived from September 24, 1991, until October 20, 1991, and asking for documentation such as credit card statements and receipts to substantiate where Hyatt resided. (FTB App. Ex. 6 at 06012).
4. On September 22, 1995, Hyatt's representative simply restated that Hyatt had signed the lease and moved into his apartment on October 20, 1991. (FTB App. Ex. 7 at 06036-37).
5. On September 26, 1995, the auditor *again* specifically requested documents and information to substantiate where Hyatt resided from September 24, 1991 through October 20, 1991. (FTB App. Ex. 8 at 06170).
6. On October 13, 1995, Hyatt's representative merely stated that Hyatt was researching that period to find receipts. (FTB App. Ex. 9 at 06175).

No such receipts or other information concerning the September 24 - October 20 time period were provided to FTB during the audit. Nor did Hyatt ever tell the auditor during the audit *where* he resided during that period. Against this background, FTB had discovered that Hyatt had not registered to vote in Nevada until November 27, 1991, declaring his apartment as his residence. (FTB App. Ex. 10). Hyatt thereafter on July 5, 1994 changed his voter registration, swearing on penalty of perjury that he resided at a different address, 5441 Sandpiper Road in Las Vegas, a residence that was owned by his taxpayer representative, Michael Kern. Hyatt had never resided there. (FTB App. Exs. 11 (Cox Affidavit ¶35), and 22 (Leatherwood Affidavit ¶12)). Necessarily, the auditor, Sheila Cox, had no choice but to find independent corroboration of Hyatt's Nevada residence. Notwithstanding all of that, she ultimately gave Hyatt the benefit of her doubts and concluded that he terminated his California residency on April 2, 1992, when he purchased a house on Tara Avenue in Las Vegas.

Hyatt alleges that the FTB's attempt to verify his claim of residency change was completely improper and part of an FTB conspiracy against him. The essence of his entire case is that he was entitled to special treatment during the audit. In the final analysis, Hyatt's case

1 boils down to the simple proposition that the FTB was obligated to accept his change of
2 residency claim and should never have audited him, and by attempting to verify the effective date
3 of termination of his California residency in light of Hyatt's failure to provide the needed
4 information, the FTB violated his privacy and committed various "torts."

5 This Court correctly saw through Hyatt's conclusory allegations; he had not met his
6 threshold burden under Rule 56 to present evidence to support any of his tort claims.

7 3. THE MERITS OF HYATT'S TORT CLAIMS WERE BEFORE THE
8 COURT

9 A central theme of Hyatt's rehearing argument is his complaint that the merits of his tort
10 claims were not before the Court. Hyatt begins his Petition for Rehearing:

11 Hyatt sued the FTB for torts based on its invasion of his privacy and
12 its fraudulent conduct. Since the Court decided the Writ Petition on issues
13 not raised, briefed or argued, Hyatt has minuscule space to describe – *for the*
14 *first time to this Court* - his specific claims and the evidence that has been
15 overlooked or misapprehended by the Court. (Page 1, lines 6-9). (Emphasis in original).

16 In his Supplemental Petition, Hyatt repeats:

17 *Before the Court rules in a writ petition on an issue which it declares as*
18 *determinative of Hyatt's entire case, and which he was not allowed to address..*
19 *he should be given the right to be heard on the issue. Page 14, lines 13-16.*
20 (Emphasis in original).

21 Once again, however, Hyatt is saying whatever he thinks will advance his position,
22 regardless of the truth or his prior statements in this very case. As with Hyatt's allegations of
23 tortious misconduct, those statements are not true. They are just more of his distortion and
24 misrepresentation that is completely refuted by the record. The lack of admissible evidence to
25 support any of Hyatt's tort claims was raised by FTB before this Court - *and Hyatt admitted the*
26 *petition would stand or fall based on his evidence.*

27 The FTB filed its first writ (the "Discovery Writ") on January 27, 2000. At pages 3-6,
28 FTB provided a short statement of background facts leading up to the discovery disputes that
caused FTB to file the Discovery Writ. (FTB App. Ex. 12). Hyatt filed his Answer to the
Discovery Writ on July 7, 2000. At pages 1-6, he provided his summary of argument addressed
to the discovery dispute. (FTB App. Ex. 13). But then, at pages 9-23, Hyatt presented his

1 version of the merits of his tort claims. *Id.* He even included in his appendix, his entire
2 opposition to FTB's summary judgment motion that he had filed in the district court.² Hyatt
3 clearly put the merits of his entire case before this Court. At page 15, lines 6-10 and footnote
4 48:

5 While alleged in various forms, Hyatt's invasion of privacy claims are all
6 based on the FTB's mishandling and illegal and improper disclosures of Hyatt's
7 private and confidential information. The legal and factual basis for the invasion
8 of privacy claims are set forth in detail in Hyatt's opposition to the FTB's ill-fated
9 motion for summary judgment.⁴⁸

10 ⁴⁸ Hyatt's opposition papers to the FTB's Motion for Summary Judgment are
11 attached as Exhibits 11 through 15, to Vols. VII and VIII, to the accompanying
12 Appendix of Exhibits filed with the Supreme Court.

13 Page 15, lines 11-13:

14 Hyatt's fraud and negligent misrepresentation claims are based on both the FTB's
15 written and verbal, but, promises to keep Hyatt's private information confidential
16 and the FTB's written, but false, promises to conduct a fair and unbiased audit of
17 Hyatt.

18 Page 15, line 25, page 16, line 2 and footnote 49:

19 The legal and factual basis for these conclusions are set forth both in Hyatt's
20 opposition to the FTB's motion for summary judgment as well as the Hyatt
21 Appendix re Crime-Fraud filed in conjunction with Hyatt's briefing on the
22 discovery motion at issue in this writ Petition.⁴⁹

23 ⁴⁹Hyatt's Appendix re Crime-Fraud is attached as Exhibit 4, to Vol. II of the
24 accompanying Appendix of Exhibits filed with the Supreme Court.

25 Page 16, lines 3-5:

26 The abuse of process and outrage claims are also based on misconduct by the FTB
27 during the course of the audits. The legal and factual basis of these claims are
28 also set forth in Hyatt's opposition to the FTB's motion for summary judgment.

On August 8, 2000, FTB replied to Hyatt's Answer to the Discovery Writ. At pages 2-11
(FTB App. Ex. 14), FTB showed Hyatt's allegations of tortious misconduct were not true:

FTB rejects Hyatt's spin and obfuscation as untrue, and refers the Court to the
statement of facts set forth in FTB's Second Writ in Case No. 36390.

It is important to remember that while Hyatt treats his allegations as established
fact, they are nothing more than allegations. Hyatt's Answer is replete with
citations to his own affidavit and the affidavits of his representatives. . . Hyatt's

²See, *Id.* at page 9, footnote 16 at line 26 ("Hyatt's opposition papers to the FTB's Motion for Summary Judgment are attached..."), and page 11, footnote 27 at lines 23-24 ("... Hyatt has attached ... Hyatt's opposition to the FTB's summary judgment motion").

1 “affidavits” are really nothing more than self-serving conclusory arguments in
2 flagrant violation of Nev.R.Civ.P. Rule 56(e). *Id.* at page 3, lines 3-16.

3 Previously, on July 7, 2000, FTB had filed the Jurisdictional Writ (Docket No. 36390). At pages
4 5-22, FTB provided its statement of facts based upon the undisputed events that occurred during
5 the audit. (FTB App. Ex. 15).

6 Hyatt answered the Jurisdictional Writ on October 13, 2000. At pages 2-4 he provided
7 another summary of his tort claims and at pages 10-20 he restated his allegations of tortious
8 misconduct. (FTB App. at Ex. 16). In particular, Hyatt said at page 10, lines 11-12:

9 “The FTB’s writ petition must stand or fall *on Hyatt’s evidence* because the
10 FTB asserts that it is not liable as a matter of law . . .”. (Emphasis added).

11 Hyatt’s “evidence” upon which FTB’s writ petition ultimately prevailed was his entire
12 opposition to the summary judgment motion he had reasserted before this Court (which still
13 failed to comply with Rule 56). That is the same “evidence” upon which Hyatt seeks rehearing.

14 The FTB filed its Reply in Support of the Jurisdictional Writ on December 28, 2000. At
15 pages 3-8 (FTB App. Ex. 17), FTB once again showed that Hyatt’s tort claims were based upon
16 unsupported conclusory allegations rather than evidence of facts.

17 Both writ petitions were consolidated by Order dated September 13, 2000. Oral argument
18 was conducted on February 8, 2001. Despite being asked several times “Where is the tort?”
19 Hyatt was not able to point to a single fact to support any of his tort claims.

20 The record is clear that the merits of Hyatt’s tort claims were before the Court.

21 4. **HYATT CONTINUES HIS STRATEGY OF ARGUING CONCLUSORY**
22 **ALLEGATIONS RATHER THAN PRESENTING EVIDENCE OF**
23 **MATERIAL FACTS**

24 At page 4 of its June 13th Order, this Court admonished that:

25 Hyatt then has the burden of demonstrating *specific evidence* indicating a
26 genuine dispute of fact. (Emphasis added, footnote omitted).

27 Despite the Court’s admonishment, Hyatt reasserts his improper affidavits to support his
28 rehearing request. FTB renews its objections as previously set forth at page 3 of FTB’s August 8,
2000 Reply in Support of Discovery Writ and Exhibit 1 thereto. (FTB App. Ex. 19). All of

1 Hyatt's affidavits consist of almost nothing but conclusory allegations and argument. Then,
2 Hyatt cites to his improper affidavits as "evidence" to support his rehearing request.

3 In addition to reasserting his improper affidavits, and in further disregard of the Court's
4 admonishment, Hyatt cites to his own prior arguments as further "evidence" and constantly
5 misrepresents the actual evidence he does cite. Worst of all, Hyatt continues to advance an
6 outrageous personal attack against the FTB auditor based upon nothing more than conclusory
7 allegations and distortions rather than specific, admissible evidence.

8 In his attacks against the auditor, Hyatt tries to make much of certain deposition
9 testimony by a fired FTB employee, Candace Les. But most of Les' deposition testimony cited
10 by Hyatt is inadmissible and irrelevant. A key part of her testimony, however, actually
11 exonerates the FTB auditor from Hyatt's allegations of improper motive and bad faith.

12 Candace Les and the FTB auditor (Sheila Cox) were in Las Vegas in November 1995
13 when Les testified they stopped at Hyatt's house. (FTB App. Ex. 20; Les Depo pg. 262, Ins. 11-
14 14). That was five months before even the first Notice of Assessment was issued on April 23,
15 1996. (FTB App. Ex. 21). While Les said: "I knew the audit was over" (FTB App. Ex. 20; Les
16 Depo pg. 273, Ins. 17-18), she was mistaken because the audit was still open. The fact that the
17 audit was still open completely negates Hyatt's allegations that the November 1995 drive-by was
18 improper or that Cox was violating FTB procedures in checking out Hyatt's house.

19 More importantly, when asked what Cox told her after Cox allegedly returned to their car,
20 Les testified: "*She did say that she didn't think he lived there.*" (FTB App. at 20; Les Depo
21 pg. 270, Ins. 20-24). (Emphasis added).

22 Despite not believing Hyatt was living at his Las Vegas house even as late as November
23 1995, the FTB auditor still gave Hyatt the benefit of her doubts by giving him April 2, 1992 (the
24 date escrow closed) as the effective date of termination of his California residency. For that,
25 Hyatt villanizes her and accuses the FTB of conducting an "extortive" and "tortious" audit. The
26 auditor was simply trying to do her job and get the facts concerning Hyatt's move because he
27 would not give them to her. The record is undisputed that FTB conducted an audit; there is no
28

admissible evidence that it committed any tort. Nothing Hyatt presents in his rehearing request shows that the Court overlooked or misapprehended anything.

5. HYATT'S PETITION MERELY RESTATES HIS PRIOR ERRONEOUS ARGUMENTS

Hyatt's Petition repeats nearly verbatim his prior erroneous arguments:

A. Hyatt wrongly argues at pages 6-8 of his Petition that FTB conducted a one-sided fraudulent audit.

- i) Hyatt previously made this argument in his July 7, 2000 Answer to Discovery Writ at pages 58-61, (FTB App. Ex. 23); and October 13, 2000 Answer to Jurisdictional Writ at pages 13-14. (FTB App. Ex. 24).
- ii) FTB responded in its August 8, 2000 Reply in Support of Discovery Writ at pages 2-7; (FTB App. Ex. 25); July 7, 2000 Jurisdiction Writ at pages 5-16, (FTB App. Ex. 26); and December 28, 2000 Reply in Support of Jurisdiction Writ at pages 3-8. (FTB App. Ex. 27).
- iii) As FTB showed, it simply audited Hyatt. The conduct he complains of resulted from his own failure to provide the information the FTB requested from him in order to verify his claim of change of residency. For example, as shown at pages 2-3, *supra*, Hyatt refused to tell the auditor where he lived September 24, 1991 - October 20, 1991 despite repeated requests for that information; Hyatt instead provided various claimed departure dates from California to Nevada; he did not move into his apartment until well after his claimed move date; he provided a false Nevada voter registration, and his patent license agreements signed after his claimed move suggested he was still in California.

B. Hyatt wrongly argues at pages 8-9 of his Petition that FTB attempted to extort a settlement as an alternative to the audit becoming publicly known.

- i) Hyatt previously made this argument in his July 7, 2000 Answer to the Discovery Writ at pages 61-62, (FTB App. Ex. 28); and his October 13, 2000 Answer to the Jurisdiction Writ at page 14. (FTB App. Ex. 29).
- ii) FTB responded in its August 8, 2000 Reply in Support of the Discovery Writ at pages 7-9, (FTB App. Ex. 30); and its December 28, 2000 Reply in Support of Jurisdiction Writ at page 7. (FTB App. Ex. 31).
- iii) As FTB showed, any settlement would have been a matter of public record requiring disclosure of Hyatt's name, total amount in dispute, amount of settlement, explanation of why such a settlement would be in the best interests of the State of California and an opinion from California Attorney General as to the overall reasonableness of the settlement. Cal.Rev. & Tax Code §19442. Moreover, the FTB lawyer who allegedly made the threat had no authority to even negotiate a settlement. Yet Hyatt claims she threatened to make Hyatt's audit public if he did not settle.

C. Hyatt wrongly argues at pages 5 and 9 of his Petition that FTB destroyed his patent licensing business.

- 1 i) Hyatt previously made this argument in his July 2, 2000 Answer to the
2 Discovery Writ at pages 12-13, (FTB App. Ex. 32); and October 13, 2000
3 Answer to Jurisdiction Writ at pages 11-13. (FTB App. Ex. 33).
- 4 ii) FTB responded in its August 8, 2000 Reply in Support of Discovery Writ
5 at pages 9-10, (FTB App. Ex. 34); and December 28, 2000 Reply in
6 Support of Jurisdiction Writ at pages 6-7. (FTB App. Ex. 35).
- 7 iii) As FTB showed, Hyatt's patent licensing business died when his patents
8 were successfully challenged, and, in effect became worthless. *See Hyatt*
9 *v. Boone*, 146 F.3d 1348 (Fed.Cir. 1998). Texas Instruments had
10 challenged Hyatt's patent by filing an "interference" action in the U.S.
11 Patent Office in April 1991, even before Hyatt's alleged move to Nevada.
12 As Hyatt's own representative during the audit, Mr. Cowan, said in his
13 October 13, 1995 letter to the auditor: "Many companies who produce
14 products that might infringe on patents held by others . . . *wait until the*
15 *validity of the patent has been tested in court.*" The Japanese companies
16 had paid Hyatt before his patents became worthless; (FTB App. Ex. 36;
17 PBKT 06176 at pg. 2, fn. 1). (Emphasis added).
- 18 D. Hyatt wrongly argues at page 5 of his Petition that FTB improperly disclosed to
19 Hyatt's Japanese licensees that he was being investigated.
- 20 i) Hyatt previously made this argument in his Answer to Discovery Writ at
21 page 13, (FTB App. Ex. 37); and his October 13, 2000 Answer to the
22 Jurisdiction Writ at pages 11-13, (FTB App. Ex. 38).
- 23 ii) FTB responded in its August 8, 2000 Reply in Support of Discovery Writ
24 at pages 9-10, (FTB App. Ex. 39); and its December 28, 2000 Reply in
25 Support of Jurisdiction Writ at pages 6-7, (FTB App. Ex. 40).
- 26 iii) As FTB showed, both the Fujitsu and Matsushita agreements contained the
27 identical provision in Paragraph 7.4 authorizing disclosure of their terms
28 and conditions, including the payment amounts, to any governmental
agency or as otherwise required by law. (FTB App. Ex. 41 and 42). All the
FTB did was send a single page letter to each company asking only what
date they wire transferred payments to Hyatt. (FTB App. Ex. 43 and 44).
Sheila Cox had written Mr. Kern on March 1, 1995: "I need a copy of the
bank statement to determine the dates that the wire transfers were made."
(FTB App. Ex. 45). She repeated that request on March 23, 1995. (FTB
App. Ex. 46). A formal legal demand for the information was made on
April 11, 1995. (FTB App. Ex. 47). On April 13, 1995, Mr. Kern finally
responded but provided only the following statement: "Union Bank –
Account Name Pretty, Schroeder, Brueggman and Clark Client Trust
Account. This account appears to be a trust account ... and Mr. Hyatt does
not have access to this information." (FTB App. Ex. 48). Faced with
such an evasive response, Cox had no other choice and wrote directly to
the Japanese companies asking merely what dates they wired their
payments to Hyatt.
- E. Hyatt continues his self-serving argument that he expected an audit with no
"public disclosure" of his "private information" at pages 2-4 of his Petition.
- i) Hyatt previously made this argument in his July 7, 2000 Answer to
Discovery Writ at pages 12-13 and 62-64, (FTB App. Ex. 49); and in his

October 13, 2000 Answer to the Jurisdiction Writ at pages 2-3 and 12-13 (FTB App. Ex. 50).

- ii) Hyatt's personal expectations about how the audit would be conducted are irrelevant. FTB documented every oral and written statement that FTB made to Hyatt or his representatives. (FTB App. Ex. 3 at ¶¶ 32 and 33 (Cox Affidavit) and FTB App. Ex. 51 (Exhibits 2, 4, 7, 9, 13, 28 and 29 to Cox Affidavit). None of those statements constituted a promise to Hyatt that the FTB would not disclose to third parties the basic information FTB learned during the audit (his "secret" Las Vegas address), or the basic information FTB already knew before the audit (his name and social security number), when such disclosures were used to identify him to third party sources of information needed to verify his change of residency.
- iii) Even if any statement had constituted such a promise, California law put Hyatt on notice that such disclosures of identifying information to third parties could happen during an audit, negating any justifiable reliance on any such promise:

A return or return information may be disclosed in a judicial or administrative proceeding pertaining to tax administration, if any of the following apply:

- (a) The taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability... Cal. Rev. & Tax. Code § 19545.

F. Hyatt wrongly argues at pages 4-5 of his Petition that FTB illegally disclosed Hyatt's "private facts," his "secret" address and his social security number.

- i) Hyatt previously made these arguments in his October 13, 2000 Answer to Jurisdiction Writ at pages 40-47. (FTB App. Ex. 52).
- ii) Any disclosure of Hyatt's tax return information (name, address, social security number and fact of an audit) was pursuant to the FTB's administration of California's income tax and was authorized by law. Cal. Rev. & Tax. § 19545. The undisputed evidence shows that the FTB auditor was only trying to verify the truthfulness of Hyatt's claim of residency change. Every disclosure of which Hyatt complains was aimed at obtaining information the auditor needed to do her job after Hyatt's failure to give her the information she needed. As a matter of law, it is not reasonable to expect that Mr. Hyatt's name, address and social security number would not be used to identify him to third parties such as utility companies and government agencies able to verify Hyatt's residency claim.
- iii) Hyatt's constant argument that use of his social security number to identify him during the audit was tortious, ignores the fact that the IRS may disclose a taxpayer's name, address and social security number during an audit. Title 26 U.S.C. §§ 6103(b)(6); 6109(d); and 6103(h)(4). FTB had the same authority to use Hyatt's name, address and social security number. Cal. Rev. & Tax Code §§ 19545 and 19549; Cal. Civ. Code § 1798.24(p).
- iv) The Privacy Notice that FTB gave Hyatt clearly states he was being asked for his identification information "to carry out the Personal Income Tax

1 Law of the State of California” and that he was required to provide his
2 social security number “for identification and return processing.” (FTB
App. Ex. 53).

3 6. **THE SUPPLEMENTAL PETITION REPEATS HYATT’S SELF SERVING**
4 **AND CONCLUSORY ALLEGATIONS**

5 Hyatt’s 15-page Supplemental Petition simply continues his strategy of inundating the
6 Court with conclusory allegations. It is also riddled with distortions and outright fabrication of
7 the evidentiary record. There are so many improper cites to the record in Hyatt’s footnotes that it
8 is impossible to respond fully to each one within the page limitation imposed by the Court. The
9 fact that FTB does not have sufficient time and space to respond to each false statement should
10 not be construed as any type of acquiescence to Hyatt’s distortions and misrepresentations.

11 7. **HYATT HAS FAILED TO MEET HIS BURDEN OF SHOWING THAT**
12 **THE COURT OVERLOOKED OR MISAPPREHENDED ANY POINT OF**
13 **FACT OR LAW IN FOOTNOTE 12**

14 This Court has recognized that the FTB conducted a standard investigation to determine
15 residency status, and that because Hyatt failed to provide evidence of unreasonableness or falsity
16 of statements, that investigation was not tortious. Order at 4-5. In footnote 12 of its Opinion,
17 this Court held that the FTB has presented evidence to establish the four conclusions stated
18 therein, and that the establishment of those conclusions negated at least one element of each of
19 Hyatt’s torts. The Court also recognized that Hyatt presented no evidence in the record to
20 contradict these four established conclusions.

21 Hyatt now has the burden to prove to this Court that it overlooked facts in the record
22 which negate the conclusions in footnote 12. Hyatt cannot and has not satisfied this burden. He
23 has presented this Court with a series of alleged “facts,” all of which have been presented to this
24 Court before in great detail, and most of which have been asserted elsewhere in his Petition and
25 Supplement as alleged proof that Hyatt presented facts in the record to support each of his tort
26 claims. Additionally, Hyatt repeatedly misstates what is in the record by including quotes that do
27 not exist in the record and by citing to testimony that most times does not support the allegations.
28 Even when the allegations are supported, they do not establish that this Court erred in reaching
its conclusions in footnote 12, or in concluding that none of the FTB’s acts constituted torts.

1 **A. Hyatt has failed to provide specific evidence to disprove the Court's**
2 **Conclusion that the FTB "never produced false statements."**

3 The Court first concluded in footnote 12 "that Franchise Tax Board (1) never produced
4 false statements."³ Hyatt claims that this conclusion is false because the FTB "produced false
5 statements" by assuring him in written and verbal forms that it would keep his information
6 confidential and would conduct a fair audit. Hyatt Supplemental Petition ("Supplement") at page
7 1, lns. 15-18. Hyatt has presented no specific evidence to prove this allegation. The FTB forms
8 that Hyatt cited to in footnotes 4 and 5 of his Supplement clearly state that the information he
9 provided could be disclosed to government officials as provided by law, and the California
10 statutes permit the FTB to use the information to conduct an audit. *See Sections 7(c) below and*
11 *5(E)(F) above.* Hyatt has presented no evidence that the FTB agreed to abrogate its statutory
12 authority and provide Hyatt with complete confidentiality with regard to the audit; this lack of
13 evidence is not surprising because in order to conduct the residency audit, the FTB had to contact
14 third parties to verify Hyatt's information and to investigate Hyatt's claims of Nevada residency.
15 It was impossible for the FTB to keep the investigation completely confidential because the
16 investigation, by its very nature, required contact with third parties. For that reason, the FTB did
17 not and would not have informed Hyatt that it would shield his audit and investigation from third
18 parties.

19 Hyatt claims that the FTB promised to conduct a fair and unbiased audit, but instead
20 buried all evidence favorable to Hyatt. Supplement at page 1, line 18. This is not a fact, it's an
21 argument against the conclusion of the residency auditor, the audit supervisor and FTB audit
22 review staff. Hyatt's charge is currently being considered in the administrative review process in
23 California, where Hyatt is free to present any evidence.

24 Hyatt argues that Candace Les claimed the "Audit narrative report re Hyatt was 'fiction,'"
25 and cites to Candace Les' deposition as support. Supplement at page 1, line 19 and n.7.
26 However, the cited pages 10 and 25 of that deposition do not discuss Les' opinion of the audit,

27
28 ³It appears from the Order that the Court meant that the FTB did not produce false statements about Hyatt to third parties. Hyatt has alleged that the FTB made false statements to him during the audit. Even if the Court intended this statement to refer to false statements made to Hyatt, Hyatt had not produced specific evidence of any such false statements.

1 and pages 172 and 176 of the deposition are not attached as exhibits. In short, there is no
2 evidence of Les' opinion of the audit in the portions of the record cited by Hyatt, and nowhere
3 does Les state that the report was "fiction."

4 Hyatt next claims that Cox's statements regarding interviews with Hyatt's apartment
5 managers was directly contradicted by the deposition testimony of the apartment manager. *Id.* at
6 page 5, line 1. First, Hyatt does not state what Cox's statements were, and there is no
7 explanation of how her statements were contradicted by the testimony of the apartment manager.
8 Furthermore, there is no evidence of a false statement; Hyatt has merely made a conclusory
9 allegation that Cox made unknown "false statements" because her version of events differs in
10 some unknown way from the apartment managers. Again, there is no "specific evidence" of
11 tortious conduct.

12 Hyatt also claims that the FTB sent Demands for Information which falsely represented to
13 Nevada respondents that they were required by Nevada law to respond. *Id.* at page 2, line. 2.
14 The FTB has provided ample authority to this Court that it is permitted to send such Demands
15 pursuant to California law. *See* Section 7(c) below. Hyatt also overstates the effect the
16 "Demands to Furnish Information" had on Nevada residents by alleging they "gave the false, yet
17 distinct appearance that Hyatt was a fugitive from California being investigated as a tax cheater."
18 *Id.* at page 8, lines 7-10. The standard form document nowhere suggests that Hyatt is a "fugitive"
19 or a "tax cheat." Hyatt has not identified a single business associate, neighbor, or other Nevada
20 resident who would support such a contention. Hyatt also fails to mention the language in the
21 accompanying cover letter to a Demand to Furnish that reads: "[f]or purposes of administering
22 the Personal Income Tax Law of the state of California and for that purpose only, we would
23 appreciate your cooperation in providing a photocopy of..." (*See* Hyatt Appdx. Exhibit 8)

24 Finally, Hyatt claims that while the FTB claimed that the audit file had been through
25 extensive levels of review, this was false because the reviewers admitted that they relied on
26 Cox's work in their review. Supplement at page 2, line 5. Hyatt's allegation is false. Hyatt
27 cites the Lou deposition as support. However, in that deposition, Lou stated only that he relied
28 on certain items that Cox had obtained during her investigation; he never stated that he did not

1 conduct his own extensive review of the audit file. Hyatt also claims that "This cursory review
2 also lead to the assessment of an additional \$6.4 million in taxes and penalties for a total
3 assessment of \$9.9 Million." *Id.* at page 2, line 8 and n.12. Hyatt cites to the Ford deposition for
4 support, but again the record is devoid of any support for this proposition. Nowhere did Ford
5 claim that her review, or the FTB's review, was "cursory." In fact, FTB spent over 500 hours
6 investigating and reviewing this matter.

7 In conclusion, Hyatt has produced no evidence that the FTB made or published false
8 information to any third parties.

9 **B. Hyatt has failed to provide specific evidence to disprove the Court's**
10 **Conclusion that the FTB "never publicized its investigation or findings**
outside the scope of the investigation."

11 Hyatt also presented no evidence to refute the finding that the FTB never publicized its
12 investigation outside the scope of the investigation.

13 Hyatt claims that Cox publicized her investigation findings outside the scope of the
14 investigation, but provides no such evidence. Hyatt alleges that Cox told Candace Les about the
15 findings and that Les did not "need to know" the information. *Id.* at page 2, line 15. Hyatt did
16 not cite to the record to support his allegation that Les did not "need to know" the information.
17 In fact, Les also was an auditor of the FTB, with whom Cox discussed the audit as a co-
18 professional.

19 Hyatt also claims that Cox disclosed her findings to non-FTB personnel, including to
20 Hyatt's ex-wife. *Id.* at page 2, lines 16-19. Hyatt claims that during its investigation, the FTB
21 contacted people, entities and associations and asked them questions about Hyatt, and that such
22 conversations illegally disclosed to third persons that Hyatt was under investigation in California.
23 *Id.* at page 8, line 5. However, all of the conversations Hyatt complains of were part of the
24 FTB's audit, and do not constitute a publication outside of the scope of the audit; in fact, the
25 disclosure was a necessary part of the audit.

26 Hyatt claims that Cox told non-FTB personnel about the audit. *Id.* at page 2, line 16,
27 citing to page 7-8 of the Supplement. The only allegations made on those pages were that "[Cox]
28 disclosed facts to her friend about family members, his colon cancer, his patent business, the

1 amount of taxes at issue, her first trip to Las Vegas, her several trips to La Palma, her interviews
2 with Hyatt's Nevada Landlord, the tenor of her dealings with Hyatt's tax representatives, and that
3 the Hyatt audit was one of the largest, if not the largest, in history." Hyatt cites to the Ford Depo
4 at pages 148-155 as support (Ford is an FTB auditor supervisor), but nowhere in that deposition
5 is there any discussion of statements made by Cox. All of the cited deposition transcript
6 concerned Ford's work as an auditor at the FTB, and Cox's name is mentioned only once to
7 confirm that she was not an auditor on a fraud case Ford had worked on. Again, there is no
8 specific evidence that the FTB publicized its findings.

9 Hyatt also alleges that Cox "boasted" to Hyatt's ex-wife, Mrs. Maystead, that "we got
10 him." This quote exists nowhere in the Maystead deposition cited by Hyatt, and it has been
11 fabricated. The transcript of the Maystead deposition actually states that Hyatt's ex-wife had one
12 very brief conversation in which Cox told her that Hyatt "had been convicted or and had – or had
13 to pay some taxes or something like that." There is no evidence that Cox "boasted" or even
14 when the conversation took place. In short, this is not evidence of a publication of the
15 investigation.

16 Hyatt also claims that the FTB contacted the Japanese customers, however that contact
17 was made explicitly within the confines of the audit, and was permitted by the terms of the
18 contracts at issue. *See* section 5(d), *supra*.

19 Finally, Hyatt claims that the FTB published his "private information" to three
20 newspapers. This is deliberately misleading. The FTB sent Demands for Information to the
21 newspaper circulation departments during the audit requesting information regarding whether
22 Hyatt subscribed to their newspapers during certain dates. This was done as part of the audit to
23 verify Hyatt's claims of residency in Nevada; it was not done, as Hyatt suggests, so that the
24 newspapers could publish that information to the world.

25 **C. Hyatt has failed to provide specific evidence to disprove the Court's**
26 **conclusion that the FTB "complied with its internal operating procedures**
with regard to contacting individuals."

27 Hyatt first claims that "Despite talking to Hyatt's adversaries, Auditor Cox never
28 interviewed or spoke with Hyatt, or his close associates and close family members, thereby

1 failing to conduct a fair, unbiased audit." *Id.* at page 3, lines 10-11. However, this is a conclusion
2 only, and is not specific evidence that the FTB failed to comply with its internal procedures when
3 conducting the audit.

4 Hyatt admittedly was a long-time resident of California who paid California income taxes
5 for many years until he moved to Nevada. The FTB had the legal and statutory right, and a
6 public duty, to investigate Hyatt's claim of change of residency. To do that, it was necessary to
7 contact persons and entities in Nevada which Hyatt had listed as sources who could verify his
8 Nevada residency. *See Industrial Welfare Com. v. Superior Court of Kern County*, 27Cal.3d 690,
9 613 P.2d 579, 587 (1980)(citing a United States Supreme Court case stating that the duty to
10 investigate involves the making of such an investigation as the nature of the case requires, and it
11 is not required to take any particular form.) In the course of the investigation, an agency may
12 seek information through those channels likely to produce the necessary information, including
13 official records and reports, and may supplement such means of inquiry by correspondence or
14 personal investigation. *Barnett v. Fields*, 196 Misc. 339, 92 N.Y.S.2d 117, 124 (1949).

15 Hyatt wrongly claims that FTB's auditor failed to conduct a fair and unbiased audit
16 because the auditor never spoke to him, his "close associates" and "close family members."
17 Supplement at 3:10. This is not a material fact, it's an argument against the conclusion of the
18 residency auditor, the audit supervisor and FTB audit review staff. Hyatt's charge is currently
19 being considered in the administrative review process in California, where Hyatt is free to
20 present any evidence.

21 Hyatt next claims that FTB failed to notify Hyatt or obtain information directly from
22 Hyatt before using his social security number and other information in contacting businesses or
23 individuals. Supplement at page 3, line 12. The Privacy Notice FTB gave Hyatt clearly states he
24 was being asked for his identification information "to carry out the personal income tax law of
25 the State of California" and that he was required to provide his social security number "for
26 identification and return processing." (FTB App. Ex. 53.)

27 Some of the information obtained by FTB during the residency audit of Mr. Hyatt was
28 obtained directly from third parties, which is permitted under the California statutes, and is

1 consistent with the duty of the FTB to conduct tax audits. Disclosures made of tax return
2 information during the course of any tax audit, including the use of a social security number, are
3 those required to complete the audit. In asserting this "fact" Hyatt has fabricated a legal
4 requirement where none exists.

5 Additionally, as the FTB has already shown *supra*, at pgs. 2-3, Hyatt refused to cooperate
6 with the FTB auditors to provide information regarding his residency in September and October
7 of 1991; and the FTB was forced to obtain information on his residency status through third
8 persons. Hyatt has no room to complain on this issue.

9 Hyatt next claims that the FTB failed to contact him prior to contacting third parties, and
10 that such action violated the FTB's internal policies. Supplement at page 3, line 13. *Id.* at 3:13.
11 Specifically, Hyatt claims the FTB violated a general provision of the California Civil Code and
12 its own security and disclosure manual when it failed to first contact him during the audit. Both
13 allegations are false. California Civil Code § 1978.15, cited by Hyatt, states only that "Each
14 agency shall collect personal information to the greatest extent practicable from the individual
15 who is the subject of the information rather than from another source." FTB has shown that
16 Hyatt refused to cooperate with the audit and that it was required to collect information from
17 third parties. Furthermore, Section 1798.25(p) of the California Civil Code expressly permitted
18 the FTB to disclose Hyatt's taxpayer information in order to investigate Hyatt's failure to comply
19 with the tax laws of the State of California. Additionally, specific provisions of the California
20 Revenue and Taxation Code allow FTB to conduct audits, contact third parties, and use taxpayer
21 information. Common sense and basic statutory construction arguments tell us so. Hyatt's
22 argument to the contrary, made here by attorneys, are disingenuous to say the least.

23 Also, FTB's Security and Disclosure Manual contains no prohibition on third party
24 contacts, as Hyatt seems to allege. It merely restated Cal. Civil Code §1978.15.

25 Hyatt next claims that "Sending 'Demands for Information' to individuals outside the
26 State of California, absent special circumstances" is a violation of FTB's internal policies.
27 Supplement at page 3, line 14. This is false. California law does not require good cause or
28 "special circumstances" to justify the issuance of a Demand to Furnish Information. Here, no

1 formal subpoenas were ever served on any Nevada resident, company or government agency
2 during the audit. Instead, the FTB only sent its informal (and standard) "Demands for
3 Information" to third parties in an effort to verify Hyatt's claimed change of residency.

4 The FTB's authority to issue the informal "Demands for Information" to Nevada residents
5 is clear.⁴ With respect to the fact that FTB merely mailed the demands for information to
6 Nevada residents, there is nothing improper, let alone illegal, with such a procedure.⁵

7 Hyatt also mischaracterizes a statement in the Residency Audit Training Manual as
8 requiring an auditor to determine if a third party is "uncooperative" before issuing a Demand for
9 Information.⁶ The manual broadly interprets "Section 19504 (formerly Section 19254) [as
10 authorizing] the Department to request and obtain information from third parties." (See FTB
11 00844 (FTB App. Ex. 54)).⁷

12 On a related note, Hyatt incorrectly asserts that FTB improperly sent Demands for
13 Information to third parties without his knowledge in violation of the Information Practices Act.
14 Supplement at page 10, line 2, n. 59. Such Demands do not violate California's privacy act.
15 California Civil Code § 1798 et seq.⁸

16 Hyatt's final allegation is that "Advising Hyatt that other taxpayers usually settle to avoid
17 further dissemination of private information, inferring that 'this could happen to you, too, if you
18 don't agree to settle' is a violation of FTB internal policies. Supplement at page 3, line 16.

20 ⁴Cal. Rev. & Tax Code §19504 empowers the FTB to examine records, require attendance, take testimony, and issue
21 subpoenas. Cal. Govt. Code § 11189 provides for enforcement of § 19504 demands from "persons residing within or without the
state."

22 ⁵See, e.g., *Wilentz v. Edwards*, 134 N.J.Eq. 522, 36 A.2d 423, 1944 (use of certified mail to serve an administrative order
23 to show cause outside the state validly conferred jurisdiction over the defendant).

24 ⁶The Supplemental Petition asserts: "[s]he did so without first ascertaining that the third party was uncooperative, as
25 required by the FTB's Residency Manual." (Supp. Petition, 9:25-10:1) The pertinent section of the manual actually provides: "[t]o
obtain information from uncooperative third parties, the auditor should use the Demand for Information form (FTB Form 4973)."
Nothing in the referenced material mandates that an auditor make a threshold finding that a third party is uncooperative or that such
Demands can only be used when a third party source refuses to cooperate.

26 ⁷A Demand for Information is not a subpoena and need not comply with the Civil Discovery Act. § 19504 does not require
27 a "Notice to Consumer" when the FTB uses Form 4973.

28 ⁸The Information Practices Act authorizes a state agency to make disclosures of "personal information" when "necessary
for an investigation by the agency of a failure to comply with a specific state law which the agency is responsible for enforcing."
(Quoting California Civil Code § 1798.24 (p)).

1 First, the quote "this could happen to you, too, if you don't agree to settle" does not exist
2 in the record. This is an egregious fabrication of the record.

3 Hyatt also wrongly infers that FTB's statutory tax settlement program is a vehicle to
4 extort money from taxpayers in exchange for not publicizing their private information, which is
5 untrue. Hyatt has claimed that a telephone conversation between FTB attorney Jovanovich and
6 Hyatt's tax attorney Cowen amounted to an extortive threat. The record shows this is not true.
7 When Jovanovich was assigned Hyatt's protest of the 1991 proposed assessment, she explained
8 to Cowan the administrative protest process, appeal process and settlement options. She kept
9 contemporaneous and detailed notes of that conversation. (FTB App. Ex. 55). The record
10 shows that absolutely nothing in this conversation between two tax professionals was untrue or
11 threatening. Cowan claims that he relayed this conversation to Hyatt who then interpreted
12 Jovanovich's settlement reference as a threat, because absent administrative settlement some facts
13 regarding Hyatt's audit may become public. In point of fact, a settlement is public as required by
14 California law. In fact, Cowan later admitted that, when he talked to Hyatt, he did not know that
15 a tax settlement in California results in a public document containing the audited taxpayer's
16 name, the amount of tax at issue and the amount approved for settlement, and the reasons why
17 the settlement is in the public interest in the opinion of the California attorney general. (FTB
18 App. Ex. 56). (Cowan deposition page 83). This fact renders illogical Hyatt's charge that FTB
19 was attempting to force him to settle to avoid publicity. *See also*, page 9 *supra*.

20 **D. Hyatt has failed to provide specific evidence to disprove the Court's**
21 **conclusion that the FTB "merely visited his house and conducted**
investigation through phone calls and letters".

22 Hyatt claims that FTB visited Hyatt's apartment managers and made records of
23 "questionable accuracy." Supplement at page 3, line 10. FTB has already explained that Hyatt
24 has not provided specific evidence of such "questionable" records, and it is undisputed that FTB
25 interviewed the apartment manager as part of the audit. *See*, page 13, *supra*.

26 Hyatt also claims that the FTB sent out an "unprecedented" amount of Demands for
27 Information." Supplement at page 4, line 1. First, the California statutes permit the FTB to send
28 the Demands, and there is no limit to how many the FTB can send. Hyatt's citations to the

1 record do not support a claim that the amount of Demands was “unprecedented.” Some of the
2 people Hyatt deposed stated that they had not used the Demands for Information as extensively
3 as they were used in the Hyatt matter, but Hyatt makes only a conclusory allegation when he
4 stated that this amount was “unprecedented.” In fact, many of the auditors Hyatt deposed stated
5 that normally they did not need to use the Demands because those taxpayers provided all of the
6 information requested. The FTB has provided ample evidence that Hyatt did not cooperate, and
7 that the Demands were a part of the normal investigation to determine Hyatt’s residency.

8 FTB has already addressed Hyatt’s contentions regarding conducting a “fair and unbiased
9 audit” and his allegations against Cox. Hyatt claims that in 1995 Cox “searched” through Hyatt’s
10 trash and mail. *Id.* at page 4, line 4. In fact, the only testimony was from the Les deposition
11 where she stated that Cox “lifted up the trash lid” on Hyatt’s trash can and that Cox “looked
12 through” Hyatt’s mailbox. There is no evidence of an invasive “search,” as Hyatt leads the Court
13 to believe. These actions were taken to help ascertain whether Hyatt was living in the Las Vegas
14 house as he had claimed. The presence of mail and garbage is an indicator of whether a person is
15 residing in the house. Cox, in fact, concluded, notwithstanding her doubts, that Hyatt did reside
16 in the home as of close of escrow, April 2, 1992.

17 Hyatt claims that someone in the FTB took a “trophy” picture in front of Hyatt’s Las
18 Vegas house, and cited to the Les deposition as support. *Id.* at page 4, line 5 (citing to Les
19 Deposition pp 264. 402-03). However, Hyatt has not included the pages of the Les deposition he
20 has cited, and again has produced no “specific evidence” to support his claims. In any event,
21 such facts do not establish tortious conduct.

22 Hyatt also claims that the FTB initiated audits of his close associates. *Id.* at page 4, line
23 6. As support, Hyatt cites only to the conclusory allegation of his own affidavit as support.
24 Hyatt has not produced specific evidence regarding such audits or the fact that the audits were
25 not proper.

26 Finally, Hyatt claims that the FTB acknowledged that Hyatt was “paranoid” about
27 privacy, and then infers that the FTB attempted to use that paranoia to extort a settlement, citing
28 to the Jovanovich deposition. *Id.* at page 4, line 7. Jovanovich testified that Hyatt’s

1 representative, Mr. Cowan, had sent her a letter stating that there had been lapses in
2 confidentiality in the case, and Jovanovich thought that Cowan's statement might have been a
3 paranoid concern because she did not notice any breaches of confidentiality. Hyatt Supp., Ex.
4 23, pages 125-26. Jovanovich also stated in two separate places in Hyatt's Exhibit 23 that she
5 honored Hyatt's wishes for privacy. *Id.* at page 125, line 2, and page 126, lines 4-6.
6 Furthermore, there is no evidence that Jovanovich told Cowan that if Hyatt did not settle, his
7 finances would become public. The FTB has addressed this issue before at page 9, *supra*. Hyatt
8 wants this Court to believe that specific evidence exists that FTB knew Hyatt was paranoid about
9 his secrecy and then capitalized on that fear by extorting a settlement. However, all Hyatt has
10 presented is conclusory allegations and no specific facts to prove the same.

11 One of Hyatt's more offensive arguments is his claim that the June 13th Order is a
12 "hunting license" for FTB "predatory conduct" against other Nevada residents. *See, e.g.*,
13 Supplemental Petition at pages 4-5. FTB did not improperly target Hyatt for an audit.
14 Substantial publicity surrounded the issuance of Hyatt's patents, including a newspaper article
15 that attracted an FTB auditor's attention in 1993. The article reported that Hyatt lived in Las
16 Vegas, but was involved in a California legal dispute with his ex-wife about earnings from recent
17 patent awards. (FTB App. Ex. 57 at ¶8). FTB reviewed its records and found that Hyatt filed
18 only a part-year California income tax return for 1991, in which he claimed to have terminated
19 his California residency on October 1, 1991. He reported \$613, 606.00 as California business
20 income from total receipts of over \$42 million for the full year. (FTB App. Ex. 58.) It would
21 have been a dereliction of public duty not to inquire further.

22 8. **HYATT HAS FAILED TO PRESENT EVIDENCE TO SUPPORT HIS**
23 **INVASION OF PRIVACY CLAIMS**

24 In Part II at pages 5-8 of his Supplemental Petition, Hyatt purports to set forth the
25 evidence supporting his invasion of privacy claims.

26 There simply is no evidence from which a jury could reasonably find that FTB committed
27 any of the invasion of privacy torts Hyatt asserts in his First Amended Complaint. Hyatt's
28 privacy tort for intrusion requires evidence of: "(1) intentional intrusion (physical or otherwise);

1 (2) on the solitude or seclusion of another; (3) that would be highly offensive to a reasonable
2 person.” *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630-31, 895 P.2d 1269 (1995), *modified*
3 *on other grounds*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997) (citing Restatement (Second)
4 Torts § 652A). Hyatt’s second privacy tort for public disclosure of private facts required
5 evidence “that a public disclosure of private facts has occurred which would be offensive and
6 objectionable to a reasonable person of ordinary sensibilities.” *Montesano v. Donrey Media*
7 *Group*, 99 Nev. 644, 649, 668 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984). Hyatt’s false
8 light claim requires proof that the FTB put Hyatt before the public in a false light in a manner
9 that “would be highly offensive to a reasonable person,” and also that the FTB “had knowledge
10 of or acted in reckless disregard as to the falsity of the publicized matter and the false light in
11 which [Hyatt] would be placed.” *Rinsley v. Brandt*, 700 F.2d 1304, 1306 (10th Cir. 1983); *see*
12 *also PETA*, 111 Nev. at 622 n.4 (citing *Brandt*); Restatement (Second) of Torts § 652E. This last
13 variety of privacy tort requires proof by “clear and convincing evidence...” *Machleder v. Diaz*,
14 801 F.2d 46, 56 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); *see also PETA*, 111 Nev. at
15 622 n.4 (citing *Diaz*).

16 Any evidence which would unite all of these privacy torts, which is wholly absent here, is
17 evidence of conduct that is at least offensive and objectionable to a reasonable person.
18 Offensiveness is a legal issue as a threshold matter, *PETA*, 111 Nev. at 634-635, and there is no
19 evidence that FTB did anything other than conduct a standard residency audit in response to
20 Hyatt’s evasiveness. Whether or not Hyatt was offended by FTB’s actions is irrelevant. Just like
21 a personal injury plaintiff alleging damages, a taxpayer “must expect reasonable inquiry and
22 investigation to be made” of his claims to the taxing agency. “[T]o this extent [their] interest in
23 privacy is circumscribed.” *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346 (Or. 1975)
24 (quoting *Forster v. Manchester*, 189 A.2d 147, 150 (Pa. 1963).

25 Hyatt also argues he has a claim for “informational privacy” even though it is not pled in
26 his First Amended Complaint. Nevada, however, recognizes only “four species of privacy tort”
27 (all of which Hyatt has pled), and none of which is “informational privacy.” *PETA*, 111 Nev. at
28 629, 895 P.2d at 1278. Moreover, disclosure of Hyatt’s return information (name, address and

1 social security number) is authorized by Cal. Rev. & Tax. Code § 19545 during an audit. As
2 previously shown, such disclosures are not tortious regardless of the label.

3 9. **HYATT HAS FAILED TO PRODUCE EVIDENCE TO SUPPORT HIS**
4 **ABUSE OF PROCESS CLAIM**

5 In Part III at pages 8-10 of his Supplemental Petition, Hyatt purports to set forth the
6 evidence supporting his abuse of process claim.

7 Hyatt does not even allege that FTB took any court action or employed any court process.
8 Instead, he alleges FTB sought to “extort” a settlement by conducting the audit and, in particular,
9 by sending Demands to Furnish Information into Nevada. California law, however, authorizes
10 FTB to send such forms to “persons residing within or without the state.” Cal. Govt. Code §
11 11189; Cal. Rev. & Tax Code § 19504.

12 Abuse of process requires: 1) an ulterior purpose other than resolving a legal dispute; and
13 2) a willful act in the use of process not proper in the regular conduct of the proceeding. *Dutt v.*
14 *Krump*, 111 Nev. 567, 575, 894 P.2d 354 (1995). Although this Court has not addressed the
15 issue, the U.S. District Court has interpreted Nevada law as being consistent with the majority
16 rule that limits the tort to abuse of judicial process, as opposed to abuse of administrative
17 process. *Laxalt v. McClatchy Newspapers*, 622 F. Supp. 737, 750-51 (D.Nev. 1985); *see also*,
18 *Gordon v. Community First State Bank*, 255 Nev. 637, 646-651, 587 N.W.2d 343 (Neb. 1998);
19 *Foothill Ind. Bank v. Mikkelsen*, 623 P.2d 748, 757 (Wyo. 1981). The few jurisdictions
20 extending the tort to abuse of an administrative process do so only as to a private party’s misuse
21 of the agency’s process, as opposed to a misuse of the process by the agency itself. *See, Hillside*
22 *Associates v. Stravato*, 642 A.2d 664, 669 (R.I. 1994).

23 Hyatt has simply failed to produce any evidence upon which FTB can be held liable for
24 abuse of process.

25 10. **HYATT’S DISTORTS THE PRECEDENTIAL IMPACT OF THE**
26 **COURT’S ORDER**

27 In parts IV-VII at pages 10-15 of his Supplemental Petition, Hyatt attempts to “spin” this
28 Court’s June 13th Order and process. For example, he ignores the constitutional and
jurisdictional issues raised by FTB’s writ petitions and argues that the Court’s June 13th Order

1 somehow changes the existing standards for summary judgment and the circumstances in which
2 this Court will review a denial of a summary judgment motion in cases not involving such issues.

3 Ignoring Rule 56(e), Hyatt also asserts that, if this Court does not accept his inadmissible
4 and conclusory allegations then henceforward: "In essence, any civil case will require 'smoking
5 gun' direct evidence of each element of each claim, and circumstantial evidence and reasonable
6 inferences will not be available to establish such elements for the fact-finder." Supplemental
7 Petition at page 12, lines 14-16. That is a gross distortion of this Court's reasoned June 13th
8 Order.

9 Hyatt succeeded in litigating this case under seal. As FTB understands, the June 13th
10 Order is an unpublished decision subject to the restrictions of Supreme Court Rule 123.
11 Therefore, the unpublished order "shall not be regarded as precedent and shall not be cited as
12 legal authority" except in the circumstances specified in Rule 123.

13 One final argument by Hyatt requires response. Hyatt argues that if the Court does not
14 reverse its decision, then Nevada residents audited by FTB will have fewer rights and less
15 privacy than their counterparts in California. As FTB previously showed, however, former
16 California citizens residing in Nevada (like Hyatt) as well as California citizens residing in
17 California, have the exact same remedies for any actual FTB misconduct: they can bring statutory
18 actions against FTB in California's own courts. *See*, Reply in Support of Jurisdiction Writ at
19 pages 18-21. (FTB App. Ex. 59).

20 CONCLUSION

21 This Court properly accepted the FTB's original Discovery Writ and the later
22 Jurisdictional Writ, consolidated them and decided them on the alternative adequate state law
23 ground that Hyatt failed to meet his burden under Rule 56(e) to produce admissible evidence of
24 any FTB tortious misconduct. Instead of criticizing the Court, he should read Rule 56 (e) and the
25 Nevada Rules of Evidence.

26 Hyatt's Petition and Supplemental Petition for Rehearing should be denied because this
27 Court did not overlook or misapprehend any material point of law or fact.

1 Dated this 7th day of August, 2001.
2

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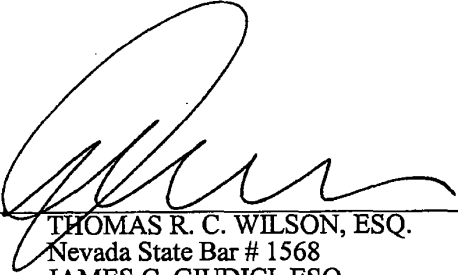
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Certificate of Compliance

I hereby certify that I have read this appellate 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, in particular N.R.A.P. 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.

Dated this 7th day of August, 2001.

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing **Answer to Hyatt's Petition for Rehearing and Supplemental Petition for Rehearing** on this 7th day of August, 2001, by depositing same in the United States Mail, postage prepaid thereon to the addresses noted below, upon the following:

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Dated this 7th day of August, 2001.



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IN THE SUPREME COURT OF THE
STATE OF NEVADA

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JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Case No. 36390

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT of
the State of Nevada, in and for the County of
Clark, Honorable Nancy Saitta, District Judge,

ERRATA TO REAL PARTY IN
INTEREST GILBERT P. HYATT'S
15 PAGE SUPPLEMENT TO HIS
PETITION FOR REHEARING RE
THE COURT'S JUNE 13, 2001
ORDER GRANTING PETITION
FOR WRIT OF MANDAMUS

Respondent,

and

GILBERT P. HYATT,

CONFIDENTIAL INFORMATION TO
BE FILED UNDER SEAL

Real Party in Interest.

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10 IN THE SUPREME COURT OF THE
11 STATE OF NEVADA

12 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

13 Petitioner,

14 vs.

15 EIGHTH JUDICIAL DISTRICT COURT of
16 the State of Nevada, in and for the County of
Clark, Honorable Nancy Saitta, District Judge,

17 Respondent,

18 and

19 GILBERT P. HYATT,

20 Real Party in Interest.
21

Case No. 36390

ERRATA TO REAL PARTY IN
INTEREST GILBERT P. HYATT'S
15 PAGE SUPPLEMENT TO HIS
PETITION FOR REHEARING RE
THE COURT'S JUNE 13, 2001
ORDER GRANTING PETITION
FOR WRIT OF MANDAMUS

CONFIDENTIAL INFORMATION TO
BE FILED UNDER SEAL

22 Real Party in Interest Gil Hyatt submits this Errata to his 15-page Supplement to his Petition for
23 Rehearing. The 15-page Supplement was filed with this Court on July 23, 2001, and the FTB's Answer
24 was served on August 7, 2001.¹
25

26 The FTB's August 7 Answer to Hyatt's Petition for Rehearing and Supplemental Petition for Rehearing pointed out certain errors
27 in the footnotes and Appendices to Hyatt's 15-page Supplement. Hyatt appreciates the FTB pointing these out and apologizes
28 to the FTB and this Court for the fact that Hyatt's Rehearing Appendices did not include copies of all pages of the record which
are referenced in his footnotes. By way of explanation (but not to excuse the errors corrected herein), Hyatt submits that he was
attempting in his Rehearing Appendices to cull through the large official record and include only certain pages of depositions and
other exhibits for the convenience of the Court in its consideration of the Petition for Rehearing, and the omission of some of these

1 Errata No. 1: Footnote 7: "[Appdx., Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

2 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

3 Errata No. 2: Footnote 10: "[Appdx. Exh. 25]" should be "[Supp. Hyatt Appendix Vol. VIII,

4 Exh. 13]" (change citation to official record, rather than to Rehearing Appendix).

5 Errata No. 3: Footnote 22: The reference to page "268" should be changed to "168"

6 (typographical error).

7 Errata No. 4: Footnote 27: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

8 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

9 Errata No. 5: Footnote 34: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

10 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

11 Errata No. 6: Footnote 35: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

12 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

13 Errata No. 7: Footnote 36: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

14 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

15 Errata No. 8: Footnote 37: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

16 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

17 Errata No. 9: Footnote 40: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

18 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

19 Errata No. 10: Footnote 44: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

20 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

21 Errata No. 11: Footnote 45: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

22 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

23 Errata No. 12: Footnote 46: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV,

24 Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

25 Errata No. 13: Footnote 50: The footnote correctly references "Chang Depo, pp. 32-33 /Supp.

26 Appdx. Exh. 32]". However, p. 33 of the Chang Depo was inadvertently omitted from Supp. Appdx.

27 cited pages from the Rehearing Appendices was inadvertent. This Errata substitutes the citation to the official record for the

28 citation to the Rehearing Appendices so the actual cited pages can be located in the record, and it also corrects a couple of

typographical errors in the footnotes. All of these errata correct footnotes in Hyatt's 15-page Supplement. The "Hyatt Appendix"

and the "Supp. Hyatt Appendix" refer to the volumes submitted as appendices to Hyatt's answers to the FTB's writ petitions.

1 Exh. 32 and both pages are attached hereto as Exhibit A.

2 Errata No. 14: Footnote 54: "[Appdx. Exhs. 9-10]" should be "[Hyatt Appendix, Vol. VII, Exh.

3 11 (Exh. 13 attached thereto)]" (change citation to official record, rather than to Rehearing Appendix).

4 Errata No. 15: Footnote 55: "FTB" should be deleted, and "Exh. 35" should be "Exh. 33"

5 (typographical error).

6 Errata No. 16: Footnote 71: "[Appdx. Exh. 27]" should be "[Hyatt Appendix, Vol. VII, Exh.

7 11]" (change citation to official record, rather than to Rehearing Appendix).

8 For the convenience of the Court and the FTB, a copy of Hyatt's 15-page Supplement, with these

9 corrections, is attached hereto as Exhibit B.

10 DATED this 10 day of August, 2001

11 HUTCHISON & STEFFEN

12 BERNHARD & LESLIE, CHTD.

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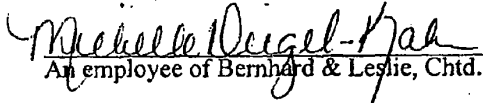
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Bernhard & Leslie, and that on this 10th day of August, 2001, I served a true and correct copy of the foregoing **ERRATA TO REAL PARTY IN INTEREST GILBERT P. HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** via regular mail, in a sealed envelope upon which postage was prepaid, to the addresses noted below, upon the following:

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DISTRICT COURT
CLARK COUNTY, NEVADA

**CERTIFIED
COPY**

GILBERT P. HYATT,)
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 Plaintiff,)
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 VS.)
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)
 FRANCHISE TAX BOARD OF THE)
)
 STATE OF CALIFORNIA, and DOES)
)
 1-100, inclusive,)
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)
 Defendants.)
)
 -----)

NO. A382999

DEPOSITION OF LOBO CHANG
LOS ANGELES, CALIFORNIA
MONDAY, NOVEMBER 29, 1999

REPORTED BY:
Jean F. Holliday
CSR No. 4535



15250 Ventura Boulevard, Suite 410 • Sherman Oaks, CA 91403
(800) 993-4G'N'G (4464) • FAX: (818) 995-4248

14:37 1 A. I do not have a complete recollection
14:37 2 of their visit. After they came in the first thing
14:37 3 they did was to show me that one-page document, and I
14:38 4 didn't quite understand what they were saying but
14:38 5 from what I did understand, they were there looking
14:38 6 for some kind of information. So I figured these
14:38 7 people must be either from the State or the IRS
14:38 8 conducting an audit there. Then they showed me their
14:38 9 business cards. So one sat down, the other one
14:38 10 started walking around, and he asked me when I
14:38 11 started working there, where was I working, and I
14:39 12 told him that I started by working in Costa Mesa. At
14:39 13 that time I was the owner, and approximately three
14:39 14 years ago we changed the name of the owner to my
14:39 15 older brothers. I worked in Costa Mesa for a little
14:39 16 more than a year and then we went to another place
14:39 17 for like maybe four or five years and after that we
14:39 18 moved to a few other locations. Eventually we
14:40 19 settled in where we were.
14:40 20 Then he said he wanted to look into
14:40 21 the record of Hyatt, so I went to look for it. Well,
14:40 22 after I found it he saw it. I showed it to him as
14:40 23 well, and then they copied a telephone number and the
14:40 24 names and also the travel plans. Later on I realized
4:41 25 that they were not there auditing my books. They

14:41 1 were there looking into Hyatt's records. So I
14:41 2 stopped cooperating.

14:41 3 Q. If you had realized that sooner, would
14:41 4 you have stopped cooperating sooner?

14:41 5 A. Yes, that's right.

14:41 6 Q. Did they tell you that they were
14:41 7 investigating your tax regarding a special item?

14:41 8 A. No.

14:41 9 Q. Did they tell you that they wanted to
14:41 10 look into the Youngmart record relating to the travel
14:42 11 schedule of Mr. Hyatt?

14:42 12 A. They didn't say that but they said
14:42 13 they wanted to look into some information regarding
14:42 14 Hyatt.

14:42 15 Q. Did they imply that they were
14:42 16 investigating whether or not Youngmart was cheating
14:42 17 on its taxes respecting Mr. Hyatt?

14:42 18 A. No. Well, I figured that they were
14:43 19 there looking for information relating to Hyatt and
14:43 20 something was wrong with his records.

14:43 21 Q. Now, when you did provide information
14:43 22 before you realized all this, were you giving as much
14:43 23 information as you did because you were trying to
14:43 24 prove that Youngmart did not cheat on its taxes?

14:43 25 A. Yes.

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10 IN THE SUPREME COURT OF THE
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12 FRANCHISE TAX BOARD OF THE STATE
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14 vs.

15 EIGHTH JUDICIAL DISTRICT COURT of
16 the State of Nevada, in and for the County of
Clark, Honorable Nancy Saitta, District Judge,

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18 and

19 GILBERT P. HYATT,

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21

Case No. 36390

REAL PARTY IN INTEREST
GILBERT P. HYATT'S 15 PAGE
SUPPLEMENT TO HIS PETITION
FOR REHEARING RE THE
COURT'S JUNE 13, 2001 ORDER
GRANTING PETITION FOR WRIT
OF MANDAMUS

CONFIDENTIAL INFORMATION TO
BE FILED UNDER SEAL

22 Pursuant to this Court's order, Petitioner Gil Hyatt submits this Supplement to his Petition for
23 Rehearing, timely filed on July 2, 2001 (the "Petition"). The Petition addressed the substantial evidence
24 supporting Hyatt's most significant invasion of privacy claim and his fraud claim. This Supplement first
25 demonstrates that there are material facts in dispute in regard to the four issues upon which the Court
26 based its order granting the FTB's petition and then discusses additional facts, evidence and law that the
27 Court overlooked or misapprehended in its order granting the FTB's petition.
28

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1 1. **Genuine issues as to material fact exist as to the four conclusions reached by the**
2 **Court in footnote 12 of the June 13 Order.¹**

3 The Court's June 13 Order concluded that the FTB had met its burden that at least one element
4 of each of Hyatt's claims had not been shown. The Order said the FTB did that "...by demonstrating
5 undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its
6 investigation or findings outside the scope of the investigation, (3) complied with its internal operating
7 procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its
8 investigation through phone calls and letters."² Based on this, the Court then found no genuine dispute
9 "that Franchise Tax Board's acts during its investigation constituted intentional torts[.]" citing Nevada
10 law as to Hyatt's causes of action, at footnote 13. The evidence cited throughout the Petition and this
11 Supplement refutes this. A brief summary of the evidence, and reasonable inferences which can be
12 derived therefrom, contradicts each of these allegedly undisputed issues."³

13 A. **Evidence of record shows that the FTB "produced false statements".** Genuine
14 issues of material fact exist as to issue (1) in footnote 12. Evidence of the FTB's false statements
15 include:

- 16 (1) FTB written confidentiality promises contained in its communications to Hyatt;⁴
- 17 (2) FTB verbal confidentiality promises, given when Hyatt's representatives insisted on specific
18 pledges of confidentiality in return for Hyatt providing additional information;⁵
- 19 (3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but
20 instead buried all evidence favorable to Hyatt;⁶
- 21 (4) Audit narrative report re Hyatt was "fiction" according to a former FTB employee;⁷

22 ¹ The Petition cited to an Appendix of Exhibits 1 through 29 attached thereto in the following format: [*Appdx., Exh. "x"*]. For
23 clarity, this Supplement cites to exhibits in the same manner, with additional exhibits attached to a Supplemental Appendix.
24 Citations to the record for the exhibits attached to the Supplemental Appendix are set forth in its table of contents.

25 ² See footnote 12 of June 13 Order. In addition, Hyatt urges the Court to review pages 21 through 26 of Hyatt's opposition to
26 the FTB's motion for summary judgment [*Appdx., Exh. 27*] that discusses the Constitutional and statutory basis and origin of the
27 invasion of informational privacy alleged by Hyatt. The informational privacy rights of Hyatt, and corresponding obligations of
28 the FTB, establish in great part the objective reasonableness of Hyatt's invasion of privacy claims. Moreover, and as discussed
below, the FTB is not immune under California law for the invasions of privacy, particularly, the informational privacy, asserted
by Hyatt.

³ These facts represent, at a minimum, sufficient evidence to refute the four "undisputed" facts. Because of the FTB's invocation
of the "deliberative process" privilege, Hyatt was prevented from getting further facts from the FTB (this was the subject of the
FTB's other writ, declared moot in this Court's June 13 order). Since discovery was stayed by this Court's earlier order, Hyatt
has not been able to complete his investigation of these and other relevant facts.

⁴ Petition, at 2-3. (Hyatt cites to the Petition or this Supplement, *infra*, when the supporting evidence is summarized therein).

⁵ Petition, at 3.

⁶ Petition, at 6-8.

⁷ Les Depo., pp. 10, 25, 172, 176 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

- 1 (5) Auditor Cox's statements re interviews with Hyatt's Las Vegas apartment managers, directly
2 contradicted by deposition testimony of the apartment manager;⁸
3 (6) FTB "Demand for Information" form, which falsely represented to Nevada respondents that
4 they were required by California law to comply with these demands;⁹
5 (7) FTB false "affidavits," which were not even sworn to, and which were falsely represented by
6 Auditor Cox as containing damaging information about Hyatt;¹⁰
7 (8) The FTB falsely stated that the audit file had been through extensive levels of review by
8 FTB reviewers: "The reviewers in Sacramento have finished their extensive examination of the
9 audit file and all of the information regarding Mr. Hyatt's residency status." However, in
10 deposition, the reviewers expressly admitted that they simply relied upon Cox's work in their
11 review of her assessment.¹¹ This cursory review also led to the assessment of an additional \$6.4
12 million in taxes and penalties for a total assessment of \$9.9 million.¹²

13 Therefore, this Court cannot say that the FTB "never produced false statements". If the Court believes
14 that these false statements are *de minimis*, it is performing, inappropriately, a fact-finder's function.

15 **B. Evidence of record shows that the FTB publicized its investigation or findings**
16 **outside the scope of the investigation.** Genuine issues of material fact exist as to issue (2) in footnote
17 12. Evidence of the FTB's publication of its investigation or findings outside the scope of its
18 investigation include:

- 19 (1) Auditor Cox's publication of her investigation and findings, and personal defamatory
20 opinions of Hyatt, to Candace Les who had no "need to know."¹³
21 (2) Auditor Cox's publication of her investigation and findings, and personal defamatory
22 opinions of Hyatt, to non-FTB personnel;¹⁴
23 (3) Auditor Cox's publication of her work and findings to Priscilla Maystead, Hyatt's ex-wife
24 when Cox boasted, "We got him."¹⁵
25 (4) Disclosure to Hyatt's Japanese customers that he was under investigation, and revealing that
26 Hyatt had provided the FTB with copies of their confidential agreements;¹⁶ and

27 ⁸ Kopp Depo., pp. 75 - 76 [Supp. Appdx., Exh. 39]; Lewis Depo., pp. 29, 45, 51 [Supp. Appdx., Exh. 30].

28 ⁹ *Infra*, at 8-9.

¹⁰ Bourke Affid., ¶¶ 15, 16, 51, 73 (evidence is cited and summarized therein) [Supp. Hyatt Appendix Vol. VIII, Exh. 13]. The
FTB knew that what it labeled as an affidavit was indeed not a true affidavit – the FTB has reverted to calling them "interview
summaries." However, Cox clearly intended to misrepresent these "interview summaries" in her Narrative Report because they
served as the foundation for Cox's assessment of fraud penalties (an extremely serious penalty requiring clear and convincing
evidence to support): "[A]s evidence of the taxpayer's specific intent to defraud the government, we have gotten affidavits from
several individuals that the taxpayer may have cheated on his taxes in the past." See FTB audit work-papers, at H 01892. [Supp.
Appdx., Exh. 45].

¹¹ Lou Depo., p. 81 [Supp. Appdx., Exh. 44].

¹² Ford Depo., p. 90-92 [Supp. Appdx., Exh. 43].

¹³ *Infra*, at 7-8.

¹⁴ *Infra*, at 7-8.

¹⁵ Maystead Depo., pp. 182-84. [Appdx., Exh. 18].

¹⁶ Petition, at 9.

1 (5) Disclosure of Hyatt's private information to three newspapers.¹⁷

2 Again, this Court cannot say that the FTB never publicized its investigation or findings outside the
3 scope of the investigation. If the Court believes that these publications are *de minimus*, it is performing,
4 inappropriately, a fact-finder's function.
5

6 **C. Evidence of record shows that the FTB did not comply with its internal operating**
7 **procedures with regard to contacting individuals.** Genuine issues of material fact exist as to issue
8 (3) in footnote 12. Evidence of the FTB's failure to comply with its internal operating procedures with
9 regard to contacting individuals include violating its policies, rules and procedures:

10 (1) Despite talking to Hyatt's adversaries, Auditor Cox never interviewed or spoke with Hyatt,
11 or his close associates and close family members, thereby failing to conduct a fair, unbiased
audit;¹⁸

12 (2) Failure to notify Hyatt or obtain the requested information from Hyatt before disclosing
social security numbers and other confidential Hyatt information to individuals or businesses;¹⁹

13 (3) Failure to contact Hyatt before contacting third parties;²⁰

14 (4) Sending "Demands for Information" to individuals outside the State of California, absent
15 special circumstances;²¹

16 (5) Advising Hyatt that other taxpayers usually settle to avoid further dissemination of private
information, inferring that "this could happen to you, too, if you don't agree to settle".²²

17 Therefore, this Court cannot say that the FTB complied with its internal operating procedures with
18 regard to contacting individuals. If the Court believes that these false statements are *de minimus*, it is
19 performing, inappropriately, a fact-finder's function.

20 **D. Evidence of record shows that the FTB did more than "merely visit Hyatt's house**
21 **and conduct its investigation through phone calls and letters."** Genuine issues of material fact exist
22 as to issue (4) in footnote 12. Evidence of the FTB's additional actions include:

23 (1) Visits to Las Vegas apartment complexes and making records of questionable accuracy
24 regarding interviews with apartment managers;²³

25 ¹⁷ Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [Appdx., Exh. 10].

26 ¹⁸ Petition, at 6-8.

26 ¹⁹ Petition, at 5.

27 ²⁰ Cal. Civ. Code 1798.15; FTB Security and Disclosure Manual, at H06706 [Appdx., Exh. 4].

27 ²¹ *Infra*, at 9-10.

27 ²² Jovanovich Depo., 50-52, 168, 185-86 [Appdx., Exh. 23]; Cowan Affid., ¶¶ 38 to ¶¶ 41 [Appdx., Exh. 6].

28 ²³ Kopp Depo., pp. 75-76 [Supp. Appdx., Exh. 39]; Lewis Depo., pp. 29, 45, 51 [Supp. Appdx., Exh. 30]

- 1 (2) Sending an unprecedented number of "Demands for Information" to individuals outside the
State of California;²⁴
2
3 (3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but
instead buried all evidence favorable to Hyatt;²⁵
4 (3) Searching through Hyatt's Las Vegas trash and mail;²⁶
5 (4) Taking a "trophy" picture in front of Hyatt's Las Vegas home;²⁷
6 (5) Initiating tax audits of close Hyatt associates;²⁸
7 (6) Acknowledging that the FTB believed Hyatt was "paranoid" about privacy, then warning his
tax attorney that without a settlement, Hyatt's finances would become public;²⁹
8 (7) Vowing to "get that Jew bastard."³⁰

9 Therefore, this Court cannot say that the FTB did nothing more than visit Hyatt's house and conduct its
10 investigation through phone calls and letters. If the Court believes that these actions are *de minimus*, it
11 is performing, inappropriately, a fact-finder's function.

12 In effect, the June 13 Order has validated, for all Nevada residents, that the FTB's predatory
13 conduct against Hyatt is reasonable and free of falsity as a matter of law – a cause for celebration at the
14 FTB since such treatment of a California resident would be unlawful and subject to redress under
15 California's Constitution and statutes. The FTB conduct reflected in the record against Hyatt now
16 becomes a "hunting license" for the FTB, where everything it has done against Hyatt may be done with
17 impunity against other Nevada residents. Even deceptive, unauthorized, quasi-subpoenas may now be
18 directed at Nevadans with this Court's blessing in the FTB's most-certain future efforts to target former
19 California residents who have moved to Nevada. Private addresses for celebrities living in Nevada,
20 along with their social security numbers and allegations of possible criminal accountability to
21 California, are now Nevada Supreme Court-approved methods to achieve the FTB's objectives against
22 wealthy Nevada residents, as the June 13 Order has determined that these are reasonable invasions of a
23 Nevada citizen's privacy rights as a matter of law. And under this Court's new standard, any tort claims
24 brought by a Nevada citizen against the FTB will, if not summarily dismissed at the district court level,

25 ²⁴ *Infra*, at 9-10.

26 ²⁵ Petition, at 6-8.

27 ²⁶ Cox Depo., pp. 1077 [Appdx. Exh. 16]; Les Depo., pp. 268-69, 405 [Appdx., Exh. 17].

28 ²⁷ Les Depo., pp. 264, 402 - 03 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

29 ²⁸ Hyatt Affid., ¶ 164 [Appdx., Exh. 7].

30 ²⁹ Jovanovich Depo., pp. 50-52, 168, 185-86 [Appdx., Exh. 23]; Cowan Affid., ¶¶ 38 to ¶¶ 41 [Appdx., Exh. 6].

31 ³⁰ Les depo., p. 10 [Appdx. Exh. 17].

1 enjoy a *de novo* review by this Court as to the facts, and, unless they are found to be more egregious
2 than those against Hyatt, be ordered dismissed in the district courts.

3 **II. Substantial, probative evidence supports Hyatt's invasion of privacy claims.**

4 **A. Substantial evidence of the FTB's illegal disclosures of Hyatt's private facts.**

5 As Hyatt briefly addressed in footnote 1 of the Petition, Hyatt's invasion of privacy claim for
6 disclosure of private facts encompasses both the newer, well-recognized claim for invasion of
7 informational privacy as well as the more traditional claim of public disclosure of private facts. The
8 district court so found in liberally construing Hyatt's claims as consistent with Nevada's notice-
9 pleading standard.³¹ Hyatt summarized the supporting evidence in the Petition and through various
10 exhibits attached to the appendix submitted with the Petition.³² Hyatt's additional invasion of privacy
11 claims are interrelated with this claim, and each is supported by the evidence summarized in the
12 Petition, and further by the additional evidence summarized below.

13 **B. Substantial evidence of the FTB's intrusion upon Hyatt's seclusion.**

- 14 1. **Elements of claim:** (1) an intentional intrusion (physical or otherwise);
15 (2) on the solitude or seclusion of another; and (3) that would be highly
16 offensive to a reasonable person."
17 2. **Supporting evidence:**

18 In addition to the evidence summarized in the Petition, affidavits and depositions have
19 established the following facts, which give rise to the inference that the FTB unreasonably intruded
20 upon Hyatt's seclusion. First, FTB auditor Sheila Cox made at least three trips to Las Vegas to
21 investigate Hyatt. During these visits, Cox contacted neighbors and other fellow Nevada residents with
22 whom Hyatt either in the past or in the future has had or might reasonably expect to have social or
23 business interactions, and she either disclosed or implied to them that Hyatt was under investigation in
24 California.³³ On one trip she took a colleague, Candace Les, on a covert visit to Hyatt's Las Vegas
25 home³⁴ — after the audit was over³⁵ — and took a trophy photograph of Les standing on Hyatt's
26 property in front of Hyatt's residence.³⁶ This corroborates Les' testimony that Cox was obsessive in her
27 zeal to "get" Hyatt, personalizing the audit in ways that were clearly not "standard" and should be found
28

³¹ Nev. R. Civ. P. Rule 8(a).

³² Petition, at 1-5.

³³ Cox Depo., pp. 426-27, 957, 1329-30, 1873 [Appdx., Exh. 16]; Hyatt Affid., ¶ 129 [Appdx., Exh. 7].

³⁴ Les Depo., p. 42 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

³⁵ Les Depo., pp. 54 - 55 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

³⁶ Les Depo., pp. 264, 402 - 03 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

1 tortious. Because the audit was closed, FTB policies forbade this curiosity-driven visit as unauthorized
2 stalking.³⁷ Because the visit was for a nontax purpose, the surveillance was forbidden by the Taxpayers'
3 Bill of Rights.³⁸ Because the visits were forbidden by FTB policies, Cox's surveying of Hyatt's former
4 apartment and his Las Vegas home violated California's privacy act and published FTB procedures.³⁹
5 Cox also made three or more trips to the neighborhood of Hyatt's prior residence in La Palma, which
6 trips included unannounced visits with residents of Hyatt's former neighborhood and questions about
7 private details of Hyatt's life.⁴⁰ All of these facts and circumstances, taken together, support Hyatt's
8 claims that he was singled out, by FTB actions which should be found tortious, for unlawful purposes,
9 to further ambitions of FTB auditors and the revenue-enhancing goals of the FTB.

10 The FTB contacted over one hundred sources, including three newspapers, a dozen neighbors,
11 the Licensing Executive Society, and Hyatt's Japanese licensees, causing the inference that Hyatt was
12 under a cloud of suspicion.⁴¹ The FTB, through its investigative actions, and in particular the manner in
13 which they were carried out in California, Nevada and Japan, intruded into Hyatt's solitude and
14 seclusion. The intrusions by the FTB support the inference that any reasonable person, including Hyatt,
15 would find them to be highly offensive.⁴² Even if these intrusions were part of a "standard" FTB
16 investigation, this is not a defense to this tort, which only requires that the intrusions be intentional,
17 affect the seclusion of another, and be highly offensive to a reasonable person. Clearly, the intrusions
18 were intentional; they affected Hyatt's seclusion; and would be highly offensive to a reasonable person
19 under the circumstances.
20
21

22 ³⁷ Les Depo., pp. 54 - 55 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

23 ³⁸ California Revenue & Taxation Code § 21014, *forbidding* any FTB employee from conducting an investigation or surveillance
24 of any person except for tax purposes. For purposes of the prohibition, the Legislature defined investigation as "any oral or
written inquiry" and surveillance as "the monitoring of persons, places, or events by means of . . . overt or covert observations,
or photography, or the use of informants."

25 ³⁹ California Information Practices Act of 1977, Civil Code § 1798.14; Disclosure Manual, Exhibit 118 at H 06708 [*Appdx.*,
26 *Exh. 3*] ("employees *shall not access or use* personal or confidential information about individuals maintained by the department
without a legal right to such information as provided by law and a 'need to know' to perform his/her official duties.") (Emphasis
added.)

27 ⁴⁰ Cox Depo., pp. 1158, 1161, 1165, 1176 [*Appdx.*, *Exh. 16*]; Les Depo., pp. 24-25, 385-86 [Supp. Hyatt Appendix, Vol. XIV,
Exh. 49].

28 ⁴¹ Cox Narrative Report [*Appdx.*, *Exh. 13*].

⁴² See, e.g., Hyatt Affid., ¶ 129-138 [*Appdx.*, *Exh. 7*].

1 C. Substantial evidence of the FTB's casting Hyatt in a false light.

2 1. Elements of claim: (1) giving publicity to a matter concerning another; (2) that
3 places the person in a false light; (3) that would be highly offensive to a
4 reasonable person; and (4) that the actor had knowledge of or acted in reckless
5 disregard as to the falsity of the publicized matter and the false light in which the
6 other would be placed.⁴³

7 2. Supporting evidence:

8 The evidence summarized above and in the Petition is fully applicable to this claim as well.
9 Moreover, the California Revenue and Taxation Code, and the laws and regulations compiled in the
10 FTB disclosure education materials, forbid disclosure of personal information about a taxpayer to
11 anyone, even to other auditors, who have *no* need to know. But Cox told Les about the murder of
12 Hyatt's son — and called him a "freak" because of it. She disclosed to Les her unsuccessful attempts to
13 start special investigations to investigate Hyatt for fraud, showed Les the narrative report, audit papers,
14 and position letters that lay out extensive detail about Hyatt's personal life and finances, disclosed to Les
15 alternative theories to tax Hyatt, told Les of her meetings with higher-ups on the Hyatt case, and talked
16 about Hyatt incessantly.⁴⁴ Cox talked about the case "constantly," "year after year." She talked about
17 the Hyatt case so much and was so unwilling to let it go — even after it was closed — that Les
18 concluded she was so "fixated" and "obsessed" with it that she was beginning to create a fiction in her
19 own head about it.⁴⁵

20 She told Les about Hyatt's Las Vegas apartment, and his Las Vegas home and his former
21 California house — referring to his old house as a "dump," falsely stating it contained a "dungeon," and
22 calling Hyatt "a bad man." She falsely alleged to Les that he had several Californians on the lookout for
23 the FTB: a "secret" Chinese "gook" girlfriend named Grace Jeng, a "one-armed man," and other
24 "ghouls."⁴⁶ She disclosed facts to her friend about his family members, his colon cancer, his patent
25 business, the amount of taxes at issue, her first trip to Las Vegas, her several trips to La Palma, her
26 interviews with Hyatt's Nevada landlord, the tenor of her dealings with Hyatt's tax representatives, and

27 ⁴³ See *Restatement (Second) of Torts* § 652E (1977). Courts have held, however, that to recover for false light, the subject of
28 the publication need not necessarily be false. See, e.g., *Douglass v. Hustler Magazine*, 769 F.2d 1128 (7th Cir. 1985), cert. denied,
475 U.S. 1094 (1986) (reasoning that use of a photograph out of context was grounds for recovery on false light theory even
though photograph was not "false.")

⁴⁴ See Les Depo., pp. 10-11, 24-26, 42, 49-51, 94-95, 103 - 104 - 105, 113-114, 125-126, 140-141, 141-142, 143-144, 167-168
171-172, 176; 181-82, 245-246; 253-255, 263, 268-269; 275, 345-56, 357-358, 371, 375-376, 385-389, 391 respectively [Supp.
Hyatt Appendix, Vol. XIV, Exh. 49].

⁴⁵ See Les Depo., pp. 59 - 60, 61 - 63, 167 - 168 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

⁴⁶ Les Depo., pp. 10, 25, 172, 176 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

1 that the Hyatt audit was one of the largest, if not the largest, in history.⁴⁷ Cox obtained written
2 statements only from Hyatt's estranged relatives and not from his friends, associates and other family
3 members.⁴⁸

4 During the FTB's contacts with Hyatt's neighbors, trade association, licensees, employees of
5 patronized businesses, and governmental officials in Nevada, the FTB disclosed that Hyatt was under
6 investigation in California,⁴⁹ and engaged in other conduct that would reasonably cause these persons to
7 have doubts as to Hyatt's moral character and his integrity.⁵⁰ In short, the FTB's actions in conducting
8 interviews and interrogations of Hyatt's neighbors, business associates, and other Nevada residents, and
9 its conduct in issuing deceitful, unauthorized "Demands to Furnish Information" gave the false, yet
10 distinct, appearance that Hyatt was a fugitive from California being investigated as a tax cheater.⁵¹

11 In so doing, the FTB: (1) gave publicity to a matter concerning Hyatt; (2) placed Hyatt in a false
12 light; (3) which was highly offensive to Hyatt, as it would be to any reasonable person; and (4) which
13 the FTB had knowledge of or acted in reckless disregard the false light in which it would place Hyatt.

14 **III. Substantial evidence supporting Hyatt's abuse of process claim.**

- 15 **A. Elements of claim:** Government agencies commit abuse of process when their demands
16 for information are motivated by an improper purpose, such as to harass the taxpayer or
17 put pressure on him to settle a collateral dispute, or for any other purpose reflecting on
the good faith of the particular investigation.⁵² An agency that acquires information in
an investigation by fraud, deceit, or trickery commits an abuse of process.⁵³
18 **B. Supporting evidence:**

19 The FTB sent numerous Nevada business and professional entities and individual residents
20 "quasi-subpoenas" entitled "Demand to Furnish Information," which cited the FTB's authority *under*
21 *California law* to issue subpoenas and demanded that the recipients thereof produce the information
22 concerning Hyatt.⁵⁴ Moreover, these Demands were captioned on behalf of the "People of the State of
California" and were prominently identified as relating to "In the Matter of: Gilbert P. Hyatt", thus

23 ⁴⁷ Ford Depo., pp. 148-55 [Supp. Appdx., Exh. 43].

24 ⁴⁸ Hyatt Affid., ¶¶ 117, 118, 174, 175 [Appdx., Exh. 6].

⁴⁹ Appdx., Exhs. 9-10.

⁵⁰ E.g., Chang Depo, pp. 32-33 [Supp. Appdx., Exh. 32].

25 ⁵¹ See, e.g., Hyatt Affid. ¶¶ 129, 143-44 [Appdx., Exh. 6].

26 ⁵² *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977).

27 ⁵³ *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 317 (5th Cir. 1981).

28 ⁵⁴ FTB 01882, 01888, 01890, 01892, 01894, 01896, 01897, 01908, 01910, 01912, 01914, 01938, 01940, 01964, 01992, 02043, 02054, 02069, 02081, 02083, 02085, 02087, 02098, 02100, 02294, 02296 [Hyatt Appendix, Vol. VII, Exh. 11 (Exh. 13 attached thereto)].

1 creating a reasonable inference that a tax, criminal or punitive investigation of Hyatt had been
2 instituted. The FTB has never claimed that it sought or received permission from any Nevada court or
3 any Nevada government agency to send such "quasi-subpoenas" into Nevada. Many Nevada residents
4 and business entities responded with answers and information concerning Hyatt. These "quasi-
5 subpoena" Demands on their face support the inference that they were calculated to coerce Nevada
6 residents into responding through deception, fear and intimidation. In contrast, more polite
7 correspondence requesting, rather than demanding, information, was sent to Nevada officials such as
8 Governor Bob Miller, Senator Richard Bryan and others who were not sent the illicit "Demands". The
9 inference can be drawn that these individuals would have recognized the absence of any authority for a
10 California tax agency to "Demand" information from a Nevada resident and would have taken offense at
11 such a "Demand."⁵⁵

12 The Demands wrongfully disclosed Hyatt's social security number and in some instances his
13 private address. Contrary to the requirements of the California privacy act, the FTB did not first go to
14 Hyatt; instead, the Demands were sent without his knowledge. Contrary to the same act, the Demands
15 did not disclose to the Nevada recipients that they were voluntary, since California has no power to
16 subpoena information directly from Nevadans. Contrary to the same act, the Demands did not require
17 the recipients to agree to keep Hyatt's personal information confidential. Contrary to the California
18 Financial Privacy Act and the Discovery Statute in California, Cox questioned Hyatt's lawyers,
19 accountants, and financial institutions without Hyatt's knowledge or consent and without first sending
20 Hyatt the required Notice to Consumer. And Cox wrote to two of Mr. Hyatt's most sensitive Japanese
21 customers, enclosing portions of sensitive, confidential multi-million dollar patent licensing
22 agreements, showing that he may have violated the confidentiality clause of the agreements. A
23 reasonable inference is that these actions were intended to damage Hyatt's business relationships.

24 Moreover, after consulting with Anna Jovanovich,⁵⁶ Cox began sending out the Demands For
25 Information. She sent out more Demands to third parties on the Hyatt audits than some auditors sent
26 out in their entire careers.⁵⁷ She did so without first ascertaining that the third party was uncooperative,

27 ⁵⁵ H 01715, 01716 [Supp. Appdx., Exh. 33].

28 ⁵⁶ 1991-tax-year audit workpapers, FTB 100139 [Supp. Appdx., Exh. 34].

⁵⁷ Ford Depo., pp. 91-92 [Supp. Appdx., Exh. 43]; Shigemitsu Depo., p. 187 [Supp. Appdx., Exh. 41]; Alvarado Depo., p. 44, [Supp. Appdx. Exh. 35]; S. Semana Depo., pp. 82-83 [Supp. Appdx., Exh. 36]; B. Gilbert Depo., pp. 35-36 [Supp. Appdx. Exh.

1 as required by the FTB's Residency Manual.⁵⁸ She did so without first seeking the information from the
2 taxpayer, as required by law.⁵⁹ This invasion of Hyatt's privacy has been condemned by the auditors
3 who have been asked about it.⁶⁰ A reasonable inference can be drawn that these actions were
4 undertaken with an illegitimate purpose, to further personal and institutional goals at Hyatt's expense,
5 rather than for legitimate, residency audit purposes.

6 **IV. The Court has overlooked or misapprehended the law in considering an issue never
7 raised in the FTB's petition for extraordinary relief.**

8 Since *State v. Thompson*⁶¹ was decided in 1983, Hyatt has not found any instance like this one,
9 where the Court granted a petition for extraordinary relief, on the ground that the district court erred in
10 denying summary judgment because the plaintiff did not establish sufficient probative evidence. Here,
11 the Court specifically stated that "[b]ecause this case implicates the principles of Full Faith and Credit
12 and comity, which are of great importance with respect to interpreting each state's sovereign
13 responsibilities and rights, we elect to exercise our extraordinary writ powers."⁶² Despite the Court's
14 stated ground for entertaining the FTB's petition, the Court has granted the FTB relief on grounds never
15 raised in its petition.⁶³ Hyatt is similarly unaware of any opinion in which this Court granted
16 extraordinary relief on a ground which was never raised by the petitioner. Such a notion is contrary to
17 established precedent holding that "the burden on the party seeking extraordinary relief is a heavy
18 one."⁶⁴ By granting the FTB's petition on grounds never raised in the petition, the Court has
19 disregarded its own precedent and completely relieved the FTB from its heavy burden.

20 If, in fact, the Court intended to establish new policy related to writ practice and return to pre-
21 1983 authority under which the Court reviewed denials of summary judgment motions based on

22 37], Illia Depo., pp. 178-179 [Supp. Appdx. Exh. 42].

23 ⁵⁸ FTB 00844 [Supp. Appdx., Exh. 38] (To obtain information from *uncooperative* third parties, the auditor should use the
Demand for Information Form (FTB Form 4973).) (Emphasis added.)

24 ⁵⁹ Information Practices Act of 1977, California Civil Code § 1798.15 ("Each agency shall collect personal information to the
greatest extent practicable directly from the individual who is the subject of the information rather than from another source.")

25 ⁶⁰ Illia Depo., p. 248 [Appdx., Exh. 42]; Bauche Depo. p. 439 [Supp. Appdx., Exh. 40].

26 ⁶¹ 99 Nev. 358, 662 P.2d 1338 (1983).

27 ⁶² Order, June 13, 2001, at 3.

28 ⁶³ *Id.*, at 3 (The Court specifically recognized that neither party addressed the sufficiency of Hyatt's evidence.).

⁶⁴ *Poulos v. District Court*, 98 Nev. 453, 652 P.2d 1177 (1982). In *Poulos*, although the plaintiff failed to support his opposition
to summary judgment with *any* affidavits or other evidence as required, the district court did not grant the defendant's motion for
summary judgment. This Court denied the defendant's petition for a writ of mandamus concluding that extraordinary relief was
unwarranted because there was "no substantial issue of public policy or precedential value in this case, and . . . no compelling
reason why [the Court's] intervention by way of extraordinary writ is warranted." *Id.* at 455-56, 652 P.2d at 1178.

1 sufficiency of the evidence, it should simply deny the FTB writs on the grounds advanced by the FTB,
2 then remand this matter to the district court for further proceedings. Then, an appeal can be taken with
3 an appropriate lower court record, appellate court briefing and argument, and ultimate decision by this
4 Court. This process would avoid what happened here: this Court essentially acting as a super trier-of-
5 fact through its independent review of a record, which, although large, was not complete (the parties
6 had not completed discovery, which was stayed by this Court). Moreover, the court's duty regarding
7 appeals from summary judgment has always been to scour the record to see *if there are material issues*
8 *of fact in dispute that would entitle the non-moving party to a trial on the merits, which is always*
9 *avored.* And it is well-established that an appellate tribunal may not weigh the facts, as the court has
10 done here.

11 **V. The Court has overlooked or misapprehended its own standards regarding review
of denials of summary judgment motions.**

12 The essential test for this Court in reviewing Hyatt's Petition for Rehearing is whether the
13 evidence presented on the FTB's summary judgment motion *and reasonable inferences from that*
14 *evidence, which must be drawn favorably to Hyatt,*⁶⁵ meet all the elements of one or more of the claims
15 in Hyatt's First Amended Complaint.⁶⁶ Hyatt's facts and the reasonable inferences drawn therefrom
16 entitle him to his day in court to argue that the FTB, in and after 1993, undertook a concerted effort to
17 illicitly exact funds from him through fraud and the commission of the other torts that were all utilized
18 to achieve its ultimate, unlawful objectives. As part of the FTB's outrageous attempt to develop a
19 colorable claim against Hyatt, the FTB implemented a strategy which resulted in all Hyatt-adverse
20 facts accepted as true, and the disregard of all Hyatt-supportive facts. The results of this strategy were
21 two FTB audit assessments of enormous amounts. Hyatt is entitled to show that the FTB audits were

22 ⁶⁵*NGA #2 Limited Liability Co. v. Rains*, 113 Nev. 1151, 1157, 96 P.2d 163, 167 (1997) ("In deciding whether summary judgment
23 is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought;
24 the factual allegations, evidence, and all reasonable inferences in favor of that party must be presumed correct. . . . A litigant has
a right to trial when there remains the slightest doubt as to remaining issues of fact.").

25 ⁶⁶As the Court is aware, Judge Saitta dismissed the declaratory relief count from Hyatt's First Amended Complaint when she
26 granted that aspect of the FTB's Motion for Judgment on the Pleadings. In that count, Hyatt had sought a declaration as to when
27 he became a Nevada resident in September, 1991 (per Hyatt) or April 1992 (per the FTB). Therefore, the FTB's references to
28 facts in Hyatt's First Amended Complaint and its assertions as to "undisputed" facts which pertain to Hyatt's residency in 1991
and 1992 are no longer part of Hyatt's claims for relief, the district court having properly exercised her function as a gate-keeper
to make sure that sufficient evidence was presented on the claims which she allowed to proceed (no formal amended complaint
was filed, or needed to be filed, by Hyatt after Judge Saitta dismissed the declaratory judgment claim as to residency on the FTB
Motion for Judgment on the Pleadings).

1 invasions of his privacy, violations of the FTB's express promises and commitments to him, abuses of
2 process, and fraud. Even the U.S. Congress has criticized the FTB in the Congressional Record for the
3 types of acts complained of by Hyatt.⁶⁷ All Hyatt wanted was a fair audit, and the FTB promised that to
4 him. Hyatt is entitled to present to a jury his evidence and theories of the case, that the FTB's promises
5 were never intended to be kept and that Hyatt was singled out for extraordinarily unfair and damaging
6 treatment because of the FTB's institutional needs to justify its audit (and the auditors' personal goals of
7 advancement) by assessing large taxes, interest, and fraud penalties.

8 The FTB has repeatedly accused Hyatt of placing his own "spin" on the facts, and Hyatt fully
9 expects the FTB's answer to Hyatt's petition for rehearing to again attack the facts which support each
10 element of Hyatt's claims. Of course, "spin" is just a derogatory expression for a party arguing its
11 version of the facts and the inferences which those facts support, an essential part of our adversary
12 system. If what the FTB derisively calls "spin" is, in fact, a reasonable inference which a fact-finder
13 can draw from the evidence, then this Court's June 13 Order adopts a new standard under which
14 inferences will no longer be permitted to satisfy the elements of a party's claim. In essence, any civil
15 case will require "smoking gun" direct evidence of each element of each claim, and circumstantial
16 evidence and reasonable inferences will not be available to establish such elements for the fact-finder.
17 Clearly, such a drastic change in civil practice should come only after an appropriate district court
18 proceeding and appellate record made with an understanding that those are the rules which now govern
19 civil practice. Hyatt should not be the one to suffer when his case is used as the vehicle for
20 implementing, in an unpublished order, such major changes in civil practice.

21 Of course, the FTB has and will undoubtedly put forth its own version of the facts, based on its
22 own inferences which it wants this Court to draw (i.e., that it conducted a "standard", fair investigation
23 perfectly within the bounds of its authority). But our adversarial system has always relied on the fact-
24 finder to resolve those issues: does the fact-finder accept Hyatt's evidence that the FTB was motivated
25 to and did conduct a biased, unlawful and tortious investigation resulting in great personal and
26 professional benefits to the FTB and its auditors, all at Hyatt's expense? Or does the fact-finder accept
27 the FTB's contention that its auditors merely followed their procedures in conducting a standard

28 ⁶⁷ Vol. 145 No. 114 - Part III Congressional Record (pp. E1773-75) [*Supp. Appdx. Exh. 46*].

1 investigation? This Court stepped into that fact-finder role, as if it were a panel of jurists, and decided
2 to accept the FTB's version of the facts over Hyatt's.⁶⁸ Again, such a change in this Court's appellate
3 role should be pronounced in a published opinion, followed by a remand to let the district court review
4 the evidence under this new standard governing the relationship between the district courts and the
5 Supreme Court.

6 **VI. The Court has overlooked or misapprehended the law regarding the FTB's
immunity in California for the conduct at issue.**

7 In footnote 7 of its June 13, 2001 order, the Court cites to Section 860.2 of the California
8 Government Code and *Mitchell v. Franchise Tax Board*⁶⁹ for the proposition that California accords its
9 government agency immunity for intentional torts. But the statute's plain language provides immunity
10 in California to the FTB and its employees in regard to "instituting" a tax proceeding. It does not apply
11 in this tort case because Hyatt's claims are not based on the FTB *instituting* a procedure or action to
12 collect taxes. Moreover, *Mitchell* held that the plaintiff's claims were all *directly* based on the FTB's
13 institution of an action or proceeding to collect taxes against the taxpayer and placement of a tax lien on
14 that individual's property. While the very fact that the FTB initiated an audit against an individual
15 cannot be the basis of a tort claim, this is not the basis of Hyatt's suit.⁷⁰ Here, as repeatedly stated
16 throughout this lawsuit, Hyatt is not attempting to nor is interfering with the tax protest proceeding in
17 California.⁷¹ Moreover, California's Constitution and California's privacy laws forbid the FTB from
18 engaging in the conduct now alleged by Hyatt and waive sovereign immunity for such conduct.⁷²

19 ⁶⁸The majority of the "facts" stated by the FTB relate to whether the FTB had good reason to initiate an audit of Hyatt. Hyatt
20 does not challenge the FTB's right to conduct residency audits, or its right to audit him. His tort claims, instead, deal with the
21 FTB's conduct in performing its audit. This Court's June 13 Order reaches the merits by deciding that the FTB's conduct was not
so bad that it gives rise to a tort claim, which is the traditional fact-finder role. This Court, then, is signaling its willingness to
evaluate whether the conduct of a particular FTB investigation was (or was not) ordinary and reasonable.

22 ⁶⁹183 Cal.App. 3d 1133, 228 Cal.Rptr.750 (1986).

23 ⁷⁰*Martinez v. City of Los Angeles*, 141 F.3d, 1373, 1379 (9th Cir. 1998) ("Here, [Plaintiff's] allegations, go beyond the contention
that the LAPD officers acted improperly in deciding to seek his arrest. He alleges they acted negligently in conducting the
24 investigation . . . , and they caused his arrest and imprisonment in Mexico."); see also *Bell v. State*, 63 Cal.App. 4th 919, 929,
74 Cal.Rptr. 2d 541 (1998) (holding no immunity under Cal. Govt. Code § 821.6 to state investigators for conduct in executing
a search warrant). Section 821.6 of the California Government Code provides immunity for public employees for "investigating
or prosecuting any judicial or administrative proceeding."

25 ⁷¹The evidence is undisputed that this case has not interfered with the tax proceeding. Hyatt's Opp. to Mot. for Sum. Judg., pp.
55-56 [Supp. Hyatt Appendix, Vol. VII, Exh. 11] and Cowan affid., ¶¶ 43, 44 [Appdx. Exh. 6].

26 ⁷²California Constitution., Art. I, Sec. 1 (providing that dissemination of data gathered on or about an individual by state agencies
is illegal and actionable as invasion of privacy). The California Supreme Court has held that the primary purpose of the
27 Constitutional amendment was to provide protection against the encroachment on personal freedom caused by increased
surveillance and data collection. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975). The legislative history of the amendment
28 demonstrates that it was intended to prevent the improper use of information properly obtained for a specific purpose, for

1 California cannot therefore object if held liable in Nevada for conduct not protected by its own
2 immunity statute and for which its own laws provide relief to an aggrieved party.

3 Hyatt's invasion of privacy claims are interrelated and stem from the FTB's iron-clad,
4 Constitutionally-mandated requirement that it respect and not invade Hyatt's privacy. The Court's order
5 of June 13, 2001 properly cited to Nevada law relating to invasion of privacy,⁷³ but the analysis does not
6 stop there. When "auditing" Nevada residents, the FTB as a public agency of the State of California
7 must comply with its internal, statutory and Constitutional privacy obligations — obligations entirely
8 consistent with Nevada law on invasion of privacy.⁷⁴ Otherwise, Nevada residents targeted for audit by
9 the FTB have fewer rights and less privacy than their counterparts in California: a result that neither the
10 Court nor the citizens of Nevada would find palatable.

11 VII. Conclusion.

12 For the aforementioned reasons, rehearing and remand should be granted in order to afford
13 Hyatt the opportunity to be heard on what this Court found, *sua sponte*, to be the determinative issue.⁷⁵
14 Before the court rules in a writ petition on an issue which it declares as determinative of Hyatt's entire
15 case, and which he was not *allowed* to address (because under N.R.A.P. 21, Hyatt was ordered to file an
16 answer "directed solely to the issues of arguable cause against issuance of an alternative or peremptory
17 writ...") he should be given the right to be heard on the issue. Where this court thinks a writ may
18 appropriately issue on a ground not even raised, requested or addressed by the party requesting the writ
19 (the FTB), the appropriate remedy is *not* to grant the writ where the prevailing party in the lower court
20 (Hyatt) has been precluded from refuting that ground.

21 The effect of the Court's broad, sweeping Order is to close the doors of Nevada's courts and
22 prevent any Nevada resident from bringing an action in Nevada for torts committed by a sister state
23 agency. The facts discussed above show clearly that this is not a case built "on gossamer threads of

24 example, the use of it for another purpose or the disclosure of it to some third party. *Id.* at 234 n.11. California Information
25 Practices Act (Cal. Civ. Code § 1798 *et seq.*) (also providing that improper dissemination of information gathered by state
26 agencies is actionable against the state and allows claim to be brought in "any court of competent jurisdiction").

27 ⁷³ Order, June 13, 2001, n. 13.

28 ⁷⁴ See Hyatt Opp. to FTB Mot. for Sum. Judg., pp. 21-26 [Appdx., Exh. 27].

⁷⁵ At a subsequent hearing before Judge Saitta on July 10, 2001, she commented, with a smile, "I got reversed in the supreme
court on an issue that wasn't even raised in the appellate briefs." (Unofficial Transcript page 4, lines 21-23, attached hereto as
Supp. Appdx. Exh. 47, but this was not a formal part of the record, since this hearing took place after this Court's June 13 Order.)

1 speculation and surmise."⁷⁶ None of the tortious acts committed against Hyatt, now a 10-year Nevada
2 resident, are triable in a Nevada court under this Court's June 13 Order, even torts committed *entirely in*
3 *Nevada*, because that Order takes over the role traditionally (and appropriately) entrusted to the fact-
4 finder.

5 Finally, this is an extremely high profile matter,⁷⁷ and a decision like the June 13 Order which
6 appears to depart from established procedures and precedents of this Court on writ practice and
7 summary judgment standards should be fully argued and briefed before being resolved, before trial, by
8 this Court. As this Court recognizes, "the law favors trial on the merits."⁷⁸ If Hyatt is to be denied a
9 trial on the merits, then at a *minimum* he should be allowed to fully argue and brief the issue under any
10 new summary judgment standards which this Court seems to enunciate and find determinative in its
11 June 13 Order.

12 Accordingly, Hyatt respectfully requests that this Court vacate its June 13 Order, issue an order
13 denying the FTB writ petition as to the grounds for relief asserted therein by the FTB, order the recall of
14 any summary judgment entered pursuant to the June 13 Order, and remand this matter for trial on the
15 merits. The Court should also review the extensive record of the Discovery Commissioner and the
16 district court on the second writ (Docket No. 35549, which would no longer be moot, as it was under
17 the Court's June 13 Order) and deny that FTB writ petition as well, ordering the FTB to provide the
18 ordered discovery. Alternatively, Hyatt respectfully requests that this Court remand this matter to the
19 district court to evaluate Hyatt's evidence in light of the standards for writ practice and summary
20 judgment review which the Court establishes in its order following rehearing.

21 DATED this ____ day of July, 2001

HUTCHISON & STEFFEN

BERNHARD & LESLIE, CHTD.

23 By: _____
Peter C. Bernhard, Esq.

24 ⁷⁶ *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588 (1992).

25 ⁷⁷ For example, immediately after this Court's order, the FTB was publicly touting it before its Franchise Tax Board Advisory
26 Board. "FTB Attorney Ben Miller . . . reported that the Nevada Supreme Court sustained FTB auditor efforts in the high-profile
27 Hyatt residency case. The taxpayer had asked the court to halt the FTB audit as 'too intrusive.' In a non-written opinion on June
13, the Nevada Supreme Court held that a Nevada trial court should have granted the FTB's request for summary judgment. Mr.
Miller, who has been with the FTB for 31 years, expressed extreme satisfaction with the outcome." (California Taxpayer's
Association, *Caltaxletter*, Vol. XIV, No. 26, July 3, 2001, p. 3, [Supp. Appdx., Exh. 48].

28 ⁷⁸ *Home Sav. Ass'n Nev. Sav. & Loan Ass'n et al v. Aetna Casualty & Surety Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993).

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Case No. 36390
Consolidated with Case No. 35549

Petitioner,

17 vs.
18 EIGHTH JUDICIAL DISTRICT COURT
of the State of Nevada, in and for the
County of Clark, Honorable
Nancy Saitta, District Judge,

RESPONSE TO ERRATA

Respondent,

and

21 GILBERT P. HYATT,

22 Real Party in Interest.
23 _____/

24 Petitioner, Franchise Tax Board of the State of California ("FTB") hereby
25 responds to the Errata filed by Real Party in Interest Gilbert P. Hyatt ("Hyatt") on August 10,
26 2001 to his Supplemental Petition for Rehearing in the above-referenced case.

27 None of the Errata by Hyatt satisfy the requirement that he produce sufficient facts
28

1 indicating a genuine dispute that the acts of the FTB during its investigation constituted
2 intentional torts. See, June 13th Order at Footnote 12.

3 ERRATA NO. 1:

4 At page 12, line 23 - page 13, line 3 of FTB's Answer to Hyatt's rehearing request, FTB
5 said:

6 Hyatt argues that Candace Les claimed the "audit narrative report re Hyatt was
7 'fiction,'" and cites to Candace Les' deposition as support. Supplement at page 1,
8 line 19 and n.7. However, the cited pages 10 and 25 of that deposition do not
9 discuss Les' opinion of the audit, and pages 172 and 176 of the deposition are not
10 attached as exhibits. In short, there is no evidence of Les' opinion of the audit in
11 the portions of the record cited by Hyatt, and nowhere does Les state that the
12 report was "fiction."

13 In response, Hyatt has now submitted his Errata No. 1 to footnote 7 of his Supplemental
14 Petition:

15 Errata No. 1: Footnote 7: "[Appedx., Exh. 17]" should be "[Supp. Hyatt
16 Appendix, Vol XIV, Exh. 49]" (change citation to official record, rather than to
17 Rehearing Appendix).

18 By doing so, Hyatt now cites the Court to where pages 172 and 176 of the Les Deposition can be
19 found. The impression Hyatt attempts to convey is that he now has produced sufficient facts to
20 support rehearing. See footnote 1 to Hyatt's Errata.

21 To the contrary, upon examination, pages 172 and 176 of the Les Deposition do not
22 "produce sufficient facts, indicating a genuine dispute," that FTB's acts constituted intentional
23 torts. See, June 13th Order at Footnote 12. Those pages of the Les Deposition consist of nothing
24 more than the personal ramblings and opinion of a terminated employee of the FTB. The cited
25 testimony bears no relevance to the substantive work of the audit; that is, verifying Hyatt's claim
26 of Nevada residency. The work of the audit addressed: where did Hyatt live in Nevada between
27 September 24 and October 20; whether he was physically present in Nevada during that time;
28 whether he actually lived in the apartment before the commencement of the lease on November
1st (which was after receipt of the first Japanese payment of \$15 million); whether he actually
resided in the apartment thereafter; and what are the physical evidence of presence in Nevada

1 through the end of 1991 and the first three months of 1992.

2 ERRATA NO. 2:

3 This Errata is to Hyatt's footnote 10 citing the "affidavit" of one of his lawyers, Thomas
4 Bourke, who provides a lawyer's argument, but not evidence of facts as required by the Court's
5 June 13th Order at Footnote 12. FTB renews its objections to the Bourke affidavit. See FTB
6 App. Ex. 19 filed August 7th in support of FTB's Answer to Hyatt's Petition for Rehearing and
7 Supplemental Petition for Rehearing.

8 ERRATA NO. 3:

9 This Errata is to Hyatt's footnote 22, changing the cite to page "268" of the Jovanovich
10 Deposition to page "168."

11 Footnote 22 purports to support Hyatt's claim of an "extortion" threat to go public if he
12 did not settle.

Page 168 of the Jovanovich deposition, however, has nothing to do with that subject.

13 ERRATA NO. 4:

14 This Errata is to Hyatt's Footnote 27 which Hyatt uses to support his argument that taking
15 a photograph from the street of his Las Vegas home was tortious because it was more than a
16 "mere visit" to his house. The photograph was taken in 1995 and showed circumstantial indicia
17 that the house may have been occupied for some time after Hyatt closed escrow on it April 2,
18 1992. That helped the auditor give Hyatt the benefit of the doubt that he had terminated his
19 California residency upon his close of escrow. Taking the photograph is not evidence of
20 sufficient facts constituting any intentional tort.

21 ERRATA NOS. 5, 6, 7 and 8:

22 These Errata are to Hyatt's footnote nos. 34, 35, 36 and 37, all of which are cited by Hyatt
23 to support his argument that the 1995 drive-by and photograph of his Las Vegas house were
24 improper. In point of fact, the audit was still open at that time. Rather than evidence of
25 intentional tort, the drive by and photograph taken from the street reflected indicia of residence

1 which the auditor used to Hyatt's benefit to conclude that he had resided in the house after close
2 of escrow on April 2, 1992, thereby terminating his California residency.

3 ERRATA NO. 9:

4 In this Errata, Hyatt has only cited the Court to a new location for his exhibits. These
5 citations were included in his original Supplemental Petition for Rehearing, and, nothing in the
6 cited pages changes FTB's analysis presented in its Opposition.

7 ERRATA NOS. 10, 11 and 12:

8 These Errata are to Hyatt's footnotes 44, 45 and 46, all of which are cited by Hyatt to
9 support his false light claim. The appendix in support of Hyatt's Supplemental Petition for
10 Rehearing had included only three separate pages of the Les Deposition cited in footnotes 44, 45
11 and 46. FTB argued, in pertinent part in its Answer at page 11, lines 25-26:

12 Additionally, Hyatt repeatedly misstates what is in the record by including quotes
13 that do not exist in the record and by citing to testimony that most times does not
14 support the allegations.

15 Errata Nos. 10, 11 and 12 now cite the Court to 64 separate pages of the Les Deposition
16 that were not in Hyatt's appendix in support of his Supplemental Petition for Rehearing. Hyatt
17 used these same citations in his Supplemental Petition for Rehearing, and has done nothing more
18 than provide this Court with an alternative location to find the Les Deposition. However,
19 nothing in that deposition constitutes sufficient facts, indicating a genuine dispute that FTB
20 placed Hyatt in false light or publicized its investigation outside the scope of the investigation.

21 ERRATA NO. 13:

22 This Errata is to Hyatt's footnote 50 and adds page 33 of the Chang Deposition which had
23 not been included in Hyatt's appendix in support of his rehearing petition. Page 33 of the Chang
24 Deposition contains the following testimony:

25 Q. Did they tell you that they wanted to look into the Youngmart record
26 relating to the travel schedule of Mr. Hyatt?

27 A. ~~They didn't say that but they said they wanted to look into some~~
28

1 information regarding Hyatt.

2 Q. Did they imply that they were investigating whether or not Youngmart was
 3 cheating on its taxes respecting Mr. Hyatt?

4 A. No. Well, I figured that they were there looking for information relating to
 5 Hyatt and something was wrong with his records. (Emphasis added).

6 Hyatt cites that testimony in footnote 50 as support for his argument that the FTB "... engaged
 7 in other conduct that would reasonably cause these persons to have doubts as to Hyatt's moral
 8 character and his integrity." Supplemental Petition at page 8, lines 6-7. The argument is based
 9 upon the leading questions, not the actual testimony given by Mr. Chang. Such a distortion of
 10 the actual testimony does not constitute evidence of sufficient facts indicating a genuine dispute
 11 that the acts of the FTB during its investigation constituted intentional torts.

Not only has Hyatt distorted the Chang testimony, but also Hyatt has deliberately misled
 the Court by implying the Chang interview was part of the audit. Hyatt cites the Chang
 deposition as an example of how the audit caused third parties "to have doubts as to Hyatt's
 moral character and integrity." Id. But Mr. Chang was interviewed by an investigator from the
 California Attorney General's office as part of FTB's trial preparation in defense of this case. It
 was not done as part of the audit as Hyatt falsely portrays it.

18 ERRATA NO. 14 and 15:

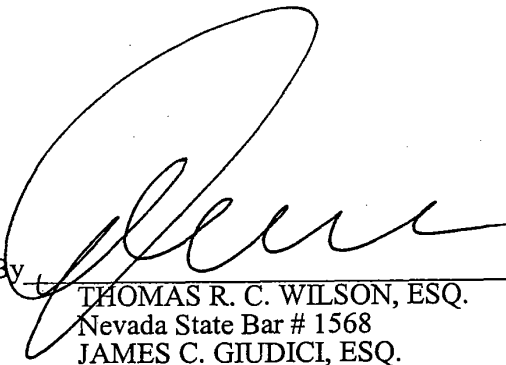
19 Footnote 54 and 55 provide this Court with nothing more than a new location for copies
 20 of FTB's Demands for Information. This change does not alter FTB's analysis presented in its
 21 Opposition, and does not constitute sufficient facts, indicating a genuine dispute which would
 22 merit this Court granting Hyatt's Petition for Rehearing.

23 ERRATA NO. 16:

24 This Errata is to Hyatt's footnote 71, which concerns the on-going administrative
 25 proceedings Hyatt is pursuing in California. The Errata provides the Court with nothing more
 26 than a new location in the record where Hyatt's opposition to the summary judgment motion can

1 be located.

2 Dated this 22nd day of August, 2001.

3
4
5
6 By 
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CERTIFICATE OF MAILING

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing **RESPONSE TO ERRATA** on this 22nd day of August, 2001, by depositing same in the United States Mail, postage prepaid thereon to the addresses noted below, upon the following:

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FILED

AUG 22 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY _____
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

16 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

17 Petitioner,

18 vs.

19 EIGHTH JUDICIAL DISTRICT COURT of
20 the State of Nevada, in and for the County of
Clark, Honorable Nancy Saitta, District Judge,

21 Respondent,

22 and

23 GILBERT P. HYATT,

24 Real Party in Interest.
25

Case No.: 36390
Consolidated with Case No. 35549

RESPONSE TO ERRATA

**CONFIDENTIAL INFORMATION
FILED UNDER SEAL**

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RECEIVED

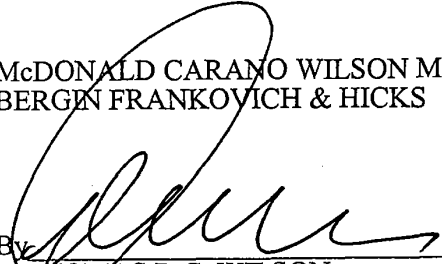
AUG 22 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

1 The envelope attached to this document contains the Franchise Tax Board of the State of
2 California's Response to Errata in the above-referenced matter. The Response to Errata contains
3 certain information, the subject of which may be precluded from public disclosure pursuant to the
4 Protective Order entered by the District Court in this case. The Protective Order is one of the matters
5 raised in the FTB's Discovery Writ Petition before this Court.

6 Dated this 22nd day of August, 2001.

7
8 McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS

9
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11 By 
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I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing Response to Errata on this 22nd day of August, 2001, by depositing same in the United States Mail, postage prepaid thereon to the addresses noted below, upon the following:

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Dated this 22nd day of August, 2001.


An Employee of McDonald Carano Wilson
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