

## **EXHIBIT 3**

## **EXHIBIT 3**

**No. 15-15296**

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GILBERT P. HYATT,

*Plaintiff-Appellant,*

v.

BETTY T. YEE, in her official capacity as California Franchise Tax Board member and California State Board of Equalization member  
DIANE L. HARKEY, in her official capacity as California State Board of Equalization member; JEROME E. HORTON, in his official capacity as California State Board of Equalization member; MICHAEL COHEN, in his official capacity as California Franchise Tax Board member; GEORGE RUNNER, in his official capacity as California State Board of Equalization member; FIONA MA, in her official capacity as California State Board of Equalization member and California Franchise Tax Board member,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Eastern District of California  
Case No. 2:14-cv-00849-GEB-DAD (Hon. Garland E. Burrell, Jr.)

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APPELLANT  
GILBERT P. HYATT'S  
OPPOSITION TO FTB APPELLEES'  
MOTION FOR JUDICIAL NOTICE

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Appellant Gilbert P. Hyatt submits this opposition and the accompanying Counter Request for Judicial Notice to Appellees Betty T. Yee, Diane L. Harkey, and Michael Cohen in their official capacities as members of the California Franchise Tax Board (“FTB” or “FTB Appellees”) Motion for Judicial Notice (Dkt. 58).

**I. Introduction.**

In response to this Court’s invitation to “move for judicial notice” FTB Appellees and SBE Appellees<sup>1</sup> have submitted a combined 100 megabytes of data, the equivalent of several banker boxes of documents. The massive submissions confirm that the issue of delay in the administrative proceedings is hotly contested and not a subject for resolution by this reviewing court. The issue of delay is inextricably intertwined with both the jurisdictional question of whether the Tax Injunction Act (28 U.S.C. § 1341) applies and the merits question of whether Mr. Hyatt’s due process and equal protection rights have been violated. As a result, as Mr. Hyatt has consistently argued, the jurisdictional issue must be deferred until resolution by the district court of the disputed factual issue as to the cause of the 20 plus year delay in the administrative proceedings.

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<sup>1</sup> A separate Request for Judicial Notice (Dkt. 57) was filed by Appellees Diane L. Harkey, Jerome E. Horton, Betty T. Yee, George Runner and Fiona Ma, in their official capacities as members of the California State Board of Equalization (“SBE” or “SBE Appellees”). Mr. Hyatt has filed a separate opposition to the SBE Request for Judicial Notice.

Moreover, the substance of most of the documents put forth by FTB are disputed and therefore not subject to judicial notice. Mr. Hyatt objects to the entirety of FTB's oversized submission (Request Nos. 1 through 108) as improper and well beyond the bounds of what is judicially noticeable in the context of a motion to dismiss. The Court may take judicial notice of the existence of the document or the date it was filed with a court or submitted to an administrative agency, but not argument as set forth by FTB as to the cause of the delay in the administrative proceedings.

As to the disputed factual question of delay, FTB's arguments (as summarized in its motion via Categories 1 through 7) are overwhelmingly rebutted by the evidence Mr. Hyatt has detailed in his pleadings and provided in both his accompanying Counter Request for Judicial Notice as well as his prior request for judicial notice submitted in the district court. (*See* 2 ER 64- 3 ER 504) In the event the Court decides to take on the unprecedented role of fact finder as to the cause of delay, the Court must grant Mr. Hyatt's Counter Request for Judicial Notice.<sup>2</sup>

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<sup>2</sup> Further, Mr. Hyatt has a wealth of additional evidence to present establishing the issue of delay and the other allegations in his complaint, but he cannot present it via a request for judicial notice. He is entitled to do so at an evidentiary hearing in the district court.

Predictably, given the heavily disputed issue of delay, FTB commenced its request for judicial notice by improperly re-arguing (as no such argument was invited by the Court) its assertion that Mr. Hyatt should be required to now switch to a new administrative process if he wants his constitutional claims heard any time soon. Yet, the record now put before this Court shows the absurdity of FTB's position. The length of time the current administrative proceeding has taken and the overflowing record of the events of the last 20 years demonstrates precisely why Mr. Hyatt should not have to abandon the current proceeding and start anew. FTB's improper focus on this argument demonstrates its clear desire not to have the case decided on the issue of delay.

**II. FTB's 108 requests for judicial notice should be denied as the Court cannot as a matter of law take on the role of fact finder.**

FTB goes far overboard in its 108 requests for judicial notice. A court may take judicial notice of the fact that a document in the public record was signed or filed, or that a hearing was held, but it cannot take judicial notice of disputed facts stated in the public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001) Documents are judicially noticeable only for the purpose of determining what statements are contained therein, not to prove the truth of the contents. *See Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1354–1355 (7th Cir. 1995) (district court properly refused to take judicial notice of

corporation's Form 10-K to determine disputed fact); *see also Lustgraaf v. Behrens*, 619 F.3d 867, 885–86 (8th Cir. 2010) (district court properly took judicial notice to decide what statements were contained in public records but improperly took judicial notice to prove truth of contents).

Here, FTB has submitted 108 documents and argues in its Motion for Judicial Notice its version of the cause of delay in the California administrative proceedings. It relies on the purported truth of the contents of those documents. FTB's 108 requests are therefore wholly improper and should be denied.

It would be a laborious task for this Court to attempt to determine the truth or falsity of the various statements in the 108 requests submitted by FTB. The Court should decline to do so.

### **III. The Court must disregard the repeatedly cited Dunn Declaration.**

FTB's Motion argues its position on delay through the Declaration of Robert Dunn (SER 1-13) citing it on every page of its motion. FTB had submitted the Dunn Declaration as part of its motion to dismiss in the district court. Mr. Hyatt filed lengthy evidentiary objections to the declaration in the district court (3 ER 505-555), and renews those objections here. Mr. Dunn lacks foundation for and personal knowledge of almost every "fact" stated in the declaration. *Id.* It is not competent evidence, and it does not create a disputed fact.

More significantly, it is not procedurally proper. The Dunn Declaration attempts to dispute facts in Mr. Hyatt's Complaint as to the reasons for the delay in the administrative proceedings. The Complaint must be taken as true at the motion to dismiss stage. The Dunn Declaration must be disregarded therefore due to its evidentiary incompetence, its inaccuracies, and its procedural impropriety.<sup>3</sup>

Nonetheless, Mr. Hyatt had submitted a request for judicial notice in the district court providing substantial evidentiary support for the allegations in his Complaint and rebutting assertions in the Dunn Declaration. (2 ER 64 – 3 ER 504) To the extent the Court gives any consideration to or relies on the Dunn Declaration at this stage of the proceedings, Mr. Hyatt requests that the Court take judicial notice of the records of the administrative proceeding both as requested by Mr. Hyatt in the district court (2 ER 64 – 3 ER 504) and as requested here in his accompanying Counter Request for Judicial Notice.

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<sup>3</sup> Again, this Court should not act as factfinder. But Mr. Hyatt's first-hand and detailed rebuttal of FTB's assertions including much of the Dunn Declaration is set forth in his affidavit that was submitted and is part of the record in the SBE Appeals. The affidavit was not focused on the issue of delay as it was submitted in the tax proceedings. It nonetheless provides eye witness testimony that stands in stark contrast to the allegations as depicted by the Dunn Declaration. (*See* HYATT RJN Exh. 78)

**IV. The disputed factual issue over the delay in the administrative proceedings must be resolved in the district court as it is intertwined with the issue of whether FTB violated Mr. Hyatt's right to due process.**

Mr. Hyatt has well pleaded facts regarding the delay by FTB and sets forth more detail than is necessary in his Complaint.<sup>4</sup> These well pleaded facts must be accepted as true at the motion to dismiss stage. *See Doe v. Holy See*, 557 F.3d 1066, 1074 (9th Cir. 2009). Indeed, FTB's 11 year delay in completing the protests has already been adjudicated in favor of Mr. Hyatt.<sup>5</sup>

Almost the entirety of Mr. Hyatt's detailed Complaint addresses the issue of delay and the conduct of the State for over 20 years as the source and cause of the delay.<sup>6</sup> This is the central issue in the case as Mr. Hyatt asserts he can no longer receive due process because of the delay. The unprecedented length of the State's

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<sup>4</sup> See Complaint, Paras. 23-26, 39-79. (4 ER 738)

<sup>5</sup> In *Franchise Tax Board of the State of California v. Hyatt*, 335 P.3d 125 (Case No. 53264, Nev. 2014)(the "Nevada Tort Case"), a judgment was entered against FTB and in favor of Mr. Hyatt in August 2008 in which one of the issues argued to the jury in the determinative fraud claim was whether FTB had delayed the protest process in bad faith. (3 ER 329; 4 ER 609, 775 ¶ 112) The jury decided the issue in Mr. Hyatt's favor. (3 ER 329) In confirming the portion of the judgment entered for Mr. Hyatt on his claims of fraud and intentional infliction of emotional distress, the Nevada Supreme Court specifically cited FTB's long delay in the protest process. (4 ER 609, 754-55 ¶ 46) Under collateral estoppel, FTB is precluded from re-litigating the issue of delay. *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)). Mr. Hyatt also raised this issue in the district court in his objection to the Dunn declaration. (3 ER 505-555)

<sup>6</sup> See Complaint, Paras. 23-26, 39-79. (4 ER 738)



20 plus year effort to extract tens of millions of dollars in taxes, penalties and interest from Mr. Hyatt has severely prejudiced his ability to defend against the State's claims.

Where, as here, facts necessary to resolve the issue of jurisdiction are disputed and intertwined with the ultimate issue in the case, the jurisdictional dispute must be deferred until resolution of the disputed facts by the trial court. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (holding that where the jurisdictional issue and the merits of the case "are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial," citing *Thornhill Pub. Co. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733-35 (9th Cir. 1979)); see also *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003).

Regardless of whether the Court grants FTB's request for judicial notice, this case must be returned to the district court for resolution of the factual dispute over the 20 plus year delay in the administrative proceedings.

**V. Mr. Hyatt submits his Counter Request for Judicial Notice in the event the Court decides to address the factual dispute over the delay in the administrative proceedings.**

Mr. Hyatt has submitted the accompanying Counter Request for Judicial Notice attached to which are Exhibits 1 through 80 (“HYATT RJN”). These exhibits consist of (i) the decision and documents that were part of the record in *Franchise Tax Board of the State of California v. Hyatt*, 335 P.3d 125 (Case No. 53264, Nev. 2014)(the “Nevada Tort Case”) and (ii) documents related to the administrative appeals before the California State Board of Equalization (the “SBE”), *In the Matter of the Appeals of Gilbert P. Hyatt*, Case Nos. 435770 and 446509.

The Nevada Supreme Court issued a decision on September 18, 2014 in the Nevada Tort Case that affirmed in part a Nevada jury’s finding that FTB committed intentional torts directed at Mr. Hyatt during the audit and protest phases of the administrative proceeding. *Franchise Tax Board of the State of California v. Hyatt*, 335 P.3d at 145-46, 148-49.<sup>7</sup> One of the facts cited by the Nevada Supreme Court was that “Hyatt showed that FTB took 11 years to resolve

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<sup>7</sup> This decision was reviewed by the United States Supreme Court in *Franchise Tax Board of California v. Hyatt*, 578 U. S. \_\_\_, 136 S. Ct. 1277 (2016)(“Hyatt II”), the only issue upon which the decision was reversed was the amount of damages the Nevada courts can award against a California state agency. *Id.* Despite FTB arguments suggesting the entire decision was reversed, Hyatt II makes no such ruling.

Hyatt's protests of the two audits.” *Id.* Mr. Hyatt requests that the Court take judicial notice of this decision by the Nevada Supreme Court. (See HYATT RJN Exh. 1)

Mr. Hyatt’s briefing filed with Nevada Supreme Court, and the evidence cited in that briefing, confirms that the issue of the 11 year delay in the protests is the identical issue represented in this case in regard to the protests. (See HYATT RJN Exh. 2. at 99-107) Mr. Hyatt therefore also requests that the Court take judicial notice of substantial evidence in the record in the Nevada Tort Case regarding the issue of delay in the administrative proceedings.

Below Mr. Hyatt summarizes the facts of the administrative proceedings for which he requests judicial notice in response to the seven “categories” addressed by FTB in its Motion.

**A. FTB’s audit records establish that FTB was primarily if not solely responsible for the audits lasting over four years from 1993 to 1997 (FTB Category 1).**

The FTB audits commenced in 1993 and lasted until 1997. (HYATT RJN Exhs. 3-9) At least four different auditors worked the audits over a period of almost four years at times retracing each other’s steps. (HYATT RJN Exhs. 10-13, 22) Neither of the first two auditors reached any conclusions about taxing Mr. Hyatt. (HYATT RJN Exhs. 11, 12)

A year and a half into the 1991 audit, a third auditor took over the case. She had no background or history on the case. She nonetheless expressed at the outset to her superiors that she understood a residency assessment “would have to be pursued.” (HYATT RJN Exh. 13) This third auditor understood the significance of the audit to FTB, and expressed that she was looking to advance her career with the Hyatt audit. (HYATT RJN Exh. 16) During the audit, she made a number of anti-Semitic remarks concerning Mr. Hyatt being Jewish, including that she would get the “Jew bastard” and that most of the large income taxpayers in California were Jewish. (HYATT RJN Exh. 14) Others at FTB believed that this auditor was obsessed with Mr. Hyatt and had created a “fiction” about him. (HYATT RJN Exh. 15) She put significantly more hours into the audit than was typical for a residency audit. She admitted to another FTB worker that she could not therefore return a low or no change audit result given the large number of hours (over 600) expended on the Hyatt audit. (HYATT RJN Exh. 17)

Nonetheless, two years into the 1991 audit in mid-1995, there was explicit doubt expressed within FTB about whether a residency case could be made against Mr. Hyatt. An internal memorandum by FTB manager Monica Embry (the “Embry” memo) summarizing a high level FTB meeting on June 6, 1995, regarding the Hyatt audit concluded that a “decision had not been made at the time of the meeting as to whether *there was enough substantiation* to sustain a position

the TP was a California resident for all of 1991. *There does not appear to be any means* of making the TP a resident for 1992 or later.” (HYATT RJN Exh. 18) The participants receiving the memorandum, including the third auditor, did not offer any corrections to the Embry memo, which was then distributed to high ranking FTB managers in early September 1995. *Id.*

Yet, the month before on August 2, 1995, the FTB had already issued its 1991 tax year audit determination letter assessing Mr. Hyatt millions of dollars including a fraud penalty. (HYATT RJN Exh. 5) This 1991 tax year assessment against Mr. Hyatt was a record amount of taxes and penalties. The third auditor then added another record amount of taxes but no penalty for the 1992 tax year. (HYATT RJN Exh. 21) FTB later assigned a fourth auditor, who did no further investigation but was told by his supervisors to write-up a fraud penalty for the 1992 tax year even though the third auditor had decided a year earlier not to assess a fraud penalty. (HYATT RJN Exh. 22)

Despite the preliminary determinations assessing millions of dollars in taxes, penalties, and interest against Mr. Hyatt, there remained significant doubt within the FTB of the case against Mr. Hyatt. The lead FTB reviewer expressed this in April 1996 writing in her review notes that “this was a really tough case” and “it is difficult to determine what the facts are . . .” (HYATT RJN Exh. 19)

The third auditor confirmed that FTB's actions caused delay in the audits. The third auditor, after being off the Hyatt 1992 tax year audit for about a year, was later reassigned to the audit and told to write-up the then larger 1992 tax year assessment to which the fourth auditor had added the fraud penalty. The third auditor openly accused her FTB supervisors of improperly delaying the 1992 tax year assessment for a year in order to meet their numbers for the next fiscal year. (HYATT RJN Exh. 30)

Further delay was caused by FTB's repeated refusal to timely provide Mr. Hyatt a copy of the audit file. The FTB audit manual required disclosure of the audit file upon request. (HYATT RJN Exh. 26) During the audit FTB refused to disclose to Mr. Hyatt the purported evidence upon which it based its preliminary assessment. His tax counsel sought a copy of the audit file on several occasions after FTB provided its preliminary determination, but FTB did not give Mr. Hyatt a copy of the audit file until long after the audit had concluded. (HYATT RJN Exh. 24) The secret evidence included unsworn statements by estranged relatives, including his ex-wife, who had no first-hand knowledge of his residency in 1991. (HYATT RJN Exh. 20)

If Mr. Hyatt had received a copy of the audit file including the unsworn statements during the audit he could have responded to and provided evidence

contradicting the false accusations made against him at that time. But he was not given an opportunity to do so. Instead, an 11 year protest phase then ensued.

**B. FTB's records establish that FTB intentionally delayed the protests for 11 years from 1996 to 2007 (FTB Category 2).**

The protests commenced in 1996 and lasted until 2007, *i.e.*, over 11 years. (HYATT RJN Exhs. 32-34) The first and second FTB protest officers admitted that they did nothing on the protests for two-and-half years (1996-1999) because they were busy with other cases. (HYATT RJN Exhs. 35-36, 38)

FTB's third protest officer commenced the protest process in 1999. (HYATT RJN Exh. 39-40) This was the beginning of the more intrusive investigation that was threatened by the first protest officer. The first protest officer had threatened that if Mr. Hyatt did not settle the tax assessment she would perform a more intrusive investigation. (HYATT RJN Exh. 37)

The third protest officer, however, described Mr. Hyatt's tax counsel as cooperative and wanted to get the case resolved and even possibly seek to mediate the parties' differences. She was quickly removed from the Hyatt protests in May 2000 and instructed not to talk to or transfer records to her replacement, the fourth protest officer. (HYATT RJN Exh. 41) This removal, re-assignment, and prohibition against communication by FTB again delayed the administrative process.

The fourth FTB protest officer (2000 - 2007) was told to stop working on the Hyatt protests in June 2001 and to put the protests on "hold" even though she was ready to issue a final determination "on short notice of several weeks." (HYATT RJN Exhs. 44-47) This hold lasted about six years until 2007. The fourth protest officer confirmed again in 2002 that "I am to do nothing on the case." (HYATT RJN Exh. 45) In a 2002 response, Mr. Hyatt's tax attorney asked that the FTB act more responsibly, he stated that he saw no reason for FTB to delay the protests, and he urged FTB to make a proposed determination (ending the protests) as soon as possible. (HYATT RJN Exhs. 46, 48) In 2005, Mr. Hyatt's tax counsel again asked FTB to close the protests but was again told by the fourth protest officer that she was instructed not to work on the case. (HYATT RJN Exh. 49)

**C. FTB's records rebut and contradict its argument that the Nevada protective order caused a delay in the protests (FTB Category 3).**

The Nevada protective order issued in the Nevada Tort Case specifically recognized that FTB had administrative subpoena powers in California and could use those powers to obtain materials designated confidential under the protective order, if appropriate under California law. (HYATT RJN Exh. 52, at 858) The Nevada trial court specifically stated that the protective order was not intended to and did not interfere with the processes allowed under California law for the tax proceedings. (HYATT RJN Exh. 51)



This issue was the subject of substantial briefing before and during the trial in the Nevada Tort Case. (HYATT RJN Exh. 53) The Nevada trial court rejected the same arguments that FTB again makes to this Court. (HYATT RJN Exhs. 54-55) Nothing prevented FTB from issuing an administrative subpoena in the California tax proceedings whenever it wished. (HYATT RJN Exh. 52, at 858; HYATT RJN Exhs. 51, 56)

Further, an internal FTB memo dated March 7, 2000 cited and relied on by FTB in making its argument for delay allegedly caused by the Nevada protective order directly contradicts FTB's delay argument. The memo by FTB in-house counsel specifically advised that "The protest attorneys will vigorously pursue development, parallel to but independent of the litigation case and litigation attorneys. *There is no restriction in the [Protective] Order as to FTB's power of examination (RTC section 19504), and it should be expected that the protest attorneys will exercise those powers fully and fairly.*" (FTB RJN, Exh. 18, at 318 (emphasis added).)

Moreover, FTB in-house attorneys admitted to the jury in the Nevada Tort Case that protective orders limiting the use of protected material to the current case are commonplace in litigation matters, and that FTB had independent administrative subpoena power regardless of the protective order. (HYATT RJN Exh. 56) Testimony from FTB in-house attorneys also confirmed that FTB had the

power to assert a "failure to exhaust" penalty against a taxpayer in a protest and thereby make an adverse finding if the taxpayer was not producing documents as requested. (HYATT RJN Exh. 57)

FTB did not even make a request under the terms of the protective order for Mr. Hyatt to stipulate to certain material being turned over to the protest proceedings until June of 2002, three years after the Nevada protective order was issued. (HYATT RJN Exh. 60) Further, Mr. Hyatt promptly responded to FTB's second and third requests in 2005 and 2006 for use of documents obtained under the Nevada protective order. (HYATT RJN Exh. 61) These requests by FTB under the protective order came only after the Nevada trial court had ruled in 2005 that Mr. Hyatt could pursue discovery of FTB delay in the protest. (HYATT RJN Exh. 50) The requests therefore appeared to be an after-the-fact attempt by FTB to create a defense for its delay in the protests.

**D. The United States Supreme Court review of the Nevada Tort Case caused no delay in the protests (FTB Category 4).**

In referencing and citing the United States Supreme Court ("U.S.S.C") review of the Nevada Tort Case, FTB references the Nevada protective order. (FTB Motion, at 9) It is clear from the two U.S.S.C decisions cited by FTB the U.S.S.C review of the Nevada Tort Case had nothing to do with the Nevada protective order. Further, FTB's repeated misstatement that the Nevada protective order "altered" FTB's investigative and administrative subpoena powers is a

blatant misstatement. As addressed above, FTB's argument is contrary to the terms of the protective order, the rulings of the Nevada court, and the statements of FTB attorneys.

**E. The California state court proceedings did not cause any delay in the protests and are erroneously described by FTB (FTB Category 5).**

The California state court proceeding regarding enforcement of an administrative subpoena referenced by FTB (FTB Motion, at 10) did not cause any delay in the protests. As described above, FTB waited years after the Nevada protective order was issued before pursuing the subpoena. (HYATT RJN Exh. 60) When FTB sought enforcement of the subpoena, the California Superior Court restricted the scope by refusing to enforce Request No. 6, which was the largest and most overbroad request in the subpoena. Mr. Hyatt's opposition to the subpoena was thereby vindicated. (FTB RJN Exh. 33, at 480)

Further, FTB in-house counsel testified that FTB did not attempt to determine if FTB protest officer already had documents sought by the subpoena. The protest officer may have had all or most of the documents called for in the subpoena. (HYATT RJN Exh. 59) This further indicates that FTB attempted to falsely blame the Nevada protective order for delays in the protests.

**F. FTB's actions, not those of Mr. Hyatt, caused the now nine year delay in the SBE appeals (FTB Category 6).**

For efficiency and to avoid duplication, Mr. Hyatt incorporates by reference this issue from his Opposition to the SBE's Request for Judicial Notice. (See Hyatt Opposition to SBE Request for Judicial Notice, at 9-15)

**G. FTB's actions in regard to the New York subpoenas caused delay in the SBE appeals not Mr. Hyatt's successful efforts to limit the scope of the overly broad subpoenas (FTB Category 7).**

For efficiency and to avoid duplication, Mr. Hyatt incorporates by reference this issue from his Opposition to the SBE's Request for Judicial Notice. (See Hyatt Opposition to SBE Request for Judicial Notice, at 10-12)

**H. FTB's refusal to correct a \$24 million error in its preliminary assessment caused substantial delay starting in the audits and lasting well into the SBE appeals (Categories 1, 2, and 6).**

In its audit determination for the 1992 tax year FTB concluded that Mr. Hyatt had moved to Nevada by April 3, 1992. (HYATT RJN Exh. 9) Yet in its proposed assessment for the 1992 tax year, FTB erroneously included \$24 million of income that was earned by Mr. Hyatt long after the April 3, 1992, end of the so-called "disputed period." Mr. Hyatt's tax counsel informed the auditor of this obvious arithmetic or transcription error before the close of the audit. (HYATT RJN Exh. 27) FTB refused to correct the \$24 million error saying it would be corrected in the protest phase. (HYATT RJN Exh. 28)

During the protests, Mr. Hyatt repeatedly requested that FTB correct this \$24 million error. (HYATT RJN Exh. 29) FTB still refused to correct this \$24 million error for 11 years during the protests and long after into the appeals, even leaving the error in its protest determination letter. (HYATT RJN Exh. 34)

Several years into the administrative appeal the SBE staff became aware of this \$24 million error and instructed FTB to substantiate its position in taxing this income. (SBE Thompson Exh. 65) Only then, almost 20 years after FTB knew of the error, did FTB correct the dates of the \$24 million income acknowledging it cannot tax this income on the basis of residency. (HYATT RJN Exh. 74) FTB however still refuses to correct its assessment against Mr. Hyatt for this this \$24 million error and still seeks to recover tens of millions of dollars of taxes, penalties and interest on this \$24 million.<sup>8</sup>

## **VI. Conclusion.**

The Court should deny FTB's Motion for Judicial Notice. But regardless of whether it grants the motion, the Court should decline to act as factfinder and return the case to the district court for resolution of the delay issue.

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<sup>8</sup> Mr. Hyatt has extensively briefed this \$24 Million FTB error issue in the SBE appeals. *See* FTB's RJN Exh. 100, at 2114-15, 2143-46; FTB's RJN Exh. 101, at 2217-18.

Respectfully submitted this 7th day of April 2017.

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Attorneys for Appellant  
Gilbert P. Hyatt

**CERTIFICATE OF SERVICE**

U.S. Court of Appeals Docket Number(s): 15-15296

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 7, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: s/ Yolanda Mendez

## **EXHIBIT 2**

## **EXHIBIT 2**



**FILED**

UNITED STATES COURT OF APPEALS

FEB 24 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

GILBERT P. HYATT,

Plaintiff-Appellant,

v.

BETTY T. YEE, in her official capacity as California Franchise Tax Board member and California State Board of Equalization member; DIANE L. HARKEY, in her official capacity as California State Board of Equalization member; JEROME E. HORTON, in his official capacity as California Franchise Tax Board member; MICHAEL COHEN, in his official capacity as California Franchise Tax Board member; GEORGE RUNNER, in his official capacity as California State Board of Equalization member; FIONA MA, in her official capacity as California State Board of Equalization member and Franchise Tax Board member,

Defendants-Appellees.

No. 15-15296

D.C. No. 2:14-cv-00849-GEB-DAD  
Eastern District of California,  
Sacramento

ORDER

Before: W. FLETCHER, FUENTES,\* and RAWLINSON, Circuit Judges.

The state parties are invited to move for judicial notice of documents that

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\* The Honorable Julio M. Fuentes, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

may shed light on the administrative and judicial proceedings that have taken place, and the possible reasons for delay, since the time Plaintiff-Appellant Hyatt first contested the California income tax liability at issue in this case.

If the state parties wish to move for judicial notice, they are instructed to do so within 21 days of this order. Plaintiff-appellant may file an optional opposition within 14 days after any motion for judicial notice is filed. The state parties may file an optional reply to any opposition within 7 days after the opposition is filed.

## **EXHIBIT 1**

## **EXHIBIT 1**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GILBERT P. HYATT,  
Plaintiff,

v.

JOHN CHIANG, JEROME E.  
HORTON, and MICHAEL COHEN,  
CALIFORNIA FRANCHISE TAX  
BOARD MEMBERS; BETTY T. YEE,  
GEORGE RUNNER, MICHELLE  
STEEL, JEROME E. HORTON, and  
JOHN CHIANG, CALIFORNIA STATE  
BOARD OF EQUALIZATION  
MEMBERS; and DOES 1 through  
20,  
Defendants.

No. 2:14-CV-00849-GEB-DAD

**ORDER GRANTING DEFENDANTS'  
MOTIONS TO DISMISS FOR LACK OF  
JURISDICTION**

Plaintiff asserts in his Complaint that the manner in which Defendants are processing his California administrative tax appeal violates his federal constitutional rights under the due process and equal protection clauses, and seeks an injunction "forbidding Defendants. . . from continuing the investigation and administrative proceedings against" him and "forbidding Defendants . . . from continuing to assess or threaten to assess [Plaintiff], or collect or threaten to collect from [Plaintiff], taxes, penalties or interest." (Compl. Prayer ¶¶ 1-2, ECF No. 2.)

Each defendant seeks dismissal of the Complaint arguing, inter alia, that it should be dismissed with prejudice

1 for lack of subject matter jurisdiction under Federal Rule of  
2 Civil Procedure ("Rule") 12(b)(1). Specifically Defendants argue  
3 the federal Tax Injunction Act ("TIA") prevents Plaintiff from  
4 challenging his California residency-based tax assessment in  
5 federal court.

6 The TIA prescribes: "The district courts shall not  
7 enjoin, suspend or restrain the assessment, levy or collection of  
8 any tax under State law where a plain, speedy and efficient  
9 remedy may be had in the courts of such State." 28 U.S.C. § 1341.

10 **I. FACTUAL BACKGROUND**

11 The following allegations in the Complaint concern the  
12 pending dismissal motions. Plaintiff Gilbert Hyatt moved from  
13 California to Nevada in 1991. (Compl. ¶ 2.) In 1993, the  
14 California Franchise Tax Board ("FTB") commenced an audit to  
15 determine whether Plaintiff owed additional California income  
16 taxes for the 1991 tax year. (Id.) The FTB initiated a second  
17 audit in 1996 to determine whether Plaintiff owed additional  
18 California income taxes for the 1992 tax year. (Id.) "The FTB  
19 asserts [Plaintiff] . . . became a Nevada resident on April 3,  
20 1992" and owes the following unpaid California income taxes: \$1.8  
21 million for the 1991 tax year and \$5.6 million for the 1992 tax  
22 year. (Id. ¶¶ 11, 21.) For the last six years, Plaintiff's  
23 administrative appeal has been pending before the California  
24 State Board of Equalization ("SBE"). (Id. ¶ 3.) Neither the 1991  
25 nor 1992 audit has concluded. (Id. ¶ 2.) Plaintiff alleges "the  
26 delays . . . fall squarely and primarily at the feet of the FTB"  
27 and the SBE. (Id. ¶¶ 23, 26.) Plaintiff further alleges that  
28 Defendants "continue to threaten[] [him] with \$55 million plus of

1 unconstitutional exactions, specifically the assessed taxes and  
2 penalties, for tax years 1991 and 1992." (Id. ¶ 8.)

3 **II. LEGAL STANDARD**

4 Each dismissal motion contains a facial and factual  
5 attack on the federal court's jurisdiction under Rule 12(b)(1).  
6 "A 'facial' attack asserts that a complaint's allegations are  
7 themselves insufficient to invoke jurisdiction, while a 'factual'  
8 attack asserts that the complaint's allegations, though adequate  
9 on their face to invoke jurisdiction, are untrue." Courthouse  
10 News Serv. v. Planet, 750 F.3d 776, 780 at n.3 (9th Cir. 2014).  
11 Only the facial attacks are reached herein.

12 "The district court resolves a facial attack as it  
13 would a motion to dismiss under Rule 12(b)(6): Accepting the  
14 plaintiff's allegations as true and drawing all reasonable  
15 inferences in the plaintiff's favor, the court determines whether  
16 the allegations are sufficient as a legal matter to invoke the  
17 court's jurisdiction." Leite v. Crane Co., 749 F.3d 1117, 1121  
18 (9th Cir. 2014). However, "the tenant that a court must accept  
19 as true all allegations contained in a complaint is inapplicable  
20 to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678  
21 (2009).

22 Federal courts are courts of limited  
23 jurisdiction. They possess only that power  
24 authorized by Constitution and statute, which  
25 is not to be expanded by judicial decree. It  
26 is to be presumed that a cause lies outside  
this limited jurisdiction, and the burden of  
establishing the contrary rests upon the  
party asserting jurisdiction.

27 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377  
28 (1994).

1           **III. STATUTORY FRAMEWORK CONCERNING APPEAL OF A CALIFORNIA**  
2                           **RESIDENCY-BASED TAX ASSESSMENT**

3           Under California law, a taxpayer seeking to "prevent or  
4           enjoin the assessment or collection of" a California residency-  
5           based income tax may not file suit in state court without first  
6           exhausting the administrative remedies in California Revenue and  
7           Taxation Code. Cal. Rev. & Tax. Code § 19381.<sup>1</sup> Two separate  
8           administrative processes may be utilized by a taxpayer to contest  
9           a tax assessment: a postdeprivation "pay-then-protest" process or  
10          a predeprivation process. Exhaustion of either process is a  
11          prerequisite to judicial review in a California state court.

12           **A. Postdeprivation "Pay-Then-Protest" Process**

13          The "pay-then-protest" process requires the challenging  
14          taxpayer to make "payment of the tax," following which a refund  
15          claim can be filed with the FTB. § 19382. If the FTB "fails to  
16          mail notice of action on [the] . . . refund claim within six  
17          months after the claim [is] filed, the taxpayer may ... bring an  
18          action [in state court] against the [FTB]. . . on the grounds set  
19          forth in the claim for the recovery of . . . [the] overpayment."  
20          § 19385. If the FTB acts on the challenger's refund claim and  
21          denies it, a taxpayer "claiming that the tax computed and  
22          assessed is void . . . may bring an action [in state court],  
23          upon the grounds set forth in that claim for refund . . . for the  
24          recovery of the . . . amount paid" plus interest. §§ 19381,  
25          19382.

26          ///

27          

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28          <sup>1</sup> Unless otherwise noted, all section references are to the California  
Revenue and Taxation Code.

1           **B.     Predeprivation Process**

2           A taxpayer challenging an assessment through the  
3 predeprivation process must "file with the [FTB] . . . a written  
4 protest against the proposed deficiency assessment, specifying in  
5 the protest the grounds upon which it is based." § 19041. If the  
6 protest is denied, the taxpayer may request that the FTB  
7 "reconsider the assessment of the deficiency." § 19044. The  
8 taxpayer may "appeal[] in writing from the action of the [FTB]...  
9 to [the SBE]." § 19045. "The [SBE] . . . shall hear and  
10 determine the appeal," and an unsuccessful taxpayer may "file[] a  
11 petition for rehearing." §§ 19047-48. After rehearing before the  
12 SBE, a taxpayer may seek review in a California state court. §  
13 19381.

14           A taxpayer who initially challenges a residency-based  
15 income tax assessment through the predeprivation process may  
16 elect to use the "pay-then-protest" process at any point by  
17 paying the disputed tax. § 19335.

18           Here, Plaintiff challenged his tax assessments using  
19 the predeprivation process and has not used the "pay-then-  
20 protest" process.

21                           **IV.     DISCUSSION**

22           The TIA "limit[s] drastically federal district court  
23 jurisdiction to interfere with [the] . . . important . . . local  
24 concern" of tax collection. Ark. v. Farm Credit Servs. of Cent.  
25 Ark., 520 U.S. 821, 826 (1997). When passing the TIA, Congress  
26 "expressed . . . concern regarding the increased costs that  
27 states would bear if forced to defend the imposition of state  
28 taxes in federal, rather than state courts." May Trucking Co. v.



1 Or. Dep't of Transp., 388 F.3d 1261, 1266 (9th Cir. 2004)  
2 (citation omitted). One of Congress' main objectives in enacting  
3 the TIA was "to stop taxpayers, with the aid of a federal  
4 injunction, from withholding large sums [from the states],  
5 thereby disrupting state government finances." Hibbs v. Winn, 542  
6 U.S. 88, 104 (2004) (citation omitted). However, the TIA's limit  
7 on federal court jurisdiction has "a narrow exception." Redding  
8 Ford v. Cal. State Bd. of Equalization, 722 F.2d 496, 497 (9th  
9 Cir. 1983). Congress vested federal courts with jurisdiction to  
10 "enjoin, suspend or restrain the assessment, levy or collection  
11 of [a] tax under State law where a plain, speedy and efficient  
12 remedy may [not] be had in the courts of [the] State." 28 U.S.C.  
13 § 1341.

14 Defendants argue the Supreme Court has held  
15 California's "pay-then-protest" process is "a plain, speedy, and  
16 efficient remedy." (Not. Mot. & Mot. Dismiss ("SBE Mot.") 9:17-  
17 18, ECF No. 15; FTB Mem. P. & A. ISO Mot. Dismiss ("FTB Mot.")  
18 12:6-7, ECF No. 17-1 (citing Franchise Tax Bd. v. Alcan Aluminum,  
19 493 U.S. 331, 338-39 (1990) ("California's refund procedures  
20 constitute a plain, speedy, and efficient remedy") and Cal. v.  
21 Grace Brethren Church, 457 U.S. 393, 417 (1982) ("Because the  
22 appellees could seek a refund of their state unemployment  
23 insurance taxes, and thereby obtain state judicial review of  
24 their constitutional claims, we hold that their remedy under  
25 state law was 'plain, speedy, and efficient' within the meaning  
26 of the [TIA], and consequently, that the District Court had no  
27 jurisdiction to issue injunctive or declaratory relief.")).

28 "It has consistently been held . . . that the refund

1 action provided by California Personal Income Tax law is a  
2 'plain, speedy and efficient remedy' such as to invoke the  
3 restraints of [the TIA]." Arnoff v. Franchise Tax Bd. of the  
4 State of Cal., 348 F.2d 9, 11 (9th Cir. 1965). As the Supreme  
5 Court stated in Alcan Aluminum Ltd., 493 U.S. at 338: "To the  
6 extent they are available, California's refund procedures  
7 constitute a plain, speedy, and efficient remedy."

8 Plaintiff rejoins even if the "pay-then-protest"  
9 process is "plain, speedy and efficient" on its face, the process  
10 will not provide him a plain, speedy and efficient remedy.  
11 (Pl.'s Mem. P. & A. ISO Consolid. Opp'n Defs.' MTD ("Opp'n")  
12 15:24-16:3, ECF No. 22.)

13 **A. Bait and Switch**

14 Plaintiff contends that the precedent on which  
15 Defendants rely is distinguishable from his situation because  
16 "[n]one of those cases . . . involves a . . . [tax] assessment in  
17 which the taxpayer . . . followed the prepayment administrative  
18 process," and California cannot now force him to "forgo" the  
19 predeprivation administrative statutory option he chose by  
20 requiring him to use the "pay-then-protest" process before he can  
21 "pursue a constitutional claim." (Opp'n 25:21-23; 26:1-3.)  
22 Plaintiff argues forcing him to change from the predeprivation  
23 process to the "pay-then-protest" process amounts to a "bait and  
24 switch" tactic, which the Supreme Court held illegal in Reich v.  
25 Collins, 513 U.S. 106 (1994) and Newsweek v. Florida Dep't of  
26 Revenue, 522 U.S. 442 (1998). (Opp'n 23:10-12.)

27 Defendants reply that Plaintiff has not been subjected  
28 to the "bait and switch" tactic involved in Reich and Newsweek

1 because "this is not a case where [California's] . . . statutory  
2 scheme has changed midstream." (FTB Reply ISO Mot. Dismiss "FTB  
3 Reply" 6:5, ECF No. 27). Defendants contend both Reich and  
4 Newsweek "concern[:] (1) taxpayers who had paid their taxes, (2)  
5 a subsequent finding that the tax was unconstitutional, [and] (3)  
6 efforts by the state courts after the tax was paid and found  
7 unconstitutional to restrict the application of a previously  
8 generally applicable refund statute." (SBE Reply ISO Mot. Dismiss  
9 ("SBE Reply") 4:8-12, ECF No. 26.)

10 In Reich and Newsweek, the taxpayer challengers paid  
11 the assessed taxes and then challenged the tax through a refund  
12 action; however, after payment, the states changed their laws to  
13 prevent the taxpayers from seeking refunds for the already paid  
14 taxes. The Supreme Court held that states are not permitted to  
15 "reconfigure [their] scheme[s], unfairly, in midcourse—to 'bait  
16 and switch'" taxpayers. Reich, 513 U.S. at 111. The Supreme Court  
17 further stated: "While [states] may be free to require taxpayers  
18 to litigate first and pay [the tax] later, due process prevents  
19 [them] from applying this requirement to taxpayers . . . who  
20 reasonably relied on the apparent availability of a postpayment  
21 refund when paying the [disputed] tax." Newsweek, 522 U.S. at  
22 445.

23 Plaintiff has not shown that the reasoning of Reich and  
24 Newsweek supports his jurisdiction argument; these decisions  
25 concern taxpayers who challenged their tax assessment after  
26 making payment and then were prevented from seeking a refund by  
27 intervening changes in state law.

28 ///

1           **B.     Access to a "Speedy" Remedy**

2           Plaintiff also rejoins the "pay-then-protest" process  
3 does not provide him a "speedy" remedy because it "would return  
4 [him] to the FTB and its administrative process" before he is  
5 able to seek relief in the state court. He contends that if the  
6 FTB's investigation lasts longer than six months, and Plaintiff  
7 elects to proceed with a state-court refund action [before the  
8 FTB investigation concludes], he risks having the state court  
9 find that he failed to exhaust the administrative remedies  
10 available," and refuse to consider his claims as happened to the  
11 plaintiff in Barnes v. State Bd. of Equalization, 118 Cal. App.  
12 3d 994 (1981). (Opp'n 30:1-12.) However, the plaintiff in Barnes  
13 did not file suit in state court until after the SBE denied his  
14 claim, and the court did not find his claim waived because the  
15 plaintiff filed suit in state court before the administrative  
16 process had closed. 118 Cal. App. 3d at 1002 (stating that "the  
17 board properly refused and denied the [taxpayer's] claim. . . .  
18 Plaintiff then approached the superior court") (emphasis added).

19           Defendants reply that "the longest [Plaintiff] . . .  
20 would have to wait [in order to bring his claim in state court]  
21 after switching to the 'pay-then-protest' [process] . . . would  
22 be six months," and a six month waiting period does not call into  
23 question whether the remedy is speedy. (SBE Reply 8:15-17.)

24           "Speedy" is a "relative concept." Rosewell v. LaSalle  
25 Nat'l Bank, 450 U.S. 503, 518 (1981). A state remedy is "'speedy'  
26 if it does not entail a significantly greater delay than a  
27 corresponding federal procedure." U.S. West, Inc. v. Nelson, 146  
28 F.3d 718, 725 (9th Cir. 1998) (interpreting an identical

1 exception to 28 U.S.C. § 1342 (public utility rate-payer suits)).  
2 "The state remedy need not be the best of all possible remedies,  
3 . . . . [and] [a]lthough delay in reviewing a taxpayer's claim  
4 may be troubling, . . . nowhere in the [TIA] . . . did Congress  
5 suggest that the remedy must be the speediest." Colonial Pipeline  
6 Co. v. Morgan, 474 F.3d 211, 218-19 (6th Cir. 2007).

7 The "pay-then-protest" process requires a taxpayer to  
8 file a claim with the FTB "for refund" and "[i]f the FTB fails to  
9 mail notice of an action . . . within six months . . . , the  
10 taxpayer may . . . bring an action against the FTB" in state  
11 court. §§ 19382, 19385.

12 Plaintiff has not shown how, if he elected to use the  
13 "pay-then-protest" process, its timetable "entails a  
14 significantly greater delay than a corresponding federal  
15 procedure." U.S. West, Inc., 146 F.3d at 725. Therefore,  
16 Plaintiff does not prevail on this portion of his jurisdiction  
17 argument.

18 **C. Uncertainty**

19 Further, Plaintiff argues the federal court has  
20 jurisdiction over his constitutional claims because it is  
21 uncertain whether these claims could be presented through the  
22 "pay-then-protest" process, and this uncertainty prevents  
23 California's state court remedy from being "plain," as the term  
24 is used in the TIA. (Opp'n 14:19-24.)

25 "[U]ncertainty' surrounding a state-court remedy"  
26 prevents it from being plain and "lifts the [TIA's] bar to  
27 federal-court jurisdiction." Rosewell, 450 U.S. at 516. The  
28 Supreme Court "has not hesitated to declare a state refund

1 provision inadequate to bar federal relief if the taxpayer's  
2 opportunity to raise his constitutional claims in the state  
3 proceedings is uncertain." Grace Brethren Church, 457 U.S. at 414  
4 n.31.

5 **1. Uncertainty Whether A Claim To Enjoin A Tax Is A**  
6 **Claim To Void A Tax**

7 Plaintiff argues "[b]y its terms. . . [the "pay-then-  
8 protest" process only] permits a state-court action for a  
9 'taxpayer claiming that the tax computed and assessed is void,'" and it is unclear whether Plaintiff's attempt to enjoin  
10 collection of the taxes assessed against him is an action to void  
11 the taxes. (Opp'n 26:20-21) (emphasis added).

12 Defendants reply that Plaintiff plainly seeks to void  
13 the taxes assessed against him since Plaintiff alleges the tax  
14 assessments are unconstitutional as applied to him and "a tax  
15 assessment that is unconstitutional as applied is every bit as  
16 'void' as an assessment that is unconstitutional on its face."  
17 (FTB Reply 8:16-17.)

18 It is evident that Plaintiff seeks to void the tax or  
19 taxes assessed against him. Therefore, Plaintiff has not met his  
20 burden of demonstrating that the "pay-then-protest" process fails  
21 to provide him a plain remedy.

22 **2. Raising Claims in State Court That Were Not**  
23 **Presented to the SBE**

24 Plaintiff also argues it is uncertain whether the "pay-  
25 then-protest" process permits him to raise in state court the  
26 constitutional claims he alleges in his federal Complaint because  
27 he did present those claims to the SBE, and the Revenue and  
28

1 Taxation Code prevents a taxpayer from raising claims in state  
2 court that were not included in an SBE appeal. (Opp'n 29:4-16.)

3 Defendants rejoin that even assuming Plaintiff is  
4 correct, the TIA still prevents the federal court from exercising  
5 jurisdiction over Plaintiff's constitutional claims where a  
6 plain, speedy, and efficient remedy was available in state court  
7 "at some time" even if the chance to utilize it has been lost  
8 because of the taxpayer's own action or inaction. (SBE Reply 2:2-  
9 4; 3:1-3.)

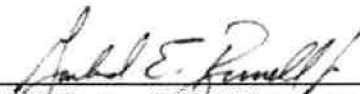
10 Application of the TIA "depends on whether a state  
11 remedy was available to the taxpayer[,] and the taxpayer's  
12 failure . . . to use the remedy . . . does not negate the  
13 existence of the remedy." Sacks Bros. Loan Co. Inc. v.  
14 Cunningham, 578 F.2d 172, 175 (7th Cir. 1978). "A number of  
15 courts have . . . unanimously concluded that failure to utilize a  
16 remedy does not render that remedy insufficient under [the TIA]." Aluminum Co. of Am. v. Dep't of Treasury of State of Mich., 522  
17 F.2d 1120, 1125 (6th Cir. 1975). When a plaintiff's own actions  
18 foreclose an otherwise "plain, speedy and efficient remedy," the  
19 TIA precludes federal court jurisdiction over the claims. See  
20 Jerron West, Inc. v. State of Cal., State Bd. of Equalization,  
21 129 F.3d 1334, 1338 (9th Cir. 1997) (declining to exercise  
22 jurisdiction in the face of an "as applied" challenge to TIA's  
23 application because "[t]he Taxpayers' failure . . . d[id] not  
24 render the[] state remedies ineffective"); Wood v. Sargeant, 694  
25 F.2d 1159, 1160 (9th Cir. 1982) (holding an "inability to pay the  
26 tax [to initiate a refund action] does not avoid the [TIA's]  
27 jurisdictional bar"). Therefore, even if Plaintiff failed to  
28

1 present his constitutional claims during the state administrative  
2 proceeding, that failure has not been shown to justify the  
3 federal court exercising jurisdiction over Plaintiff's  
4 constitutional claims.

5 **V. CONCLUSION**

6 For the stated reasons, Plaintiff's Complaint is  
7 dismissed for lack of subject matter jurisdiction without leave  
8 to amend. Further, the Clerk of Court shall close this action.

9 Dated: February 9, 2015

10  
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12 GARLAND E. BURRELL, JR.  
13 Senior United States District Judge  
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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

**Case No. 53264**

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant/Cross-Respondent

Electronically Filed  
Apr 19 2017 09:24 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

v.

GILBERT P. HYATT

Respondent/Cross-Appellant

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APPEAL FROM JUDGMENT – EIGHTH JUDICIAL DISTRICT COURT  
STATE OF NEVADA, CLARK COUNTY  
HONORABLE JESSIE WALSH, DISTRICT JUDGE

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**APPELLANT’S SECOND REQUEST FOR JUDICIAL NOTICE**  
**(Oral argument scheduled for May 2, 2017, at 10:30 a.m.)**

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*Attorneys for Appellant/Cross-Respondent*  
*Franchise Tax Board of the State of California*

## **I. Introduction**

Pursuant to NRAP 27 and NRS 47.150, appellant Franchise Tax Board of the State of California (“FTB”) respectfully moves the Court to take judicial notice of a publicly available document filed by respondent Gilbert Hyatt (“Hyatt”) in litigation that Hyatt is prosecuting in federal court against the members of FTB and the State Board of Equalization (“BOE”) that seeks to enjoin FTB from collecting the taxes Hyatt owes.<sup>1</sup>

In 2013, Hyatt filed suit against FTB and BOE in the United States District Court of the Eastern District of California, case no. 2:14-cv-00849-GEB-DAD, contending that the delays in Hyatt’s administrative proceedings before FTB and BOE give rise to federal constitutional claims under 42 U.S.C. §1983. As a result of those delays, Hyatt seeks as a remedy a permanent injunction that allows him to avoid paying his taxes. The federal district court dismissed Hyatt’s claims under the Tax Injunction Act, 28 U.S.C. 1341, which bars a federal court from interfering in a state’s sovereign tax collecting function. February 10, 2015 Order Granting Motion to Dismiss, ECF #35, Ex. 1 hereto.

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<sup>1</sup> This request is supported by the publically available documents attached hereto as Exhibits 1-3, all of which are self-authenticating. *See* NRS 52.085. FTB seeks judicial notice only of Exhibit 3 (RJN 608-633), which Hyatt filed in the Ninth Circuit Court of Appeals. The numbering of this document starts where the numbering of FTB’s previous request for judicial notice (which the Court granted on January 12, 2017) left off.

Hyatt appealed to the Ninth Circuit Court of Appeals, case no. 15-15296. On February 24, 2017, after briefing and oral argument, the Ninth Circuit “invited [FTB and SBE] to move for judicial notice of documents that may shed light on the administrative and judicial proceedings that have taken place, and the possible reasons for delay, since the time Plaintiff-Appellant Hyatt first contested the California income tax liability at issue in this case.” February 24, 2017 Order, ECF #56, Ex. 2 hereto. FTB and BOE filed requests for judicial notice.

In response, Hyatt filed an opposition, in which he argued that this Court’s now-vacated 2014 Opinion, *Franchise Tax Bd. of Calif. v. Hyatt*, 130 Nev. Adv. Op. 71, 335 P.3d 125 (2014), has preclusive effect on the federal court proceeding as to the issue of delay and should excuse him from paying the taxes he owes. Hyatt’s Opposition, ECF #65 at 6 n.2, 8-9 (RJN 618, 620-621), Ex. 3 hereto. Hyatt’s filing in his federal litigation is a further example of how Hyatt is using the 2014 Opinion to circumvent his tax liability.

## **II. Legal Argument**

### **A. Standard for Taking Judicial Notice**

A court must take judicial notice “if requested by a party and supplied with the necessary information.” NRS 47.150(2); *Mack v. Est. of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). Facts that are subject to judicial notice “are facts in issue or facts from which they may be inferred.” NRS 47.130(1). To be judicially

noticed, a fact must be “[g]enerally known” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” NRS 47.130(2); *see Mack*, 125 Nev. at 91, 206 P.3d at 106; *see also Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 919, 620 P.2d 868, 869 (1980) (“[F]act, not reasonably open to dispute, should be judicially noticed.”).

Though generally the Court does not take judicial notice of court records in different cases, “under some circumstances, [it] will invoke judicial notice to take cognizance of the record in another case.” *Mack*, 125 Nev. at 91, 206 P.3d at 106. Parties successfully invoke this exception when “the closeness of the relationship between the two cases” justifies taking judicial notice of documents filed in the other case. *Id.*; *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981).

B. Because Court Filings Are Public Records, the Court Can Judicially Notice Hyatt’s Filing in His Federal Litigation for the Fact that Hyatt Uses the Nevada Litigation to Advance His Litigation Elsewhere.

To support his effort to get a federal court to enjoin FTB’s ability to collect the taxes he owes, Hyatt contends that a purported finding of delay by this Court has preclusive effect on other court proceedings, even though the district court prohibited FTB from presenting evidence regarding the cause of the delay and the 2014 Opinion has been vacated by the United States Supreme Court. Specifically, Hyatt argued to the Ninth Circuit:

In confirming the portion of the judgment entered for Mr. Hyatt on his claims of fraud and intentional infliction of emotional distress, the

Nevada Supreme Court specifically cited FTB's long delay in the protest process. Under collateral estoppel, FTB is precluded from re-litigating the issue of delay.

Ex. 3, Hyatt's Opposition, ECF #65 at 6 n.5 (RJN 618) (record citations omitted).

By arguing that the Nevada jury verdict and the 2014 Opinion have preclusive effect on his federal litigation, Hyatt tries to parlay this Court's opinion into a federal court injunction that allows Hyatt to circumvent his tax liability. Yet, as this Court acknowledged, the jurisdictional boundaries of this case should have prevented any jury intrusion into FTB's decision-making in the audit regarding Hyatt's tax liability. 2014 Opinion, 335 P.3d at 151. Had this Court treated FTB like its Nevada counterpart, Hyatt would have had to exhaust his administrative remedies prior to seeking judicial relief and could not have used any findings by the Nevada courts to avoid paying the taxes he owes. *See Malecon Tobacco v. State, Dep't of Tax.*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002).

Hyatt's filing also misrepresents this Court's 2014 Opinion. The jury in this case did not render a special verdict about who was responsible for the length of Hyatt's proceedings before FTB, and this Court (as an appellate tribunal) made no finding of fact on that subject. The jury simply found in Hyatt's favor on various claims, and in holding that the evidence was sufficient to support those verdicts, this Court pointed out that the delay was among the grounds on which the jury *could have* found FTB liable. 2014 Opinion, 335 P.3d at 148.

FTB submits that judicial notice of this document from Hyatt's federal litigation is appropriate under these circumstances.

### **III. Conclusion**

Based on the foregoing, FTB respectfully asks the Court to take judicial notice of the document attached as Exhibit 3, numbered RJN 608-633.

### **AFFIRMATION**

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 18<sup>th</sup> day of April, 2017.

McDONALD CARANO LLP

By: /s/

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### **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18<sup>th</sup> day of April, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Peter Bernhard  
Mark Hutchinson  
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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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/s/ Pamela Miller  
An employee of McDonald Carano Wilson, LLP

### LIST OF EXHIBITS

EXHIBIT	DESCRIPTION	PAGES
1.	District Court February 10, 2015 Order, Case No. 2:14-CV-00849-GEB-DAD, Granting Defendants' Motions to Dismiss for Lack of Jurisdiction	13
2.	Ninth Circuit February 24, 2017 Order, Case No. 15-15296, inviting requests for judicial notice	2
3.	Hyatt's February 7, 2017 Opposition to FTB Appellees' Motion for Judicial Notice, Case No. 15-15296	26