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IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.73933

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JOINT APPENDIX

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IN THE SUPREME COURT OF THE STATE OF NEVADA

AFFIRMATION

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Attorneys for Appellant

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1 i.e., both assume the well-pleaded factual allegations in the complaint are true. *Federal Civil*
2 *Procedure Before Trial* 9:198 at page 9-45 (1998); *Wright & Miller* § 1367 at pages 514-517
3 (defendant may assert both a lack of subject matter jurisdiction and failure to state a claim upon which
4 relief can be granted under Rule 12(c) because under Rule 12(h) both defenses are preserved;
5 regardless of the form of the motion, the court applies the same standard). For all the reasons
6 previously stated by the FTB, when Plaintiff's factual allegations are examined (not his self-serving
7 conclusory assertions), it is clear that no claim against the FTB upon which this Court can grant relief
8 is stated. Judgment on the pleadings is therefore appropriate.

9
10 Plaintiff cites *Bernard v. Rockhill Development Co.*, 103 Nev. 132, 734 P.2d 1238 (1987) as
11 precluding the FTB's motion because it is labeled a Rule 12(c) motion and the FTB has not admitted
12 all of Plaintiff's allegations in its Answer. Contrary to Plaintiff's argument, *Bernard* does not
13 preclude the Court from considering the FTB's motion.

14
15 First, as previously shown, the FTB's motion challenges this Court's subject matter
16 jurisdiction, which was not at issue in *Bernard*. Also as previously shown, this Court has the inherent
17 duty to determine if it has subject matter jurisdiction. And, the FTB has the right to raise a lack of
18 subject matter jurisdiction "at any time" under Rule 12(h)(3).

19
20 The *Bernard* opinion cited to *Wright & Miller* § 1367 at page 510 for the proposition: "The
21 motion for a judgment on the pleadings only has utility when all material allegations of fact are
22 admitted in the pleadings and only questions of law remain." While that is a correct quotation from
23 *Wright & Miller*, the statement is not completely dispositive. *See e.g. Wright & Miller* § 1367 at
24 *pages 514-517 cited above*. In addition, the *Bernard* opinion also cited to Section 1368 of *Wright*
25 *& Miller*. That section states, in pertinent part at page 523:

26
27 Although a moving party, for purposes of the motion, concedes the
28 accuracy of the factual allegations in his adversary's pleading, he does

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0001

1 CASE NO. 98-A382999
2 DEPARTMENT XVIII
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA
5 -oOo-
6
7 GILBERT P. HYATT,)
8 Plaintiff,)
9 vs.) REPORTER'S TRANSCRIPT
10) OF
11 FRANCHISE TAX BOARD OF)
12 THE STATE OF CALIFORNIA,) PROCEEDING
13 Defendant.)
14)
15 BEFORE THE HONORABLE NANCY SAITTA, DISTRICT JUDGE
16
17 WEDNESDAY, APRIL 07, 1999
18 10:00 a.m.
19
20 APPEARANCES:
21 For the Plaintiff: THOMAS L. STEFFEN, ESQ.
22 JOHN T. STEFFEN, ESQ.
23 THOMAS K. BOURKE, ESQ.
24 DONALD J. KULA, ESQ.
25
26 For the Defendant: THOMAS R. C. WILSON II, ESQ.
27 JAMES W. BRADSHAW, ESQ.
28 GEORGE M. TAKENOUCHI, ESQ.
29 FELIX LEATHERWOOD, ESQ.
30
31 Reported by: Karen G. Mell, CCR No. 412
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0003

1 MR. WILSON: Your Honor, if I may, I'm going
2 to put this on the table for something to put my papers
3 on. And I know that you have been inundated with a
4 stack of papers, and I don't intend to revisit those.
5 All I intend to do this morning is to try and provide
6 some practical, if that's the word, context for the
7 reasons why we're here and the history of this case,
8 and I don't propose to revisit the cases or beat up on
9 what already has been the subject of an awful lot of
10 attention on paper.
11 MR. T. STEFFEN: Counsel, while you're having
12 a sip of water -- may I, Your Honor, ask if the
13 plaintiff's request for the filing of the surreply and
14 the defendant's request for response thereto will both
15 be considered by the Court?
16 THE COURT: Both are going to be considered.
17 I'm prepared to go forward with that.
18 MR. T. STEFFEN: Thank you.
19 MR. WILSON: I'm glad we have water. Lawyers
20 are like plants, Your Honor, and they have the same
21 process of evapotranspiration. Instead of taking the
22 water out of the ground and letting the sun take it,
23 why, we talk a lot, and I apologize for that.
24 THE COURT: Precisely the same concept. I
25 believe you.
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0002

1 LAS VEGAS, CLARK COUNTY, NV.; WED., APRIL 07, 1999
2 10:00 a.m.
3 -oOo-
4 PROCEEDINGS
5 THE COURT: This is Hyatt versus California
6 State Franchise Tax Board. This is the defendant's
7 motion for judgment pleadings.
8 You may rest assured, all of you, that I have
9 spent countless hours reading everything that you have
10 prepared. And the emphasis was on purpose just then,
11 so what I'm going to ask you to do, please keep your
12 arguments brief. What I generally ask people to do in
13 this type of situation, highlight or emphasize for me
14 those matters that you feel are most important, and
15 trust me when I say I have read all the pleadings as
16 well as the case law, the voluminous case law that was
17 submitted in support of your documents.
18 So with that in mind, Defense, would you like
19 to start, please.
20 MR. WILSON: Thank you, Your Honor. My name
21 is Thomas Wilson. I'm Nevada counsel for FTB. Let me
22 introduce Jim Bradshaw, who also is; George Takenouchi,
23 Deputy Attorney General from California; and Felix
24 Leatherwood also.
25 THE COURT: Good morning, and welcome.
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1 MR. WILSON: Your Honor, this matter, of
2 course, as you observed a moment ago, arises on the
3 defendant's motion for lack of -- to be dismissed for
4 lack of subject matter jurisdiction, and I really want
5 to address broadly the two parts to that. One is the
6 first cause of action for which the plaintiff seeks
7 certain declaratory relief; and the second part, on the
8 tort causes of action.
9 This case arose because a long-time
10 California resident, Mr. Hyatt, moved to Nevada, which
11 is a non-taxing state. And there's nothing wrong with
12 that, and that's known as tax avoidance. And the
13 issue, of course, is when he became domiciled here and
14 whether he was here as a matter of permanent residence
15 during the critical period of time, which seems to be
16 September 26th of '91 to April the 3rd of '92. And
17 when he was here in the permanent residence and whether
18 his presence in California was merely transitory and
19 temporary or whether it was the other way around, that
20 really is the factual question which is the subject of
21 the administrative process in California. And we have
22 parts of two years which are in controversy, of course,
23 the latter part of '91 and the earlier part of 1992.
24 Mr. Hyatt filed two protests in the
25 administrative process. He entered an appearance, if
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1 conclude one way or another. And, of course, if the
2 conclusion is adversary, as it has been, Mr. Hyatt is
3 free to follow the process available to him to present
4 additional evidence and to argue his case and perhaps
5 change the outcome.

6 The point of this discussion, I guess, is
7 simply to say that Hyatt's tort claims, as pled, really
8 are the subject of the California audit process. That
9 is, because they have audited, because they have
10 inquired, because they have attempted to verify,
11 because they have asked questions, the plaintiff has
12 said the conduct is tortious. It really comes down to
13 that, and they are, of course, the substance of
14 California process in Nevada.

15 It's our position that the Court does not
16 have subject matter jurisdiction over the alleged
17 tortious conduct because it's limited to those stark
18 realities, and it's really limited to how you conduct
19 an audit process. You ask a question. And these are
20 the facts which, as pled, he has pled his outrage and
21 his reaction to the fact that his privacies have been
22 invaded, that he has been embarrassed, that they've
23 used his name and address and Social Security number.
24 I suppose they do that to be sure they have the right
25 person when they talk to somebody.

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1 But if these facts -- and I'm talking only
2 about the facts and not about the hyperbole that's used
3 to characterize them. If these are -- if these facts
4 amount to tortious conduct -- and we're looking at the
5 plea -- then simply having an inquiry and asking
6 questions, which is the FTB's responsibility, would be
7 tortious conduct in and of itself. I suggest that
8 can't be the law. And for that reason, I suggest that,
9 as pled, this Court does not have subject matter
10 jurisdiction over the tort causes of action in the
11 Complaint either.

12 Thank you, Your Honor. I talked a lot longer
13 than I had anticipated, and I appreciate your patience.
14 THE COURT: Plaintiff, please, in response.

15 MR. T. STEFFEN: Your Honor, my name is Tom
16 Steffen, and to my immediate right is Tom Bourke, who
17 has been admitted for purposes of this case. Next to
18 Mr. Bourke is Mr. Hyatt, plaintiff in the action. Don
19 Kula, a California attorney also admitted; and my son,
20 John, who is also representing Plaintiff.

21 THE COURT: Welcome.

22 MR. T. STEFFEN: Thank you. Your Honor, I
23 was commenting to our client yesterday that I felt I
24 could hear esteemed counsel's argument before he even
25 made it. And that was: Mr. Hyatt voluntarily supplied

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0023

1 information to the FTB, including his residence
2 address, claimed to be an actual Nevada resident from
3 September 26, '91 on, and that the FTB thereafter set
4 out a few -- they used the circumlocution "requests"
5 rather than "demands," but a few requests to confirm
6 whether or not Mr. Hyatt was indeed a Nevada resident.
7 Thereby, I suppose, hopefully assisting him in not
8 having to pay California tax. They say surely making a
9 drive-by inquiry and sending a few letters to a few
10 people is in a sense innocuous; it's not tortious. He,
11 Mr. Wilson, suggests, in fact, that our position is
12 that California could not come to Nevada and make an
13 investigative inquiry as to Mr. Hyatt's residence.
14 And, of course, that's not the position at all.

15 Repeatedly they have said this is really a
16 tax case disguised as a tort case. They say Mr. Hyatt
17 wants to obtain a Nevada judgment on his residency that
18 will be res judicata entitled to full faith and credit
19 in California. And, yet, in their own papers, page 10
20 of their Motion for Judgment on the Pleadings, they
21 make the statement that any Nevada judgment will not be
22 given full faith and credit in California.

23 And that wouldn't be the first time. In
24 Nevada v. Hall -- and incidentally, Your Honor, Nevada
25 v. Hall is a very important case. And the FTB, in its
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1 reply to Plaintiff's opposition, makes the statement on
2 page 17: Nevada by statute had waived its immunity
3 from suit, and, therefore, the suit was permitted to go
4 forward in California.

5 That is absolutely false. In fact, when the
6 State of Nevada was sued, the State walks in with a
7 placard saying sovereign immunity. The Superior Court
8 agreed, it went up to the California Supreme Court, and
9 the California Supreme Court said, whatever the law has
10 been in the past, hereafter there will be no sovereign
11 immunity given to the State of California on -- or
12 given to the State of Nevada on acts committed by
13 Nevada officials in the State of California. So it
14 goes back to Superior Court, and then the State of
15 Nevada walks in and says, well, we have a statute. We
16 would like you to give full faith and credit. That
17 statute limits the amount of damages to 25,000. We
18 have agreed within the State of Nevada to be sued up to
19 that limit, and that's only within the State.

20 So Nevada asked California to give full faith
21 and credit to the damage limitation. Of course, the
22 State of California said no. Said a lot more than
23 that. Said when Nevada agents cross the line, Nevada
24 sovereignty ends. It ends at the border.

25 And so that case made it very, very clear
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