

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

**Case No. 80884**

Electronically Filed  
~~Jul 31 2020~~ 11:40 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant,

v.

GILBERT P. HYATT

Respondent.

Appeal Regarding Judgment and Post-Judgment Orders  
Eighth Judicial District Court  
District Court Case No.: A382999

**APPELLANT'S  
APPENDIX VOLUME 5**

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Attorneys for Appellant

## CHRONOLOGICAL INDEX TO APPELLANT'S APPENDIX

DATE	DOCUMENT	VOLUME	PAGE	RANGE
8/5/2019	Order of Remand	1	AA000001	AA000002
8/13/2019	Notice of Hearing	1	AA000003	AA000004
9/25/2019	Recorder's Transcript of Pending Motions	1	AA000005	AA000018
10/15/2019	FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party	1	AA000019	AA000039
10/15/2019	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party – Volume 1	2	AA000040	AA000281
10/15/2019	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party – Volume 2	3-4	AA000282	AA000534
10/15/2019	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party – Volume 3	5	AA000535	AA000706

<b>DATE</b>	<b>DOCUMENT</b>	<b>VOLUME</b>	<b>PAGE</b>	<b>RANGE</b>
10/15/2019	Plaintiff Gilbert Hyatt's Brief in Support of Proposed Form of Judgment that Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party	6-9	AA000707	AA001551
2/21/2020	Judgment	10	AA001552	AA001561
2/26/2020	Notice of Entry of Judgment	10	AA001562	AA001573
2/26/2020	FTB's Verified Memorandum of Costs	10	AA001574	AA001585
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 1	10	AA001586	AA001790
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 2	11-12	AA001791	AA002047
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 3	13-14	AA002048	AA002409
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 4	15	AA002410	AA002615
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 5	16	AA002616	AA002814
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 6	17	AA002815	AA003063
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 7	18	AA003064	AA003313
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 8	19-20	AA003314	AA003563

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2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 9	21-22	AA003564	AA003810
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 10	23-24	AA003811	AA004075
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 11	25-26	AA004076	AA004339
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 12	27-28	AA004340	AA004590
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 13	29-30	AA004591	AA004845
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 14	31-32	AA004846	AA005125
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 15	33	AA005126	AA005212
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 16	34	AA005213	AA005404
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 17	35	AA005405	AA005507
3/02/2020	Plaintiff Gilbert P. Hyatt's Motion to Strike, Motion to Retax, and Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	35	AA005508	AA005518
3/13/2020	FTB's Motion for Attorney's Fees Pursuant to NRC 68	35	AA005519	AA005545



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3/13/2020	Appendix to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	36	AA005546	AA005722
3/16/2020	FTB's Opposition to Plaintiff Gilbert Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	37	AA005723	AA005749
3/20/2020	FTB's Notice of Appeal of Judgment	37	AA005750	AA005762
3/27/2020	Plaintiff Gilbert P Hyatt's Opposition to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	37	AA005763	AA005787
4/1/2020	Reply in Support of Plaintiff Gilbert P. P Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	37	AA005788	AA005793
4/9/2020	Court Minutes	37	AA005794	AA005795
4/14/2020	FTB's Reply in Support of Motion for Attorney's Fees	37	AA005796	AA005825
4/27/2020	Recorder's Transcript of Pending Motions	37	AA005826	AA005864
6/08/2020	Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	37	AA005865	AA005868
6/8/2020	Notice of Entry of Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	37	AA005869	AA005875

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7/2/2020	FTB's Supplemental Notice of Appeal	37	AA005876	AA005885

### **ALPHABETICAL INDEX TO APPELLANT'S APPENDIX**

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Dated this 31<sup>st</sup> day of July, 2020.

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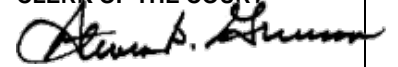
Attorneys for Appellant

## **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of McDonald Carano LLP, and on the 31<sup>st</sup> day of July, 2020, a copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

/s/ Beau Nelson

An Employee of McDonald Carano LLP



APEN  
Pat Lundvall (NSBN 3761)  
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*Attorneys for Defendant  
Franchise Tax Board of the State of California*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

GILBERT P. HYATT,

Plaintiff,

vs.

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA, and DOES 1-100, inclusive,

Defendants.

Case No.: 98A382999

Dept. No.: X

**APPENDIX OF EXHIBITS IN  
SUPPORT OF FTB's BRIEF RE THE  
REQUIREMENT OF ENTRY OF  
JUDGMENT IN FTB'S FAVOR AND  
DETERMINATION THAT FTB IS  
PREVAILING PARTY**

**(Volume 3)**

Defendant Franchise Tax Board of the State of California "FTB") hereby submits an  
APPENDIX OF EXHIBITS IN SUPPORT OF FTB's BRIEF RE THE REQUIREMENT OF  
ENTRY OF JUDGMENT IN FTB'S FAVOR AND DETERMINATION THAT FTB IS  
PREVAILING PARTY:

Ex.	Exhibit Description	Volume No.	Bates No.
A	Proposed Judgment	1	001-004
B	Complaint	1	005-027
C	Ninth Circuit Court of Appeals Brief	1	028-050
D	Docket Report of Eighth Judicial District Court in Case No. 98-A382999 as of 10/8/2019	1-2	051-489



Ex.	Exhibit Description	Volume No.	Bates No.
E	Offer of Judgment	3	490-493
F	2008 Judgment	3	494-502
G	U.S. Supreme Court Cost Award	3	503-506
H	Hyatt's Supplemental Answering Brief Following Mandate from the Supreme Court of the United States (relevant portions)	3	507-512
I	July 22, 2002 Letter from Hyatt's Counsel to FTB	3	513-516
J	Answer to First Amended Complaint	3	517-526
K	Defendant's Motion for Judgment on the Pleadings	3	527-607
L	FTB's Motion for Summary Judgment	3	608-658

Dated this 15th day of October, 2019.

McDONALD CARANO LLP

/s/ Pat Lundvall

Pat Lundvall (NSBN 3761)  
 McDONALD CARANO LLP  
 2300 West Sahara Avenue, Suite 1200  
 Las Vegas, Nevada 89102  
 lundvall@mcdonaldcarano.com

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

**CERTIFICATE OF SERVICE**

I certify that on this 15th day of October, 2019, I caused a true and correct copy of the **APPENDIX OF EXHIBITS IN SUPPORT OF FTB's BRIEF RE THE REQUIREMENT OF ENTRY OF JUDGMENT IN FTB'S FAVOR AND DETERMINATION THAT FTB IS PREVAILING PARTY (VOLUME 3)** to be electronically filed and served to all parties of record via this Court's electronic filing system to all parties listed on the e-service master list:

/s/ Beau Nelson  
An employee of McDonald Carano LLP

# EXHIBIT E

# EXHIBIT E

McDONALD-CARANO-WILSON  
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7 Las Vegas, Nevada 89102  
8 Telephone No. (702) 873-4100

9 Attorneys for Defendant Franchise Tax Board

10 **DISTRICT COURT**  
11 **CLARK COUNTY, NEVADA**

12 \* \* \* \*

13 GILBERT P. HYATT,  
14 Plaintiff,

15 vs.

16 FRANCHISE TAX BOARD OF THE  
17 STATE OF CALIFORNIA, and DOES 1-  
18 100, inclusive

19 Defendants.

Case No. : A 382999  
Dept. No. : X  
Docket No. : R

20 **FTB'S OFFER OF JUDGMENT**

Hearing Date:  
Hearing Time:

21 TO: Plaintiff Gilbert P. Hyatt and his attorneys of record:

22 Pursuant to Rule 68 of the Nevada Rules of Civil Procedure and Nevada Revised Statute  
23 17.115, defendant Franchise Tax Board of the State of California ("FTB") offers to allow judgment to  
24 be taken against it and in favor of plaintiff Gilbert P. Hyatt ("Hyatt") in the amount of One Hundred  
25 Ten Thousand Dollars (\$110,000) inclusive of all pre-offer, prejudgment interest, taxable costs  
26 and attorneys fees. This Offer of Judgment is for the amount of One Hundred Ten Thousand Dollars  
27 (\$110,000) only. No amount in excess of this One Hundred Ten Thousand Dollars (\$110,000) is being  
28 offered. This inclusive amount is expressly intended to preclude a separate award of costs, fees, interest  
or any other form of compensation. This Offer of Judgment shall apply to all claims asserted by Hyatt  
against FTB in the above referenced action and if accepted, shall completely resolve this matter.

This Offer of Judgment is made for the purposes specified in NRCP 68 and Nevada Revised

1 Statute 17.115, is expressly designated a compromise settlement, and it is not to be construed as an  
2 admission of any kind whatsoever in any administrative proceeding or court of law in any forum or  
3 jurisdiction, including Nevada and California. If this Offer of Judgment is acceptable, Hyatt should  
4 send the original of his written acceptance to FTB attorneys at the address listed below. If this Offer  
5 of Judgment is accepted, FTB intends to pay the amount of the offer within a reasonable time and  
6 exercise its option to obtain a dismissal of this action rather than a judgment. See NRCF 68(d) and  
7 NRS 17.115(2)(a)((1).

8 Dated this 26 day of November, 2007.

9 McDONALD CARANO WILSON LLP

10  
11 By:

  
12 JAMES W. BRADSHAW (NSBN 1638)  
13 PAT LUNDVALL (NSBN 3761)  
14 CARLA HIGGINBOTHAM (NSBN 8495)  
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18 Attorneys for Defendant  
19 Franchise Tax Board of the State of California  
20  
21  
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28

**CERTIFICATE OF SERVICE**

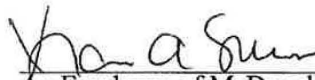
I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served a true and correct copy of the foregoing **FTB'S OFFER OF JUDGMENT** on this 26<sup>th</sup> day of November, 2007 by hand delivery upon the following:

Peter C. Bernhard, Esq.  
Bullivant Houser Bailey PC  
3883 H. Hughes Parkway, No. 550  
Las Vegas, Nevada 89169

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served true and correct copies of the foregoing **FTB'S OFFER OF JUDGMENT** on this 26<sup>th</sup> day of November, 2007 by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

Mark A. Hutchison, Esq.  
Hutchison & Steffen  
Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145

Donald Kula, Esq.  
Perkins Coie  
1620 - 26<sup>th</sup> Street  
Sixth Floor, South Tower  
Santa Monica, CA 90404-4013



An Employee of McDonald Carano Wilson LLP

# EXHIBIT F

# EXHIBIT F

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 7 Telephone: (702) 669-3600

8 *Attorneys for Plaintiff Gilbert P. Hyatt*

**FILED**

SEP. 8 3 54 PM '08

*Edmund A. Houser*  
**FUS**  
 CLERK OF THE COURT

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

12 GILBERT P. HYATT,

13 Plaintiffs,

14 v.

15 FRANCHISE TAX BOARD OF THE STATE  
 16 OF CALIFORNIA, and DOES 1-100 inclusive,

17 Defendants.

Case No.: A382999

Dept. No.: X

**NOTICE OF ENTRY OF JUDGMENT**

Date of Hearing: N/A

Time of Hearing: N/A

(filed under seal by order of the Discovery  
 Commissioner dated February 22, 1999)

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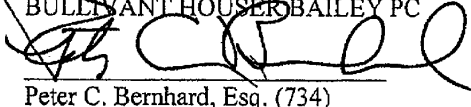
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TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

PLEASE TAKE NOTICE that a Judgment was entered in the above-entitled matter, on the 8th day of September, 2008, a copy of which is attached hereto as Exhibit "A".

DATED this 8 day of September, 2008.

HUTCHISON & STEFFEN, LTD.  
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Las Vegas, Nevada 89145

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*Attorneys for Plaintiff Gilbert P. Hyatt*

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Facsimile: (702) 650-2995

RECEIPT OF COPY

RECEIPT OF COPY of NOTICE OF ENTRY OF JUDGMENT is hereby  
acknowledged this 8th of September, 2008.

McDonald Carano Wilson LLP

By: Kim L. Christinas  
2300 West Sahara Avenue, Suite 1000  
Las Vegas, Nevada 89102

BullivantHouserBailey PC

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Telephone: (702) 669-3600  
Attorneys for Plaintiff Gilbert P. Hyatt

FILED

SEP 8 10 21 AM '08



CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,

Defendant.

Case No.: A382999

Dept. No.: X

JUDGMENT

Date of Hearing: N/A

Time of Hearing: N/A

(filed under seal by order of the Discovery  
Commissioner dated February 22, 1999)

This matter came on for trial before the Court and a jury, beginning on April 14, 2008, and concluding with the verdicts of the jury on August 6, 2008 (liability for and amount of compensatory damages), on August 12, 2008 (liability for punitive damages), and on August 14, 2008 (amount of punitive damages), the Honorable Jessie Walsh, District Judge, presiding. Plaintiff Gilbert P. Hyatt appeared with his counsel Mark A. Hutchison, Esq. of Hutchison & Steffen, LLC, Peter C. Bernhard, Esq. of Bullivant Houser Bailey, PC, and Donald J. Kula Esq. of Perkins Coie. Defendant Franchise Tax Board of the State of California appeared with its

1 representative and its counsel, Pat Lundvall Esq., and James Bradshaw Esq., of McDonald  
2 Carano Wilson, LLP.

3       Testimony was taken under oath, and evidence was offered, introduced and admitted.  
4 Counsel argued the merits of their clients' cases, the issues have been duly tried, and the jury  
5 duly rendered its verdict. The jury rendered a verdict in favor of Plaintiff Gilbert P. Hyatt and  
6 against Franchise Tax Board on all causes of action presented to the jury, including Plaintiff's  
7 second cause of action for invasion of privacy intrusion upon seclusion, third cause of action for  
8 invasion of privacy publicity of private facts, fourth cause of action for invasion of privacy false  
9 light, fifth cause of action for intentional infliction of emotional distress, sixth cause of action  
10 for abuse of process, seventh cause of action for fraud and eighth cause of action for breach of  
11 confidential relationship. This Court previously dismissed Plaintiff's first cause of action for  
12 declaratory relief, and that cause of action was not presented to the jury.  
13

14       The jury returned its verdict awarding Plaintiff Gilbert P. Hyatt compensatory damages  
15 of EIGHTY-FIVE MILLION DOLLARS AND NO CENTS (\$85,000,000.00) for emotional  
16 distress; compensatory damages of FIFTY-TWO MILLION DOLLARS AND NO CENTS  
17 (\$52,000,000.00) for invasion of privacy; attorneys' fees as special damages of ONE MILLION,  
18 EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS  
19 (\$1,085,281.56); and punitive damages of TWO HUNDRED FIFTY MILLION DOLLARS  
20 AND NO CENTS (\$250,000,000.00).  
21

22       At the conclusion of the verdict reached on August 6, 2008, the jury was polled, and  
23 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that  
24 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to liability and the  
25 amount of compensatory damages awarded on each of Plaintiff's seven claims. At the  
26 conclusion of the verdict on punitive damages on August 12, 2008, the jury was polled, and  
27  
28

1 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that  
2 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to whether the conduct  
3 of the Defendant warranted punitive damages. At the conclusion of the verdict on punitive  
4 damages on August 14, 2008, the jury was polled, and seven jurors responded that the verdict as  
5 read by the Clerk of the Court was the verdict of that juror, with one juror responding in the  
6 negative, resulting in a verdict of seven (7) in favor and one (1) opposed, as to the amount of  
7 punitive damages awarded against Defendant.  
8

9 NOW, THEREFORE, based on the foregoing, judgment upon the jury verdicts is entered  
10 in favor of Plaintiff Gilbert P. Hyatt and against Defendant Franchise Tax Board, as follows:

11 IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is  
12 awarded compensatory damages in the amount of EIGHTY-FIVE MILLION DOLLARS AND  
13 NO CENTS (\$85,000,000.00) for emotional distress, plus prejudgment interest at the rate of  
14 seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of  
15 \$63,184,110.12 from the date the Complaint was served (calculated through August 27, 2008,  
16 and accruing from August 27, 2008 at the rate of \$ 16,301.37 per day until the date of this  
17 Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from  
18 the date of this Judgment until satisfied in full;  
19

20 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.  
21 Hyatt is awarded compensatory damages in the amount of FIFTY-TWO MILLION DOLLARS  
22 AND NO CENTS (\$52,000,000.00) for invasion of privacy, plus prejudgment interest at the rate  
23 of seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of  
24 \$38,653,797.60 from the date the Complaint was served (calculated through August 27, 2008,  
25 and accruing from August 27, 2008 at the rate of \$ 9,972.60 per day until the date of this  
26  
27  
28

1 Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from  
2 the date of this Judgment until satisfied in full;

3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.  
4 Hyatt is awarded attorneys' fees as special damages in the amount of ONE MILLION,  
5 EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS  
6 (\$1,085,281.56), plus prejudgment interest at the rate of seven percent per annum (7%) (the  
7 applicable prejudgment statutory rate) in the amount of \$497,824.53 from the dates the special  
8 damages were incurred (calculated through August 27, 2008, and accruing from August 27,  
9 2008 at the rate of \$ 208.14 per day until the date of this Judgment), with interest continuing to  
10 accrue at the applicable postjudgment statutory rate from the date of this Judgment until  
11 satisfied in full; and  
12

13 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.  
14 Hyatt is awarded punitive damages in the amount of TWO HUNDRED FIFTY MILLION  
15 DOLLARS AND NO/100 CENTS (\$250,000,000.00), with interest to accrue at the applicable  
16 postjudgment statutory rate from the date of this Judgment until satisfied in full.  
17

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24 \ \ \

25 \ \ \

26 \ \ \

27 \ \ \

28

BullivantHouserBailey PC

3883 Howard Hughes Pkwy., Suite. 550  
Las Vegas, NV 89169  
Telephone: (702) 669-3600  
Facsimile: (702) 650-2995

1 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.

2 Hyatt is awarded costs in the amount of to be determined with interest to accrue at  
3 the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full.

4 DATED this 5 day of Sept ~~August~~, 2008.

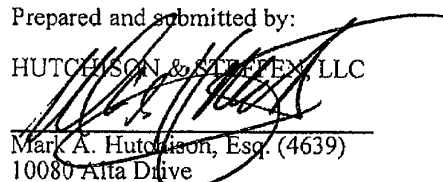
6 JESSIE WALSH

7 DISTRICT JUDGE

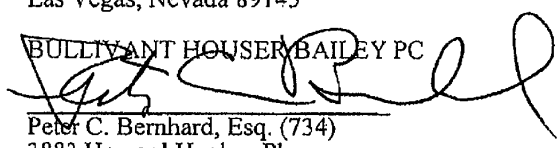
8 Prepared and submitted by:

9 Prepared and submitted by:

10 HUTCHINSON & STEFFEN, LLC

11   
12 Mark A. Hutchinson, Esq. (4639)  
13 10080 Alta Drive  
14 Suite 200  
15 Las Vegas, Nevada 89145

16 BULLIVANT HOUSER BAILEY PC

17   
18 Peter C. Bernhard, Esq. (734)  
19 3883 Howard Hughes Pkwy.  
20 Suite 550  
21 Las Vegas, Nevada 89169  
22 (702) 669-3600

23 Attorneys for Plaintiff Gilbert P. Hyatt  
24  
25  
26  
27  
28

# EXHIBIT G

# EXHIBIT G



**Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001**

**Scott S. Harris**  
Clerk of the Court  
(202) 479-3011

June 17, 2018

Mr. Seth P. Waxman, Esq.  
Wilmer Cutler Pickering Hale and Dorr LLP  
1875 Pennsylvania Ave., NW  
Washington, DC 20006

**Re: Franchise Tax Board of California  
v. Gilbert P. Hyatt,  
No. 17-1299**

Dear Mr. Waxman:

Today, a certified copy of the mandate and a certified copy of the judgment of this Court in the above-entitled case were emailed to the Clerk of the Supreme Court of Nevada.

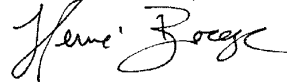
The petitioner is given recovery of costs in this Court as follows:

**Clerk's costs:       \$300.00**

This amount may be recovered from the respondent.

Sincerely,

SCOTT S. HARRIS, Clerk

By 

Herve' Bocage  
Judgments/Mandates Clerk

Enc.

cc: All counsel of record  
Clerk, Supreme Court of Nevada  
(Your docket No. 53264)

**Supreme Court of the United States**

**No. 17-1299**

**FRANCHISE TAX BOARD OF CALIFORNIA,**

Petitioner

**v.**

**GILBERT P. HYATT**

**ON WRIT OF CERTIORARI** to the Supreme Court of Nevada.

**THIS CAUSE** came on to be heard on the transcript of the record from the above court and was argued by counsel.

**ON CONSIDERATION WHEREOF**, it is ordered and adjudged by this Court that the judgment of the above court is reversed with costs, and the case is remanded to the Supreme Court of Nevada for further proceedings not inconsistent with the opinion of this Court.

May 13, 2019

**Clerk's costs:        \$300.00**



A True copy SCOTT S. HARRIS

Clerk of the Supreme Court of the United States

*Scott S. Harris*

**United States of America, ss:**  
**THE PRESIDENT OF THE UNITED STATES OF AMERICA**

**17-1299**

**FRANCHISE TAX BOARD OF CALIFORNIA,**

Petitioner

**v.**

**GILBERT P. HYATT**

To the Honorable the Justices of the Supreme Court of Nevada.

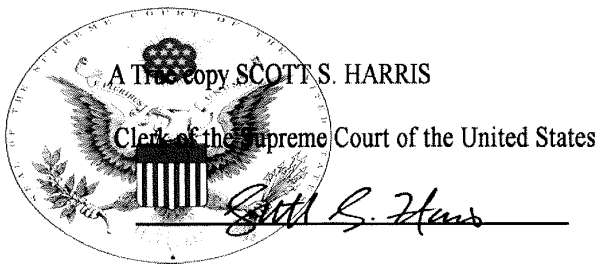
**GREETINGS:**

Supreme Court of Nevada case, FRANCHISE TAX BOARD OF CALIFORNIA, Appellant/Cross-Respondent v. GILBERT P. HYATT, Respondent/Cross-Appellant, No. 53264, was submitted to the **SUPREME COURT OF THE UNITED STATES** on the petition for writ of certiorari and the response thereto; and the Court having granted the petition.

It is ordered and adjudged on May 13, 2019, by this Court that the judgment of the above court in this cause is reversed with costs, and the case is remanded to the Supreme Court of Nevada for further proceedings not inconsistent with the opinion of this Court.

Witness the Honorable **JOHN G. ROBERTS, JR.**, Chief Justice of the United States, the 13<sup>th</sup> day of May, in the year Two Thousand and Nineteen.

**Clerk's costs:        \$300.00**



# EXHIBIT H

# EXHIBIT H

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

STATE OF CALIFORNIA,  
Appellant/Cross-respondent,  
v.  
GILBERT P. HYATT,  
Respondent/Cross-appellant.

) Supreme Court 53264  
) District Case No. A3829999  
) Electronically Filed  
) Oct 25 2016 08:45 a.m.  
) Elizabeth A. Brown  
) Clerk of Supreme Court  
)  
)  
)  
)  
)  
)

---

**APPEAL**

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

---

**RESPONDENT GILBERT P. HYATT'S SUPPLEMENTAL ANSWERING  
BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF  
THE UNITED STATES**

---

MARK A. HUTCHISON, Nev. Bar No. 4639  
MICHAEL K. WALL, Nevada Bar No. 2098  
Hutchison & Steffen, LLC  
10080 Alta Drive, Suite 200  
Las Vegas, NV 89145  
Telephone: (702) 385-2500  
Facsimile: (702) 385-2086

PETER C. BERNHARD, Nev. Bar No. 734  
KAEMPFER CROWELL  
1980 Festival Plaza Drive, Suite 650  
Las Vegas, NV 89135-2958  
Telephone: (702) 792-7000  
Facsimile: (702) 796-7181

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

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

it cites for exhaustion of administrative remedies because those cases involved attempts to stop or circumvent an administrative process. In this case, the Nevada courts have kept strictly separate this tort case and the still ongoing California administrative process. This case does not stop or interfere with the California administrative process. The two matters have always been and remain two different trains traveling on separate tracks.

In sum, this Court previously reviewed lengthy briefing and heard oral arguments on two occasions before issuing the *2014 Opinion*. Nothing warrants revisiting that decision now except to modify the damage award in accord with *Hyatt II*. FTB's request now for reconsideration of unrelated claims should be denied. This Court should therefore re-issue its *2014 Opinion* with a modified damages amount for the fraud claim to conform with Nevada's statutory damages cap, which FTB's prior briefing in this case specified is \$75,000 per claim. In addition, for the IIED claim the Court should either (i) allow Hyatt to re-try the claim in the district court as ordered in the *2014 Opinion* or (ii) direct the district court to enter judgment on the IIED claim in favor of Hyatt for the \$75,000 statutory maximum as previously argued by FTB, thereby allowing a final judgment to be entered with no further proceedings before the district court (other than entry of the judgment and as necessary to enforce judgment).

process that will decide the tax dispute.<sup>70</sup> This tort case will not decide the tax case, nor will resolution of the tax case address and resolve the issues put forth in this tort case. This Court affirmed this ruling and the separateness of the two proceedings in its *2002 Opinion*:

Preliminary, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or *administrative exhaustion* deprive the district court of subject matter jurisdiction over Hyatt's tort claims. . . . Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply.<sup>71</sup>

Indeed, the separateness of the two proceeding was the basis of some of the evidentiary errors found by this Court to have been committed by the district court during the trial. This Court found that certain evidence should not have been admitted because it went only to the issue of whether taxes were owed, not whether a tort was committed.<sup>72</sup>

///

---

<sup>70</sup> 2 AA 357-419, 420-421.

<sup>71</sup> *2002 Opinion*, at 6 (emphasis added).

<sup>72</sup> *2014 Opinion*, at 149-50 (evidence challenging audit conclusions as improper), 150-51 (evidence of audit determinations).



## VII. Conclusion.

For all of the foregoing reasons, the relief sought by FTB should be denied. The Court should re-issue its *2014 Opinion* after correcting the amount of damages awarded to the \$75,000 maximum per claim as FTB argued in its prior briefing in this appeal.

DATED: October 24, 2016.

MARK A. HUTCHISON, Nev. Bar  
No.4639

MICHAEL K. WALL, Nev. Bar No. 2098  
HUTCHISON & STEFFEN, LLC

A handwritten signature in black ink, appearing to read "Michael K. Wall", written over a horizontal line.

MICHAEL K. WALL, Nev. Bar No. 2098

PETER C. BERNHARD, Nev. Bar No. 734  
KAEMPFER CROWELL

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

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

# EXHIBIT I

# EXHIBIT I

Exhibit H - Tab 33

MORRISON & FOERSTER LLP

SAN FRANCISCO  
LOS ANGELES  
DENVER  
PALO ALTO  
WALNUT CREEK  
SACRAMENTO  
CENTURY CITY  
ORANGE COUNTY  
SAN DIEGO

ATTORNEYS AT LAW

400 CAPITOL MALL, SUITE 2600  
SACRAMENTO, CALIFORNIA 95814  
TELEPHONE (916) 448-3200  
TELEFACSIMILE (916) 448-3222

NEW YORK  
WASHINGTON, D.C.  
NORTHERN VIRGINIA  
LONDON  
BRUSSELS  
BEIJING  
HONG KONG  
SINGAPORE  
TOKYO

July 22, 2002

Writer's Direct Contact  
(916) 325-1324  
ecoffill@mofo.com

By Certified Mail, No. 7099 3220 0000 5840 0612  
Return Receipt Requested

Benjamin F. Miller  
Director, Multistate Tax Bureau  
Franchise Tax Board  
Legal Branch  
P. O. Box 1720  
Rancho Cordova, CA 95741-1720

Re: Subpoena Duces Tecum  
Administrative Protest of Gilbert P. Hyatt  
Taxable Years 1991 and 1992  
Notices of Proposed Assessment Nos.  
04728236 and 04340945

Dear Mr. Miller:

I am writing to you in response to the subpoena duces tecum in the above matter, which was received by this firm on July 10, 2002. You appear as the sole declarant on the "Declaration in Support" of the subpoena duces tecum. I write at this time seeking clarification on two matters presented by the subpoena duces tecum.

First, we request clarification regarding the specificity of the six items listed on the "Attachment 1 Description of Records," as your descriptions are vague, overbroad, and ambiguous. It is my understanding from speaking with counsel for plaintiff in *Gilbert P. Hyatt v. Franchise Tax Board*, Clark County, Nevada, Case No. A 382999, that the documents produced by both parties in discovery in that case have been individually "Bates Stamped" and assigned a unique number. It is also my understanding from speaking with counsel in the Nevada case that documents produced in the Nevada case also have been produced directly to the administrative protest. It is

MORRISON & FOERSTER LLP

Mr. Benjamin F. Miller  
July 22, 2002  
Page Two

also my understanding from speaking with counsel in the Nevada case that some of the discovery in that case is marked "Confidential - NV Protective Order," pursuant to the protective attached as Exhibit A to the subpoena duces tecum. I further understand from Mr. Hyatt's counsel in the Nevada case that materials from that case *not* designated "Confidential - NV Protective Order" can be used in the protest, subject to the confidentiality provisions of the California Revenue and Taxation Code. It is therefore uncertain whether your subpoena is intended to encompass documents beyond those designated "Confidential - NV Protective Order." In addition, we are not aware of any "Volume" numbers for your items 3 through 5.

Accordingly, in order to determine (1) specifically what documents/transcripts FTB is seeking under the subpoena duces tecum, and (2) specifically which of those documents FTB is seeking are marked "Confidential - NV Protective Order," please specify the documents FTB seeks in your "Attachment 1 Description of Records" by reference to their descriptions and to their Bates numbers.

Second, we request clarification regarding FTB's claims of relevancy as set forth (solely) in your Declaration in Support of Subpoena Duces Tecum. The subpoena duces tecum states it "is issued under authority of California Revenue and Taxation Code Section 19504 . . ." and that "[t]he statutory purpose of this Subpoena Duces Tecum is to determine if Gilbert P. Hyatt has complied with the provisions of the California Personal Income Tax Law." One (of the many) requirements of California Revenue and Taxation Code section 19504 is that the requested material be "relevant." You state in paragraph two of your declaration, in pertinent part, that: "Mr. Hyatt's protest relates to notices of proposed assessment issued by the Franchise Tax Board for the years 1991 and 1992 and involves questions of when he ceased to be a resident of California and the income that should have been reported on California personal income tax returns."

Items 1 through 6 of your "Attachment 1 Description of Records" appear to be deliberately written to identify and request all (i.e., "any and all" in your item No. 6) discovery in the Nevada case without limitation. However, I understand the Nevada court specifically ruled, on defendant FTB's motion, that Mr. Hyatt's residency for California state tax purposes during 1991 and 1992 is not in issue in the Nevada case. I understand from Mr. Hyatt's Nevada counsel that on February 10, 1999, FTB filed a Motion for Judgment on the Pleadings (Corrected Copy), which argued, in part, that the court should dismiss plaintiff Hyatt's first cause of action in the case, which requested the court declare plaintiff Hyatt's status as a Nevada resident effective from September 26, 1991 to the present. Defendant FTB argued in its Motion that because a ruling on Mr. Hyatt's residency will be made in California's administrative process, the Nevada court should not exercise jurisdiction over plaintiff Hyatt's cause of action for declaratory relief while the FTB administrative proceedings are pending. I am further

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MORRISON & FOERSTER LLP

Mr. Benjamin F. Miller  
July 22, 2002  
Page Three

informed by Nevada counsel that on April 7, 1999, at the conclusion of the hearing on the FTB's Motion, the court granted FTB's motion regarding the first cause of action, and an order was filed to that effect on April 19, 1999.

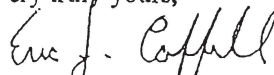
Accordingly, Mr. Hyatt's California residency status during 1991 and 1992 has not been an issue in the Nevada case since April 1999. Instead, the central focus of the case, as I understand it from Mr. Hyatt's counsel in the Nevada case, has been the events and misconduct of FTB personnel starting with the commencement of the audit in 1993 and beyond.

Oddly enough, the dismissal of the residency issue from the Nevada case appears to have been completely ignored by FTB. The March 31, 2002 Franchise Tax Board Litigation Roster, which is the most recent issue available on the FTB's website, still identifies as the first issue in the Nevada Hyatt litigation "Whether plaintiff was a resident of California from September 26, 1991 through April 2, 1992." However, as explained above, that cause of action has not been part of the Nevada case since April of 1999.

In view of this fact, FTB may still be functioning under the misunderstanding that residency is somehow part of the Nevada case. In view of the fact that residency, by order of the Nevada court, is not in issue in the Nevada case and has not been an issue in the Nevada case since April 1999, please explain in detail your allegations in your Declaration why you believe all the requested documents in the Nevada litigation are "relevant" under the subpoena duces tecum to the pending FTB administrative protest of Mr. Hyatt.

I look forward to your response, and thank you in advance for your cooperation.

Very truly yours,



Eric J. Coffill

cc: Peter C. Bernard  
Mark A. Hutchinson

# EXHIBIT J

# EXHIBIT J

1 **ANS**

2 THOMAS R. C. WILSON, ESQ.  
Nevada State Bar # 1568  
3 MATTHEW C. ADDISON, ESQ.  
Nevada State Bar # 4201  
4 BRYAN R. CLARK, ESQ.  
Nevada State Bar # 4442  
5 McDONALD CARANO WILSON McCUNE  
6 BERGIN FRANKOVICH & HICKS LLP  
2300 West Sahara Avenue, Suite 1000  
7 Las Vegas, Nevada 89102  
8 (702) 873-4100  
Attorneys for Defendants

FILED  
AUG 13 4 03 PM '98  
*Laura L. [Signature]*  
CLERK

9  
10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 \*\*\*\*\*

13 GILBERT P. HYATT,

14 Plaintiff,

15 vs.

16 FRANCHISE TAX BOARD OF THE  
17 STATE OF CALIFORNIA, and DOES 1-  
18 100, inclusive

19 Defendants.

Case No. : A382999  
Dept. No. : X  
Docket No. : R

**ANSWER TO FIRST AMENDED  
COMPLAINT**

20 COME NOW, Defendant Franchise Tax Board of the State of California ("FTB"), by  
21 and through its attorneys, McDonald Carano Wilson McCune Bergin Frankovich & Hicks,  
22 LLP, and as an Answer as follows:

23 **ANSWER**

- 24 1. FTB denies each and every allegation contained in Paragraph 1.  
25 2. FTB admits, in general, the allegations contained in Paragraph 2.  
26 3. FTB is without sufficient information and/or belief to admit or deny, and  
27 therefore denies, each and every allegation contained in Paragraph 3.  
28

4. FTB denies each and every allegation contained in Paragraph 4.
5. FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 5.
6. FTB believes Plaintiff's statements in Paragraph 6 do not constitute allegations and therefore do not require a response.
7. FTB believes Plaintiff's statements in Paragraph 7 constitute a summary of his causes of action and therefore do not require a response.
8. FTB denies Plaintiff established full-time residency in Nevada on September 26, 1991, and, with regard to the remaining allegations in Paragraph 8, FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each of them.
9. FTB denies each and every allegation contained in Paragraph 9.
10. FTB admits Plaintiff filed a state income tax return with the State of California for 1991, but it denies each and every remaining allegation in Paragraph 10.
11. FTB has audited Plaintiff's tax return(s) and investigated Plaintiff's Nevada contacts, but it denies each and every remaining allegation contained in Paragraph 11.
12. FTB denies each and every allegation in Paragraph 12.
13. FTB admits issuing requests to certain Nevada entities and people for information concerning Plaintiff without seeking permission from a Nevada court or any Nevada government agency, but it denies each and every remaining allegation in Paragraph 13.
14. FTB admits sending correspondence to certain Nevada government officials seeking information regarding Plaintiff, but it denies each and every remaining allegation contained in Paragraph 14.
15. FTB denies each and every allegation contained in Paragraph 15.
16. FTB denies each and every allegation contained in Paragraph 16.
17. FTB denies each and every allegation contained in Paragraph 17.

///



1 18. FTB is without sufficient information and/or belief to admit or deny, and  
2 therefore denies, each and every allegation contained in Paragraph 18.

3 19. FTB is without sufficient information and/or belief to admit or deny, and  
4 therefore denies, each and every allegation contained in Paragraph 19.

5 20. FTB denies each and every allegation contained in Paragraph 20.

6 21. FTB denies, and/or is without sufficient information and/or belief to admit or  
7 deny, and therefore denies, each and every allegation contained in Paragraph 21.

8 22. FTB denies each and every allegation contained in Paragraph 22.

9 23. FTB denies each and every allegation contained in Paragraph 23.

10 24. FTB denies each and every allegation contained in Paragraph 24.

11 25. FTB denies each and every allegation contained in Paragraph 25.

12 26. FTB denies each and every allegation contained in Paragraph 26.

13 27. FTB denies each and every allegation contained in Paragraph 27.

14 **FIRST CAUSE OF ACTION**

15 **(For Declaratory Relief)**

16 28. In response to Paragraph 28, FTB realleges and incorporates herein by this  
17 reference each and every allegation contained in Paragraphs 1 through 27, as thought set  
18 forth herein.

19 29. FTB believes Paragraph 29 constitutes Plaintiff's counsel's view of California  
20 law, and not allegations of fact which require a response herein. To the extent, however,  
21 the statements in Paragraph 29 constitute allegations, FTB denies each and every one of  
22 them.

23 30. FTB denies each and every allegation contained in Paragraph 30.

24 31. FTB denies each and every allegation contained in Paragraph 31.

25 32. FTB denies each and every allegation contained in Paragraph 32.

26  
27 ///

28 ///

**SECOND CAUSE OF ACTION**

**(For Invasion of Privacy - Unreasonable Intrusion Upon the Seclusion of Another)**

33. In response to Paragraph 33, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 32 above, as thought set forth herein.

34. FTB denies each and every allegation contained in Paragraph 34.

35. FTB denies each and every allegation contained in Paragraph 35.

36. FTB denies each and every allegation contained in Paragraph 36.

37. FTB denies each and every allegation contained in Paragraph 37.

38. FTB denies each and every allegation contained in Paragraph 38.

39. FTB denies each and every allegation contained in Paragraph 39.

**THIRD CAUSE OF ACTION**

**(For Invasion of Privacy - Unreasonable Publicity Given To Private Facts)**

40. In response to Paragraph 40, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 39 above, as thought set forth herein.

41. FTB denies each and every allegation contained in Paragraph 41.

42. FTB denies each and every allegation contained in Paragraph 42.

43. FTB denies each and every allegation contained in Paragraph 43.

44. FTB denies each and every allegation contained in Paragraph 44.

**FOURTH CAUSE OF ACTION**

**(For Invasion of Privacy - Casting Plaintiff in a False Light)**

45. In response to Paragraph 45, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 44 above, as thought set forth herein.

46. FTB denies each and every allegation contained in Paragraph 46.

1 47. FTB denies each and every allegation contained in Paragraph 47.

2 48. FTB denies each and every allegation contained in Paragraph 48.

3 49. FTB denies each and every allegation contained in Paragraph 49.

4 **FIFTH CAUSE OF ACTION**

5 **(For the Tort of Outrage)**

6 50. In response to Paragraph 50, FTB realleges and incorporates herein by this  
7 reference each and every allegation contained in Paragraphs 1 through 49 above, as  
8 thought set forth herein.

9 51. FTB denies each and every allegation contained in Paragraph 51.

10 52. FTB denies each and every allegation contained in Paragraph 52.

11 53. FTB denies each and every allegation contained in Paragraph 53.

12 **SIXTH CAUSE OF ACTION**

13 **(For Abuse of Process)**

14 54. In response to Paragraph 54, FTB realleges and incorporates herein by this  
15 reference each and every allegation contained in Paragraphs 1 through 53 above, as  
16 thought set forth herein.

17 55. FTB denies each and every allegation contained in Paragraph 55.

18 56. FTB denies each and every allegation contained in Paragraph 56 (a), (b), (c),  
19 (d), (e), (f), (g), (h), (i), (j) and (k).

20 57. FTB denies each and every allegation contained in Paragraph 57.

21 58. FTB denies each and every allegation contained in Paragraph 58.

22 **SEVENTH CAUSE OF ACTION**

23 **(For Fraud)**

24 59. In response to Paragraph 59, FTB realleges and incorporates herein by this  
25 reference each and every allegation contained in Paragraphs 1 through 58 above, as  
26 thought set forth herein.  
27  
28

1 60. FTB denies, and/or is without sufficient information and/or belief to admit or  
2 deny, and therefore denies, each and every allegation contained in Paragraph 60.

3 61. FTB denies each and every allegation contained in Paragraph 61.

4 62. FTB denies each and every allegation contained in Paragraph 62 (a), (b), (l),  
5 (ii), (iii), (iv), (v), and (c).

6 63. FTB denies each and every allegation contained in Paragraph 63 (a), (b), (c),  
7 (d) and (e).

8 64. FTB denies each and every allegation contained in Paragraph 64.

9 65. FTB denies each and every allegation contained in Paragraph 65.

10 66. FTB denies each and every allegation contained in Paragraph 66.

11 67. FTB denies each and every allegation contained in Paragraph 67.

12 **EIGHTH CAUSE OF ACTION**

13 **(For Negligent Misrepresentation)**

14 68. In response to Paragraph 68, FTB realleges and incorporates herein by this  
15 reference each and every allegation contained in Paragraphs 1 through 67 above, as  
16 thought set forth herein.

17 69. FTB denies each and every allegation contained in Paragraph 69.

18 70. FTB denies each and every allegation contained in Paragraph 70.

19 71. FTB denies each and every allegation contained in Paragraph 71.

20 72. FTB denies each and every allegation contained in Paragraph 72.

21 **AFFIRMATIVE DEFENSES**

22 1. Plaintiff's First Amended Complaint fails to state any cause of action on  
23 which relief can be granted.

24 2. This Court lacks the necessary jurisdiction to hear Plaintiff's causes of action  
25 for declaratory and injunctive relief.

26 3. Plaintiff's First Amended Complaint does not adequately set forth any claim  
27 or cause of action for punitive damages.  
28

1           4.       Since Plaintiff has failed to plead fraud with particularity as required under  
2 Nevada law, his Seventh Cause of Action must be dismissed.

3           5.       The issue of Plaintiff's residency for purposes of California income tax is  
4 presently the subject of an on-going administrative procedure within the State of California.  
5 The existence of that on-going administrative procedure bars and precludes Plaintiff from  
6 litigating his allegations related to residency in this Court.

7           6.       To the extent the negligence of any party, entity or person caused any  
8 damage to Plaintiff, FTB did not negligently act or fail to act, and any such damages were  
9 therefore caused by entities and/or persons other than FTB.

10          7.       To the extent any damages were suffered by Plaintiff as a result of the events  
11 described in his First Amended Complaint, the majority of the cause of those damages was  
12 Plaintiff's own negligence, rather than that of FTB or unnamed defendant, so Plaintiff is  
13 barred by Nevada law from recovering any sum from any party under a negligence theory.

14          8.       Plaintiff's Second, Third, Fourth and Fifth Causes of Action are barred by the  
15 doctrines of consent, release and waiver.

16          9.       FTB's actions in investigating Plaintiff's income tax status were privileged  
17 and conducted without malice. In its investigation of Plaintiff and dealings with Plaintiff  
18 and his representatives, FTB was simply exercising its constitutional right to collect taxes  
19 owed to the State of California with no ulterior purpose.

20          10.       Pursuant to the Nevada Rules of Civil Procedure, during the course of  
21 discovery in this matter, FTB may discover additional facts and/or information which  
22 justify the alteration or supplement of these responses and affirmative defenses and  
23 therefore reserves the right to amend and/or supplement this Answer as necessary in the  
24 future.

25       ///

26       ///

27       ///

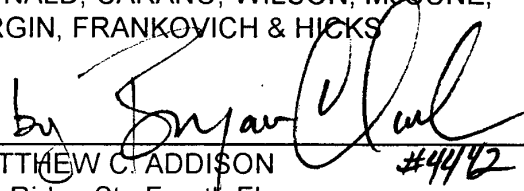
WHEREFORE, FTB prays the Court enter judgment as follows:

1. That Plaintiff Hyatt take nothing by way of his Complaint;
2. That FTB be awarded reimbursement for the attorneys' fees and costs it has incurred and will incur in the defense of this matter; and
3. For such other and further relief as this Court deems necessary and appropriate under the circumstances of this case.

DATED this 13<sup>th</sup> day of August, 1998.

McDONALD, CARANO, WILSON, McCUNE,  
BERGIN, FRANKOVICH & HICKS

By

  
MATTHEW C. ADDISON  
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#4482

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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 served a true and correct copy of the foregoing ANSWER TO FIRST AMENDED COMPLAINT on this 13<sup>th</sup> day of August, 1998, by depositing same in the United States Mail, postage prepaid thereon, upon the following:

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Karen A. Shuman

An Employee of McDonald Carano Wilson  
McCune Bergin Frankovich & Hicks LLP

15088

# EXHIBIT K

# EXHIBIT K



**MOT**

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*Shirley B. Panagiere*

FEB 9 11 19 AM '99

**FILED**

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

\* \* \* \* \*

GILBERT P. HYATT,  
  
Plaintiff,

vs.

FRANCHISE TAX BOARD OF THE  
STATE OF CALIFORNIA, and DOES 1-  
100, inclusive

Defendants.

Case No. : A382999  
Dept. No. : XVIII  
Docket No. : R

**DEFENDANT'S MOTION FOR  
JUDGMENT ON THE PLEADINGS**

COMES NOW, Defendant, the FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA ("FTB"), by and through its undersigned attorneys of record, and moves the court pursuant to Nevada Rule of Civil Procedure 12(c) for judgment on the pleadings.

The Plaintiff is currently engaged in "scorched earth" discovery against the FTB as to matters for which the Nevada Court has no subject matter jurisdiction, claims which are not properly pled, issues pending in an ongoing California administrative proceeding claims which are barred under Nevada and California law.

1 Accordingly, Judgment on the pleadings is particularly justified to narrow the issues and  
2 avoid wasteful discovery expense.

3  
4 This Motion is based on the points and authorities set forth below and the pleadings on file  
5 herein.

6 DATED this 9<sup>th</sup> day of February, 1999.

7  
8 McDONALD, CARANO, WILSON, McCUNE,  
9 BERGIN, FRANKOVICH & HICKS

10 By Bryan Clark  
11 BRYAN R. CLARK, ESQ.  
12 Nevada Bar #4442  
13 2300 West Sahara Avenue, Suite 1000  
14 Las Vegas, Nevada 89102  
15 Attorneys for Defendant

16 **NOTICE OF MOTION**

17 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

18 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will  
19 bring the foregoing DEFENDANT'S MOTION FOR JUDGMENT ON PLEADINGS on for hearing  
20 before the above-entitled court on the 8 day of March, 1999, at the hour of \_\_\_\_ m. in  
21 Department XVII of the above-entitled court, or as soon thereafter as counsel can be heard.

22 DATED this 9<sup>th</sup> day of Feb., 1999.

23 McDonald Carano Wilson McCune  
24 Bergin-Frankovich & Hicks LLP

25 Bryan Clark  
26 BRYAN R. CLARK, ESQ.  
27 Nevada Bar No. 4442  
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POINTS AND AUTHORITIES

I.

BACKGROUND FACTS AND CIRCUMSTANCES.

Defendant, The FTB is the California government agency responsible for collecting income taxes from California residents and non-residents with California income. Plaintiff, Gilbert Hyatt was admittedly a long-time resident and taxpayer of the State of California t 1991. In 1990, he income in 1991 and 1992. . Plaintiff alleges that on September 26, 1991, he became a resident of Clark County, Nevada, shortly before receipt of millions of dollars of income resulting from issuance of his patents. Plaintiff alleges various Nevada contacts developed by him as proof of residency such as purchase of a home in Las Vegas on April 3, 1992. It is believed that at the time of his alleged move to Nevada, Plaintiff enjoyed the certainty of realizing millions of dollars of income in the near future as a result of the patent issuing.

The FTB investigated the legitimacy of Plaintiff's claim of Nevada residency. It was determined that Plaintiff was actually a California resident for 1991 and part of 1992. Accordingly, Plaintiff was given notice of additional tax assessment which he is protesting through the FTB's administrative procedures. This suit follows the FTB investigation of Plaintiff's Nevada contacts and occurs during the pendency of Plaintiff's ongoing protest in the FTB's administrative proceedings.

Plaintiff purports to state eight causes of action in his First Amended Complaint (the "Complaint") which are, according to the Complaint captions:

1. Declaratory Relief;
2. Invasion of Privacy - Intrusion upon the Seclusion of Another;
3. Invasion of Privacy - Publicity Given to Private Facts;
4. Invasion of Privacy - Casting in False Light;
5. Tort of Outrage;
6. Abuse of Process;



1 7. Fraud; and

2 8. Negligent Misrepresentation.

3 The prayer for relief requests the court's declaration regarding Plaintiff's status as a Nevada  
4 resident and the FTB's power to investigate Plaintiff's residency, an award of "actual and  
5 consequential" damages, punitive damages, costs and attorney fees.

6 The FTB answered the amended complaint, generally denying the complaint allegations.  
7 Affirmative defenses are sta  
8 of th  
9 Plaintiff's California residency and tax liability are pending.

10 Rather than fact allegations, the 30 page First Amended Complaint contains mostly repetitious  
11 arguments, legal conclusions and speculation as to the FTB's representatives' motives and intentions.  
12 These should be ignored for purpose of this motion. The following "facts" are alleged:

13 Plaintiff, Gilbert Hyatt is a "highly successful inventor" who admittedly resided in California  
14 through September 26, 1991. In 1990, he was granted patents on "certain of his important inventions".  
15 Complaint par. 8. Plaintiff alleges that on September 26, 1991, he became a resident of Clark County,  
16 Nevada. Plaintiff alleges various Nevada contacts developed by him as proof of residency such as  
17 purchase of a home in Las Vegas on April 3, 1992. Complaint par. 9. Prior to that time, he was  
18 admittedly a "long-standing resident and taxpayer of the State of California". Complaint paragraph  
19 60.

20 Plaintiff filed only a part-year state income tax return with the state of California for 1991.  
21 Complaint par.10. In June of 1993, FTB began an audit of Plaintiff's 1991 return. In July of 1993,  
22 FTB began to investigate Plaintiff's contacts with Nevada. Complaint par. 11. FTB investigated  
23 Plaintiff's claim of Nevada residency by contacting various Nevada persons and entities which  
24 included both government and private persons. Complaint par. 12. To gather information, FTB  
25 corresponded with entities and persons using its "Demand to Furnish Information" form not issued  
26 from a Nevada court or any Nevada government agency. Complaint par. 13. In addition to the  
27  
28

1 Demand to Furnish Information forms used to accumulate information, FTB corresponded with other  
2 persons and entities in letter form. Complaint par. 14. Plaintiff was unaware of FTB's investigation  
3 in Nevada until after such contacts had taken place. Complaint par. 15. Plaintiff admittedly had a legal  
4 duty to cooperate with FTB in its investigation. Complaint paragraph 71.

5 On April 23, 1996, after FTB had completed its audit and investigation of Plaintiff's 1991  
6 return, FTB sent a notice of proposed assessment, that is, a formal notice that taxes are owed, to  
7 Plaintiff. FTB found that Plaintiff was a resident of California, not Nevada, until April 3, 1992. It was  
8 determined by FTB that Plaintiff's assertion of N

9 On April 1, 1996, Plaintiff received formal notice that FTB had commenced an investigation  
10 into the 1992 tax year and its tentative determination that Plaintiff would also be assessed California  
11 income tax for the period of January 1 through April 3 of 1992. Complaint par. 18. On April 10, 1997  
12 and May 12, 1997, Plaintiff received notices from FTB that it would be issuing a formal notice of  
13 proposed assessment for the 1992 tax year and penalties for Plaintiff's failure to file a 1992 tax return.  
14 Complaint par. 19. Plaintiff claims that prior to receipt of the notice of proposed assessment for 1992,  
15 a representative of FTB stated to one of Plaintiff's representatives that disputes over assessments by  
16 FTB always settle at the notice stage as tax payers do not want to risk their personal financial  
17 information being made public. Plaintiff understood this statement to be a strong suggestion by FTB  
18 that he settle the disputed taxes by payment of some portion of the assessment. Plaintiff has refused  
19 to do so, contending that he has not been a resident of California since September 26, 1991. Complaint  
20 par. 20.

21 On August 14, 1997, Plaintiff received a formal notice of proposed assessment for 1992  
22 assessing California state income tax on Plaintiff's income for the entire year of 1992 together with  
23 accrued interest and penalties. Complaint par. 21. Plaintiff believes that the FTB's investigations  
24 directed at him will be repeated. Complaint par. 22. Plaintiff believes that the FTB may continue to  
25 assess California state income taxes for the years 1993 and beyond. Complaint par. 23.  
26  
27  
28

1 Plaintiff believes that FTB's motive in conducting the Nevada investigation is to collect  
2 additional taxes and assess penalties for fraud for tax years 1991 and 1992 in spite of Plaintiff's  
3 contention that FTB is aware that Plaintiff became a Nevada resident on September 26, 1991.  
4 Complaint par. 24 and 25.

5 Plaintiff argues that because of his contention that he is a Nevada resident, the Nevada courts  
6 should determine the issue of residency rather than forcing him to go through California's  
7 administrative procedures and court action. Complaint par. 17.

8 Plaintiff contends that Nevada's courts have personal jurisdiction over FTB because of its  
9 investigation conducted within the state of Nevada to create a basis for maintaining that Plaintiff  
10 continued his residency in California after September 26, 1991. Complaint par. 26. Plaintiff believes  
11 that the FTB has a pattern and practice of entering into Nevada to investigate Nevada residents who  
12 were formerly residents of California, then assessing such residents California state income tax for time  
13 periods subsequent to the date when such individuals moved to and established residency in Nevada.  
14 Complaint par. 27.

## 15 II. 16 ARGUMENT

17 NRCP 12(c) provides for a motion for judgment on the pleadings:

18 After the pleadings are closed but within such time as not to delay the  
19 trial, any party may move for judgment on the pleadings.

20 A Rule 12(c) motion is available to provide a means of disposing of cases when material facts  
21 are not in dispute and judgment on the merits is appropriate on the content of the pleadings. Bernard  
22 v. Rockhill Dev. Co., 103 Nev. 132, 135 -36, 734 P.2d 1238 (1987) (citing 5 C. Wright & A. Miller,  
23 *Federal Practice and Procedure* §§ 1367 - 1368(1969)). This motion has utility when all material  
24 allegations of fact are admitted in the pleadings and only questions of law remain. Id. at 136. The  
25 moving party will succeed on the motion if there are no allegations in the Complaint that if proven  
26 would permit recovery. Id.

1 Consideration of the Amended Complaint allegations with the elements of each cause of action  
2 pled shows that the FTB is entitled to judgment on the pleadings.

3 **A. PLAINTIFF'S DECLARATORY ACTION MUST BE DISMISSED**  
4 **BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION**

5 Plaintiff's First Claim for Relief seeks declaratory relief from the Court regarding his residency  
6 for the purpose of avoiding California income tax. This is currently the subject of an FTB administra-  
7 tive proceeding in which Plaintiff seeks the same determination. Under California law, it is a well  
8 established requirement that administrative remedies must be exhausted before a party can proceed  
9 with a court action against a department of the State of California. To protect the FTB from  
10 precipitous taxpayer court action, California Revenue and Tax Code section 19381 provides:

11 No injunction or writ of mandate or other legal or equitable process  
12 shall issue in any suit, action, or proceeding in any court against this  
13 state or against any officer of this state to prevent or enjoin the  
14 assessment or collection of any tax under this part; provided, however,  
15 that any individual after protesting a notice or notices of deficiency  
16 assessment issued because of his or her alleged residence in this state  
17 and after appealing from the action of the Franchise Tax Board to the  
18 State Board of Equalization, may within 60 days after the action of the  
19 State Board of Equalization becomes final commence an action, on the  
20 grounds set forth in his or her protest, in the Superior Court of the  
21 County of Sacramento, in the County of Los Angeles or in the City and  
22 County of San Francisco against the Franchise Tax Board to determine  
23 the fact of his or her residence in this state during the year or years set  
24 forth in the notice or notices of deficiency assessment.

25 In this California income tax matter, Plaintiff seeks a residency determination from this Nevada  
26 court to determine his residency status which he is presently disputing through the administrative  
27 process under California law. Where an administrative remedy is provided by statute, relief must be  
28 sought from the administrative body and the administrative remedy must be exhausted before the courts  
will act; and a court violating this rule acts in excess of its jurisdiction. Aronoff v. Franchise Tax  
Board, 60 Cal.2d 177, 180-81, 383 P. 2d 409 (1963); Abelleira v. District Court of Appeal, 17 Cal.2d  
280, 291-306 (App. Ct.1941).

...

1 The California Supreme Court in Aronoff, held that:

2 ...petitioners' failure to exhaust their administrative remedies constitute  
3 a jurisdictional barrier to obtaining relief from the courts.

4 In Horack v. Franchise Tax Board, 18 Cal.App.3d 363, 368 (Cal. App. 4<sup>th</sup> Dist.1971), the  
5 California court of appeal held that the trial court was acting in excess of its jurisdiction when petitioner  
6 had instituted proceedings to pursue their administrative remedies and had not exhausted such remedies  
7 at the time they sought relief from the court.

8 The doctrine of exhaustion of administrative remedies requires a party to use all available  
9 agency administrative procedures for relief and to proceed to a final decision on the merits by the  
10 agency before he may resort to the courts. McHugh v. County of Santa Cruz, 33 Cal.App.3d 533, 538-  
11 539 (Cal. App. 1<sup>st</sup> Dist.1973).

12 In the instant matter, Plaintiff clearly has not exhausted the California administrative process  
13 and his failure to do so deprives this Court of subject matter jurisdiction.

14 Under California law, a taxpayer who claims to be a resident of another state has two options  
15 in challenging FTB's assessment of income taxes. Those options center on whether he is willing to  
16 pay the disputed tax and seek a refund. If the taxpayer declines to pay the disputed tax, he may file a  
17 formal protest which is then investigated by and decided by an FTB officer. Cal. Rev. & Tax C. §  
18 19381. If that officer upholds the assessment, the taxpayer may appeal the decision to the State Board  
19 of Equalization. Id. If the Board upholds the assessment, the taxpayer may seek judicial review in one  
20 of three California superior courts. Id.; see also Shiseido Cosmetics (American) Ltd. v. Franchise Tax  
21 Bd., 235 Cal.App.3d 478, 488 (Cal.App.3d Dist. 1991), cert. denied 505 U.S. 1205, leave denied 506  
22 U.S. 947 (1992)( citing California Const., Art. XIII, section 33).

23 Alternatively, if the taxpayer elects to pay the disputed tax, he may do so under protest and  
24 directly seek a refund from one of the same three trial courts. Cal. Rev. & Tax C. §§ 19382 and 19385;  
25 see also California Const., Art. XIII, § 32. Either way, California courts have consistently required  
26 "strict adherence to the administrative procedure set forth by the Legislature before a court action (can)  
27 be filed". Shiseido Cosmetics (American) Ltd., 235 Cal.App.3d at 488.  
28

1 This administrative process was discussed recently in Schatz v. FTB, 1999 Cal.App.  
2 LEXIS 57, COURT OF APPEALS OF CALIFORNIA, THIRD APPELLATE DISTRICT  
3 January 26, 1999:

4 Pursuant to California's income tax scheme regarding defi-  
5 ciency assessments, the Board sends the taxpayer a notice of proposed  
6 deficiency assessment that "set[s] forth the reasons for the proposed  
7 deficiency assessment and the computation thereof." (Rev. & Tax.  
8 Code, §§ 19033, 19034, formerly Rev. & Tax. Code, §§ 18583, 18584;  
9 all further references to undesignated statutory sections are to the  
10 Revenue and Taxation Code unless otherwise noted.) ...(the parties  
11 term this notice the "Notice of Proposed Assessment" or NPA).

12 A taxpayer has 60 days to file with the Board "a written protest  
13 against the proposed deficiency assessment" contained in the notice of  
14 proposed deficiency assessment. (§19041; formerly § 18590.) "If a  
15 protest is filed, the [Board] shall reconsider the assessment of the  
16 deficiency...." (§ 19044; formerly § 18592.) Appeal to the State Board  
17 of Equalization is then permitted; finality is dependent upon the extent  
18 to which a taxpayer pursues the appellate process afforded. (§§ 19045-  
19 19048; formerly §§ 18593-18596.)

20 There is also a remedy available to Plaintiff in California in its Superior Courts as to  
21 overreaching by FTB's officers or employees under California's Taxpayers' Bill of Rights, in R&TC  
22 Section 21021 regarding Reckless Disregard of Procedure, California law provides for damages.  
23 Plaintiff has not pursued this.

24 In this California matter, Plaintiff filed formal protests of FTB's assessments for 1991 and  
25 1992, but FTB has not yet completed its review of either protest. FTB's evaluation of his protests was  
26 ongoing when Plaintiff filed this action and is currently pending. Those protests have not yet been  
27 decided and Plaintiff has not paid the disputed assessments. Thus, Plaintiff has no present right to seek  
28 judicial relief under California law. Even a California court cannot expand "the methods for seeking  
tax refunds expressly provided by the Legislature." Woolsey v. State of California, 3 Cal. 4<sup>th</sup> 758, 792  
(Cal. 1992), cert. denied 508 U.S. 940 (1993). Nevertheless, Plaintiff now asks this Court to ignore

1 California's administrative process and preempt it by issuing a declaratory judgment on the primary  
2 issue presently before the FTB - his residency.

3  
4 **B. PLAINTIFF'S DECLARATORY ACTION WOULD BE BARRED FROM**  
5 **BOTH CALIFORNIA AND UNITED STATES COURTS**

6 As shown above, Plaintiff's failure to exhaust administrative remedies would constitute an  
7 absolute bar from his action going forward in California courts. Tax Injunction Act (28 U.S. C. § 1341)  
8 is an absolute jurisdictional bar to federal involvement in the State revenue collection schemes.  
9 Keleher v. New England Tel. & Tel. Co., 947 F.2d 547, 548 (2d Cir. 1991). The Tax Injunction Act  
10 is first and foremost, a vehicle to drastically limit federal court jurisdiction over the important local  
11 concern of the collection of taxes. Rosewell v. LaSalle National Bank, 450 U.S. 503, 522, 101 S.Ct.  
12 1221, 1231-32, 67 L. Ed. 2d 464, 479 (1981) reh'g denied, 451 U.S. 1011(1981). It divests the court  
13 of jurisdiction not only to issue an injunction enjoining state officers from collecting state taxes but also  
14 from issuing declaratory relief in state tax causes. California v. Grace Brethren Church, 457 U.S. 393.  
15 407-11, 102 S.Ct. 2498, 2507-09, 73 L.Ed.2d 93 (1982). California has established adequate  
16 procedures to provide plaintiff with a plain, speedy, and efficient remedy through its administrative  
17 remedies and the right for actions to be brought in California courts after the administrative process is  
18 exhausted.

19 The California law and federal Tax Injunction Act demonstrate the strong public policy served  
20 by not interfering in the administrative tax process. Nevada's courts should not presume to substitute  
21 its law and procedure where a sister state's law bars action in a matter involving a sister state's taxing  
22 authority.

23 **C. THIS COURT SHOULD NOT EXERCISE JURISDICTION**  
24 **AS A MATTER OF COMITY**

25 That Plaintiff's Complaint in Nevada District Court does in fact seek to impede and interfere  
26 with California's taxing authority is manifest. Plaintiff strongly alleges and argues impairment of  
27 Nevada's sovereignty and the integrity of its territorial boundaries, which should provide Plaintiff with  
28 a safe harbor from any tax liability in California:

1 Par. 5: "... (1) This is an action for, inter alia, declaratory relief; (2) substantial issues of  
2 public policy are implicated concerning the sovereignty of the State of Nevada and the  
3 integrity of its territorial boundaries as opposed to governmental agencies of another  
4 state who enter Nevada in an effort to extraterritorially, arbitrarily and deceptively  
5 enforce their policies, rules and regulations on residents of Nevada in general, and  
6 Plaintiff Gilbert P. Hyatt in particular;..."

7 Instead of concluding the ongoing and available California ad  
8 he was a permanent resident and domiciled in Nevada commencing on September 26, 1991, Plaintiff  
9 seeks a declaratory judgment in Nevada that he in fact was not a California resident and, instead, was  
10 a Nevada resident commencing on September 26, 1991. Although this very issue is pending in the  
11 California administrative proceedings, Plaintiff contends that "this action does not seek to impede or  
12 interfere with California's taxing authority," he requests in his Complaint:

13 Par. 7: "Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 et seq.  
14 to confirm Plaintiff's status as a Nevada resident effective as of September 26, 1991  
15 and continuing to the present and, correspondingly, his non-residency during said  
16 period in California..."

17 Plaintiff acknowledges in his Complaint that the FTB's investigation in Nevada was a part of  
18 its audit of his 1991 tax return:

19 Par. 11: "...the FTB began an audit of the 1991 return...as part of its audit, the FTB  
20 began to investigate Plaintiff by making or causing to be made numerous and  
21 continuous contacts directed at Nevada..."

22 The principles of comity require this Court to decline jurisdiction and dismiss this case. Under  
23 the principle of comity, "the courts of one jurisdiction may give effect to the laws and judicial  
24 decisions, of another jurisdiction out of deference and respect." Mianecki v. Second Jud. District  
25 Court, 99 Nev. 93, 98, 658 P.2d 422, 425 (1983) cert. dismissed, 464 U.S. 806 (1983). A state is free  
26 to close its courts to suits against a sister state as a matter of comity, particularly where assertion of  
27 jurisdiction "would impinge unnecessarily upon harmonious interstate relations which were part and  
28 parcel of the spirit of cooperative federalism." Simmons v. State, 670 P.2d 1372, 1385 (Mont. 1983).

The United States Supreme Court has indicated that in actions such as this, where a lawsuit  
poses a threat to a state's "capacity to fulfill its own sovereign responsibilities," a court should decline



1 jurisdiction as a matter of comity in furtherance of our constitutional system of cooperative federalism.  
2 Nevada v. Hall, 440 U.S. 410, 424 n.24 (1979), reh'g denied, 441 U.S. 917 (1979).

3 Under California law, Plaintiff's causes of action would be barred by the doctrine of exhaustion  
4 of administrative remedie

5 Because these actions cannot go forward in California courts, this court should not exercise jurisdiction  
6 as a matter of comity. California would not give full faith and credit to a Nevada judgment purporting  
7 to determine an action barred under California law.

8 A New York Court of Appeals specifically found that "(f)or our tribunals to sit in judgment on  
9 a tax controversy between another State and its present or former citizens would be an intrusion into  
10 the public affairs of (that other) State". City of Philadelphia v. Cohen, 184 N.E.2d 167, 169-70  
11 (N.Y.App. 1962), cert. denied 371 U.S. 934 (1962).<sup>1</sup>

12 The United States Supreme Court has long recognized that the taxing power of a state is one  
13 of the state's attributes of sovereignty. Such power exists independently of the express provisions of  
14 the U.S. Constitution. The taxing power is indispensable to the continued existence of the states. A  
15 state's taxing power "may be exercised to an unlimited extent upon all property, trades, business, and  
16 advocations existing or carried on within the territorial boundaries of the State, except so far as it has  
17 been surrendered to the Federal government." Union Pacific Railroad Company v. Peniston, 85 U.S.

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19  
20 <sup>1</sup> Under the facts of this case, three other legal principles provide background on why  
21 this Court should exercise comity and defer to California's administrative process  
22 to resolve Plaintiff's residency claims: (1) "exhaustion of administrative remedies";  
23 (2) the "primary jurisdiction doctrine"; and (3) the "abstention" doctrine. First, no  
24 action generally lies until a Plaintiff has first exhausted whatever administrative  
25 remedies are provided by statute (i.e. such an action is premature and must be  
26 dismissed). See generally, Bowen v. New York City, 476 U.S. 467 (1986). Second,  
27 the "primary jurisdiction doctrine" allows courts to stay or dismiss proceedings (over  
28 which they have jurisdiction but are properly before an administrative agency) to  
give the parties a reasonable opportunity to seek an administrative ruling. See  
generally Reiter v. Cooper, 507 U.S. 258, 268 (1993). And third, courts have the  
power to abstain in cases where resolution of certain issues "might unnecessarily  
interfere with a state system for the collection of taxes." See generally, Quackenbush  
v. Allstate Ins. Co., 517 U.S. 706, 116 S.Ct. 1712, 1721 (1996).

1 5, 29 (1873). The taxing power necessarily includes the power in this case to determine if Plaintiff  
2 remained liable for California's state income taxes for any time after September 26, 1991.

3 Plaintiff has filed lengthy and substantive administrative protests. He has not paid any disputed  
4 tax assessment. No decisions on those protests have been issued by FTB. Accordingly, Plaintiff has  
5 clearly failed to exhaust his administrative remedies under California law. Because a ruling on  
6 Plaintiff's residency will be made in California's administrative process, this Court should decline to  
7 assert jurisdiction over Plaintiff's cause of action for declaratory relief pending the FTB's administra-  
8 tive rulings. Since California clearly has an adequate administrative procedure available to Plaintiff  
9 no court should interrupt that process until and unless Plaintiff pays the assessments or seeks judicial  
10 review of an adverse ruling by the State Board of Equalization. For all these reasons, this Court should  
11 exercise comity and decline to assert jurisdiction over the resolution of Plaintiff's request for  
12 declaratory relief in favor of California's ongoing administrative consideration of Plaintiff's protests.

13  
14  
15 **D. PLAINTIFF'S TORT CAUSES OF ACTION ARE**  
16 **BARRED IN CALIFORNIA COURTS**

17 California, a sovereignty, is immune from tort lawsuits except to the extent it allows itself to  
18 be sued pursuant to the California Tort Claims Act. The California Tort Claims Act requires that, for  
19 actions against the state or its employees for money damages,

20 Cali

21 California Government Code sections 911.2 and 905.2. Presentation of a claim in the manner  
22 prescribed by law is mandatory and an absolute prerequisite to a suit for money damages. Pacific Tel  
23 and Tel. Co. v. County of Riverside, 106 Cal.App.3d 183, 188 (Cal. App. 4<sup>th</sup> Dist.1980); Bozaich v.  
24 State of California, 32 Cal.App.3d 688, 696-97 (Cal. App. 5<sup>th</sup> Dist.1973). Failure to file a claim within  
25 the prescribed time period in the manner prescribed by law is fatal to a claimant's causes of action. City  
26 of San Jose v. Superior Court, 12 Cal.3d 447, 454 (1974); Chase v. State, 67 Cal.App. 3d 808, 810  
27 (1977); See also, Ortega v. O'Conner, 764 F.2d 703, 707 (9th Cir. 1985), rev'd on other grounds, 480  
28

1 U.S. 709 (1987); Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 627 (9th Cir. 1988).  
2 Because Plaintiff failed to comply with the  
3 Tort-Claim Act, Plaintiff's tort causes of action are invalid as a matter of California law.  
4

5 **E. DECLARATORY RELIEF IS NOT AVAILABLE UNDER NEVADA LAW.**

6 In his First Amended Complaint under the First Cause of Action Plaintiff seeks declaratory  
7 relief. This remedy is not available under Nevada law when an administrative agency has jurisdiction  
8 over the matter. The issue of Plaintiff's residency is currently before the FTB.

9 Plaintiff alleges that, pursuant to California law, in determining whether an individual was a  
10 resident of California subject to California income tax, the individual must have been domiciled in  
11 California during the taxed period for "other than temporary or transitory purposes". Citing California's  
12 Revenue and Tax Code §17014, Plaintiff further alleges that the FTB's own regulations and precedents  
13 require it to apply certain factors in determining an individual's domicile and whether the individual's  
14 presence in California was more than temporary or transitory. Plaintiff describes these considerations  
15 and then describes the Nevada contact which he contends show that he was a Nevada resident.  
16 Complaint par. 29. Plaintiff contends that the FTB refused to consider all evidence of Plaintiff's Nevada  
17 residency in assessing taxes and penalties. Complaint par. 30. Thus, Plaintiff contends that an actual  
18 controversy exists as to whether Plaintiff was a full-time resident of Nevada commencing on  
19 September 26, 1991.

20 Plaintiff contends that under either Nevada or California law he was a resident of Nevada  
21 throughout the disputed periods, that FTB ignored its own regulations and precedents, that FTB has  
22 no jurisdiction to impose a tax obligation on Plaintiff, that FTB had no authority to conduct its  
23 investigation in Nevada or request information from Nevada  
24 residents and businesses. Complaint par. 31. Plaintiff requests the judgment of this Nevada court  
25 "declaring and confirming Plaintiff's status as a full-time, bona fide resident of the state of Nevada  
26 effective from September 26, 1991 to the present" and further declaring that FTB's investigation and  
27 information requests to Nevada residents were without approval or authority from a Nevada court or  
28

1 government agency and violative of Nevada's "sovereignty and territorial integrity". Complaint par  
2 32.

3 Plaintiff's contention that he is a resident of Nevada under Nevada law is, of course, utterly  
4 irrelevant. California's power to tax its residents exists independently of any other state's law. See,  
5 Lawrence v. State Tax Comm., 286 U.S. 276 (1932). It is possible to be determined a dual resident.  
6 The remedy for one determined to be a dual resident (this happens occasionally as each of the taxing  
7 states has a different definition of "resident") is the tax credit, R&TC Section 18001.

8 Nevada has adopted the Uniform Declaratory Judgments Act found at NRS 30.010 et seq. The  
9 court's power in this regard is set forth in NRS 30.030. The court can grant declaratory relief regarding  
10 legal relations affected by statute as set forth in NRS 30.040:

11 Any person ... whose rights, status or other legal relations are affected  
12 by statute... may have determined any question of construction or  
13 validity arising under the ... statute... and obtain a declaration of rights,  
14 status or other legal relations thereunder.

15 The Uniform Declaratory Judgments Act does not establish new causes of action or grant  
16 jurisdiction to the court when it would not otherwise exist. Builders Ass'n. of Northern Nev. v. City  
17 of Reno, 105 Nev. 368, 776 P.2d 1234, 1234 (1989).

18 Declaratory relief is not appropriate to review questions of administrative discretion. Prudential  
19 Ins. Co. v. Insurance Comm., 82 Nev. 1, 409 P.2d 248 (1966). In Phelps v. Second Judicial District  
20 Court., 106 Nev. 917, 803 P.2d 1101, 1103 (1990) the Nevada Supreme Court held that a district court  
21 was without jurisdiction to entertain an action for declaratory relief which sought collateral review of  
22 decisions of the Joint Medicolegal Screening Panel concerning the admissibility or sufficiency of  
23 documents presented to it, because the panel's decisions on such questions clearly involved its  
24 administrative discretion.

25 ...

26 ...

27 ...

1 Declaratory relief actions to review interlocutory decisions of state agencies are inappropriate,  
2 particularly where such actions frustrate the legislature's purpose of relegating certain matters to a state  
3 agency for a speedy resolution. See, Public Serv. Comm. v. Eighth Judicial District Court, 107 Nev.  
4 680, 683-85, 818 P.2d 396 (1991) where the Nevada Supreme Court held:

5 It is well-settled that courts will not entertain a declaratory judgment  
6 action if there is pending, at the time of the commencement of the  
7 action for declaratory relief, another action or proceeding to which the  
8 same persons are parties and in which the same issues may be adjudi-  
9 cated. [citation omitted]. Further, a court will refuse to consider a  
10 complaint for declaratory relief if a special statutory remedy has been  
11 provided. [citation omitted]. A separate action for declaratory  
12 judgment is not an appropriate method of testing defenses in a pending  
13 action, [citation omitted], nor is it a substitute for statutory avenues of  
14 judgment and appellate review.

15 Public Serv. Comm., 684-85.

16 In Kress v. Corey, 65 Nev. 1, 189 P.2d 352 (1948), the Nevada Supreme Court set forth the  
17 following requirements necessary to qualify for a declaratory judgment:

18 The requisite precedent facts or conditions which the courts generally  
19 hold must exist in order that declaratory relief may be obtained may be  
20 summarized as follows: (1) there must be a justiciabile controversy;  
21 that is to say, a controversy in which a claim of right is asserted against  
22 one who has an interest in contesting it; (2) the controversy must be  
23 between persons whose interests are adverse; (3) the party seeking a  
24 declaratory relief must have a legal interest in the controversy, that is  
25 to say, a legally protectable interest; and (4) the issue involved in the  
26 controversy must be ripe for judicial determination.

27 Kress, at 26.

28 In Cox v. Glenbrook Co., 78 Nev. 254, 266-68, 371 P.2d 647 (1962), the definition of  
"justiciable controversy" was discussed:

[E]very judgment following a trial upon the merits must be based upon  
the evidence presented; it cannot be based upon an assumption *before*  
the facts are known or have come into existence.

....

[F]actual circumstances which may arise in the future cannot be fairly  
determined now. As to this phase of the case we are asked to make a  
hypothetical adjudication, where there is presently no justiciable

1 controversy, and where the existence of a controversy is dependent  
2 upon the happening of future events.  
3 judgment should deal with a present, ascertained or ascertainable state  
4 of facts....

5 In Cox, the court also held that an action seeking a declaration of rights based upon factual  
6 circumstances which have not yet arisen was not yet ripe for judicial intervention.

7 In Resnick v. Nevada Gaming Comm., 104 Nev. 60, 752 P.2d 229, 231 (1988), the court held  
8 that the Nevada Gaming Commission's refusal to turn over investigative materials to an applicant for  
9 a gaming license so that the applicant could better prepare for his licensing hearing did not present a  
10 controversy ripe for judicial determination. The responsible agency had not yet made a final decision  
11 or order. Thus, the matter was not ripe for judicial review.

12 A court may deny declaratory relief in the exercise of its discretion. El Capitan Club v.  
13 Fireman's Fund Ins. Co., 89 Nev. 65, 506 P.2d 426 (1973). Where the court believes that more  
14 effective relief can and should be obtained by another procedure and that for that reason, a declaration  
15 will not serve a useful purpose, then the court is justified in refusing a declaration because of the  
16 availability of another remedy. Id. 69-70 (citing Jones v. Robertson, 180 P.2d 929, 933 (Cal App.  
17 1947)).

18 **F. THERE IS NO INVASION OF PRIVACY CAUSE OF ACTION PROPERLY PLED.**

19 The First Amended Complaint purports to state claims for relief under theories of invasion of  
20 privacy. The facts alleged relate to the FTB's efforts to verify Plaintiff's contention that he changed  
21 his residency from California to Nevada. The facts alleged in this regard are that the FTB's  
22 representative used Plaintiff's name, address and social security number in contacting Nevada utility  
23 companies and government agencies in its investigation of his Nevada residency.

24 As discussed below, Plaintiff has failed to plead any actionable invasion of any privacy interest  
25 and the pleadings show that the FTB's representatives' investigation was in furtherance of a legitimate  
26 public duty.

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**ANY DISCLOSURE OF PLAINTIFF'S TAX RETURN  
INFORMATION WAS PURSUANT TO THE ADMINISTRATION OF  
TAXES AND WAS AUTHORIZED BY CALIFORNIA LAW**

California Revenue and Taxation Code section 19545 provides:

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, or the collection of the taxpayer's civil liability with respect to any tax imposed under this part.
- (b) The treatment of an item reflected on the return is directly related to the resolution of an issue in the proceeding.
- (c) The return or return information directly relates to a transnational relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding. (Emphasis added).

The pleadings show that the FTB auditor was only verifying the truthfulness of the Plaintiff's claim of Nevada residency and any disclosures made were authorized under California law.

Most courts, including Nevada state and federal courts, draw on the principles set forth in the Restatement (Second) of Torts § 652 A et seq. regarding invasion of privacy torts. Restatement § 652G incorporates the conditional privileges available to defendants stated in sections 594 and 598 A which apply to the publication of any matter that is an invasion of privacy. These include section 594, Protection of the Publisher's Interest; section 596, Common Interests; section 598, Communication to One Who May Act in the Public Interest; and section 598 A, Actions of Inferior State Officers in a Performance of Their Duties.

The case of McLain v. Boise Cascade Corp., 533 P.2d 343 (Ore. 1975) illustrates the privilege allowed state agencies to investigate matters within their agencies' concern. This includes the right to conduct surveillance and minor trespass to property in order to validate a plaintiff's position taken in an agency action. As in the McLain case, Plaintiff, Gil Hyatt was not even aware of the FTB's investigation until after the fact. Complaint para. 15. Such agency inquiry to verify Plaintiff's claim

1 of Nevada residency was obviously conducted in an unobtrusive manner. As in McLain, plaintiff's  
2 subjective belief and irritation that the agency "snuck around behind my back" is not an invasion of  
3 privacy. McLain at . 345-47.

4 The Restatement affirmative defenses and related case law underscore the public policy that  
5 an invasion of privacy is not actionable unless unwarranted and unreasonable. Mr. Hyatt complains  
6 of the FTB's actions taken to verify his claimed Nevada contacts such as verifying home ownership,  
7 utility services and other social and business contacts which Mr. Hyatt contended established his  
8 Nevada residency.

9 Whether the Defendant's actions enjoy a qualified privilege against a claim of invasion of  
10 privacy is a question of law to be determined by the court. Senogles v. Security Benefit Life Ins. Co.,  
11 536 P.2d 1358, 1362-63, 217 Kan. 438 (1975). In Senogles, the court held that there is no actionable  
12 invasion of privacy where the communication alleged to be actionable is made by a party concerning  
13 a matter in which the parties have an interest or duty. As in Senogles, there is no contention by  
14 Plaintiff that inquiry by FTB was not related to its official duty of administering state income tax by  
15 seeking information to verify Plaintiff's residency from those persons or agencies who would have such  
16 information.

17 Whether or not there has been an invasion of privacy must be considered in light of Plaintiff's  
18 actions. By contending change of residency and volunteering proof of residency, Plaintiff invited  
19 FTB's inquiry to verify Plaintiff's claim of Nevada residency. Such action amounts to consent to  
20 FTB's inquiry into Plaintiff's Nevada contacts which Plaintiff contended amounted to residency.  
21 Plaintiff complains of the inquiry made to Nevada agencies using Plaintiff's name, address and/or  
22 social security number. Of course, these are reasonable and common means of identifying persons.  
23 This is information provided by Plaintiff to the FTB. As a matter of law, such action is not "offensive"  
24 or unreasonable.  
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1 In Hill v. Nat'l Collegiate Athletic Assoc., 865 P.2d 633, 648, 7 Cal.4th 1, 26 Cal.Rptr.2d 834  
2 (1994), the California Supreme Court discussed the competing inte  
3 allege and prove conduct that is "highly offensive" to a reasonable person:

4 In determining the "offensiveness" of an invasion of privacy interest,  
5 common law courts consider, among other things: "the degree of the  
6 intrusion, the context, conduct and circumstances surrounding the  
7 intrusion as well as the intruder's motives and objectives, the setting  
8 into which he intrudes, and the expectations of those whose privacy is  
9 invaded". (Citation omitted).

10 The Hill court stressed the limited scope of the invasion of privacy tort and the narrow interest  
11 protected:

12 Thus, the common law right of privacy is neither absolute nor globally  
13 vague, but is carefully confined to specific sets of interest that must  
14 inevitably be weighed in the balance against competing interest before  
15 the right is judicially recognized. A plaintiff's expectation of privacy  
16 in a specific context must be objectively reasonable under the circum-  
17 stances, especially in light of the competing social interests involved.  
18 As one commentator has summarized: "through a careful balancing of  
19 interest, the courts develop specific [common law] causes of action  
20 which protected somewhat well-defined aspects of personal privacy.  
21 Although privacy was clearly identified as an interest worthy of some  
22 legal protection, courts generally did not give privacy a privileged place  
23 or undue weight in the balancing process" [citation omitted]

24 Hill at 648.

25 In Mr. Hyatt's case, he does not complain of any traditionally actionable acts of invasion of  
26 privacy such as intrusion into a private place such as a home or even an office. Nor does Mr. Hyatt  
27 contend that there has been any publication of a private matter to the general public or any person or  
28 entity other than those who could provide information to verify Mr. Hyatt's contention of Nevada  
residency.

The Hill court discussed the limited interest protected:

Legally recognized privacy interest are generally of two classes: (1)  
interest in precluding the dissemination or misuse of sensitive and  
confidential information (informational privacy); and (2) interest in

making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (“autonomy privacy”).

Hill at 654.

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 utility companies or government agencies able to verify Mr. Hyatt’s claim of residency. Merely identifying Mr. Hyatt by this public information is not “highly offensive” as a matter of law. As the Hill court held:

Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. [citation omitted]. ... if the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interest, the question of invasion may be adjudicated as a matter of law.

Hill at 657.

#### **1. INTRUSION UPON THE SECLUSION OF ANOTHER.**

Plaintiff’s Second Cause of Action purports to state a claim for invasion of privacy due to unreasonable intrusion upon the seclusion of another. Plaintiff believes that neighbors, businesses, government officials and others in Nevada with whom Plaintiff has or may have social or business interactions were approached and questioned by the FTB. It is Plaintiff’s belief that the FTB disclosed or implied to these persons that Plaintiff was under investigation in California “in such a manner as to cause doubts to arise concerning Plaintiff’s integrity and moral character”. Additionally, Plaintiff contends that as part of the investigation of his 1991 tax return, he turned over to FTB “highly personal and confidential information with the understanding that it would remain confidential.” Complaint par. 34. Plaintiff believes that FTB violated his right to privacy by revealing his “confidential information” to unidentified third parties. Complaint par. 35.

Plaintiff believes that the FTB investigations of Plaintiff occurring in Nevada and California were performed with the intent to harass, annoy, vex, embarrass and intimidate Plaintiff so that he would enter into a settlement concerning the disputed taxes and penalties which serve to “syphon his time and energies from the productive work in which he is engaged”. Complaint par. 36. Plaintiff

1 believes that the FTB investigation was conducted in such a manner as to intentionally intrude into his  
2 solitude and seclusion which a reasonable person would find highly offensive. Complaint par. 37.

3 In PETA v. Bobby Berosini, Ltd., 111 Nev. 615, 628-639, 895 P.2d 1269 (1995), Modified on  
4 other grounds, 113 Nev. 632, 637, 940 P. 2d 134, 138 (1997), the Nevada Supreme Court discussed the  
5 common law of privacy torts as set forth in the Restatement (Second) of Torts, § 652A et. seq.:

6 ... The four species of privacy tort are: (1) unreasonable intrusion upon the seclusion  
7 of another; (2) appropriation of the name or likeness of another; (3) unreasonable  
8 publicity given to private facts; and (4) publicity unreasonably placing another in a  
9 false light before the public.

10 In PETA, the Nevada Supreme Court gave examples of situations where a person has no  
11 reasonable expectation of privacy. It is no invasion of privacy to photograph a person in a public place.  
12 PETA at 631. There is no reasonable expectation of privacy when the plaintiff knows that other  
13 persons can overhear or as to matters which neighbors or passersby can observe. PETA at 633. Thus,  
14 matters that are already public or which can be observed by the public are not protected.

15 One variety of invasion of privacy pled by Plaintiff is the unreasonable intrusion upon the  
16 seclusion of another. The Nevada Supreme Court explained the elements of this tort in PETA:

17 To recover for the tort of intrusion, a plaintiff must prove the following elements: (1)  
18 an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of  
19 another; (3) that would be highly offensive to a reasonable person.

20 PETA, at 630-31 (citing Restatement (Second) Torts section 652A).

21 In PETA, the court rejected Berosini's argument that the placing of a camera was an intrusion  
22 where the person placing the camera was merely recording the events occurring in a place where he  
23 was authorized to be. On the issue of whether or not the Defendant's conduct would be highly offensive  
24 to a reasonable person, the PETA court explained that there is a preliminary determination of  
25 "offensiveness" which presents a legal issue for the court rather than the fact finder:

26 ... A court considering whether a particular action is "highly offensive" should consider  
27 the following factors: "the degree of intrusion, the context, conduct and circumstances  
28 surrounding the intrusion as well as the intruder's motives and objectives, the setting  
into which he intrudes, and the expectations of those whose privacy is invaded."  
[citations omitted].

1 PETA, at 634-35.

2 The PETA court noted the non-intrusive nature of the video-taping process. As in the  
3 investigation of Mr. Hyatt's residency, Berosini was not even aware of the intrusion. The court found  
4 that Berosini's privacy claims arose not from the actual presence of the video camera, but from the  
5 subsequent publication of the video tape contents. In the instant case, Plaintiff merely complains that  
6 persons and entities in Nevada were contacted by FTB's agents to verify his Nevada contacts and  
7 claimed residency. Whether or not and when Plaintiff became a Nevada resident was the issue between  
8 the FTB and Plaintiff. Verification of Plaintiff's information in this regard cannot be considered  
9 tortious.

10 **2. PUBLICITY GIVEN TO PRIVATE FACTS.**

11 Plaintiff's Third Cause of Action purports to state a claim for invasion of privacy for  
12 unreasonable publicity given to private facts. In this regard he alleges that he revealed to the FTB  
13 "highly personal and confidential information at the request of the FTB" as part of its investigation and  
14 that he expected this information to be kept confidential. Complaint par. 41. Plaintiff alleges that the  
15 FTB disclosed to third parties in Nevada "certain of Plaintiff's personal and confidential information  
16 which had been cooperatively disclosed to the FTB only for legitimate investigative purposes".  
17 Complaint par. 42. The information disclosed is revealed in the Complaint to be Plaintiff's name,  
18 address and social security number used by the FTB to identify the Plaintiff to agencies and entities  
19 contacted by the FTB for information to verify Plaintiff's Nevada residency. The information used to  
20 identify the Plaintiff are public, rather than private facts. Such information is commonly and necessarily  
21 used to identify a person. Plaintiff's place of residence was at issue as a result of Plaintiff's 1991 return  
22 claiming Nevada residency. The information used was voluntarily provided to the FTB by the Plaintiff.

23 In Montesano v. Donrey Media Group, 99 Nev.644, 649, 668 P.2d 1081 (1983), Cert. Denied,  
24 466 U.S. 959 (1984), the Nevada Supreme Court discussed this tort. The privacy tort of public  
25 disclosure of private facts requires proof that a public disclosure of private facts has occurred which  
26 would be offensive and objectionable to a reasonable person of ordinary sensibilities. In Montesano,  
27  
28

1 the Nevada Supreme Court recognized this tort cause of action as set forth in the Restatement (Second)  
2 of Torts, § 652D (1977), but applied a more restrictive interpretation than outlined in the comments to  
3 the Restatement, or as set forth in opinions from other jurisdictions.

4 The Montesano case involved publication of an article in the Las Vegas Review Journal relating  
5 to police officers injured or killed in the line of duty. The newspaper included in its article a report of  
6 the plaintiff's hit and run killing of a police officer which had occurred 20 years earlier. The Court  
7 rejected the plaintiff's argument that use of his name was not a legitimate concern to the public when  
8 balanced against the long passage of time and his criminal rehabilitation and return to private, lawful  
9 life. The line of privacy cases followed by Nevada's Supreme Court wherein liability was rejected for  
10 unauthorized disclosure of identity include situations where the names were published of a victim of  
11 rape, a person subjected to involuntary sterilization, and a victim of institutionalized whipping in a  
12 correctional facility. Montesano, 99 Nev. at 651-55.

13 The Nevada Supreme Court follows the United States Supreme Court's lead in Cox  
14 Broadcasting v. Cohn, 420 U.S. 469, 494-495, 95 S.Ct. 1029, 1045-1046, 43 L.Ed.2d 328 (1975),  
15 where the offending publication involves matters of public record:  
16

17 Even the prevailing law of invasion of privacy generally recognize that the  
18 interest of privacy fades when the information involved already appears on the public  
19 record. The conclusion is **compelling** when viewed in terms of the First and  
20 Fourteenth Amendments and in light of the public interest in a free press.

21 Montesano, 99 Nev. at 653-54. Plaintiff's name and address are matters of public record obviously  
22 protected by Montesano and Cox Broadcasting even if published to the world by the media. The  
23 FTB's limited use of the information necessary to identify Plaintiff in order to verify his residence is  
24 not actionable.

25 In M & R Inv. Co., Inc. v. Mandarino, 103 Nev. 711, 719, 748 P.2d 488 (1987), the Nevada  
26 Supreme Court held that publication of facts which the plaintiff himself made public did not constitute  
27 a publication of private facts and that there is no reasonable expectation of privacy when the plaintiff  
28 makes facts public.

1 A person's name, address and social security number are made public to some degree by all  
2 persons living and conducting business in modern society. Mere inquiry to verify Plaintiff's residency  
3 and use of this minimal information to identify Plaintiff cannot be considered offensive as a matter of  
4 law.

### 5 **3. CASTING IN FALSE LIGHT.**

6 Plaintiff's Fourth Cause of Action purports to state a claim for invasion of privacy for casting  
7 Plaintiff in false light. In this regard, Plaintiff alleges that by gathering information in Nevada as part  
8 of its investigation, the FTB invaded Plaintiff's right to privacy "by stating or insinuating to said  
9 Nevada residents that Plaintiff was under investigation in California, thereby falsely portraying Plaintiff  
10 as having engaged in illegal and immoral conduct, and decidedly casting Plaintiff's character in false  
11 light". Complaint par. 46. Plaintiff further alleges that the FTB's conduct in publicizing its  
12 investigation had the effect of "compromising the attitude of those who know or would, in reasonable  
13 likelihood, come to know Gil Hyatt because of the nature and scope of his work." The publicity was  
14 "offensive and objectionable" to Plaintiff. Plaintiff alleges that the FTB acted "for other than  
15 honorable, lawful or reasonable purposes" and its conduct "was calculated to harm, vex, annoy and  
16 intimidate Plaintiff resulting in "damage to Plaintiff's reputation." Complaint par. 47.

17 In PETA, the court referenced the false light invasion of privacy tort. The false light tort was  
18 not appealed. Nonetheless, the appellant argued that video tapes which were defamatory resulted in  
19 Berosini's actions "being taken out of context." This was stated by the Supreme Court to be the "very  
20 essence of the ... false light tort." In footnote 4 on page 622 of the opinion, the Nevada Supreme Court  
21 referenced the federal cases of Machleder v. Diaz, 801 F.2d 46, 55 (2d Cir. 1986), cert. denied, 479  
22 U.S. 1088 (1987) and Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983). In Brandt, the Tenth  
23 Circuit Court of Appeals discussed the false light tort as set forth in the Restatement (Second) of Torts  
24 § 652E (1977):

25  
26 One who gives publicity to a matter concerning another that places the  
27 other before the public in a false light is subject to liability to the other  
28 for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Brandt at 1306.

The Brandt court explained that the injury redressed by the false light privacy tort is mental distress from having been exposed to public view as compared to defamation actions which compensate damage to reputation. Id. at 1307. In other respects, the false light tort is similar to defamation. Both involve a determination that the matter published is not true. Truth is an absolute defense. Statements of opinion are not actionable. Id. at p. 1307. Whether a given statement constitutes an assertion of fact or an opinion is a question of law for determination by the court. Id. at 1308.

In the Diaz case, the Federal Second Circuit Court of Appeals considered the false light tort. The court made a detailed review of the background of this tort and applied the common law approach set forth in the Restatement (Second) of Torts § 652E. Id. at 52-53.

The Diaz court noted the significant procedural difference between the false light and defamation tort:

...The burden of proof in a defamation case is preponderance of the evidence, while in false light litigation it takes clear and convincing evidence to establish the claim.

Id. at 56.

Both the Brandt and Diaz cases stress the First Amendment safe-guard applied to the false light privacy tort. Brandt at 1307, Diaz at 53-54.

For the false light invasion of privacy tort to lie, there must be “publicity”. Unlike the tort of defamation, this requires more than a mere publication of disparaging facts to another. The publication for a false light claim to lie must be to the public generally or to a large number of persons. Morrow v. II Morrow, Inc., 911 P.2d 964, 968, 139 Or. App. 212 (1996), Review denied, 916 P. 2d 312 (Or. 1996). Restatement (Second) of Torts § 652D comment (a) discusses the “publicity” requirement:

The form of invasion of the right of privacy covered in this Section depends upon publicity given to the private life of the individual. "Publicity," as it is used in this Section, differs from "publication," as that term is used in Section 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

Thus, because of the "publicity" requirement, courts have held that reports to government agencies and investigation of or reports regarding a plaintiff's insurance do not qualify under the false light invasion of privacy tort. Andrews v. Stallings, 892 P.2d 611, 626, 119 N.M. 478 (N.M. App. 1995).

**G. PLAINTIFF HAS FAILED TO PLEAD AN ACTIONABLE TORT OF OUTRAGE**

Plaintiff's fifth cause of action purports to state a claim for the "tort of outrage". In this regard, Plaintiff alleges that the manner in which FTB carried out its investigation and FTB's apparent intent to continue its investigation and assess taxes, interest and penalties "was, and continues to be, extreme, oppressive and outrageous conduct". Plaintiff believes that FTB carried out its investigation in Nevada for the "ostensible purpose of seeking truth concerning his place of residency,..." but that the true purpose was to coerce payment of sums "irrespective of his demonstrably bona fide residence of Nevada throughout the disputed periods." Plaintiff alleges that as a result of this conduct, he has "indeed suffered fear, grief, humiliation, embarrassment, anger and a strong sense of outrage...". Complaint par. 51.

In Branda v. Sanford, 97 Nev. 643, 648, 637 P.2d 1223 (1981) the Nevada Supreme Court considered the elements of this tort:

We recently explicitly recognized that liability can flow from intentional infliction of emotional distress. Star v. Rabello, 97 Nev. 124, 625 P.2d 90 (1981). There, we stated the elements of a prima facie case to be: (1) extreme and outrageous conduct by the defendant; (2) intent to cause emotional distress or reckless disregard as to the proba-



1 bility; (3) severe emotional distress; and (4) actual and proximate causation of the  
2 emotional distress. Id., citing Cervantes v. J.C. Penney, Inc., 595 P.2d 975 (Cal. 1979).

3 The acts complained of by Plaintiff are really only that the FTB investigation resulted in an  
4 adverse finding and assessment of additional tax, interest and penalties. No doubt every taxpayer faced  
5 with an additional assessment has anxieties. People may be outraged at the prospect of taxes, but such  
6 outrage is not actionable. It is not extreme and outrageous conduct for the FTB to investigate a  
7 taxpayer's alleged change of residency done contemporaneously with receipt of extraordinary income.  
8 It is their job.

9 **H. PLAINTIFF HAS NOT PLED AN ACTIONABLE TORT OF ABUSE OF PROCESS.**

10 Plaintiff's Sixth Cause of Action purports to state a claim for abuse of process. Plaintiff does  
11 not allege that any court action was taken by the FTB or that any court process was employed. In this  
12 regard, Plaintiff alleges that the FTB sought to "extort vast sums of money from Plaintiff through  
13 administrative proceedings... through means of administrative quasi-subpoenas". Complaint par. 55.  
14 The FTB directed "Demand[s] to Furnish Information" referenced by Plaintiff as "quasi-subpoenas"  
15 to Nevada residents, professionals and businesses, "requiring specific information about Plaintiff"  
16 without authorization from any Nevada court or government agency. Plaintiff contends that this  
17 constitutes "actionable abuse of process". Each "demand" was represented to be "authorized by  
18 California Revenue and Taxation Code § 19504 (formerly 19254(a) and 26423(a)) sent out by the state  
19 of California, Franchise Tax Board on behalf of "the people of the State of California" identified as  
20 relating to "*In the Matter of: Gilbert P. Hyatt;*", further identifying Plaintiff by his social security  
21 number and "in certain instances *by his actual home address* in violation of express promises of  
22 confidentiality by the FTB;...".

23  
24 Plaintiff contends that each "demand" was unlawful and used to coerce payment of taxes from  
25 him and by assessing taxes, interest and penalties, the FTB abused its administrative powers.  
26 Complaint par. 56. Plaintiff characterizes these actions as "intentional and malicious abuse of the  
27 administrative processes,...". Complaint par. 57.  
28

1 In Dutt v. Kremp, 111 Nev. 567, 575, 894 P.2d 354 (1995), the Nevada Supreme Court defined  
2 the tort of abuse of process:

3 An abuse of process claim consists of two elements: (1) an ulterior  
4 purpose other than resolving a legal dispute; and (2) a willful act in the  
5 use of process not proper in the regular conduct of the proceeding.  
6 Kovacs v. Acosta, 106 Nev. 57, 59, 787 P.2d 368, 369 (1990). An  
7 “ulterior purpose” includes any “improper motive” underlying the  
8 issuance of legal process. See Laxalt v. McClatchy, 622 F.Supp. 737,  
9 751 (D. Nev. 1985).

10 An action for abuse of process hinges on the misuse of regularly issued process. In contrast,  
11 the tort of malicious prosecution rests upon the wrongful issuance of process. Nevada Credit Rating  
12 Bur. v. Williams, 88 Nev. 601, 606, 503 P.2d 9 (1972).

13 Plaintiff’s pleading of abuse of process falls short of stating a claim upon which relief can be  
14 granted by the court. Plaintiff complains that during its investigation FTB improperly used  
15 “administrative quasi-subpoenas”, including “Demand[s] to Furnish Information” addressed to Nevada  
16 persons. The purpose alleged in the Complaint is to obtain information regarding Plaintiff’s residency  
17 and compel payment of California income tax.

18 The abuse of process tort requires an “ulterior purpose other than resolving a legal dispute”  
19 which is not pled and “use of process not proper in the regular conduct of the proceeding.” Dutt, 111  
20 Nev. at 575. The obvious purpose of the “quasi-subpoenas” was to gather information regarding  
21 Plaintiff’s claim of Nevada residency. No use of “process” is pled.

22 In Laxalt v. McClatchy Newspapers, 622 F. Supp. 737, 750-51 (Nev. 1985), the U.S. District  
23 Court in Nevada considered Nevada law regarding the tort of abuse of process. In doing so, the federal  
24 court discussed “process”:

25 ... the phrase clearly indicates that the available process in the case  
26 (complaint and summons) was abused by the subsequent acts of the  
27 lawyer. The availability of process is thus a prerequisite to the tort, in  
28 that there must be process extant which the defendant abuses in order  
for the tort to lie. The mere filing of a complaint with malicious intent  
is insufficient or there must also be some subsequent act to filing which  
abuses the process.

1 The McClatchy court made it clear that some “process” must be abused following the initiation  
2 of litigation for the tort to lie.

3 The term “process” as used in the tort elements broadly describes the tools available to litigants  
4 during court proceedings once an action is commenced. For a tort of abuse of process, the defendant  
5 must have employed some “process”, in the technical sense of the term. See Sea-Pac Co., Inc. v.  
6 United Food & Commer. Worker’s Loc. Union, 699 P.2d 217, 218-19, 103 Wash.2d 800 (1985). In  
7 Sea-Pac, the plaintiff claimed abuse of process resulted from a labor union filing a charge with the  
8 National Labor Relations Board with a malicious motive. The Washington Supreme Court held that  
9 the trial court erred in failing to grant the labor union’s motion for summary judgment because no court  
10 process had been employed by the labor union. There must be an act after filing a lawsuit using legal  
11 process “empowered by that suit to accomplish an end not within the purview of the suit.” [citation  
12 omitted]. Id.

13 Likewise, in Foothill Ind. Bank. v. Mikkelson, 623 P.2d 748, 757 (Wyo. 1981) the Wyoming  
14 Supreme Court held that publication of a notice of mortgage foreclosure not involving court action was  
15 not use of “process” as used in the tort of abuse of process. Even if the motive which impels the  
16 mortgagee to seek foreclosure was malicious, no abuse of process results. The law does not concern  
17 itself with motive of parties that “was animated by hostility or other bad motive” when the tool  
18 employed is for the intended purpose. Id.

19 The word “process” as used in the tort of abuse of process encompasses the entire range of  
20 procedures incident to the judicial litigation process, including discovery requests, deposition notices,  
21 entry of defaults, motion practice in addition to the tradition motion of “process” which was restricted  
22 to utilization of process in the nature of attachment, garnishment or warrants of arrest resulting in  
23 seizure of person or property. Nienstedt v. Wetzel, 651 P.2d 876, 880-81 (Ariz. App. 1982). Whether  
24 or not the process of a non-judicial agency was used for an improper purpose is for the agency to  
25 decide. Without misuse of process issued in a court action, there can be no abuse of process. Sea-Pac  
26 Co. at 221.  
27  
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1 In this case, Mr. Hyatt has not alleged that any court proceeding existed or that any court  
2 process was employed against him. Thus, there can be no abuse of process claim.

3 **I. NO FRAUD CLAIM IS PROPERLY ALLEGED.**

4 Plaintiff's Seventh Cause of Action purports to state a claim for fraud. Over five pages of the  
5 Amended Complaint are devoted to these allegations. Nearly all of these allegations state mere  
6 argument, conclusions and speculation not supported by fact allegations. In spite of the great quantity  
7 of verbiage, Plaintiff fails to state his averments of fraud with particularity as required by NRCP 9 (b).  
8 The facts pled state only, in essence, that Plaintiff relied on the FTB's promise of confidentiality in  
9 turning over highly confidential information (i.e. his address) during the FTB's investigation and that  
10 the FTB betrayed this trust (thus defrauding him) by sending "Demand[s] to Furnish Information" to  
11 Las Vegas utility companies during the investigation to determine his residency. The harm alleged is  
12 that FTB's requests included identification of Plaintiff by his name and address. Complaint paragraphs  
13 60-64. Plaintiff admits that it was his legal duty to cooperate in the FTB investigation. Complaint  
14 Paragraph 71.

15 In Nevada the essential elements of intentional misrepresentation are set forth in Landex, Inc.  
16 v. State ex rel. List, 94 Nev. 469, 478, 582 P.2d 786 (1978):

- 17 1. A false misrepresentation made by the Defendant;
- 18 2. Knowledge or belief on the part of the Defendant that the representation is  
19 false or that he had an insufficient basis of information to make the representation;
- 20 3. An intention to induce the Plaintiff to act or to refrain from acting in reliance  
21 upon the misrepresentation;
- 22 4. Justifiable reliance upon the misrepresentation on the part of the Plaintiff in  
23 taking action or refraining from it; and
- 24 5. Damage to the Plaintiff resulting from such reliance.

25 The elements of intentional misrepresentation must be established by clear and convincing  
26 evidence. Lubbe v. Barba, 91 Nev. 596, 599, 540 P.2d 115 (1975).

1 A review of the type of damages required to be proven by the Plaintiff shows how inapplicable  
2 the tort of fraud is in this situation. In Randono v. Turk, 86 Nev. 123, 466 P.2d 218 (1970), the Nevada  
3 Supreme Court discussed both measures of damages for fraud. These include "out-of-pocket" or  
4 "benefit-of-the-bargain" measures of damages. Both measures of damage involve pecuniary loss to  
5 the plaintiff. Neither measure of damages includes an award for emotional distress or hurt feelings.

6 The Plaintiff is really only complaining that his address was used in a manner that he finds  
7 disagreeable. The FTB used Plaintiff's address to identify Plaintiff to other agencies and utilities in  
8 order to verify Plaintiff's claim of Nevada residency. This does not satisfy the elements of fraud.

9 **J. NEGLIGENT MISREPRESENTATION IS NOT PROPERLY PLED.**

10 Plaintiff's Eighth Cause of Action purports to state a claim for negligent misrepresentation. The  
11 allegations in this regard are incomprehensible for the most part. It is apparently contended that a  
12 "business relationship" of "trust" existed between the Plaintiff and FTB which was breached when the  
13 FTB failed to inform Plaintiff that its agents would fail to keep information he provided confidential  
14 in spite of assurances to do so. Plaintiff would have it that the FTB is his trusted agent! The FTB's  
15 function is provided for by California statutes and regulations. This scheme does not provide that the  
16 agency is the taxpayers' fiduciary. As set forth above, the agency has authority to use taxpayer  
17 information in furtherance of its duties. Plaintiff was admittedly obligated by law to cooperate with  
18 the FTB's investigation and to provide information to it.

19 The elements of negligent misrepresentation are set forth in Bill Stremmel Motors, Inc. v. First  
20 Nat. Bank of Nev., 94 Nev. 131, 134, 575 P.2d 938 (1978):  
21

- 22 1. The defendant must have supplied information while in the course of  
23 his business, profession or employment, or any other transaction in which he had a  
24 pecuniary interest;
- 25 2. The information must have been false;
- 26 3. The information must have been supplied for the guidance of the  
27 plaintiff in his business transaction;
- 28 4. The defendant must have failed to exercise reasonable care or  
competence in obtaining or communicating the information;

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5. The plaintiff must have justifiably relied upon the information by taking action or refraining from taking action; and

6. As a result of his reliance upon the accuracy of the information, the plaintiff must have sustained damage.

Plaintiff's Eighth purported cause of action is a perversion of the tort. There was no "business transaction" between Plaintiff and the FTB. The matter concerned only the FTB's investigation of Plaintiff's claim of change of residence, a determination that he did not and assessment of additional taxes. Plaintiff argues that the FTB misrepresented its intent or ability to keep his address confidential. He does not allege that this information was used for purposes other than those relating to investigating his residence and assessing income tax, the FTB's statutory duty.

Nor does Plaintiff plead any damage compensable under this tort. In Bill Stremmel Motors, the Nevada Supreme Court adopted the Restatement (Second) of Torts theory of this tort. Comment *a* of section 552 of the Restatement makes it clear that damage resulting from the false information provided must relate to commercial information negligently provided by one under a duty to provide commercial information, resulting in pecuniary harm to the party relying on it in a business transaction.

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III.

CONCLUSION

The Plaintiff's action for declaratory relief cannot be maintained due to the pending administrative proceedings. Plaintiff's tort claims are barred by his failure to comply with the California Tort Claims Act. Under Nevada law, the tort claims are not properly pled.

There are no allegations which if proven would permit recovery. Accordingly, Defendant is entitled to judgment on the pleadings.

DATED this 9<sup>th</sup> day of February, 1999.

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

\*\*\*\*\*

GILBERT P. HYATT,  
  
Plaintiff,

vs.

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA, and DOES 1-100,  
inclusive

Defendants.

Case No. : A382999  
Dept. No. : XVIII  
Docket No. : R

**NOTICE OF ERRATA**

(re: Defendant's Motion for Judgment on the  
Pleadings, filed February 9, 1999)

COMES NOW, Defendant, the FRANCHISE TAX BOARD OF THE STATE OF  
CALIFORNIA ("FTB"), by and through its undersigned attorneys of record, and submits,  
contemporaneously herewith, its MOTION FOR JUDGMENT ON THE PLEADINGS --  
CORRECTED COPY. The original version of the Motion, filed on February 9, 1999, contained  
numerous errors which were the result of computer system difficulties at the offices of Defendant's  
counsel. Please disregard that document.

*Shirley B. Pangione*

FEB 10 4 24 PM '99

**FILED**



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1  
2 DATED this 10<sup>th</sup> day of February, 1999.  
3  
4

5 McDONALD, CARANO, WILSON, McCUNE,  
6 BERGIN, FRANKOVICH & HICKS

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1 MOT

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FEB 10 4 25 PM '99

FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

\*\*\*\*\*

13 GILBERT P. HYATT,

14 Plaintiff,

15 vs.

16 FRANCHISE TAX BOARD OF THE  
17 STATE OF CALIFORNIA, and DOES 1-  
18 100, inclusive

19 Defendants.

Case No. : A382999  
Dept. No. : XVIII  
Docket No. : R

**DEFENDANT'S MOTION FOR  
JUDGMENT ON THE PLEADINGS**

**CORRECTED COPY**

20 COMES NOW, Defendant, the FRANCHISE TAX BOARD OF THE STATE OF  
21 CALIFORNIA ("FTB"), by and through its undersigned attorneys of record, and moves the court  
22 pursuant to Nevada Rule of Civil Procedure 12(c) for judgment on the pleadings.

23  
24 The Plaintiff is currently engaged in "scorched earth" discovery against the FTB as to matters  
25 for which the Nevada Court has no subject matter jurisdiction, claims which are not properly pled,  
26 issues pending in an ongoing California administrative proceeding, and claims which are barred under  
27 Nevada and California law.  
28

1 Accordingly, Judgment on the pleadings is particularly justified to narrow the issues and avoid  
2 wasteful discovery expense.

3  
4 This Motion is based on the points and authorities set forth below and the pleadings on file  
5 herein.

6 DATED this 10<sup>th</sup> day of February, 1999.

7  
8 McDONALD, CARANO, WILSON, McCUNE,  
BERGIN, FRANKOVICH & HICKS

9 By Bryan Clark  
10 BRYAN R. CLARK, ESQ.  
11 Nevada Bar #4442  
12 2300 West Sahara Avenue, Suite 1000  
13 Las Vegas, Nevada 89102  
14 Attorneys for Defendant

15 **NOTICE OF MOTION**

16 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

17 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will  
18 bring the foregoing DEFENDANT'S MOTION FOR JUDGMENT ON PLEADINGS on for hearing  
19 before the above-entitled court on the 8<sup>th</sup> day of March, 1999, at the hour of \_\_\_\_m. in  
20 Department XVII of the above-entitled court, or as soon thereafter as counsel can be heard.

21 DATED this 10<sup>th</sup> day of Feb., 1999.

22 McDonald Carano Wilson McCune  
23 Bergin Frankovich & Hicks LLP

24 Bryan Clark  
25 BRYAN R. CLARK, ESQ.  
26 Nevada Bar No. 4442  
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**POINTS AND AUTHORITIES**

**I.**

**BACKGROUND FACTS AND CIRCUMSTANCES.**

Defendant, FTB is the California government agency responsible for collecting income taxes from California residents and non-residents with California income. Plaintiff Gilbert Hyatt was admittedly a long-time resident and taxpayer of the State of California through at least September 26, 1991. In 1990, he was granted patents on certain inventions, resulting in many millions of dollars of income in 1991 and 1992. Plaintiff alleges that on September 26, 1991, he became a resident of Clark County, Nevada, shortly before receipt of millions of dollars of income resulting from issuance of his patent. Plaintiff alleges various Nevada contacts developed by him as proof of residency such as purchase of a home in Las Vegas on April 3, 1992. It is believed that at the time of his alleged move to Nevada, Plaintiff enjoyed the certainty of realizing millions of dollars of income in the near future as a result of the patents issuing.

The FTB investigated the legitimacy of Plaintiff's claim of Nevada residency. It was determined that Plaintiff was actually a California resident for 1991 and part of 1992. Accordingly, Plaintiff was given notice of additional tax assessment which he is now protesting through the FTB's administrative procedures. This suit follows the FTB investigation of Plaintiff's Nevada contacts and occurs during the pendency of Plaintiff's ongoing protest in the FTB's administrative proceedings.

Plaintiff purports to state eight causes of action in his First Amended Complaint (the "Complaint") which are, according to the Complaint captions:

1. Declaratory Relief;
2. Invasion of Privacy - Intrusion upon the Seclusion of Another;
3. Invasion of Privacy - Publicity Given to Private Facts;
4. Invasion of Privacy - Casting in False Light;
5. Tort of Outrage;
6. Abuse of Process;

- 1 7. Fraud; and
- 2 8. Negligent Misrepresentation.

3 The prayer for relief requests the court's declaration regarding Plaintiff's status as a Nevada  
4 resident and the FTB's power to investigate Plaintiff's residency, an award of "actual and  
5 consequential" damages, punitive damages, costs and attorney fees.

6 The FTB answered the Complaint, generally denying its allegations. Affirmative defenses are  
7 stated, including the court's lack of subject matter jurisdiction and the effect of the California  
8 administrative proceedings currently underway between the parties where issues of Plaintiff's  
9 California residency and tax liability are pending.

10 Rather than fact allegations, the 30 page Complaint contains mostly repetitious arguments,  
11 legal conclusions and speculation as to the FTB's representatives' motives and intentions. These  
12 should be ignored for purpose of this motion. The following "facts" are alleged:

13 Plaintiff Gilbert Hyatt is a "highly successful inventor" who admittedly resided in California  
14 through September 26, 1991. In 1990, he was granted patents on "certain of his important  
15 inventions." Complaint ¶8. Plaintiff alleges that on September 26, 1991, he became a resident of  
16 Clark County, Nevada. Plaintiff alleges various Nevada contacts developed by him as proof of  
17 residency such as purchase of a home in Las Vegas on April 3, 1992. Complaint ¶9. Prior to that  
18 time, he was admittedly a "long-standing resident and taxpayer of the State of California." Complaint  
19 ¶60.

20 Plaintiff filed only a part-year state income tax return with the state of California for 1991.  
21 Complaint ¶10. In June of 1993, FTB began an audit of Plaintiff's 1991 return. In July of 1993, FTB  
22 began to investigate Plaintiff's contacts with Nevada. Complaint ¶11. FTB investigated Plaintiff's  
23 claim of Nevada residency by contacting various Nevada persons and entities which included both  
24 government and private persons. Complaint ¶12. To gather information, FTB corresponded with  
25 entities and persons using its "Demand to Furnish Information" form not issued from a Nevada court  
26 or any Nevada government agency. Complaint ¶13. In addition to the Demand to Furnish  
27 Information forms used to accumulate information, FTB corresponded with other persons and entities  
28

1 in letter form. Complaint ¶14. Plaintiff was unaware of FTB's investigation in Nevada until after such  
2 contacts had taken place. Complaint ¶15. Plaintiff admittedly had a legal duty to cooperate with FTB  
3 in its investigation. Complaint ¶71.

4 On April 23, 1996, after FTB had completed its audit and investigation of Plaintiff's 1991  
5 return, FTB sent a notice of proposed assessment, that is, a formal notice that taxes are owed, to  
6 Plaintiff. FTB found that Plaintiff was a resident of California, not Nevada, until April 3, 1992. It  
7 was determined by FTB that Plaintiff's assertion of Nevada residency was fraudulent. Complaint ¶  
8 16.

9 On April 1, 1996, Plaintiff received formal notice that FTB had commenced an investigation  
10 into the 1992 tax year and its tentative determination that Plaintiff would also be assessed California  
11 income tax for the period of January 1 through April 3 of 1992. Complaint ¶18. On April 10, 1997,  
12 and May 12, 1997, Plaintiff received notices from FTB that it would be issuing a formal notice of  
13 proposed assessment for the 1992 tax year and penalties for Plaintiff's failure to file a 1992 tax return.  
14 Complaint ¶19. Plaintiff claims that prior to receipt of the notice of proposed assessment for 1992,  
15 a representative of FTB stated to one of Plaintiff's representatives that disputes over assessments by  
16 FTB always settle at the notice stage as tax payers do not want to risk their personal financial  
17 information being made public. Plaintiff understood this statement to be a strong suggestion by FTB  
18 that he settle the disputed taxes by payment of some portion of the assessment. Plaintiff has refused  
19 to do so, contending that he has not been a resident of California since September 26, 1991.  
20 Complaint ¶20.

21 On August 14, 1997, Plaintiff received a formal notice of proposed assessment for 1992  
22 assessing California state income tax on Plaintiff's income for the entire year of 1992 together with  
23 accrued interest and penalties. Complaint ¶21. Plaintiff believes that the FTB's investigations  
24 directed at him will be repeated. Complaint ¶22. Plaintiff believes that the FTB may continue to  
25 assess California state income taxes for the years 1993 and beyond. Complaint ¶23.

26 Plaintiff believes that FTB's motive in conducting the Nevada investigation is to collect  
27 additional taxes and assess penalties for fraud for tax years 1991 and 1992 in spite of Plaintiff's  
28

1 contention that FTB is aware that Plaintiff became a Nevada resident on September 26, 1991.  
2 Complaint ¶24 and ¶25.

3 Plaintiff argues that because of his contention that he is a Nevada resident, the Nevada courts  
4 should determine the issue of residency rather than forcing him to go through California's  
5 administrative procedures and court action. Complaint ¶17.

6 Plaintiff contends that Nevada's courts have personal jurisdiction over FTB because of its  
7 investigation conducted within the state of Nevada to create a basis for maintaining that Plaintiff  
8 continued his residency in California after September 26, 1991. Complaint ¶26. Plaintiff believes that  
9 the FTB has a pattern and practice of entering into Nevada to investigate Nevada residents who were  
10 formerly residents of California, then assessing such residents California state income tax for time  
11 periods subsequent to the date when such individuals moved to and established residency in Nevada.  
12 Complaint ¶27.

## 13 II.

### 14 ARGUMENT

15 NRCP 12(c) provides for a motion for judgment on the pleadings:

16 After the pleadings are closed but within such time as not to delay the  
17 trial, any party may move for judgment on the pleadings.

18 A Rule 12(c) motion is available to provide a means of disposing of cases when material facts  
19 are not in dispute and judgment on the merits is appropriate on the content of the pleadings. Bernard  
20 v. Rockhill Dev. Co., 103 Nev. 132, 135 -36, 734 P.2d 1238 (1987) (citing 5 C. Wright & A. Miller,  
21 *Federal Practice and Procedure* §§ 1367 - 1368(1969)). This motion has utility when all material  
22 allegations of fact are admitted in the pleadings and only questions of law remain. Id. at 136. The  
23 moving party will succeed on the motion if there are no allegations in the Complaint that if proven  
24 would permit recovery. Id.

25 Consideration of the Complaint is allegations with the elements of each cause of action pled  
26 shows that the FTB is entitled to judgment on the pleadings.

**A. PLAINTIFF'S DECLARATORY ACTION MUST BE DISMISSED  
BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION**

Plaintiff's First Claim for Relief seeks declaratory relief from the court regarding his residency for the purpose of avoiding California income tax. This is currently the subject of an FTB administrative proceeding in which Plaintiff seeks the same determination. Under California law, it is a well established requirement that administrative remedies must be exhausted before a party can proceed with a court action against a department of the state of California. To protect the FTB from precipitous taxpayer court action, California Revenue and Tax Code (Cal. Rev. & Tax C.) section 19381 provides:

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state or against any officer of this state to prevent or enjoin the assessment or collection of any tax under this part; provided, however, that any individual after protesting a notice or notices of deficiency assessment issued because of his or her alleged residence in this state and after appealing from the action of the Franchise Tax Board to the State Board of Equalization, may within 60 days after the action of the State Board of Equalization becomes final commence an action, on the grounds set forth in his or her protest, in the Superior Court of the County of Sacramento, in the County of Los Angeles or in the City and County of San Francisco against the Franchise Tax Board to determine the fact of his or her residence in this state during the year or years set forth in the notice or notices of deficiency assessment.

In this California income tax matter, Plaintiff seeks a residency determination from this Nevada court to determine his residency status which he is presently disputing through the administrative process under California law. Where an administrative remedy is provided by statute, relief must be sought from the administrative body and the administrative remedy must be exhausted before the courts will act; and a court violating this rule acts in excess of its jurisdiction. Aronoff v. Franchise Tax Board, 60 Cal.2d 177, 180-81, 383 P. 2d 409 (1963); Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291-306 (App. Ct. 1941).

1 The California Supreme Court in Aronoff, held that:

2 ...petitioners' failure to exhaust their administrative remedies consti-  
3 tute a jurisdictional barrier to obtaining relief from the courts.

4 In Horack v. Franchise Tax Board, 18 Cal.App.3d 363, 368 (Cal. App. 4<sup>th</sup> Dist. 1971), the  
5 California court of appeal held that the trial court was acting in excess of its jurisdiction when  
6 petitioner had instituted proceedings to pursue their administrative remedies and had not exhausted  
7 such remedies at the time they sought relief from the court.

8 The doctrine of exhaustion of administrative remedies requires a party to use all available  
9 agency administrative procedures for relief and to proceed to a final decision on the merits by the  
10 agency before he may resort to the courts. McHugh v. County of Santa Cruz, 33 Cal.App.3d 533,  
11 538-539 (Cal. App. 1<sup>st</sup> Dist. 1973).

12 In the instant matter, Plaintiff clearly has not exhausted the California administrative process  
13 and his failure to do so deprives this Court of subject matter jurisdiction.

14 Under California law, a taxpayer who claims to be a resident of another state has two options  
15 in challenging FTB's assessment of income taxes. Those options center on whether he is willing to  
16 pay the disputed tax and seek a refund. If the taxpayer declines to pay the disputed tax, he may file  
17 a formal protest which is then investigated by and decided by an FTB officer. Cal. Rev. & Tax C.  
18 § 19381. If that officer upholds the assessment, the taxpayer may appeal the decision to the State  
19 Board of Equalization. Id. If the Board upholds the assessment, the taxpayer may seek judicial  
20 review in one of three California superior courts. Id.; see also Shiseido Cosmetics (American) Ltd.  
21 v. Franchise Tax Bd., 235 Cal.App.3d 478, 488 (Cal.App.3d Dist. 1991), cert. denied 505 U.S. 1205,  
22 leave denied 506 U.S. 947 (1992)( citing California Const., Art. XIII, section 33).

23 Alternatively, if the taxpayer elects to pay the disputed tax, he may do so under protest and  
24 directly seek a refund from one of the same three trial courts. Cal. Rev. & Tax C. §§ 19382 and  
25 19385; see also California Const., Art. XIII, § 32. Either way, California courts have consistently  
26 required "strict adherence to the administrative procedure set forth by the Legislature before a court  
27 action (can) be filed." Shiseido Cosmetics (American) Ltd., 235 Cal.App.3d at 488.  
28

1 This administrative process was discussed recently in Schatz v. FTB, 1999 Cal.App. LEXIS  
2 57, Court of Appeals of California, Third Appellate District January 26, 1999:

3 Pursuant to California's income tax scheme regarding  
4 deficiency assessments, the Board sends the taxpayer a notice of  
5 proposed deficiency assessment that "set[s] forth the reasons for the  
6 proposed deficiency assessment and the computation thereof." (Rev.  
7 & Tax. Code, §§ 19033, 19034, formerly Rev. & Tax. Code, §§  
8 18583, 18584; all further references to undesignated statutory sections  
9 are to the Revenue and Taxation Code unless otherwise noted.) ... (the  
10 parties term this notice the "Notice of Proposed Assessment" or  
11 NPA).

12 A taxpayer has 60 days to file with the Board "a written  
13 protest against the proposed deficiency assessment" contained in the  
14 notice of proposed deficiency assessment. (§19041; formerly §  
15 18590.) "If a protest is filed, the [Board] shall reconsider the  
16 assessment of the deficiency...." (§ 19044; formerly § 18592.)  
17 Appeal to the State Board of Equalization is then permitted; finality  
18 is dependent upon the extent to which a taxpayer pursues the appellate  
19 process afforded. (§§ 19045-19048; formerly §§ 18593-18596.)

20 There is also a remedy available to Plaintiff in California in its Superior Courts as to  
21 overreaching by FTB's officers or employees under California's Taxpayers' Bill of Rights, in Cal. Rev  
22 & Tax C. section 21021 regarding Reckless Disregard of Procedure, California law provides for  
23 damages. Plaintiff has not pursued this.

24 In this California matter, Plaintiff filed formal protests of FTB's assessments for 1991 and  
25 1992, but FTB has not yet completed its review of either protest. FTB's evaluation of his protests  
26 was ongoing when Plaintiff filed this action and is currently pending. Those protests have not yet  
27 been decided and Plaintiff has not paid the disputed assessments. Thus, Plaintiff has no present right  
28 to seek judicial relief under California law. Even a California court cannot expand "the methods for  
seeking tax refunds expressly provided by the Legislature." Woolsey v. State of California, 3 Cal.  
4<sup>th</sup> 758, 792 (Cal. 1992), cert. denied 508 U.S. 940 (1993). Nevertheless, Plaintiff now asks this

1 Court to ignore California's administrative process and preempt it by issuing a declaratory judgment  
2 on the primary issue presently before the FTB - his residency.

3  
4 **B. PLAINTIFF'S DECLARATORY ACTION WOULD BE BARRED FROM**  
5 **BOTH CALIFORNIA AND UNITED STATES COURTS**

6 As shown above, Plaintiff's failure to exhaust administrative remedies would constitute an  
7 absolute bar from his action going forward in California courts. Tax Injunction Act (28 U.S.C. §  
8 1341) is an absolute jurisdictional bar to federal involvement in the State revenue collection schemes.  
9 Keleher v. New England Tel. & Tel. Co., 947 F.2d 547, 548 (2d Cir. 1991). The Tax Injunction  
10 Act is, first and foremost, a vehicle to drastically limit federal court jurisdiction over the important  
11 local concern of the collection of taxes. Rosewell v. LaSalle National Bank, 450 U.S. 503, 522, 101  
12 S.Ct. 1221, 1231-32, 67 L. Ed. 2d 464, 479 (1981) reh'g denied, 451 U.S. 1011(1981). It divests  
13 the court of jurisdiction not only to issue an injunction enjoining state officers from collecting state  
14 taxes but also from issuing declaratory relief in state tax causes. California v. Grace Brethren Church,  
15 457 U.S. 393, 407-11, 102 S.Ct. 2498, 2507-09, 73 L.Ed.2d 93 (1982). California has established  
16 adequate procedures to provide plaintiff with a plain, speedy, and efficient remedy through its  
17 administrative remedies and the right for actions to be brought in California courts after the  
18 administrative process is exhausted.

19 The California law and federal Tax Injunction Act demonstrate the strong public policy  
20 served by not interfering in the administrative tax process. Nevada's courts should not presume to  
21 substitute its law and procedure where a sister state's law bars action in a matter involving a sister  
22 state's taxing authority.

23 **C. THIS COURT SHOULD NOT EXERCISE JURISDICTION**  
24 **AS A MATTER OF COMITY**

25 That Plaintiff's Complaint does in fact seek to impede and interfere with California's taxing  
26 authority is manifest. Plaintiff strongly alleges and argues impairment of Nevada's sovereignty and  
27 the integrity of its territorial boundaries, which should provide Plaintiff with a safe harbor from any  
28 tax liability in California:



1 5: ... (1) This is an action for, inter alia, declaratory relief; (2) substantial issues of  
2 public policy are implicated concerning the sovereignty of the State of Nevada and  
3 the integrity of its territorial boundaries as opposed to governmental agencies of  
4 another state who enter Nevada in an effort to extraterritorially, arbitrarily and  
5 deceptively enforce their policies, rules and regulations on residents of Nevada in  
6 general, and Plaintiff Gilbert P. Hyatt in particular;...

7 Complaint, ¶5. Instead of concluding the ongoing and available California administrative procedures  
8 to establish that he was a permanent resident and domiciled in Nevada commencing on September  
9 26, 1991, Plaintiff seeks a declaratory judgment in Nevada that he in fact was not a California resident  
10 and, instead, was a Nevada resident commencing on September 26, 1991. Although this very issue  
11 is pending in the California administrative proceedings, Plaintiff contends that "this action does not  
12 seek to impede or interfere with California's taxing authority." He requests in his Complaint:

13 7: Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 et seq. to  
14 confirm Plaintiff's status as a Nevada resident effective as of September 26, 1991 and  
15 continuing to the present and, correspondingly, his non-residency during said period  
16 in California..

17 Plaintiff acknowledges in his Complaint that the FTB's investigation in Nevada was a part of  
18 its audit of his 1991 tax return:

19 11: ...the FTB began an audit of the 1991 return...as part of its audit, the FTB began  
20 to investigate Plaintiff by making or causing to be made numerous and continuous  
21 contacts directed at Nevada...

22 The principles of comity require this Court to decline jurisdiction and dismiss this case. Under  
23 the principle of comity, "the courts of one jurisdiction may give effect to the laws and judicial  
24 decisions, of another jurisdiction out of deference and respect." Mianecki v. Second Jud. District  
25 Court, 99 Nev. 93, 98, 658 P.2d 422, 425 (1983) cert. dismissed, 464 U.S. 806 (1983). A state is  
26 free to close its courts to suits against a sister state as a matter of comity, particularly where assertion  
27 of jurisdiction "would impinge unnecessarily upon harmonious interstate relations which were part  
28 and parcel of the spirit of cooperative federalism." Simmons v. State, 670 P.2d 1372, 1385 (Mont.  
1983).

1 The United States Supreme Court has indicated that in actions such as this, where a lawsuit  
2 poses a threat to a state's "capacity to fulfill its own sovereign responsibilities," a court should decline  
3 jurisdiction as a matter of comity in furtherance of our constitutional system of cooperative  
4 federalism. Nevada v. Hall, 440 U.S. 410, 424 n.24 (1979), reh'g denied, 441 U.S. 917 (1979).

5 Under California law, Plaintiff's causes of action would be barred by the doctrine of  
6 exhaustion of administrative remedies and the claims filing requirements under the California Torts  
7 Claims Act. Because these actions cannot go forward in California courts, this court should not  
8 exercise jurisdiction as a matter of comity. California would not give full faith and credit to a Nevada  
9 judgment purporting to determine an action barred under California law.

10 A New York Court of Appeals specifically found that "(f)or our tribunals to sit in judgment  
11 on a tax controversy between another State and its present or former citizens would be an intrusion  
12 into the public affairs of (that other) State". City of Philadelphia v. Cohen, 184 N.E.2d 167, 169-70  
13 (N.Y.App. 1962), cert. denied 371 U.S. 934 (1962).<sup>1</sup>

14 The United States Supreme Court has long recognized that the taxing power of a state is one  
15 of the state's attributes of sovereignty. Such power exists independently of the express provisions  
16 of the U.S. Constitution. The taxing power is indispensable to the continued existence of the states.  
17 A state's taxing power "may be exercised to an unlimited extent upon all property, trades, business,  
18 and advocations existing or carried on within the territorial boundaries of the State, except so far as  
19

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20 <sup>1</sup>  
21 Under the facts of this case, three other legal principles provide background on why this  
22 Court should exercise comity and defer to California's administrative process to resolve  
23 Plaintiff's residency claims: (1) "exhaustion of administrative remedies"; (2) the "primary  
24 jurisdiction doctrine"; and (3) the "abstention" doctrine. First, no action generally lies until  
25 a Plaintiff has first exhausted whatever administrative remedies are provided by statute (i.e.  
26 such an action is premature and must be dismissed). See generally, Bowen v. New York City,  
27 476 U.S. 467 (1986). Second, the "primary jurisdiction doctrine" allows courts to stay or  
28 dismiss proceedings (over which they have jurisdiction but are properly before an administra-  
tive agency) to give the parties a reasonable opportunity to seek an administrative ruling. See  
generally Reiter v. Cooper, 507 U.S. 258, 268 (1993). And third, courts have the power to  
abstain in cases where resolution of certain issues "might unnecessarily interfere with a state  
system for the collection of taxes." See generally, Quackenbush v. Allstate Ins. Co., 517 U.S.  
706, 116 S.Ct. 1712, 1721 (1996).

1 it has been surrendered to the Federal government.” Union Pacific Railroad Company v. Peniston,  
2 85 U.S. 5, 29 (1873). The taxing power necessarily includes the power in this case to determine if  
3 Plaintiff remained liable for California’s state income taxes for any time after September 26, 1991.

4 Plaintiff has filed lengthy and substantive administrative protests. He has not paid any disputed  
5 tax assessment. No decisions on those protests have been issued by FTB. Accordingly, Plaintiff has  
6 clearly failed to exhaust his administrative remedies under California law. Because a ruling on  
7 Plaintiff’s residency will be made in California’s administrative process, this Court should decline to  
8 assert jurisdiction over Plaintiff’s cause of action for declaratory relief pending the FTB’s  
9 administrative rulings. Since California clearly has an adequate administrative procedure available  
10 to Plaintiff, no court should interrupt that process until and unless Plaintiff pays the assessments or  
11 seeks judicial review of an adverse ruling by the State Board of Equalization. For all these reasons,  
12 this Court should exercise comity and decline to assert jurisdiction over the resolution of Plaintiff’s  
13 request for declaratory relief in favor of California’s ongoing administrative consideration of  
14 Plaintiff’s protests.  
15  
16

17 **D. PLAINTIFF’S TORT CAUSES OF ACTION ARE**  
18 **BARRED IN CALIFORNIA COURTS**

19 California, as a sovereign, is immune from tort lawsuits except to the extent it allows itself  
20 to be sued pursuant to the California Tort Claims Act. The California Tort Claims Act requires that,  
21 for actions against the state or its employees for money damages, the Plaintiff must present a claim  
22 to the California State Board of Control “not later than six months after the accrual of the cause of  
23 action.” California Government Code sections 911.2 and 905.2. Presentation of a claim in the manner  
24 prescribed by law is mandatory and an absolute prerequisite to a suit for money damages. Pacific Tel.  
25 and Tel. Co. v. County of Riverside, 106 Cal.App.3d 183, 188 (Cal. App. 4<sup>th</sup> Dist. 1980); Bozaich  
26 v. State of California, 32 Cal.App.3d 688, 696-97 (Cal. App. 5<sup>th</sup> Dist. 1973). Failure to file a claim  
27 within the prescribed time period in the manner prescribed by law is fatal to a claimant’s causes of  
28

1 action. City of San Jose v. Superior Court, 12 Cal.3d 447, 454 (1974); Chase v. State, 67 Cal.App.  
2 3d 808, 810 (1977); See also, Ortega v. O'Conner, 764 F.2d 703, 707 (9th Cir. 1985), rev'd on other  
3 grounds, 480 U.S. 709 (1987); Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 627 (9th  
4 Cir. 1988). Because Plaintiff failed to comply with the claim filing requirements as required under  
5 the California Tort Claims Act, Plaintiff's tort causes of action are invalid as a matter of California  
6 law.

7 **E. DECLARATORY RELIEF IS NOT AVAILABLE UNDER NEVADA LAW**

8  
9 In his Complaint under the First Cause of Action Plaintiff seeks declaratory relief. This  
10 remedy is not available under Nevada law when an administrative agency has jurisdiction over the  
11 matter. The issue of Plaintiff's residency is currently before the FTB.

12 Plaintiff alleges that, pursuant to California law, in determining whether an individual was a  
13 resident of California subject to California income tax, the individual must have been domiciled in  
14 California during the taxed period for "other than temporary or transitory purposes." Citing Cal. Rev.  
15 & Tax C. section 17014, Plaintiff further alleges that the FTB's own regulations and precedents  
16 require it to apply certain factors in determining an individual's domicile and whether the individual's  
17 presence in California was more than temporary or transitory. Plaintiff describes these considerations  
18 and then describes the Nevada contacts which he contends show that he was a Nevada resident.  
19 Complaint ¶29. Plaintiff contends that the FTB refused to consider all evidence of Plaintiff's Nevada  
20 residency in assessing taxes and penalties. Complaint ¶30. Thus, Plaintiff contends that an actual  
21 controversy exists as to whether Plaintiff was a full-time resident of Nevada commencing on  
22 September 26, 1991.

23 Plaintiff contends that under either Nevada or California law he was a resident of Nevada  
24 throughout the disputed periods, that FTB ignored its own regulations and precedents, that FTB has  
25 no jurisdiction to impose a tax obligation on Plaintiff, that FTB had no authority to conduct its  
26 investigation in Nevada or request information from Nevada residents and businesses. Complaint ¶  
27 31. Plaintiff requests the judgment of this Nevada court "declaring and confirming Plaintiff's status  
28 as a full-time, bona fide resident of the state of Nevada effective from September 26, 1991 to the

1 present" and further declaring that FTB's investigation and information requests to Nevada residents  
2 were without approval or authority from a Nevada court or government agency and violative of  
3 Nevada's "sovereignty and territorial integrity." Complaint ¶32.

4 Plaintiff's contention that he is a resident of Nevada under Nevada law is, of course, utterly  
5 irrelevant. California's power to tax its residents exists independently of any other state's law. See,  
6 Lawrence v. State Tax Comm., 286 U.S. 276 (1932). It is possible to be determined a dual resident.  
7 The remedy for one determined to be a dual resident (this happens occasionally as each of the taxing  
8 states has a different definition of "resident") is the tax credit, Cal. Rev. & Tax C. section 18001.

9 Nevada has adopted the Uniform Declaratory Judgments Act found at NRS §30.010 et seq.  
10 The court's power in this regard is set forth in NRS §30.030. The court can grant declaratory relief  
11 regarding legal relations affected by statute as set forth in NRS §30.040:

12 Any person ... whose rights, status or other legal relations are affected  
13 by statute... may have determined any question of construction or  
14 validity arising under the ... statute... and obtain a declaration of  
15 rights, status or other legal relations thereunder.

16 The Uniform Declaratory Judgments Act does not establish new causes of action or grant  
17 jurisdiction to the court when it would not otherwise exist. Builders Ass'n. of Northern Nev. v. City  
18 of Reno, 105 Nev. 368, 369, 776 P.2d 1234, 1234 (1989).

19 Declaratory relief is not appropriate to review questions of administrative discretion.  
20 Prudential Ins. Co. v. Insurance Comm., 82 Nev. 1, 409 P.2d 248 (1966). In Phelps v. Second  
21 Judicial District Court., 106 Nev. 917, 920-21, 803 P.2d 1101, 1103 (1990) the Nevada Supreme  
22 Court held that a district court was without jurisdiction to entertain an action for declaratory relief  
23 which sought collateral review of decisions of the joint medical legal screening panel concerning the  
24 admissibility or sufficiency of documents presented to it, because the panel's decisions on such  
25 questions clearly involved its administrative discretion.

1 Declaratory relief actions to review interlocutory decisions of state agencies are inappropriate,  
2 particularly where such actions frustrate the legislature's purpose of relegating certain matters to a  
3 state agency for a speedy resolution. See, Public Serv. Comm. v. Eighth Judicial District Court, 107  
4 Nev. 680, 684-85, 818 P.2d 396 (1991) where the Nevada Supreme Court held:

5 It is well-settled that courts will not entertain a declaratory judgment  
6 action if there is pending, at the time of the commencement of the  
7 action for declaratory relief, another action or proceeding to which the  
8 same persons are parties and in which the same issues may be  
9 adjudicated. [citation omitted]. Further, a court will refuse to  
10 consider a complaint for declaratory relief if a special statutory remedy  
11 has been provided. [citation omitted]. A separate action for declara-  
12 tory judgment is not an appropriate method of testing defenses in a  
13 pending action, [citation omitted], nor is it a substitute for statutory  
14 avenues of judgment and appellate review.

15 In Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352 (1948), the Nevada Supreme Court set forth  
16 the following requirements necessary to qualify for a declaratory judgment:

17 The requisite precedent facts or conditions which the courts generally  
18 hold must exist in order that declaratory relief may be obtained may  
19 be summarized as follows: (1) there must be a justiciable contro-  
20 versy; that is to say, a controversy in which a claim of right is asserted  
21 against one who has an interest in contesting it; (2) the controversy  
22 must be between persons whose interests are adverse; (3) the party  
23 seeking a declaratory relief must have a legal interest in the contro-  
24 versy, that is to say, a legally protectable interest; and (4) the issue  
25 involved in the controversy must be ripe for judicial determination.

26 In Cox v. Glenbrook Co., 78 Nev. 254, 266-68, 371 P.2d 647 (1962), the definition of  
27 "justiciable controversy" was discussed:

28 [E]very judgment following a trial upon the merits must be based  
upon the evidence presented; it cannot be based upon an assumption  
*before* the facts are known or have come into existence.

....  
[F]actual circumstances which may arise in the future cannot be fairly  
determined now. As to this phase of the case we are asked to make  
a hypothetical adjudication, where there is presently no justiciable  
controversy, and where the existence of a controversy is dependent  
upon the happening of future events. [citation omitted]. A declaratory  
judgment should deal with a present, ascertained or ascertainable state  
of facts....

1 The Cox court also held that an action seeking a declaration of rights based upon factual  
2 circumstances which have not yet arisen was not yet ripe for judicial intervention.

3 In Resnick v. Nevada Gaming Comm., 104 Nev. 60, 62-63, 752 P.2d 229, 231 (1988), the  
4 court held that the Nevada Gaming Commission's refusal to turn over investigative materials to an  
5 applicant for a gaming license so that the applicant could better prepare for his licensing hearing did  
6 not present a controversy ripe for judicial determination. The responsible agency had not yet made  
7 a final decision or order. Thus, the matter was not ripe for judicial review.

8 A court may deny declaratory relief in the exercise of its discretion. El Capitan Club v.  
9 Fireman's Fund Ins. Co., 89 Nev. 65, 506 P.2d 426 (1973). Where the court believes that more  
10 effective relief can and should be obtained by another procedure and that for that reason, a declaration  
11 will not serve a useful purpose, then the court is justified in refusing a declaration because of the  
12 availability of another remedy. Id. at 69-70 (citing Jones v. Robertson, 180 P.2d 929, 933 (Cal App.  
13 1947)).

14 **F. THERE IS NO INVASION OF PRIVACY CAUSE OF ACTION PROPERLY PLED**

15 The Complaint purports to state claims for relief under theories of invasion of privacy. The  
16 facts alleged relate to the FTB's efforts to verify Plaintiff's contention that he changed his residency  
17 from California to Nevada. The facts alleged in this regard are that the FTB's representatives used  
18 Plaintiff's name, address and social security number in contacting Nevada utility companies and  
19 government agencies in its investigation of his Nevada residency.

20 As discussed below, Plaintiff has failed to plead any actionable invasion of any privacy interest  
21 and the pleadings show that the FTB's representatives' investigation was in furtherance of a  
22 legitimate public duty.  
23  
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28

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1. ANY DISCLOSURE OF PLAINTIFF'S TAX RETURN  
INFORMATION WAS PURSUANT TO THE ADMINISTRATION OF  
TAXES AND WAS AUTHORIZED BY CALIFORNIA LAW

Cal. Rev. & Tax C. section 19545 provides:

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, or the collection of the taxpayer's civil liability with respect to any tax imposed under this part.
- (b) The treatment of an item reflected on the return is directly related to the resolution of an issue in the proceeding.
- (c) The return or return information directly relates to a transnational relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding. (emphasis added).

The pleadings show that the FTB auditor was only verifying the truthfulness of the Plaintiff's claim of Nevada residency and any disclosures made were authorized under California law.

Most courts, including Nevada's state and federal courts, draw on the principles set forth in the Restatement (Second) of Torts § 652A et seq. regarding invasion of privacy torts. Restatement § 652G incorporates the conditional privileges available to defendants stated in sections 594 and 598A which apply to the publication of any matter that is an invasion of privacy. These include section 594, Protection of the Publisher's Interest; section 596, Common Interests; section 598, Communication to One Who May Act in the Public Interest; and section 598A, Actions of Inferior State Officers in a Performance of Their Duties.

The case of McLain v. Boise Cascade Corp., 533 P.2d 343 (Ore. 1975) illustrates the privilege allowed state agencies to investigate matters within their agencies' concern. This includes the right to conduct surveillance and minor trespass to property in order to validate a plaintiff's position taken in an agency action. As in the McLain case, Plaintiff, Gilbert Hyatt was not even aware of the FTB's investigation until after the fact. Complaint ¶15. Such agency inquiry to verify



1 Plaintiff's claim of Nevada residency was obviously conducted in an unobtrusive manner. As in  
2 McLain, Plaintiff's subjective belief and irritation that the agency "snuck around behind my back" is  
3 not an invasion of privacy. Id., at 345-47.

4 The Restatement's affirmative defenses and related case law underscore the public policy that  
5 an invasion of privacy is not actionable unless unwarranted and unreasonable. Mr. Hyatt complains  
6 of the FTB's actions taken to verify his claimed Nevada contacts such as verifying home ownership,  
7 utility services and other social and business contacts which Mr. Hyatt contended established his  
8 Nevada residency.

9 Whether the Defendant's actions enjoy a qualified privilege against a claim of invasion of  
10 privacy is a question of law to be determined by the court. Senogles v. Security Benefit Life Ins. Co.,  
11 536 P.2d 1358, 1362-63, 217 Kan. 438 (1975). In Senogles, the court held that there is no actionable  
12 invasion of privacy where the communication alleged to be actionable is made by a party concerning  
13 a matter in which the parties have an interest or duty. As in Senogles, there is no contention by  
14 Plaintiff that inquiry by FTB was not related to its official duty of administering California's state  
15 income tax by seeking information to verify Plaintiff's residency from those persons or agencies who  
16 would have such information.

17 Whether or not there has been an invasion of privacy must be considered in light of Plaintiff's  
18 actions. By contending change of residency and volunteering proof of residency, Plaintiff invited  
19 FTB's inquiry to verify Plaintiff's claim of Nevada residency. Such action amounts to consent to  
20 FTB's inquiry into Plaintiff's Nevada contacts which Plaintiff contended amounted to residency.  
21 Plaintiff complains of the inquiry made to Nevada agencies using Plaintiff's name, address and/or  
22 social security number. Of course, these are reasonable and common means of identifying persons.  
23 This is information provided by Plaintiff to the FTB. As a matter of law, such action is not  
24 "offensive" or unreasonable.

1 In Hill v. Nat'l Collegiate Athletic Assoc., 865 P.2d 633, 648, 7 Cal.4th 1, 26 Cal.Rptr.2d  
2 834 (1994), the California Supreme Court discussed the competing interests and requirement that  
3 Plaintiff allege and prove conduct that is "highly offensive" to a reasonable person:

4 In determining the "offensiveness" of an invasion of privacy interest,  
5 common law courts consider, among other things: "the degree of the  
6 intrusion, the context, conduct and circumstances surrounding the  
7 intrusion as well as the intruder's motives and objectives, the setting  
8 into which he intrudes, and the expectations of those whose privacy  
9 is invaded." [citation omitted].

10 The Hill court stressed the limited scope of the invasion of privacy tort and the narrow interest  
11 protected:

12 Thus, the common law right of privacy is neither absolute nor globally  
13 vague, but is carefully confined to specific sets of interest that must  
14 inevitably be weighed in the balance against competing interest before  
15 the right is judicially recognized. A plaintiff's expectation of privacy  
16 in a specific context must be objectively reasonable under the  
17 circumstances, especially in light of the competing social interests  
18 involved. As one commentator has summarized: "through a careful  
19 balancing of interest, the courts develop specific [common law] causes  
20 of action which protected somewhat well-defined aspects of personal  
21 privacy. Although privacy was clearly identified as an interest worthy  
22 of some legal protection, courts generally did not give privacy a  
23 privileged place or undue weight in the balancing process." [citation  
24 omitted].

25 Id., 865 P.2d. at 648.

26 In Mr. Hyatt's case, he does not complain of any traditionally actionable acts of invasion of  
27 privacy such as intrusion into a private place such as a home or even an office. Nor does Mr. Hyatt  
28 contend that there has been any publication of a private matter to the general public or any person  
or entity other than those who could provide information to verify Mr. Hyatt's contention of Nevada  
residency.

The Hill court discussed the limited interest protected:

Legally recognized privacy interest are generally of two classes: (1)  
interest in precluding the dissemination or misuse of sensitive and  
confidential information (informational privacy); and (2) interest in

1 making intimate personal decisions or conducting personal activities  
2 without observation, intrusion, or interference ("autonomy privacy").

3 Id., 865 P.2d at 654.

4 As a matter of law, it is not reasonable to expect that Mr. Hyatt's name, address and social  
5 security number would not be used to identify him to utility companies or government agencies able  
6 to verify Mr. Hyatt's claim of residency. Merely identifying Mr. Hyatt by this public information is  
7 not "highly offensive" as a matter of law. As the Hill court held:

8 Whether a legally recognized privacy interest is present in a given case  
9 is a question of law to be decided by the court. [citation omitted]. ...  
10 if the undisputed material facts show no reasonable expectation of  
11 privacy or an insubstantial impact on privacy interest, the question of  
invasion may be adjudicated as a matter of law.

12 Id., 865 P.2d. at 657.

13 **2. INTRUSION UPON THE SECLUSION OF ANOTHER**

14 Plaintiff's Second Cause of Action purports to state a claim for invasion of privacy due to  
15 unreasonable intrusion upon the seclusion of another. Plaintiff believes that neighbors, businesses,  
16 government officials and others in Nevada with whom Plaintiff has or may have had social or business  
17 interactions were approached and questioned by the FTB. It is Plaintiff's belief that the FTB  
18 disclosed or implied to these persons that Plaintiff was under investigation in California "in such a  
19 manner as to cause doubts to arise concerning Plaintiff's integrity and moral character." Additionally,  
20 Plaintiff contends that as part of the investigation of his 1991 tax return, he turned over to FTB  
21 "highly personal and confidential information with the understanding that it would remain  
22 confidential." Complaint ¶ 34. Plaintiff believes that FTB violated his right to privacy by revealing  
23 his "confidential information" to unidentified third parties. Complaint ¶ 35.

24 Plaintiff believes that the FTB investigations of Plaintiff occurring in Nevada and California  
25 were performed with the intent to harass, annoy, vex, embarrass and intimidate Plaintiff so that he  
26 would enter into a settlement concerning the disputed taxes and penalties which serve to "syphon his  
27 time and energies from the productive work in which he is engaged." Complaint ¶ 36. Plaintiff  
28

believes that the FTB investigation was conducted in such a manner as to intentionally intrude into his solitude and seclusion which a reasonable person would find highly offensive. Complaint ¶ 37.

In PETA v. Bobby Berosini, Ltd., 111 Nev. 615, 628-639, 895 P.2d 1269 (1995), modified on other grounds, 113 Nev. 632, 637, 940 P. 2d 134, 138 (1997), the Nevada Supreme Court discussed the common law of privacy torts as set forth in the Restatement (Second) of Torts, § 652A et. seq.:

... The four species of privacy tort are: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the name or likeness of another; (3) unreasonable publicity given to private facts; and (4) publicity unreasonably placing another in a false light before the public.

In PETA, the Nevada Supreme Court gave examples of situations where a person has no reasonable expectation of privacy. It is no invasion of privacy to photograph a person in a public place. PETA at 631. There is no reasonable expectation of privacy when the plaintiff knows that other persons can overhear or as to matters which neighbors or passersby can observe. PETA at 633. Thus, matters that are already public or which can be observed by the public are not protected.

One variety of invasion of privacy pled by Plaintiff is the unreasonable intrusion upon the seclusion of another. The Nevada Supreme Court explained the elements of this tort in PETA:

To recover for the tort of intrusion, a plaintiff must prove the following elements: (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of another; (3) that would be highly offensive to a reasonable person.

Id., 113 Nev. at 630-31 (citing Restatement (Second) Torts section 652A).

In PETA, the court rejected Berosini's argument that the placing of a camera was an intrusion where the person placing the camera was merely recording the events occurring in a place where he was authorized to be. On the issue of whether or not the Defendant's conduct would be highly offensive to a reasonable person, the PETA court explained that there is a preliminary determination of "offensiveness" which presents a legal issue for the court rather than the fact finder:

... A court considering whether a particular action is "highly offensive" should consider the following factors: "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and

objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.” [citations omitted].

Id., 113 Nev. at 634-35.

The PETA court noted the non-intrusive nature of the video-taping process. As in the investigation of Mr. Hyatt’s residency, Berosini was not even aware of the intrusion. The court found that Berosini’s privacy claims arose not from the actual presence of the video camera, but from the subsequent publication of the video tape contents. In the instant case, Plaintiff merely complains that persons and entities in Nevada were contacted by FTB’s agents to verify his Nevada contacts and claimed residency. Whether or not and when Plaintiff became a Nevada resident was the issue between the FTB and Plaintiff. Verification of Plaintiff’s information in this regard cannot be considered tortious.

## 2. PUBLICITY GIVEN TO PRIVATE FACTS

Plaintiff’s Third Cause of Action purports to state a claim for invasion of privacy for unreasonable publicity given to private facts. In this regard he alleges that he revealed to the FTB “highly personal and confidential information at the request of the FTB” as part of its investigation and that he expected this information to be kept confidential. Complaint ¶41. Plaintiff alleges that the FTB disclosed to third parties in Nevada “certain of Plaintiff’s personal and confidential information which had been cooperatively disclosed to the FTB only for legitimate investigative purposes.” Complaint ¶42. The information disclosed is revealed in the Complaint to be Plaintiff’s name, address and social security number used by the FTB to identify the Plaintiff to agencies and entities contacted by the FTB for information to verify Plaintiff’s Nevada residency. The information used to identify the Plaintiff are public, rather than private facts. Such information is commonly and necessarily used to identify a person. Plaintiff’s place of residence was at issue as a result of Plaintiff’s 1991 return claiming Nevada residency. The information used was voluntarily provided to the FTB by the Plaintiff.

In Montesano v. Donrey Media Group, 99 Nev. 644, 649, 668 P.2d 1081 (1983), cert. denied, 466 U.S. 959 (1984), the Nevada Supreme Court discussed this tort. The privacy tort of public

1 disclosure of private facts requires proof that a public disclosure of private facts has occurred which  
2 would be offensive and objectionable to a reasonable person of ordinary sensibilities. In Montesano,  
3 the Nevada Supreme Court recognized this tort cause of action as set forth in the Restatement  
4 (Second) of Torts, § 652D (1977), but applied a more restrictive interpretation than outlined in the  
5 comments to the Restatement, or as set forth in opinions from other jurisdictions.

6 The Montesano case involved publication of an article in the Las Vegas Review Journal  
7 relating to police officers injured or killed in the line of duty. The newspaper included in its article  
8 a report of the plaintiff's hit and run killing of a police officer which had occurred 20 years earlier.  
9 The Court rejected the plaintiff's argument that use of his name was not a legitimate concern to the  
10 public when balanced against the long passage of time and his criminal rehabilitation and return to  
11 private, lawful life. The line of privacy cases followed by Nevada's Supreme Court wherein liability  
12 was rejected for unauthorized disclosure of identity include situations where the names were  
13 published of a victim of rape, a person subjected to involuntary sterilization, and a victim of institu-  
14 tionalized whipping in a correctional facility. Montesano, 99 Nev. at 651-55.

15 The Nevada Supreme Court follows the United States Supreme Court's lead in Cox  
16 Broadcasting v. Cohn, 420 U.S. 469, 494-495, 95 S.Ct. 1029, 1045-1046, 43 L.Ed.2d 328 (1975),  
17 where the offending publication involves matters of public record:

18 Even the prevailing law of invasion of privacy generally recognize that the  
19 interest of privacy fades when the information involved already appears on the public  
20 record. The conclusion is compelling when viewed in terms of the First and  
21 Fourteenth Amendments and in light of the public interest in a free press.

22 Montesano, 99 Nev. at 653-54. Plaintiff's name and address are matters of public record obviously  
23 protected by Montesano and Cox Broadcasting even if published to the world by the media. The  
24 FTB's limited use of the information necessary to identify Plaintiff in order to verify his residence is  
25 not actionable.

26 In M & R Inv. Co., Inc. v. Mandarino, 103 Nev. 711, 719, 748 P.2d 488 (1987), the Nevada  
27 Supreme Court held that publication of facts which the plaintiff himself made public did not constitute  
28

1 a publication of private facts and that there is no reasonable expectation of privacy when the plaintiff  
2 makes facts public.

3 A person's name, address and social security number are made public to some degree by all  
4 persons living and conducting business in modern society. Mere inquiry to verify Plaintiff's residency  
5 and use of this minimal information to identify Plaintiff cannot be considered offensive as a matter of  
6 law.

### 7 **3. CASTING IN FALSE LIGHT**

8 Plaintiff's Fourth Cause of Action purports to state a claim for invasion of privacy for casting  
9 Plaintiff in false light. In this regard, Plaintiff alleges that by gathering information in Nevada as part  
10 of its investigation, the FTB invaded Plaintiff's right to privacy "by stating or insinuating to said  
11 Nevada residents that Plaintiff was under investigation in California, thereby falsely portraying  
12 Plaintiff as having engaged in illegal and immoral conduct, and decidedly casting Plaintiff's character  
13 in false light." Complaint ¶46. Plaintiff further alleges that the FTB's conduct in publicizing its  
14 investigation had the effect of "compromising the attitude of those who know or would, in reasonable  
15 likelihood, come to know Gil Hyatt because of the nature and scope of his work." The publicity was  
16 "offensive and objectionable" to Plaintiff. Plaintiff alleges that the FTB acted "for other than  
17 honorable, lawful or reasonable purposes" and its conduct "was calculated to harm, vex, annoy and  
18 intimidate Plaintiff" resulting in "damage to Plaintiff's reputation." Complaint ¶47.

19 In PETA, the court referenced the false light invasion of privacy tort. The false light tort was  
20 not appealed. Nonetheless, the appellant argued that video tapes which were defamatory resulted in  
21 Berosini's actions "being taken out of context." This was stated by the Supreme Court to be the "very  
22 essence of the ... false light tort." In footnote 4 on page 622 (113 Nev.) of the opinion, the Nevada  
23 Supreme Court referenced the federal cases of Machleder v. Diaz, 801 F.2d 46, 55 (2d Cir. 1986),  
24 cert. denied, 479 U.S. 1088 (1987) and Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983). In  
25 Brandt, the Tenth Circuit Court of Appeals discussed the false light tort as set forth in the  
26 Restatement (Second) of Torts § 652E (1977):  
27  
28

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id., at 1306.

The Brandt court explained that the injury redressed by the false light privacy tort is mental distress from having been exposed to public view as compared to defamation actions which compensate damage to reputation. Id., at 1307. In other respects, the false light tort is similar to defamation. Both involve a determination that the matter published is not true. Truth is an absolute defense. Statements of opinion are not actionable. Id., at 1307. Whether a given statement constitutes an assertion of fact or an opinion is a question of law for determination by the court. Id. at 1308.

In the Diaz case, the Second Circuit also considered the false light tort. The court made a detailed review of the background of this tort and applied the common law approach set forth in the Restatement (Second) of Torts § 652E. Id., 801 F. 2d at 52-53. The Diaz court noted the significant procedural difference between the false light and defamation tort:

...The burden of proof in a defamation case is preponderance of the evidence, while in false light litigation it takes clear and convincing evidence to establish the claim.

Id., at 56.

Both the Brandt and Diaz cases stress the First Amendment safe-guard applied to the false light privacy tort. Brandt at 1307; Diaz at 53-54.

For the false light invasion of privacy tort to lie, there must be "publicity." Unlike the tort of defamation, this requires more than a mere publication of disparaging facts to another. The publication for a false light claim to lie must be to the public generally or to a large number of



persons. Morrow v. II Morrow, Inc., 911 P.2d 964, 968, 139 Or. App. 212 (1996), review denied, 916 P. 2d 312 (Or. 1996). Restatement (Second) of Torts § 652D comment (a) discusses the “publicity” requirement:

The form of invasion of the right of privacy covered in this Section depends upon publicity given to the private life of the individual. “Publicity,” as it is used in this Section, differs from “publication,” as that term is used in Section 577 in connection with liability for defamation. “Publication,” in that sense, is a word of art, which includes any communication by the defendant to a third person. “Publicity,” on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

Thus, because of the “publicity” requirement, courts have held that reports to government agencies and investigation of or reports regarding a plaintiff’s insurance do not qualify under the false-light invasion of privacy tort. Andrews v. Stallings, 892 P.2d 611, 626, 119 N.M. 478 (N.M. App. 1995).

**G. PLAINTIFF HAS FAILED TO PLEAD AN ACTIONABLE TORT OF OUTRAGE**

Plaintiff’s fifth cause of action purports to state a claim for the “tort of outrage”. In this regard, Plaintiff alleges that the manner in which FTB carried out its investigation and FTB’s apparent intent to continue its investigation and assess taxes, interest and penalties “was, and continues to be, extreme, oppressive and outrageous conduct.” Plaintiff believes that FTB carried out its investigation in Nevada for the “ostensible purpose of seeking truth concerning his place of residency,...” but that the true purpose was to coerce payment of sums “irrespective of his demonstrably bona fide residence of Nevada throughout the disputed periods.” Plaintiff alleges that as a result of this conduct, he has “indeed suffered fear, grief, humiliation, embarrassment, anger and a strong sense of outrage....” Complaint ¶51.

In Branda v. Sanford, 97 Nev. 643, 648, 637 P.2d 1223 (1981) the Nevada Supreme Court considered the elements of this tort:

1 We recently explicitly recognized that liability can flow from intentional infliction of  
2 emotional distress. Star v. Rabello, 97 Nev. 124, 625 P.2d 90 (1981). There, we  
3 stated the elements of a prima facie case to be: (1) extreme and outrageous conduct  
4 by the defendant; (2) intent to cause emotional distress or reckless disregard as to the  
5 probability; (3) severe emotional distress; and (4) actual and proximate causation of  
6 the emotional distress. Id., citing Cervantes v. J.C. Penney, Inc., 595 P.2d 975 (Cal.  
7 1979).

8 The acts complained of by Plaintiff are really only that the FTB investigation resulted in an  
9 adverse finding and assessment of additional tax, interest and penalties. No doubt every taxpayer  
10 faced with an additional assessment has anxieties. People may be outraged at the prospect of taxes,  
11 but such outrage is not actionable. It is not extreme and outrageous conduct for the FTB to  
12 investigate a taxpayer's alleged change of residency done contemporaneously with receipt of  
13 extraordinary income. It is their job.

14 **H. PLAINTIFF HAS NOT PLED AN ACTIONABLE TORT OF ABUSE OF PROCESS**

15 Plaintiff's Sixth Cause of Action purports to state a claim for abuse of process. Plaintiff does  
16 not allege that any court action was taken by the FTB or that any court process was employed. In this  
17 regard, Plaintiff alleges that the FTB sought to "extort vast sums of money from Plaintiff through  
18 administrative proceedings... through means of administrative quasi-subpoenas." Complaint ¶55.  
19 The FTB directed "Demand[s] to Furnish Information" referenced by Plaintiff as "quasi-subpoenas"  
20 to Nevada residents, professionals and businesses, "requiring specific information about Plaintiff"  
21 without authorization from any Nevada court or government agency. Plaintiff contends that this  
22 constitutes "actionable abuse of process." Each "demand" was represented to be "authorized by Cal.  
23 Rev. & Tax C. §19504 (formerly 19254(a) and 26423(a)) sent out by the state of California,  
24 Franchise Tax Board on behalf of "the people of the State of California" identified as relating to "*In*  
25 *the Matter of: Gilbert P. Hyatt*," further identifying Plaintiff by his social security number and "in  
26 certain instances *by his actual home address* in violation of express promises of confidentiality by the  
27 FTB;..."

28 Plaintiff contends that each "demand" was unlawful and used to coerce payment of taxes from  
him and by assessing taxes, interest and penalties, the FTB abused its administrative powers.

1 Complaint ¶56. Plaintiff characterizes these actions as “intentional and malicious abuse of the  
2 administrative processes...” Complaint ¶57.

3 In Dutt v. Kremp, 111 Nev. 567, 575, 894 P.2d 354 (1995), the Nevada Supreme Court  
4 defined the tort of abuse of process:

5 An abuse of process claim consists of two elements: (1) an ulterior  
6 purpose other than resolving a legal dispute; and (2) a willful act in the  
7 use of process not proper in the regular conduct of the proceeding.  
8 Kovacs v. Acosta, 106 Nev. 57, 59, 787 P.2d 368, 369 (1990). An  
9 “ulterior purpose” includes any “improper motive” underlying the  
10 issuance of legal process. See Laxalt v. McClatchy, 622 F.Supp. 737,  
11 751 (D. Nev. 1985).

12 An action for abuse of process hinges on the misuse of regularly issued process. In contrast,  
13 the tort of malicious prosecution rests upon the wrongful issuance of process. Nevada Credit Rating  
14 Bur. v. Williams, 88 Nev. 601, 606, 503 P.2d 9 (1972).

15 Plaintiff’s pleading of abuse of process falls short of stating a claim upon which relief can be  
16 granted by the court. Plaintiff complains that during its investigation FTB improperly used  
17 “administrative quasi-subpoenas,” including “Demand[s] to Furnish Information” addressed to  
18 Nevada persons. The purpose alleged in the Complaint is to obtain information regarding Plaintiff’s  
19 residency and compel payment of California income tax.

20 The abuse of process tort requires an “ulterior purpose other than resolving a legal dispute”  
21 which is not pled and “use of process not proper in the regular conduct of the proceeding.” Dutt, 111  
22 Nev. at 575. The obvious purpose of the “quasi-subpoenas” was to gather information regarding  
23 Plaintiff’s claim of Nevada residency. No use of “process” is pled.

24 In Laxalt v. McClatchy Newspapers, 622 F. Supp. 737, 750-51 (Nev. 1985), the U.S. District  
25 Court in Nevada considered Nevada law regarding the tort of abuse of process. In doing so, the  
26 federal court discussed “process”:

27 ... the phrase clearly indicates that the available process in the case  
28 (complaint and summons) was abused by the subsequent acts of the  
lawyer. The availability of process is thus a prerequisite to the tort,  
in that there must be process extant which the defendant abuses in  
order for the tort to lie. The mere filing of a complaint with malicious

1 intent is insufficient or there must also be some subsequent act to  
2 filing which abuses the process.

3 The McClatchy court made it clear that some "process" must be abused following the  
4 initiation of litigation for the tort to lie.

5 The term "process" as used in the tort elements broadly describes the tools available to  
6 litigants during court proceedings once an action is commenced. For a tort of abuse of process, the  
7 defendant must have employed some "process" in the technical sense of the term. See Sea-Pac Co.,  
8 Inc. v. United Food & Commer. Worker's Loc. Union, 699 P.2d 217, 218-19, 103 Wash.2d 800  
9 (1985). In Sea-Pac, the plaintiff claimed abuse of process resulted from a labor union filing a charge  
10 with the National Labor Relations Board with a malicious motive. The Washington Supreme Court  
11 held that the trial court erred in failing to grant the labor union's motion for summary judgment  
12 because no court process had been employed by the labor union. There must be an act after filing a  
13 lawsuit using legal process "empowered by that suit to accomplish an end not within the purview of  
14 the suit." [citation omitted]. Id.

15 Likewise, in Foothill Ind. Bank. v. Mikkelson, 623 P.2d 748, 757 (Wyo. 1981) the Wyoming  
16 Supreme Court held that publication of a notice of mortgage foreclosure not involving court action  
17 was not use of "process" as used in the tort of abuse of process. Even if the motive which impels the  
18 mortgagee to seek foreclosure was malicious, no abuse of process results. The law does not concern  
19 itself with motive of parties that "was animated by hostility or other bad motive" when the tool  
20 employed is for the intended purpose. Id.

21 The word "process" as used in the tort of abuse of process encompasses the entire range of  
22 procedures incident to the judicial litigation process, including discovery requests, deposition notices,  
23 entry of defaults, motion practice in addition to the tradition motion of "process" which was restricted  
24 to utilization of process in the nature of attachment, garnishment or warrants of arrest resulting in  
25 seizure of person or property. Nienstedt v. Wetzel, 651 P.2d 876, 880-81 (Ariz. App. 1982).  
26 Whether or not the process of a non-judicial agency was used for an improper purpose is for the  
27  
28

1 agency to decide. Without misuse of process issued in a court action, there can be no abuse of  
2 process. Sea-Pac Co., 699 P.2d at 221.

3 In this case, Mr. Hyatt has not alleged that any court proceeding existed or that any court  
4 process was employed against him. Thus, there can be no abuse of process claim.

5 **I. NO FRAUD CLAIM IS PROPERLY ALLEGED**

6 Plaintiff's Seventh Cause of Action purports to state a claim for fraud. Over five pages of the  
7 Amended Complaint are devoted to these allegations. Nearly all of these allegations state mere  
8 argument, conclusions and speculation not supported by fact allegations. In spite of the great  
9 quantity of verbiage, Plaintiff fails to state his averments of fraud with particularity as required by  
10 NRCP 9 (b). The facts pled state only, in essence, that Plaintiff relied on the FTB's promise of  
11 confidentiality in turning over highly confidential information (e.g., his address) during the FTB's  
12 investigation and that the FTB betrayed this trust (thus defrauding him) by sending "Demand[s] to  
13 Furnish Information" to Las Vegas utility companies during the investigation to determine his  
14 residency. The harm alleged is that FTB's requests included identification of Plaintiff by his name and  
15 address. Complaint paragraphs 60-64. Plaintiff admits that it was his legal duty to cooperate in the  
16 FTB investigation. Complaint ¶71.

17 In Nevada the essential elements of intentional misrepresentation are set forth in Landex, Inc.  
18 v. State ex rel. List, 94 Nev. 469, 478, 582 P.2d 786 (1978):

- 19 1. A false misrepresentation made by the Defendant;
- 20 2. Knowledge or belief on the part of the Defendant that the represent-  
21 ation is false or that he had an insufficient basis of information to make the  
22 representation;
- 23 3. An intention to induce the Plaintiff to act or to refrain from acting in  
24 reliance upon the misrepresentation;
- 25 4. Justifiable reliance upon the misrepresentation on the part of the  
26 Plaintiff in taking action or refraining from it; and
- 27 5. Damage to the Plaintiff resulting from such reliance.
- 28

1 The elements of intentional misrepresentation must be established by clear and convincing  
2 evidence. Lubbe v. Barba, 91 Nev. 596, 599, 540 P.2d 115 (1975).

3 A review of the type of damages required to be proven by the Plaintiff shows how inapplicable  
4 the tort of fraud is in this situation. In Randono v. Turk, 86 Nev. 123, 466 P.2d 218 (1970), the  
5 Nevada Supreme Court discussed both measures of damages for fraud. These include "out-of-  
6 pocket" or "benefit-of-the-bargain" measures of damages. Both measures of damage involve  
7 pecuniary loss to the plaintiff. Neither measure of damages includes an award for emotional distress  
8 or hurt feelings.

9 The Plaintiff is really only complaining that his address was used in a manner that he finds  
10 disagreeable. The FTB used Plaintiff's address to identify Plaintiff to other agencies and utilities in  
11 order to verify Plaintiff's claim of Nevada residency. This does not satisfy the elements of fraud.

12 **J. NEGLIGENT MISREPRESENTATION IS NOT PROPERLY PLED**

13 Plaintiff's Eighth Cause of Action purports to state a claim for negligent misrepresentation.  
14 The allegations in this regard are incomprehensible for the most part. It is apparently contended that  
15 a "business relationship" of "trust" existed between the Plaintiff and FTB which was breached when  
16 the FTB failed to inform Plaintiff that its agents would fail to keep information he provided  
17 confidential in spite of assurances to do so. Plaintiff would have it that the FTB is his trusted agent!  
18 The FTB's function is provided for by California statutes and regulations. This scheme does not  
19 provide that the agency is the taxpayers' fiduciary. As set forth above, the agency has authority to  
20 use taxpayer information in furtherance of its duties. Plaintiff was admittedly obligated by law to  
21 cooperate with the FTB's investigation and to provide information to it.

22 The elements of negligent misrepresentation are set forth in Bill Stremmel Motors, Inc. v.  
23 First Nat. Bank of Nev., 94 Nev. 131, 134, 575 P.2d 938 (1978):

24 1. The defendant must have supplied information while in the course of  
25 his business, profession or employment, or any other transaction in which he had a  
26 pecuniary interest;

27 2. The information must have been false;

1 3. The information must have been supplied for the guidance of the  
2 plaintiff in his business transaction;

3 4. The defendant must have failed to exercise reasonable care or  
4 competence in obtaining or communicating the information;

5 5. The plaintiff must have justifiably relied upon the information by taking  
6 action or refraining from taking action; and

7 6. As a result of his reliance upon the accuracy of the information, the  
8 plaintiff must have sustained damage.

9 Plaintiff's Eighth purported cause of action is a perversion of the tort. There was no "business  
10 transaction" between Plaintiff and the FTB. The matter concerned only the FTB's investigation of  
11 Plaintiff's claim of change of residence, a determination that he did not and assessment of additional  
12 taxes. Plaintiff argues that the FTB misrepresented its intent or ability to keep his address  
13 confidential. He does not allege that this information was used for purposes other than those relating  
14 to investigating his residence and assessing income tax, the FTB's statutory duty.

15 Nor does Plaintiff plead any damage compensable under this tort. In Bill Stremmel Motors,  
16 the Nevada Supreme Court adopted the Restatement (Second) of Torts theory of this tort. Comment  
17 a of section 552 of the Restatement makes it clear that damage resulting from the false information  
18 provided must relate to commercial information negligently provided by one under a duty to provide  
19 commercial information, resulting in pecuniary harm to the party relying on it in a business  
20 transaction.

III.

CONCLUSION

The Plaintiff's action for declaratory relief cannot be maintained due to the pending administrative proceedings. Plaintiff's tort claims are barred by his failure to comply with the California Tort Claims Act. Under Nevada law, the tort claims are not properly pled. There are no allegations which if proven would permit recovery. Accordingly, Defendant is entitled to judgment on the pleadings.

DATED this 10<sup>th</sup> day of February, 1999.

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# EXHIBIT L

# EXHIBIT L

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22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 **\*\*\*\*\***

25 **GILBERT P. HYATT,**

26 **Plaintiff,**

27 **vs.**

28 **FRANCHISE TAX BOARD OF THE**  
**STATE OF CALIFORNIA, and DOES 1-100,**  
**inclusive**

**Defendants.**

Case No. : A382999  
Dept. No. : XVIII  
Docket No. : R

**MOTION FOR SUMMARY JUDGMENT**  
**UNDER NRCP 56(b), OR**  
**ALTERNATIVELY FOR DISMISSAL**  
**UNDER NRCP 12(h)(3)**

**FILED UNDER SEAL BY ORDER OF**  
**THE DISCOVERY COMMISSIONER**  
**DATED FEBRUARY 22, 1999**

Date of Hearing: 2/22/00

Time of Hearing: 9A

25 Defendant FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA (the "FTB") moves  
26 the Court under Nevada Rule of Civil Procedure 56(b) for summary judgment on all remaining causes  
27 of action. In the alternative, the FTB moves to dismiss for lack of jurisdiction over the subject matter  
28 under Nevada Rule of Civil Procedure 12(h)(3).

1       The Court's power to impose liability on the FTB, if any, is limited to the FTB's conduct in the  
2 State of Nevada. This is because the FTB is a California government agency, and as such enjoys  
3 sovereign immunity under a variety of California laws from any attempt of Hyatt to litigate over the  
4 FTB's California acts. But even as to the FTB's Nevada acts, the undisputed facts show that there is  
5 no evidence from which a jury could reasonably find that the FTB committed an actionable invasion  
6 of privacy, an abuse of process, any outrageous conduct, or any act of fraud or negligent  
7 misrepresentation against plaintiff Gilbert Hyatt. Instead, the FTB's Nevada acts were a privileged part  
8 of the FTB's governmental functions, and were justified by Hyatt's own conduct that cast considerable  
9 doubt on his claim that he changed his state of residence from California to Nevada in late 1991. For  
10 these reasons, the FTB is entitled to summary judgment on the merits of Hyatt's claims.

11       In the alternative, the FTB is entitled to dismissal of all of Hyatt's claims under Nevada Rule  
12 of Civil Procedure 12(h)(3). Rule 12(h)(3) requires dismissal whenever it appears that the Court lacks  
13 jurisdiction over the subject matter. The undisputed facts show that all of the FTB's Nevada acts  
14 concerning Hyatt were taken as part of the FTB's administration of California's tax laws. Under  
15 principles of Full Faith and Credit, sovereign immunity, and constitutional choice of law, the Court  
16 must apply California's governmental immunity laws regarding tax administration to these Nevada acts,  
17 just as it must apply these immunity laws to the FTB's California conduct. Under the same principles,  
18 the Court also must apply California's administrative exhaustion laws to the entirety of Hyatt's case.  
19 All of these California laws are jurisdictional bars to Hyatt's case, and their mandatory application  
20 requires dismissal of Hyatt's claims. Even if applying these laws was not mandatory, principles of  
21 comity suggest that the Court should apply them, and thus decline to exercise jurisdiction over this case.  
22 Finally, this Court lack jurisdiction over Hyatt's case based on Nevada's own law of administrative  
23 exhaustion/ripeness.

24     \\

25     \\

26     \\


27

28

1 This Motion is based on the attached Memorandum of Points and Authorities, affidavits, and  
2 exhibits, as well as all other matters properly of record.

3 DATED this 27<sup>th</sup> day of January, 2000.

4 McDONALD CARANO WILSON McCUNE  
5 BERGIN FRANKOVICH & HICKS

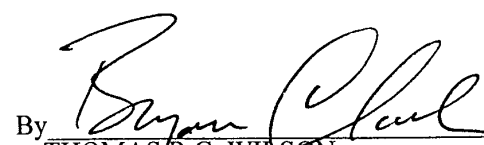
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15 **NOTICE OF MOTION**

16 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

17 PLEASE TAKE NOTICE that the undersigned will bring the foregoing MOTION FOR  
18 SUMMARY JUDGMENT UNDER NRCP 56(b), OR ALTERNATIVELY FOR DISMISSAL UNDER  
19 NRCP 12(h)(3) on for hearing before the above-entitled Court on the 27 day of Feb,  
20 2000, at the hour of 9am in Department \_\_\_\_ of the above-entitled Court, or as soon thereafter as  
21 counsel can be heard.

22 McDONALD CARANO WILSON McCUNE  
23 BERGIN FRANKOVICH & HICKS

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1 and principles of Full Faith and Credit, sovereign immunity, and constitutional choice of law require  
2 application of all of these California laws. Under these principles, the Court must apply California's  
3 governmental immunity laws regarding tax administration to the entirety of the FTB's conduct,  
4 including its Nevada acts. The same principles also require the Court to apply California's laws  
5 regarding exhaustion of administrative remedies to the entirety of this case. Hyatt has no right to  
6 proceed with this action under these laws. Even if applying these laws was not required, the Court  
7 should still apply them as a matter of comity. Hyatt's action is even barred by Nevada's own  
8 administrative exhaustion/ripeness law. For all of these reasons, Hyatt has no right to proceed further  
9 with his case against the FTB.

#### 10 **UNDISPUTED FACTS**

11 This case arises from the FTB's supposed misconduct during its California residency audits of  
12 Gilbert Hyatt for tax years 1991 and 1992. (First Am. Compl. ¶ 7, lines 2:8-3:16 (June 12, 1998).)  
13 When a California taxpayer claims a change in state of residence, the FTB sometimes performs a  
14 California residency audit to determine whether the taxpayer established significant permanent ties with  
15 the taxpayer's new state of claimed residency, and whether the taxpayer severed significant permanent  
16 ties with California on or near the asserted change of residency date. (Illia Affidavit ¶ 2, Cox Affidavit  
17 ¶ 36.)<sup>1</sup> The FTB is the California government agency that conducts residency audits as part of its  
18 governmental obligation to administer California's personal income tax laws. (Cal. Rev. & Tax. Code  
19 § 19501.) Hyatt is a computer industry figure who acknowledges being a long time California resident  
20 through at least most of 1991. (First Am. Compl. ¶ 60, lines 26-27.)

21 In 1990, Hyatt obtained patents on certain computer technologies, resulting in over one hundred  
22 million dollars of income in late 1991 and 1992. (First Am. Compl. ¶ 8, lines 21-23.) Substantial  
23 publicity surrounded Hyatt's patents, including a newspaper article that attracted an FTB auditor's  
24 attention in 1993. (Leatherwood Affidavit ¶ 8 & Ex. 1 (attaching excerpt from FTB auditor's  
25 deposition).) The 1993 article reported that Hyatt lived in Las Vegas, but was involved in a California  
26

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27 <sup>1</sup> All affidavits referenced in the FTB's motion are included in the pleading "Evidence in  
28 Support of Franchise Tax Board's Motion for Summary Judgment, or Alternatively for Dismissal," filed  
concurrently. All affidavits and supporting exhibits are also numbered sequentially.

1 legal dispute with his ex-wife about substantial earnings from recent patent awards. (*Id.*) The FTB  
2 reviewed its records and found that Hyatt filed only a part-year income tax return with the State of  
3 California for 1991. (*See* First Am. Compl. ¶ 10, lines 21-24; Cox Aff. ¶ 4 & Ex. 1.) In that return,  
4 Hyatt alleged under penalty of perjury that he severed his California residency on October 1, 1991 and  
5 lived in California for 273 days during 1991. (Cox. Aff. ¶ 4 & Ex. 1 p. 14.) On the return, he reported  
6 \$613,605 as California business income from a total receipts of \$42,266,667 that would have been  
7 reportable had he been a full year resident. (*Id.*)

8        Shortly after determining that Hyatt received more than \$42 million dollars shortly after  
9 claiming to have become a Nevada resident near the end of a tax year, the FTB initiated an audit of  
10 Hyatt's 1991 tax return. (*See* Cox Aff. ¶ 5 & Ex. 2 p. 34-35.) The FTB initiated its audit by sending  
11 a June 17, 1993 notice letter to Hyatt's Nevada post office box address, and a second notice letter after  
12 Hyatt did not respond to the first. (*Id.*) In response, Hyatt granted Powers of Attorney to a Nevada  
13 accountant, Michael W. Kern, and a California attorney, Eugene Cowan, to represent him during the  
14 audit. (*Id.* ¶ 6 & Ex. 3.) About one month later, the FTB mailed a letter and one of its standard forms  
15 ("FTB 3805F") to Hyatt's accountant, requesting basic information about Hyatt's residence status. (*Id.*  
16 ¶ 7 & Ex. 4 p. 41.) Hyatt's responses to this standard form became the bases for the FTB's subsequent  
17 actions concerning Hyatt.

18 **1. Hyatt's responses raised many questions about his change of residency claim.**

19        Hyatt's responses to this standard FTB form, and the FTB's attempts to verify their accuracy,  
20 raised many questions about his change of residency claim. For instance, Hyatt claimed in his response  
21 to have moved to Nevada on September 25, 1991, as opposed to the October 1, 1991 date asserted on  
22 his 1991 California income tax return. (Cox Aff. ¶¶ 4, 8 & Ex. 1, 5 pp. 14, 43.) But the FTB  
23 ultimately learned that Hyatt had a California doctor's appointment on September 26, 1991, and told  
24 this to Hyatt's accountant. (*Id.* ¶ 9 & Ex. 6, 7 pp. 52, 56.) In response, Hyatt then changed his alleged  
25 move date from September 25, 1991 to September 26, 1991, and alleged that on September 26, after  
26 he visited his doctor in California, he left for Nevada to begin establishing his residence and business  
27 there. (*Id.* ¶ 9 & Ex. 8 p. 93.)

28        But Hyatt never provided moving receipts for this date, instead claiming that he moved himself

1 by using a trailer, providing his son's June 1992 Nevada trailer registration as "proof" of a September  
2 1991 move. (Cox Aff. ¶ 11 & Ex. 11 pp. 227, 229.) In addition, Hyatt failed to provide the FTB any  
3 substantiation and corroborative documentation that he moved his personal effects to Nevada despite  
4 repeated requests and Hyatt's accountant's promise to do so. (*Id.* ¶ 10 & Ex. 9, 10 pp. 221, 222, 224,  
5 226.)

6 At the same time, Hyatt's credit card statements showed evidence of dining charges in California  
7 from September 1991 through March 1992. (Cox Aff. ¶ 12 & Ex. 12 pp. 233, 234.) The credit card  
8 statements showed evidence of numerous dining charges in California during this period, but Nevada  
9 dining charges on only one day from January 2, 1991 through March 16, 1992. (*Id.*) These dining  
10 charges included a charge at a California restaurant on October 2, 1991, the day after Hyatt's original  
11 claimed move date. (*Id.*) Getting the credit card statements that showed these charges required five  
12 separate request letters to Hyatt's accountant. (*Id.* ¶ 13 & Ex. 13 pp. 250, 252, 255, 264, 271.)

13 Hyatt also claimed in his response to have rented a Las Vegas apartment in October 1991, later  
14 providing a lease agreement with a lease start date of October 20, 1991. (Cox Aff. ¶ 14 & Ex. 14 p.  
15 283.) Upon learning of this start date, the FTB asked where Hyatt had stayed between September 25,  
16 September 26, or October 1 (Hyatt's various claimed move dates to Nevada) and October 20. (*Id.* ¶ 15  
17 & Ex. 15 pp. 289, 293.) Hyatt never answered this question, and never gave the FTB any  
18 documentation establishing where he supposedly stayed in Nevada from September 25 through October  
19 20. (*Id.* ¶ 16.) Instead, Hyatt's doctor and credit card statements suggested that Hyatt was in California  
20 on September 26 and on October 2, 1991, (*Id.* ¶¶ 9, 12 & Ex. 6, 12 pp. 52, 233, 239), and Hyatt's  
21 attorney stated that Hyatt was in Washington, Texas, and New York from October 14, 1991 to October  
22 22, 1991. (*Id.* ¶ 17 Ex. 8 pp. 94.)

23 Moreover, Hyatt's \$540 per month apartment was in a complex serving many tenants receiving  
24 federal HUD subsidies. (Cox Aff. ¶ 14 & Ex. 14, 16 pp. 283, 298.) The apartment manager also  
25 informed the FTB's auditor that she did not remember seeing Hyatt often, and that he usually paid the  
26 rent ahead of time with a post dated check. (*Id.* ¶ 18 & Ex. 16 p. 298, 299.) The manager showed the  
27 auditor one envelope in Hyatt's rental file. While it had Hyatt's Las Vegas post office box return  
28 address, it was postmarked from Long Beach, California on December 8, 1991. (*Id.*)

1 Hyatt further claimed in his response that he participated in various Nevada civic and social  
2 activities, including: (1) a computer hobby group; (2) a Jewish temple; (3) a business association; (4)  
3 a school tutoring program; (5) a national computer convention; (6) shopping at membership department  
4 and sports equipment stores; and (7) skiing on a Nevada mountain. (Cox Aff. ¶ 8 & Ex. 5 p. 51.) Hyatt  
5 also claimed to have conducted "international trade activity" with Nevada politicians Robert Miller and  
6 Richard Bryan. (*Id.*)

7 But many of Hyatt's supposed Nevada affiliations began in April 1992, not September or  
8 October 1991, by Hyatt's own admission. (Cox Aff. Ex. 5 p. 51.) Moreover, the FTB could never  
9 verify Hyatt's supposed Nevada affiliations that began before April 1992. For example, the FTB's letter  
10 to the computer hobby group and Jewish temple addresses that Hyatt gave were undeliverable. (*Id.* ¶  
11 19 & Ex. 17 pp. 303, 304.) As to the temple, Hyatt's representative later explained that he had told the  
12 FTB the wrong temple, but his second temple did not even respond to the FTB's inquiry. (*Id.* ¶ 19.)  
13 Similarly, the Nevada Development Authority that Hyatt identified had no record of Hyatt's  
14 membership, the Nevada Governor's office had no record of Hyatt, and the Nevada Senator's office did  
15 not respond to the FTB's inquiry. (*Id.* ¶ 19 & Ex. 18, 19 pp. 305, 307.) Even for affiliations after April  
16 1992, the FTB found discrepancies, as the school tutoring program could not verify Hyatt's claimed  
17 volunteer activity. (*Id.* ¶ 20 & Ex. 20 p. 308.)

18 Hyatt also alleged in his response that he sold his California home on October 1, 1991. (Cox  
19 Aff. ¶ 8 & Ex. 5 p. 43.) When the FTB asked for documentation of the sale, Hyatt provided three non-  
20 notarized, unrecorded documents, including a grant deed. (*Id.* ¶ 21 & Ex. 14 pp. 280, 281, 282.) The  
21 FTB then asked the Recorder's Office in the appropriate California county, which provided the same  
22 grant deed, notarized, but recorded on June 16, 1993. (*Id.* ¶ 21 & Ex. 21, 22 pp. 310, 311.) Curiously,  
23 the notary stamp on the recorded deed was for a 4 year California notary commission to expire on  
24 December 5, 1995, evidencing that this notary commission was invalid to notarize a document on  
25 October 1, 1991, prior to the effective date of the commission. *See* Calif. Gov. Code § 8204; 31 Ops.  
26 Atty. Gen. 258 (1958). The FTB's subsequent discovery has revealed the reason for this anomaly: Hyatt  
27 signed the deed in California on June 16, 1993, but the notary backdated the deed to October 1, 1991,  
28 at Hyatt's request. (Leatherwood Aff. ¶ 11 & Ex. 3 (notary log excerpts evidencing June 16, 1993

1 date).) The FTB's evidence from Hyatt's notary also shows that Hyatt was in California to notarize a  
2 different document on September 27, 1991, one day after the third and final date that Hyatt told the FTB  
3 that he moved to Nevada. (*Id.* Ex. 3.) Hyatt has made the same claim to have moved to Nevada on  
4 September 26, 1991 to this Court. (*E.g.*, First Am. Compl. ¶¶ 1, 7, 8.)

5 Hyatt also asserted in his response that he had registered to vote in Nevada in 1991, his first  
6 voter registration anywhere since at least 1986. (Cox Aff. Ex. 5 at 45-46.) When the FTB asked the  
7 Clark County Election Department for details, Election Department records showed that Hyatt had  
8 amended his registration in July 1994 to include a Las Vegas home address on Sandpiper Lane. (*Id.* ¶  
9 35 & Ex. 30 p. 402.) But the FTB learned that the home at this address had never been in Hyatt's name,  
10 and was actually the home of Hyatt's accountant at the time of Hyatt's voter registration. (*Id.* ¶ 35 &  
11 Ex. 30-31 p. 402, 405.) The FTB also determined that Hyatt's accountant had purchased a different  
12 home in June 1994, and completed the sale of his Sandpiper Lane address to someone other than Hyatt  
13 in October 1994. (*Id.*) The FTB also found out that Hyatt had purchased a different home on Tara  
14 Avenue in Las Vegas in April 1992. (*See* Cox Aff. Ex. 7 at 59.)

15 Thus, it appeared to the FTB that Hyatt was using a Nevada address that was not his own for  
16 voting purposes long after Hyatt claimed to have changed his state of residence. Indeed, the FTB's  
17 discovery efforts have confirmed that Hyatt listed Sandpiper Lane as his voting address from 1994  
18 through at least November 1998, but the real resident at the Sandpiper Lane address does not even know  
19 who Hyatt is. (Leatherwood Aff. ¶ 12 & Ex. 4 (Election Department Voter Register Application dated  
20 July 5, 1994 and Precinct Registers for September 6, 1994 and November 3, 1998); Mayers Aff. ¶¶ 1-7  
21 (affidavit of Sandpiper Lane resident from 1994 to the present).)

22 Finally, Hyatt's response to FTB form 3805F indicates that he received payments under  
23 multiple patent licensing agreements in 1991. (Cox Aff. ¶ 8 & Ex. 5 p. 44.) When the FTB obtained  
24 portions of two licensing agreements signed after the date of Hyatt's supposed change of residency, the  
25 FTB noted that the agreements listed a California mailing address for Hyatt. (*Id.* ¶ 22 & Ex. 23 pp. 313,  
26 314, 327.) The agreements provided for large payments on or before October 31 and November 15,  
27 1991, only a few weeks after Hyatt claimed to have changed his state of residency from California to  
28 Nevada. (*Id.* ¶ 22 & Ex. 23.)



1   **2.     This case arises from the FTB's attempts to verify Hyatt's change of residency claim.**

2           After concluding its audit that uncovered the above discrepancies, the FTB issued a "Notice of  
3 Proposed Assessment" against Hyatt for 1991 for additional tax in the amount of \$1,876,471, and a  
4 fraud penalty in the amount of \$1,407,353.25. (Bauche Aff. ¶ 4 & Ex. A.) A Notice of Proposed  
5 Assessment is not a final tax assessment, but a preliminary determination of the FTB's intended course  
6 of action that is subject to taxpayer protest. (See Bauche Aff. ¶ 3; Cal. Rev. & Tax Code §§ 19042,  
7 19044.) The bases for the FTB's Notice of Proposed Assessment were Hyatt's significant and  
8 continuing California ties, and the absence of any significant Nevada ties, from September 1991 through  
9 the first part of 1992. (Cox Aff. ¶ 37.)

10          Based on the results of the 1991 audit, the FTB also began an audit on Hyatt for taxable year  
11 1992. (Cox Aff. ¶ 38.) As a result of this second audit, the FTB issued a separate Notice of Proposed  
12 Assessment for 1992 for additional tax in the amount of \$5,669,021, and a fraud penalty in the amount  
13 of \$4,251,765.75. (Bauche Aff. ¶ 6 & Ex. C.)

14          Hyatt has protested both Notices of Proposed Assessment, meaning that the Notices of Proposed  
15 Assessment are both under FTB administrative review. (Bauche Aff. ¶¶ 5, 7; see also Cal. Rev. & Tax.  
16 Code § 19044.) The FTB's California administrative proceedings related to Hyatt's protests are not  
17 over, and the FTB's Notices of Proposed Assessment are not yet final. (Bauche Aff. ¶¶ 5 & 7; see also  
18 Cal. Rev. & Tax Code § 19044.) Nevertheless, shortly after protesting the FTB's 1992 proposed  
19 assessment, Hyatt filed this Nevada case, seeking declaratory relief from this Court to determine his  
20 Nevada residency and California nonresidency under California law, and further alleging that the Board  
21 acted tortiously during the audit process. (Compl. (Jan. 6, 1998).) The bases of Hyatt's complaint, or  
22 at least what remains of it after the Court dismissed the declaratory relief action, (Partial Judgment on  
23 the Pleadings (Apr. 16, 1999)), are alleged FTB invasions of privacy (of three varieties), outrageous  
24 conduct, abuse of process, fraud, and negligent misrepresentations "in Nevada." (E.g., First Amended  
25 Compl. ¶ 26, lines 22-24 ("This Court has personal jurisdiction . . . because of the FTB's . . . conduct  
26 within the State of Nevada (emphasis added)); ¶¶ 35, 42, 46, 51 (causes of action two through five, all  
27 alleging improper conduct "in Nevada" (emphasis added)); ¶ 56, lines 34 (sixth cause of action,  
28 complaining of abuse of process directed at Nevada residents); ¶ 62(c), lines 6-19 (seventh cause of

1 action, alleging acts in Nevada as evidence of fraud).)

2 The FTB's acts "in Nevada," or from California across the state border into Nevada, were as  
3 follows:

4 **Nevada field visit, March 1995:** In March 1995, Sheila Cox, the FTB auditor during most of  
5 the Hyatt audits, flew to Nevada with another auditor working on a different case. (Cox Aff. ¶¶ 23, 24  
6 & Ex. 16.) Ms. Cox and the other auditor spent partial days on each of three consecutive days trying  
7 to confirm Hyatt's change of residency claim. (*Id.* Ex. 16.) The auditors went to a local library to look  
8 for articles about Hyatt in local newspapers. (*Id.* Ex. 16 p. 297.) They went to the location of Hyatt's  
9 post office box to see if Hyatt received mail there. (*Id.* Ex. 16 p. 297.) They drove seven times to the  
10 neighborhood where Hyatt supposedly lived at a "confidential" address on Tara Avenue, and looked  
11 at the Tara Avenue house that he bought in April 1992 (it was seemingly vacant, with minimal  
12 landscaping). (*Id.* Ex. 16; *see also id.* Ex. 5 at 50 (claiming confidentiality as to home address).)

13 During the first visit to the neighborhood, the auditors also asked a mail carrier that came by,  
14 without identifying Hyatt, whether she delivered mail on Tara Avenue (she said yes but could not  
15 provide any information). (*Id.* Ex. 16 p. 298.) On the fourth neighborhood visit, Ms. Cox saw a  
16 package on the house's front porch and then walked up to the porch, and without touching it looked at  
17 the mailing address that was clearly visible (it was not addressed to Hyatt). (*Id.* Ex. 16 p. 300.) On the  
18 same visit, the auditors noticed several construction workers at a site across from the house on Tara  
19 Avenue and asked, without identifying Hyatt, if they had been working there long (they had just started  
20 working there). (*Id.* Ex. 16 p. 300.)

21 On the fifth neighborhood visit, the neighborhood trash man came by, and the auditors asked,  
22 without identifying Hyatt, how much trash came from the house (answer: not much). (*Id.* Ex. 16 p.  
23 301.) During the seven neighborhood visits, the auditors also talked to a total of five people in  
24 surrounding homes, without identifying Hyatt, to see if they had seen anyone living at the house. (*Id.*  
25 Ex. 16.) The auditors also visited a local real estate office and asked the manager if the home where  
26 Hyatt claimed to live had been listed for sale recently. (*Id.* Ex. 16 p. 302.)

27 The rest of the FTB's March 1995 field visit involved visits to the Las Vegas apartment complex  
28 where Hyatt claimed to have once lived, a Sam's Club membership store, and the office of Hyatt's

1 accountant, which Hyatt claimed was one of his Nevada business addresses. (*Id.* Ex. 16 p. 302.) At  
2 the apartment, the auditors spent approximately one hour looking at the apartment complex, asking the  
3 managers about their memory of Hyatt, asking one woman who lived just across from Hyatt's rented  
4 unit if she remembered him, and reviewing the items in Hyatt's rental file (including Hyatt's envelope  
5 with a Nevada return address and a California postmark). (*Id.* Ex. 16.) At the Sam's Club, the auditors  
6 met with the manager to determine if he could provide any membership information, without identifying  
7 Hyatt (the manager provided store numbers but could not provide any third party information). (*Id.* Ex.  
8 16 p. 301.) At the office of Hyatt's accountant, the auditors asked the receptionist if Hyatt's accountant  
9 or Hyatt himself was there. (*Id.* Ex. 16 p. 302.) The receptionist indicated that Kern was not present  
10 and that she did not know who Hyatt was. (*Id.* Ex. 16 p. 302.)

11 When a contact with a Nevada citizen required it, Ms. Cox, the lead auditor, identified herself  
12 as a California Franchise Tax Board employee and showed her Franchise Tax Board identification card.  
13 (Cox. Aff. ¶ 25 & Ex. 24.) If any person contacted requested information about the reason for the  
14 inquiry, Ms. Cox stated simply that it was regarding a tax matter. (*Id.* ¶ 25.) The auditors did not reveal  
15 Hyatt's name during any such contacts unless necessary, and never disclosed Mr. Hyatt's social security  
16 number or any comparable specifics about Mr. Hyatt to anyone during the field visit. (*Id.*)

17 **Nevada visit, November 1995:** During late November 1995, Ms. Cox accompanied another  
18 FTB auditor to Las Vegas to assist on the other auditor's cases. (Cox Aff. ¶ 26.) During the visit,  
19 because the other auditor's case work was in the vicinity of Hyatt's supposed residence on Tara  
20 Avenue, Ms. Cox made a brief observation of it. (*Id.*) She made no inquiries with other persons during  
21 this trip concerning the residency of Mr. Hyatt. (*Id.*)

22 **Contacts from California with third parties in Nevada:** The FTB's audit of Mr. Hyatt  
23 involved mail and phone contacts with Nevada third parties between July 15, 1993 and September 27,  
24 1995. (Cox Aff. ¶¶ 27-28.) Most (78%) of the FTB's third party contacts in Nevada by mail or phone  
25 were to persons or entities that Hyatt identified on his initial response to the FTB's request for residency  
26 information. (*Id.* ¶ 31.) The substance of the FTB's phone contacts with Nevada third parties are  
27 documented in the FTB's audit files for Hyatt. (*Id.* ¶ 27 & Ex. 25.) The FTB's mail contacts were  
28 either by letter alone, or by a letter accompanied by a "Demand to Furnish Information," a standard FTB

1 form. (*Id.* ¶ 28.)

2 The FTB's mail correspondence by letter alone involved twenty letters to fifteen Nevada  
3 recipients: the Department of Motor Vehicles (two letters), the Las Vegas Postmaster (three letters),  
4 five Clark County Government agencies (seven letters), Nevada Governor Robert Miller, Nevada  
5 Senator Richard Bryan, Dr. Steven Hall (Hyatt's dentist), University Medical Center, KB Plumbing,  
6 Mr. Pryor (a resident in Mr. Hyatt's claimed Las Vegas neighborhood), Mr. Eggers (another  
7 neighborhood resident), and Allstate Sand and Gravel. (Cox Aff. ¶ 29 & Ex. 26.) The FTB's mail  
8 correspondence by cover letter enclosing a "Demand to Furnish Information" form involved fifteen  
9 letters to twelve Nevada recipients: Temple Beth Am (two letters), the Sports Authority, Nevada  
10 Development Authority (two letters), Personal Computer Users Group, Bizmart, Sam's Club,  
11 Congregation Ner Tamid, Las Vegas Valley Water District, Silver State Disposal Service, Southwest  
12 Gas Corp., Las Vegas Sun (two letters), and the Wagon Trails Apartments. (*Id.* ¶ 30 & Ex. 27.)

13 When the above correspondence involved Nevada government agencies or businesses, the FTB  
14 generally identified Hyatt merely by name and social security number, and where necessary with Hyatt's  
15 claimed Nevada post office or home address. (Cox Aff. ¶¶ 29, 30 & Ex. 26, 27.) When the  
16 correspondence involved Nevada individuals, such as residents of Hyatt's neighborhood, the FTB often  
17 identified Hyatt only by name, or not at all. (*See id.* Ex. 26 pp. 348, 350, 352.) All of the FTB's letters  
18 enclosing a "Demand to Furnish Information" form were to businesses or other entities, rather than  
19 individuals. (*See id.* Ex. 27.) Most of these Nevada mail contacts were to government agencies or  
20 businesses that one would expect to maintain large citizen or client databases, such as the Clark County  
21 Election Department, the Department of Motor Vehicles, and Sam's Club. (*See id.* Ex. 26-27 pp. 339,  
22 340, 373.)

23 **Contacts from California with Hyatt or his representatives in Nevada:** The FTB sent two  
24 initial notice letters to Hyatt's Las Vegas post office box, and corresponded with Hyatt's Nevada  
25 accountant via phone and mail from California from June 1993 through October 1995. (Cox Aff. ¶¶  
26 32, 33.) These contacts involved Nevada by necessity, as Hyatt claimed to have a Nevada address, and  
27 designated a Nevada accountant in conjunction with his Los Angeles, California attorney to handle the  
28 FTB's audits. (*Id.* ¶ 6 Ex. 3.) Copies of the letters that the FTB sent into Nevada to Hyatt or his

1 accountant over this period are attached. (*Id.* ¶ 32.) Auditors' notes of the telephone calls to Hyatt's  
2 accountant are also attached. (*Id.* ¶ 33 & Ex. 29.)

3 **3. Hyatt wants a Nevada trial on everything that the FTB did, whether in Nevada or not.**

4 While Hyatt invokes this Court's jurisdiction based on acts "in Nevada," Hyatt's massive  
5 discovery efforts indicate that he wants to litigate far more. Hyatt's lawyers have spent over 315 hours  
6 taking depositions, generated more than 11,000 pages of transcripts from 24 deponents (including a  
7 2,400 page transcript from a single witness), propounded 329 individual document demands to the FTB,  
8 made over 340 other document requests to deposed witnesses, and demanded and received over 17,000  
9 pages of FTB produced documents. (Leatherwood Aff. ¶¶ 3-7.) But very little of Hyatt's discovery  
10 concerns the FTB's Nevada acts, because Hyatt believes that the bases of the FTB's alleged tort liability  
11 are "not limited to what happened in the State of Nevada." (*Id.* ¶ 9 & Ex. 2 (statement of Hyatt's  
12 counsel).) Given Hyatt's discovery strategy, and his counsels' opinions about the scope of this case,  
13 it is clear that Hyatt wants this Nevada action to be a sweeping indictment of everything that the FTB  
14 did involving Hyatt, whether in Nevada or not.

15 **LEGAL STANDARDS**

16 **1. Summary judgment standard.**

17 The Court must grant the FTB's summary judgment motion if the FTB shows that there is "no  
18 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of  
19 law." Nev. R. Civ. P. 56(c). Under this rule, the FTB bears the initial responsibility of informing the  
20 Court of the bases for its motion, and of identifying the evidence that it believes demonstrates the  
21 absence of a genuine factual issue. *Clauson v. Lloyd*, 103 Nev. 432, 435 n.3, 743 P.2d 631 (1987)  
22 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986)). The FTB can satisfy this  
23 initial responsibility by pointing to parts of the record that demonstrate "an absence of evidence  
24 supporting one or more of the prima facie elements of the non-moving party's case." *NGA #2 Limited*  
25 *Liability Company v. Rains*, 113 Nev. 1151, 1156, 946 P.2d 163 (also citing *Celotex*). The FTB may  
26 also discharge its initial responsibility with evidence that there are complete defenses to Hyatt's claims.  
27 See *Lester v. Buchanan*, 112 Nev. 1426, 1431, 929 P.2d 910 (1996).

28 Once the FTB satisfies its initial responsibility, Hyatt must point to specific facts, rather than

1 general allegations and conclusions, demonstrating the existence of a genuine issue of material fact.  
2 *Bird v. Casa Royale West*, 97 Nev. 67, 70, 624 P.2d 17 (1981). A genuine issue of material fact exists  
3 only where “the evidence is such that a reasonable jury could return a verdict for [Hyatt].” *Bulbman*,  
4 *Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588 (1992) (citations omitted). Hyatt “is not entitled  
5 to build a case on the gossamer threads of whimsy, speculation, and conjecture.” *Id.* (quoting *Collins*  
6 *v. Union Fed. Savings & Loan*, 99 Nev. 284, 294, 662 P.2d 610 (1983)).

7 **2. Dismissal standard under NRCP 12(h)(3).**

8 The Nevada Rules of Civil Procedure require dismissal of an action “whenever it appears by  
9 suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter.” Nev.  
10 R. Civ. P. 12(h)(3). A motion to dismiss for lack of subject matter jurisdiction can make two different  
11 types of attacks: facial or factual. A facial attack simply concerns whether the face of the complaint  
12 supports an exercise of the court’s jurisdiction. A factual attack, such as the present motion, challenges  
13 the court’s actual lack of subject matter jurisdiction regardless of the formal sufficiency of the  
14 allegations. *See generally* Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1350 at 211-  
15 218; *id.* § 1393 at 764-776. Issues of sovereign immunity are jurisdictional, and are properly raised  
16 under Rule 12(h)(3). *E.g., Ramey Const. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315,  
17 318 (10th Cir. 1982).

18 **SUMMARY OF ARGUMENT**

19 The FTB’s acts outside Nevada cannot form a basis for liability in this Nevada Court. The FTB  
20 is a California government agency, and no authority allows this Nevada Court to impose liability on a  
21 California government agency for its California conduct. As to the FTB’s Nevada acts, there is no  
22 evidence on which a reasonable jury could return a verdict for Hyatt. The FTB took what few actions  
23 it did in Nevada as part of its governmental obligations to administer California’s tax laws, and as a  
24 result of Hyatt’s inability or unwillingness to provide satisfactory evidence of his claimed change of  
25 state of residence from California to Nevada. Moreover, Hyatt’s claims boil down to nothing more than  
26 trivial complaints that the FTB disclosed his name, alleged Las Vegas home address, and Social  
27 Security number to a few Nevada entities and individuals, and made statements in Nevada suggesting  
28 truthfully that the FTB’s contacts about Hyatt concerned a tax matter. The FTB cannot be punished

1 simply for doing its job, and the Court should award summary judgment to the FTB.

2 In the alternative, the FTB is entitled to dismissal of Hyatt's remaining claims under Nevada  
3 Rule of Civil Procedure 12(h)(3). California law contains multiple jurisdictional bars to Hyatt's lawsuit  
4 that derive from California's sovereign immunity, including governmental immunity laws regarding tax  
5 administration activities, and administrative exhaustion laws regarding taxation and tort claims.  
6 Principles of Full Faith and Credit, sovereign immunity, and constitutional choice of law all require  
7 application of these California laws to this case. Under these principles, the Court must apply  
8 California's governmental immunity laws regarding tax administration to the entirety of the FTB's  
9 conduct, including its Nevada acts, and Hyatt has no right to proceed further under these laws. Hyatt  
10 also has no right to proceed further with this case under California's administrative exhaustion laws,  
11 as Hyatt failed to exhaust his administrative remedies before filing this suit. Even if applying these laws  
12 was not required, the Court should still apply them as a matter of comity. Hyatt's case is even barred  
13 by Nevada's own administrative exhaustion/ripeness law. For all of these reasons, Hyatt's case should  
14 be dismissed.

#### 15 ARGUMENT

##### 16 1. The FTB's acts outside Nevada cannot form the basis for FTB liability in this case.

17 As an initial matter, the Court must recognize that the FTB's conduct outside Nevada cannot  
18 form a basis for liability in this Court under any of Hyatt's claims. The FTB is a government agency  
19 of California, a sovereign state, and no authority allows this Nevada Court to impose liability on a  
20 branch of the California government based on acts that did not involve Nevada in any way. *Nevada v.*  
21 *Hall*, a favorite Hyatt case, involved a California court's imposition of liability on a Nevada agency  
22 based on an accident "in California," not an accident in Nevada or anywhere else. *Nevada v. Hall*, 440  
23 U.S. 410, 411, 99 S.Ct. 1182 (1978). *Mianecki v. Second Jud. District Court*, another Hyatt favorite,  
24 involved allegations of failures to act in Nevada, and another state's conduct that necessarily involved  
25 Nevada; namely, approving a convicted sex offender's Nevada travel. *Mianecki v. Second Jud. District*  
26 *Court*, 99 Nev. 93, 95, 658 P.2d 422 (1983). Neither of these authorities permits a Nevada court to hold  
27 the FTB liable for anything that it did concerning Hyatt that occurred entirely in California or otherwise  
28 outside of Nevada.

1 Even if this were not the case, the FTB's entirely intrastate acts in California can only be  
2 evaluated under California's own laws, under which the FTB has statutory immunity from Hyatt's tort  
3 claims. Cal. Gov. Code § 860.2; *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228  
4 Cal. Rptr. 750 (1986). California's laws regarding exhaustion of administrative remedies also bar  
5 Hyatt's attempt to litigate over the FTB's California acts. Hyatt has not yet exhausted his California  
6 administrative remedies concerning California tax matters, and has also never presented his tort claims  
7 to the California Board of Control, the California agency to which all tort claimants against the state  
8 must submit their claims before suing. Hyatt's failure to do either of these things before filing suit  
9 precludes litigation regarding the FTB's California acts in this case. Cal. Rev. & Tax. Code § 19381  
10 (barring legal action against any California official "to prevent or enjoin the assessment or collection  
11 of any tax," including taxes based on residency determinations, absent exhaustion of all applicable  
12 administrative remedies); Cal. Gov. Code §§ 911.2, 905.2 (making presentation of tort claim to  
13 California Board of Control a jurisdictional prerequisite to suit).

14 In opposition to the FTB's motion for judgment on the pleadings, Hyatt claimed that "[t]he FTB  
15 is in Nevada answering for its tortious conduct here. . .," not in California or elsewhere. (Plaintiff Gil  
16 Hyatt's Surreply at 5 (emphasis in original) (attached to Plaintiff's Motion for Leave to File Surreply  
17 (Apr. 2, 1999).) Opposing the same motion, Hyatt also claimed that "California's sovereignty ended  
18 at the Nevada border," which constitutes an acknowledgment of the FTB's sovereignty before the  
19 Nevada/California state line is crossed. (Opp. to Motion at 21, lines 19-20 (Mar. 15, 1999).) But given  
20 Hyatt's discovery efforts and prior pleadings, he will undoubtedly retreat from this acknowledgment  
21 of the FTB's sovereignty in opposition to this motion, and attempt to smear the FTB and avoid  
22 summary judgment or dismissal using the same non-Nevada allegations that Hyatt has made all along.  
23 The Court should disregard this tactic, and focus on the FTB's Nevada acts alone.

24 **2. The FTB is entitled to summary judgment concerning its Nevada acts.**

25 **A. None of the FTB's Nevada acts were tortious.**

26 When the Court focuses on the FTB's Nevada acts, described fully above, Hyatt obviously has  
27 no triable claim. Given the limited and appropriate nature of the FTB's Nevada acts, there is no  
28 evidence from which a jury could reasonably find that the FTB committed an actionable invasion of



1 privacy, an abuse of process, any act constituting a tort of outrage, or any act of fraud or negligent  
2 misrepresentation. Instead, the FTB's Nevada acts were a privileged part of the FTB's governmental  
3 functions, and were justified by Hyatt's own conduct that cast considerable doubt on his claim that he  
4 changed his state of residence from California to Nevada in late 1991. The lack of evidence supporting  
5 Hyatt's claims, combined with the FTB's privilege to do what it did, require summary judgment for the  
6 FTB.

7           **(1) There is no evidence from which a jury could reasonably find that the**  
8           **FTB's Nevada acts were an invasion of privacy.**

9           Focusing on the FTB's Nevada acts, there is no evidence from which a jury could reasonably  
10 find that the FTB invaded Hyatt's privacy under any of the privacy causes of action in Hyatt's  
11 complaint: (a) unreasonable intrusion upon the seclusion of another; (b) unreasonable publicity given  
12 to private facts; and (c) casting Hyatt in a false light. (First Am. Compl., Causes of Action Two through  
13 Four.) Hyatt's first privacy tort for intrusion requires evidence of: "(1) an intentional intrusion  
14 (physical or otherwise); (2) on the solitude or seclusion of another; (3) that would be highly offensive  
15 to a reasonable person." *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630-31, 895 P.2d 1269 (1995),  
16 *modified on other grounds*, 113 Nev. 644, 650, 940 P. 2d 134, 138 (1997) (citing Restatement (Second)  
17 Torts § 652A). Hyatt's second privacy tort for public disclosure of private facts requires evidence "that  
18 a public disclosure of private facts has occurred which would be offensive and objectionable to a  
19 reasonable person of ordinary sensibilities." *Montesano v. Donrey Media Group*, 99 Nev. 644, 649,  
20 668 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984). Hyatt's false light claim requires proof that  
21 the FTB put Hyatt before the public in a false light in a manner that "would be highly offensive to a  
22 reasonable person," and also that the FTB "had knowledge of or acted in reckless disregard as to the  
23 falsity of the publicized matter and the false light in which [Hyatt] would be placed." *Rinsley v. Brandt*,  
24 700 F.2d 1304, 1306 (10th Cir. 1983); *see also PETA*, 111 Nev. at 622 n.4 (citing *Brandt*); Restatement  
25 (Second) of Torts § 652E. This last variety of privacy tort requires proof by "clear and convincing  
26 evidence. . . ." *Machleder v. Diaz*, 801 F.2d 46, 56 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987);  
27 *see also PETA*, 111 Nev. at 622 n.4 (citing *Diaz*).

28           The evidence that unites all of these privacy torts, and that is wholly absent here, is evidence of

1 conduct that is at least offensive and objectionable to a reasonable person. Offensiveness is a legal issue  
2 as a threshold matter, *PETA*, 111 Nev. at 634-635, and there is no evidence of FTB acts in Nevada  
3 allowing a reasonable conclusion that the FTB engaged in such conduct. To the contrary, the evidence  
4 shows that all the FTB did in Nevada was try to verify Hyatt's claimed change of residency, using  
5 methods that disclosed minimal identifying information about Hyatt to a limited number of Nevada  
6 companies, government agencies, and citizens, many of whom Hyatt identified himself as able to  
7 corroborate his residency claim.

8 The context in which the FTB made these disclosures is an important consideration in evaluating  
9 their offensiveness. *PETA*, 111 Nev. at 634-635. Here, the context in which the FTB was operating  
10 was one in which Hyatt's "evidence" of a residency change simply did not add up. Hyatt claimed to  
11 changed his residency near the end of a year just before receiving \$100 million of otherwise taxable  
12 California income. (Cox Aff. ¶ 4 & Ex. 1 p. 12.) He told the FTB three different move dates to  
13 Nevada, providing his third and final move date after the FTB found evidence that his other move dates  
14 were necessarily false. (*Id.* ¶¶ 4, 8, 9 & Ex. 1, 5, 6, 7, 8 pp. 14, 43, 52, 56, 93; *see also* Leatherwood  
15 Aff. ¶ 11 & Ex. 3.) He was a multimillionaire, but claimed to have rented a Nevada apartment in a  
16 primarily lower-income complex, and moved his possessions with a family trailer. (Cox Aff. ¶¶ 11, 14  
17 & Ex. 11, 14 pp. 227, 283.) Hyatt never accounted for where he was in Nevada between September  
18 25, September 26 or October 1, 1991, his three alleged move dates, and October 20, 1991. (*Id.* ¶¶ 4,  
19 8, 9 & Ex. 1, 5, 6, 7, 8.) He sent at least one envelope to the Wagon Trails Apartment postmarked from  
20 California at a time when he was supposed to have already moved. (*Id.* ¶ 18.)

21 Hyatt also gave the FTB many supposed Nevada social and business contacts that the FTB could  
22 not verify. (Cox Aff. ¶¶ 19, 20 & Ex. 17, 18, 19, 20.) He had California dining charges on his credit  
23 cards for many months after he claimed to have changed his state of residence to Nevada, and Nevada  
24 dining charges on only one day during the same period. (*Id.* ¶ 12 & Ex. 12.) The sale deed for his  
25 house was not recorded until years after he sold it, and had irregularities on its face resulting from his  
26 backdating of the deed. (*Id.* ¶ 21 & Ex. 14, 21, 22; Leatherwood Aff. ¶ 11 & Ex. 3.) The FTB's  
27 discovery about this transaction also shows that Hyatt was in California on September 27, 1991, one  
28 day after the third and final date that Hyatt claimed to have moved. (Leatherwood Aff. Ex. 3.) The

1 receptionist at his supposed Nevada business address had never heard of him when asked. (Cox Aff.  
2 ¶ 24 & Ex. 16.) He registered to vote in Nevada using someone else's address long after the date that  
3 he had claimed to have moved. (Cox Aff. ¶ 35 & Ex. 30-31; Mayers Aff. ¶¶ 1-7; *see also* Leatherwood  
4 Aff. ¶ 12 & Ex. 4.) Two of his licensing agreements executed after he supposedly moved listed a  
5 California address for him. (Cox Aff. ¶ 22 & Ex. 23 pp. 313, 314, 327.)

6       Whether or not Hyatt was highly offended by the FTB's Nevada conduct, there was nothing  
7 objectively offensive about the FTB's Nevada conduct in the context of Hyatt's suspect change of  
8 residency claim. Instead, the FTB's disclosures were justified by Hyatt's own shifting, dubious story  
9 about his claimed change of residency, which occurred just before he received over \$100 million in  
10 income otherwise taxable in California. No reasonable person could find offensive and objectionable,  
11 the FTB's limited Nevada disclosures of Hyatt's name, address, and social security number in this  
12 context, which was largely of Hyatt's own creation. A reasonable person would expect such disclosures  
13 to help the FTB confirm or refute Hyatt's change of residency claim.

14       Indeed, even apart from the specific context of this case, a reasonable person with nothing to  
15 hide would not be offended by a state taxing agency's disclosure of minimal identifying information  
16 like the disclosures that the FTB made. A reasonable person with nothing to hide would also not be  
17 offended by cursory questions to potential witnesses about what activities, if any, they saw at a certain  
18 home or apartment, made by FTB employees stating simply, when necessary, that the inquiry concerned  
19 a tax matter. Just like a plaintiff alleging damages, a reasonable taxpayer "must expect reasonable  
20 inquiry and investigation to be made" of his or her assertions to the taxing agency, and "to this extent  
21 [their] interest in privacy is circumscribed." *See McLain v. Boise Cascade Corp.*, 271 Or. 549, 555, 533  
22 P.2d 343 (1975) (quoting *Forster v. Manchester*, 410 Pa. 192, 189 A.2d 147, 150 (1963).) Only an  
23 unreasonable person would expect taxing agencies to make such inquiries without disclosing a single  
24 piece of identifying information about a taxpayer, as Hyatt apparently does.

25       A reasonable person also would not consider the FTB's Nevada audit activities as "stating or  
26 insinuating . . . that [Hyatt] was under investigation in California, thereby falsely portraying [him] as  
27 having engaged in illegal or immoral conduct," as Hyatt does. (First Am. Compl. ¶ 46.) Instead, a  
28 reasonable person would consider the FTB's Nevada disclosures about Hyatt as conveying, at most, the

1 fact that the FTB was auditing Hyatt for some unspecified tax purpose. No FTB correspondence to third  
2 parties in Nevada ever said that Hyatt had engaged in “illegal or immoral” conduct. No statement of  
3 any FTB employee to third parties in Nevada ever communicated that either. Hyatt’s contrary  
4 allegation is simply his lawyers’ conclusory, unsupported “spin” on what the FTB really said and did  
5 in Nevada, which is insufficient to avoid summary judgment. *Wayment v. Holmes*, 112 Nev. 232, 237,  
6 912 P.2d 816 (1996) (“[Conclusory statements along with general allegations do not create an issue  
7 of material fact.]” (citing *Michaels v. Sudeck*, 107 Nev. 332,334, 810 P.2d 1212 (1991).)

8 In addition to the above defects common to all of Hyatt’s privacy claims, there also is no  
9 evidence creating a genuine issue of material fact as to other elements of his privacy causes of action,  
10 as follows:

11 **Unreasonable intrusion upon Hyatt’s seclusion.** There is no evidence of FTB acts in Nevada  
12 constituting an intrusion on Hyatt’s solitude or seclusion. There is no evidence that the FTB’s Nevada  
13 acts breached any private space of Hyatt’s, or involved examination of any private affairs of Hyatt that  
14 he did not himself reference in response to FTB information requests. Hyatt’s placing of some of his  
15 arguably private affairs in issue, such as his membership in a Nevada Jewish temple, negates any  
16 objectively reasonable expectation of seclusion or solitude as to those affairs. *PETA*, 111 Nev. at 631,  
17 895 P.2d at 1279. Again, cases involving persons seeking damages for injuries are instructive. *E.g.*,  
18 *McLain*, 271 Or. at 555, 533 P.2d at 346 (“It is . . . well established that one who seeks to recovery  
19 damages for alleged injuries must expect that his claim will be investigated and he waives his right of  
20 privacy to the extent of a reasonable investigation.”)

21 Moreover, Hyatt’s allegation that the FTB’s minimal information disclosures in Nevada  
22 somehow contributed to the intrusion on Hyatt’s solitude or seclusion makes no sense. (First. Am.  
23 Compl. ¶¶ 34-35.) The intrusion tort concerns acts of investigation or examination of private matters  
24 or a secluded place, not the publication of anything to third parties. Restatement (Second) of Torts §  
25 652B, Comment (b). Furthermore, Hyatt had no reasonable expectation of privacy that barred the  
26 FTB’s limited Nevada disclosures of his name, supposed Nevada address, and social security number  
27 for the purpose of verifying his residency claim. To hold otherwise would seriously impede the FTB’s  
28 efforts to enforce California’s tax laws.

1           **Unreasonable publicity given to private facts.** As with the previous tort, Hyatt had no  
2 reasonable expectation of privacy that barred the FTB's minimal information disclosures in Nevada for  
3 the purpose of verifying Hyatt's residency claim. There is also no evidence that the FTB's minimal  
4 information disclosures in Nevada constituted sufficient publicity to be actionable under this tort. As  
5 used to describe this tort, the word "[p]ublicity . . . means that the matter is made public, by  
6 communicating it to the public at large, or to so many persons that the matter must be regarded as  
7 substantially certain to become one of public knowledge." Restatement (Second) of Torts § 652D,  
8 Comment (a). Here, the FTB sent only eighteen pieces of correspondence to Nevada organizations or  
9 government offices that referenced Hyatt's social security number and/or linked his name with his  
10 supposedly confidential Las Vegas address on Tara Avenue. (*See Cox Aff.* ¶¶ 29, 30, & Ex. 26, 27.)  
11 The FTB's disclosure to this limited group of Nevada citizens and entities is not actionable "publicity"  
12 as a matter of law. *See Polin v. Dun & Bradstreet, Inc.*, 768 F.2d 1204, 1206-1207 (10th Cir. 1985) (no  
13 invasion of privacy claim for credit report issued to seventeen subscribers because "publicity"  
14 requirement not satisfied).

15           Even if the FTB had publicized information about Hyatt, there is no evidence that the  
16 supposedly confidential information that the FTB disclosed in Nevada (his name, allegedly  
17 "confidential" Nevada address, and social security number) actually were "private facts." There can  
18 be no liability for unreasonable publicity of information "when the defendant merely gives further  
19 publicity to information that is already public," such as a "matter of public record." Restatement  
20 (Second) of Torts § 652D, Comment (b). Here, the public already knew Hyatt's name from the  
21 substantial publicity surrounding his patent awards. (*See First. Am. Compl.* ¶ 8, lines 25-27  
22 (acknowledging publicity).) In addition, Hyatt had registered to vote in Nevada when the FTB began  
23 auditing Hyatt, making his social security number a matter of public record. (*Leatherwood Aff.* ¶ 12  
24 & Ex. 4.) Hyatt's "secret" Nevada home on Tara Avenue was also pictured in a segment on "Hard  
25 Copy," a national television news magazine, long before any of the FTB's Nevada disclosures. (*Id.* ¶  
26 14 & Ex. 6.) Furthermore, Hyatt's social security number is a matter of public record in California from  
27 at least two of his California court actions. (*Id.* ¶¶ 13, 15 & Ex. 5, 7.) These facts, coupled with the  
28 absence of evidence of highly offensive conduct, preclude Hyatt from recovery for this privacy tort.

1       **Casting Hyatt in a false light.** Hyatt's false light claim suffers from the additional defects that  
2 nothing that the FTB said in Nevada publicized a matter that was false. Both publicity and falsity are  
3 essential elements of Hyatt's false light claim. Restatement (Second) of Torts § 652E (requiring  
4 "publicity"); *id.*, comment (a) ("[I]t is essential...that the matter published concerning the plaintiff is  
5 not true."). The FTB's Nevada disclosures about Hyatt included only accurate identifying information  
6 about Hyatt, and at most indicated that Hyatt was the subject of an FTB audit, which was entirely true.  
7 (Cox. Aff. Ex. 26-27.) The FTB sent only eighteen pieces of Nevada correspondence that referenced  
8 Hyatt's social security number and/or linked his name with his supposedly confidential Las Vegas  
9 address, which is not tortious publicity as a matter of law. (Cox Aff. ¶¶ 29, 30 & Ex. 26, 27.)

10                   **(2) There is no evidence of FTB acts in Nevada from which a jury could**  
11                   **reasonably find extreme and outrageous conduct.**

12       The evidence concerning Hyatt's Fifth Cause of Action for the tort of outrage is similarly  
13 flawed. In *Branda v. Sanford*, the Nevada Supreme Court held that this tort requires, among other  
14 things, "extreme and outrageous conduct" on the defendant's part to be actionable:

15                   We recently explicitly recognized that liability can flow from intentional  
16                   infliction of emotional distress. . . . the elements of a prima facie case  
17                   [are]: (1) extreme and outrageous conduct by the defendant; (2) intent to  
18                   cause emotional distress or reckless disregard as to the probability; (3)  
19                   severe emotional distress; and (4) actual and proximate causation of the  
20                   emotional distress. *Branda v. Sanford*, 97 Nev. 643, 648, 637 P.2d 1223  
21                   (1981).

22       A defendant's acts must be "extreme and outrageous" to "an average member of the community," and  
23 must go so far beyond "all possible bounds of decency" as to be considered "atrocious" and "utterly  
24 intolerable:"

25                   Liability has been found only where the conduct has been so outrageous  
26                   in character, and so extreme in degree, as to go beyond all possible  
27                   bounds of decency, and to be regarded as atrocious, and utterly  
28                   intolerable in a civilized community. Generally, the case is one in which  
29                   the recitation of the facts to an average member of the community would  
30                   arouse his resentment against the actor, and lead him to exclaim,  
31                   "Outrageous!" Restatement (Second) of Torts § 46, Comment (d); *see*  
32                   also *Star v. Rabello*, 97 Nev. 124, 126, 625 P.2d 90 (1981) (citing  
33                   section 46 of the Restatement in its analysis of the tort).

34       Conduct with "social value" is generally not actionable under these standards. *E.g., Forster*  
35 *v. Manchester*, 189 A.2d 147, 151-152 (Pa. 1963) (private detective's surveillance of plaintiff to

1 determine if she had made false insurance claim not actionable as a tort of outrage, in part because of  
2 the "social value" inherent in revealing false claims). It is for the Court to determine, in the first  
3 instance, whether the FTB's conduct may reasonably be regarded as so extreme and outrageous as to  
4 justify a jury trial. *See* Restatement (Second) of Torts § 46, Comment (h).

5 Here, there is no evidence of any FTB acts in Nevada from which a jury could reasonably find  
6 the FTB liable for the tort of outrage. The FTB's limited acts in Nevada were performed as part of its  
7 duty to administer the California Personal Income Tax Law. Calif. Rev. & Tax Code §§ 17014, 19501.  
8 The FTB's Nevada acts resulted from Hyatt's own inability or unwillingness to provide credible  
9 evidence of his claimed change of state of residence from California to Nevada in late 1991. They were  
10 directed primarily to Nevada references that Hyatt gave to support his claim, and merely asked for basic  
11 information related to Hyatt's residency in 1991 and 1992. Some of the FTB's acts involved disclosure  
12 of Hyatt's name, social security number, and claimed Nevada address, but such minimal disclosures  
13 were hardly "atrocious," "utterly intolerable," or beyond "all possible bounds of decency," particularly  
14 where this information was already publicly available from other sources. Instead, these disclosures,  
15 and the FTB's limited questioning of Nevada citizens about Hyatt's residence here, were part of the  
16 reasonable efforts of the California government to determine the truth or falsity of Hyatt's change of  
17 residency claim. As such, the FTB's Nevada acts had inherent "social value," and do not give rise to  
18 the tort of outrage. *Forster*, 189 A.2d at 151-152. No doubt every taxpayer faced with an additional  
19 assessment has anxieties and feels "outraged." Nobody likes the tax man. But Hyatt's own outrage at  
20 the FTB's proposed assessments against him does not arise from "extreme and outrageous" FTB  
21 conduct in Nevada as a matter of law.

22  
23 **(3) There is no evidence of FTB acts in Nevada from which a jury could reasonably find an FTB abuse of process.**

24 The evidence concerning Hyatt's Sixth Cause of Action for abuse of process is likewise  
25 insufficient. Hyatt does not allege that the FTB took any court action or employed any court process,  
26 but instead alleges that the FTB sought to "extort vast sums of money" from Hyatt by directing  
27 unauthorized "administrative quasi-subpoenas" into Nevada. (First Am. Compl. ¶ 55.) The FTB's  
28 "Demand to Furnish Information" form is what Hyatt calls an "administrative quasi-subpoena." (*Id.*

¶ 56.) The FTB sent this form to a few Nevada recipients during the course of the FTB's administrative tax process concerning Hyatt's change of residency claim. California law expressly authorizes the FTB to send this form to "persons residing within or without the state." Cal. Govt. Code § 11189 (providing for enforcement of FTB demands for documentation) (emphasis added); Cal. Rev. & Tax. Code § 19504 (empowering the FTB to demand "any book, papers, or other data which may be relevant" to the FTB's tax enforcement duties).

In *Dutt v. Kremp*, 111 Nev. 567, 575, 894 P.2d 354 (1995), the Nevada Supreme Court defined the tort of abuse of process:

An abuse of process claim consists of two elements: (1) an ulterior purpose other than resolving a legal dispute; and (2) a willful act in the use of process not proper in the regular conduct of the proceeding. . . . An "ulterior purpose" includes any "improper motive" underlying the issuance of legal process.

Most jurisdictions limit the tort to abuse of judicial process, as opposed to abuse of administrative process. *Gordon v. Community First State Bank*, 255 Neb. 637, 646-651, 587 N.W.2d 343 (Neb. 1998) (stating and adopting "majority rule" limiting abuse of process tort to judicial process). See also *Sea-Pac Co. v. United Food & Commer. Worker's Loc. Union*, 699 P.2d 217, 218-19, 103 Wash.2d 800 (1985) (summary judgment must be granted where no court process employed); *Foothill Ind. Bank v. Mikkelson*, 623 P.2d 748, 757 (Wyo. 1981) (publication of a notice of mortgage foreclosure not involving court action was not use of "process" as required for the abuse of process tort); Keeton et al., *Prosser & Keaton on the Law of Torts* § 121 at 898 (5<sup>th</sup> ed. 1984) ("[T]he judicial process must in some manner be involved" for there to be an abuse of process.)

Nevada state courts have not addressed this issue, but the Nevada federal court's discussion of the tort under Nevada state law is consistent with the majority rule. *Laxalt v. McClatchy Newspapers*, 622 F. Supp. 737, 750-51 (D. Nev. 1985) ("The mere filing of a complaint with malicious intent is insufficient [to find an abuse of process] for there must also be some subsequent act to filing which abuses the process.") (emphasis added). Further, even the few jurisdictions extending the tort to abuse of an administrative process do so only as to a private party's misuse of the administrative process, as opposed to a misuse of the process by the administrative agency itself. E.g., *Hillside Associates v. Stravato*, 642 A.2d 664, 669 (R.I. 1994).



1 Hyatt's abuse of process claim cannot survive under the above standards. Hyatt's abuse of  
2 process allegations and evidence rest entirely on claimed abuse of an administrative process, not the  
3 judicial process of any court. Further, Hyatt's allegations and evidence do not concern a private party's  
4 misuse of the FTB's administrative process, but the FTB's supposed misuse of its own process, a novel  
5 liability theory that has no legal support. Hyatt cannot recover for abuse of process under the  
6 undisputed facts of this case. *Gordon*, 255 Neb. at 646-651; *Sea-Pac*, 699 P.2d at 218-19, 221;  
7 *Foothill*, 623 P.2d at 757; *Laxalt*, 622 F. Supp. at 750-51.

8  
9 **(4) There is no evidence of FTB acts in Nevada from which a jury could reasonably find fraud or negligent misrepresentation.**

10 There is also no evidence on which a jury could reasonably find that the FTB engaged in fraud  
11 or negligent misrepresentations in Nevada. The bases for Hyatt's fraud and negligent misrepresentation  
12 claims are that unnamed FTB representatives, at various unspecified times, falsely promised  
13 confidentiality concerning "various aspects of plaintiff's circumstances, including . . . his personal home  
14 address and his business and financial transactions and status," and falsely gave "express and implied  
15 assurances and representations" that the FTB's audit "was to be an objective inquiry into the status of  
16 his 1991 tax obligation." (First. Am. Compl. ¶¶ 61, 63, 68-69.) Hyatt alleges no specifics about either  
17 type of FTB misrepresentation, and his alleged "indices of the FTB's fraud" almost exclusively describe  
18 FTB correspondence, meetings, and other acts within California. (*Id.* ¶ 62(a)-(c).)

19 In Nevada, the elements of intentional misrepresentation are set forth in *Landex, Inc. v. State*  
20 *ex rel. List*, 94 Nev. 469, 478, 582 P.2d 786 (1978):

- 21 1. A false representation made by the defendant;
- 22 2. Knowledge or belief on the part of the defendant that the  
23 representation is false or, that he has an insufficient basis  
24 of information to make the representation;
- 25 3. An intention to induce the plaintiff to act or to refrain  
26 from acting in reliance upon the misrepresentation;
- 27 4. Justifiable reliance upon the representation on the part of  
28 the plaintiff in taking action or refraining from taking  
action; and
5. Damage to the plaintiff resulting from such reliance.

1 Hyatt must establish all of these elements by clear and convincing evidence. *Lubbe v. Barba*, 91 Nev.  
2 596, 599, 540 P.2d 115 (1975). Hyatt's negligent misrepresentation claim also requires that the FTB  
3 have supplied false information, but only allows recovery if the FTB supplied the information  
4 negligently to Hyatt at a time when it owed him a legal duty to provide accurate information, and did  
5 so "for the guidance of [Hyatt] in [his] business transaction[]." *Bill Stremmel Motors, Inc. v. First*  
6 *Nat'l. Bank of Nev.*, 94 Nev. 131, 134, 575 P.2d 938 (1978) (emphasis added).

7 The FTB has documented in this motion every oral and written statement that the FTB made to  
8 Hyatt or his representatives in Nevada, and none of those statements give rise to any claim under the  
9 above standards. (See Cox Aff. ¶¶ 32, 33.) None of those statements constituted a promise to Hyatt  
10 that the FTB would not disclose to third parties the basic information that the FTB learned during the  
11 audit (specifically, his "confidential" Las Vegas address), or the basic information that the FTB already  
12 knew before the audit (specifically, his name and social security number). (*Id.*) Even if any statement  
13 had constituted such a promise, California law put Hyatt on notice that such disclosures of identifying  
14 information to third parties could happen during an audit, negating any justifiable reliance on any such  
15 promise:

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

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

20 See also *Franchise Tax Bd. v. Superior Court*, 164 Cal. App. 3d 526, 537, 210 Cal. Rptr. 605 (1985)  
21 (FTB investigations regarding tax liability matters are "administrative inquiries"); *Smith v. State*, 38  
22 Nev. 477, 151 P. 512, 513 (1915) ("Everyone is presumed to know the law and this presumption is not  
23 even rebuttable."). Moreover, Hyatt admittedly had a duty to cooperate with the FTB's requests for  
24 information, (see First Am. Compl. ¶ 71, lines 20-21), negating any claim that the FTB's supposed  
25 promises of confidentiality for even basic identifying information caused something to happen to Hyatt  
26 that would not have happened otherwise.

27 Hyatt's claim that unnamed FTB representatives falsely promised at various unspecified times  
28 that the FTB would be "objective" in its 1991 audit is similarly defective. (First Am. Compl. ¶ 63, line

23.) Again, Hyatt's acknowledged duty to cooperate with the FTB's audit negates any possibility that these representations caused Hyatt to suffer some injury that he would not have suffered otherwise. (*See id.* ¶ 71, lines 20-21.) In addition, Hyatt's attempt to use vague promises of "objectivity" as bases for fraud and negligent misrepresentation claims is merely a thinly disguised attempt to litigate the FTB's underlying residency determination in its entirety, and to have this Court adjudicate issues concerning the FTB's non-Nevada conduct. But the Court dismissed Hyatt's request for a residency determination for lack of subject matter jurisdiction, and has no power to adjudicate the same residency issues and non-Nevada acts through Hyatt's proposed alternate route. (*See Partial Judgment on the Pleadings* (Apr. 16, 1999); *supra* at 16-17.)

If the above were not enough, Hyatt's negligent misrepresentation claim suffers from an additional defect. The FTB's involvement with Hyatt concerned only a California residency audit and a proposed assessment of personal income taxes, not a "business transaction" between Hyatt and the FTB. The absence of conduct fitting "squarely within a business or commercial transaction" between Hyatt and the FTB is fatal to Hyatt's negligent misrepresentation claim. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382, 1387 (1998) (company's drug and alcohol policy did not create a business transaction between company and employee).

**B. The FTB was privileged to take the Nevada actions that it did in any event.**

The FTB's affirmative defense of privilege is also a basis for summary judgment for the FTB. (Answer to First Am. Compl. p. 7 ¶ 8, lines 16-20 (Aug. 13, 1998) (asserting privilege defense).) Hyatt's entire case is premised on the assumption that the FTB was required to accept as true his claim that he had changed his residency as of September 26, 1991. Based on this assumption, he alleges that even the FTB's minimal disclosures and activities in Nevada give rise to a whole host of actionable torts.

But it is fundamental that administrative agencies are privileged to make their own investigatory decisions, based upon their particular areas of expertise and exercise of their delegated authority. *General Motors Corp. v. Federal Energy Regulatory Commission*, 613 F.2d 939, 944 (D.C. App. 1979) (in the absence of specific legislative direction, the decision of an administrative body whether or not to conduct an investigation is committed to the agency's discretion). It is also well-established that an

1 agency is privileged to investigate merely upon suspicion that the law is being violated. *See, e.g.,*  
2 *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *DeMasters v. Arend*, 313 F.2d 79, 87  
3 (9th Cir. 1963), *cert. dismissed*, 375 U.S. 936 (1963); *Brovelli v. Superior Court of Los Angeles Co.*,  
4 364 P.2d 462, 465 (Cal. 1961). An agency may even investigate because it wants assurance that the law  
5 is not being violated. *Morton Salt*, 338 U.S. at 639; *DeMasters*, 313 F.2d at 88; *Brovelli*, 364 P.2d at  
6 465.

7 To impose tort liability upon an agency simply because it did not accept a person's asserted  
8 position and instead conducted its own investigation has long been rejected. *Gibson v. Reynolds*, 77  
9 F. Supp. 629, 640 (D. Ark. 1948), *aff'd*, 172 F.2d 95 (8th Cir. 1949), *cert. denied*, 337 U.S. 925 (1949)  
10 (A Draft Board was "not required to adopt plaintiff's view" in an administrative inquiry); *Maroosis v.*  
11 *Smyth*, 187 F.2d 228, 233 (9th Cir. 1951), *cert. denied*, 342 U.S. 814 (1951) (An IRS Collector was not  
12 required to consider a taxpayer's books to be accurate, and it was within the Collector's power to count  
13 physically the taxpayer's inventory to determine the amount owed).

14 Tax agencies in particular are entitled to exercise broad investigative power. The U.S. Supreme  
15 Court held in *United States v. Powell*, 379 U.S. 48 (1964) that the government is not required to make  
16 a showing of probable cause before seeking judicial enforcement of an IRS summons to produce  
17 documents, leaving the determination of the advisability and content of the summons to the agency's  
18 discretion:

19 Although a more stringent interpretation is possible, one which would  
20 require some showing of cause for suspecting fraud, we reject such an  
21 interpretation because it might seriously hamper the Commissioner in  
22 carrying out investigations he thinks warranted, forcing him to litigate  
and prosecute appeals on the very subject which he desires to  
investigate... *Powell*, 379 U.S. at 53.

23 The same judicial deference to a taxing agencies' administrative discretion is evident in the  
24 many decisions holding the Internal Revenue Service and its agents immune from suit for alleged torts  
25 committed in their tax administration duties. *E.g., Johnson v. United States*, 680 F. Supp. 508, 515  
26 (E.D.N.Y. 1987) (United States and IRS district director immune in a civil suit in which the plaintiff  
27 alleged that the director committed wrongful acts arising out of the assessment and attempted collection  
28 of the plaintiff's income tax); *Josephson v. Joslin*, 38 F.R.D. 344, 346-347 (D.N.J. 1965) (IRS agent

1 allegedly engaged in willful and malicious harassment of plaintiff while in the course of examining the  
2 plaintiff's books and records to ascertain his income tax liability was immune from suit); *Stankevitz v.*  
3 *IRS*, 640 F.2d 205, 206 (9<sup>th</sup> Cir. 1981) (summary judgment for IRS and IRS agents on immunity grounds  
4 as against claim of conspiracy to deprive taxpayer of his constitutional rights by maliciously auditing  
5 his account, as well as assessing an unjust deficiency); *White v. Commissioner*, 537 F. Supp. 679, 684  
6 (D. Colo. 1982) (damage claim for an improper audit dismissed because "IRS officials are absolutely  
7 immune from damages resulting from their decisions to initiate or continue proceedings such as audits  
8 and assessments, which are subject to later IRS adjudications"); *McKenzie v. Moeller*, 76-2 U.S. Tax  
9 Cas. (CCH) § 9535, 38 AFTR 2d (RIA) 5463 (E.D. Wis. 1976) (IRS and IRS agents sued for invasion  
10 of privacy and deprivation of constitutional rights on the basis of the issuance of a summons to obtain  
11 information relative to the plaintiff's tax liability were entitled to immunity).

12         Given the FTB's privilege to act as it did in Nevada, Hyatt has no right to proceed to trial on any  
13 of his claims. The FTB's decisions to take certain minimal acts against Hyatt were a privileged part of  
14 the FTB's discretion to administer California's tax laws. California law gave the FTB the statutory  
15 authority and duty to investigate Hyatt's change of residency claim. Cal. Rev. & Tax. Code §§ 17014  
16 & 19501. California law also contemplated and allowed the FTB to demand documentation and make  
17 necessary disclosures about Hyatt for this purpose, and to enforce demands for documentation both  
18 within and without the state. Cal. Rev. & Tax. Code § 19504 (empowering the FTB to demand "any  
19 book, papers, or other data which may be relevant" to the FTB's tax enforcement duties); Cal. Govt.  
20 Code § 11189 (providing for enforcement of FTB demands for documentation to "persons residing  
21 within or without the state.") (emphasis added); Cal. Rev. & Tax. Code § 19545 (authorizing FTB  
22 disclosures of a tax return or "return information" in an administrative proceeding concerning a  
23 taxpayer's civil liability). The FTB did not have to take Hyatt at his word, particularly where his word  
24 raised more questions than it answered about his claim to have changed residency on September 25, 26,  
25 or October 1, 1991. (*See supra* at 6-10.)

26         The FTB's privilege defense to Hyatt's invasion of privacy claims in particular has even more  
27 legal support. The Restatement (Second) of Torts makes the conditional privileges available to  
28 defamation defendants also available to invasion of privacy defendants. Restatement (Second) of Torts

1 § 652G. One conditional privilege allows publication of private matters "if the circumstances induce  
2 a correct or reasonable belief that : (a) there is information that affects a sufficiently important interest  
3 of the publisher; and (b) the recipient's knowledge of the [private] matter will be of service in the lawful  
4 protection of the interest." *Id.* § 594. Another conditional privilege allows state officers of any rank  
5 to communicate otherwise private information "required or permitted in the performance of his official  
6 duties." *Id.* § 598A.

7 Given Hyatt's questionable claim to have changed residency, FTB employees reasonably  
8 believed that third parties in Nevada had information affecting an important FTB interest: determining  
9 whether Hyatt had fulfilled his obligations under California tax law. Restatement (Second) of Torts §  
10 594(a). The FTB also had a reasonable belief that disclosing Hyatt's name, address and social security  
11 number to these few Nevada third parties would help them provide accurate and complete information  
12 to the FTB, which would be of service to the protection of the FTB's important interest. *Id.* § 594(b).  
13 Hyatt cannot genuinely dispute the lawfulness of the FTB's protection of that interest, as the FTB is the  
14 agency with the affirmative statutory duty for administering California's tax laws. Cal. Rev. & Tax.  
15 Code § 19501. There can also be no genuine dispute that every act of an FTB employee in Nevada  
16 involved acts required or permitted in the employees' official duties. (*See Cox Aff.* ¶ 36; *Illia Aff.* ¶¶  
17 2, 3, 4.)

18 **3. Alternatively, the FTB is entitled to dismissal of Hyatt's claims under Nevada Rule of Civil**  
19 **Procedure 12(h)(3).**

20 The above demonstrates that Hyatt has no right to a trial even without consideration of the  
21 jurisdictional bars to Hyatt's claims under California law, of which there are several. California  
22 Government Code section 860.2, a reflection of California's sovereign immunity, specifically  
23 immunizes the FTB from liability for the torts that Hyatt claims, which all arise from FTB acts relating  
24 to application of California's tax laws:

25 Neither a public entity nor a public employee is liable for an injury  
26 caused by:

27 (a) Instituting any judicial or administrative proceeding or action for or  
28 incidental to the assessment or collection of a tax.

(b) An act or omission in the interpretation or application of any law

1 relating to a tax.

2 In addition, California's Revenue and Taxation Code bars legal action against any California  
3 official "to prevent or enjoin the assessment or collection of any tax," including taxes based on  
4 residency determinations, prior to exhaustion of all applicable administrative remedies, which Hyatt has  
5 not yet done. Cal. Rev. & Tax. Code § 19381. California law further protects the FTB from Hyatt's  
6 tort lawsuit by making presentation of tort claims to California's Board of Control a jurisdictional  
7 prerequisite to suit, something that Hyatt did not do before filing. Cal. Gov. Code §§ 911.2, 905.2.

8 As described below, principles of Full Faith and Credit, sovereign immunity, and constitutional  
9 choice of law all require that the Court apply these California laws. Under these principles, the Court  
10 must apply California's governmental immunity laws regarding tax administration to the entirety of the  
11 FTB's conduct, including its Nevada acts, and Hyatt has no right to proceed further under these laws.  
12 The Court must also apply California's administrative exhaustion laws, but Hyatt failed to exhaust his  
13 administrative remedies before filing, which is another reason for dismissing this action. Even if  
14 applying these laws was not required, the Court should still apply them as a matter of comity. Finally,  
15 Nevada's own law of administrative exhaustion/ripeness is also a bar to Hyatt's actions. For all of these  
16 reasons, Hyatt's case should be dismissed.

17  
18 **A. Full Faith and Credit requires the Court to apply California's governmental  
immunity and administrative exhaustion laws.**

19 Principles of Full Faith and Credit require the Court to apply California's governmental  
20 immunity laws regarding tax administration to the entirety of the FTB's conduct, including its conduct  
21 in Nevada. *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979), *reh'g denied*, 441 U.S. 917 (1979). Full  
22 Faith and Credit also requires applying California's administrative exhaustion laws to the entirety of  
23 Hyatt's case. *Id.*

24 In *Nevada v. Hall*, a University of Nevada employee driving a State of Nevada car in California  
25 negligently caused an accident resulting in severe physical injury to California residents. At the time,  
26 Nevada law limited tort recoveries against the State of Nevada to \$25,000. *Nevada v. Hall*, 440 U.S.  
27 at 412. The California courts declined to apply this limitation, despite Nevada's argument that the Full  
28 Faith and Credit Clause required California to respect the limitations on Nevada's statutory waiver of

1 its immunity from suit. *Id.* at 412-413.

2 The Supreme Court affirmed, holding that the Full Faith and Credit Clause did not require  
3 California to apply Nevada's immunity laws to the California car accident. *Nevada v. Hall*, 440 U.S.  
4 at 424. The Court noted that California had an interest in providing full protection to those injured on  
5 its highways, and that requiring California to limit recovery based on Nevada law would have been  
6 obnoxious to California's policy of full recovery. *Id.* But the Court also stated that different state  
7 policies could require a different Full Faith and Credit analysis, particularly where one state's exercise  
8 of jurisdiction over a sister state could "interfere with [the sister state's] capacity to fulfill its own  
9 sovereign responsibilities:"

10 California's exercise of jurisdiction in this case poses no substantial  
11 threat to our constitutional system of cooperative federalism. Suits  
12 involving traffic accidents occurring outside of Nevada could hardly  
13 interfere with Nevada's capacity to fulfill its own sovereign  
14 responsibilities. We have no occasion, in this case, to consider whether  
15 different state policies, either of California or of Nevada, might require  
16 different analysis or a different result. *Nevada v. Hall*, 440 U.S. at 424  
17 n. 24.

18 Under *Nevada v. Hall*, negligently driving a car on the highways of a sister state is not an  
19 exercise of an inherent sovereign function. But auditing a citizen's claimed change of residency and  
20 corresponding state income tax liability is an exercise of an inherent sovereign function in which states  
21 have "a special and fundamental interest." *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1193 (10<sup>th</sup> Cir.  
22 1998) (cert. denied, 142 L.Ed.2d 902.) ("Congress has made it clear in no uncertain terms that a state  
23 has a special and fundamental interest in its tax collection system.") The FTB's Nevada acts were all  
24 performed as part of such an audit, and thus were taken as part of the State of California's inherent  
25 sovereign right to collect and lay taxes. (*See Illia Aff.* ¶ 2; *Cox Aff.* ¶ 36.)

26 Given that the FTB's Nevada acts involved an inherent sovereign function, this case falls  
27 squarely within footnote 24 of the *Nevada v. Hall* opinion. Allowing Hyatt to proceed notwithstanding  
28 the existence of multiple California laws barring his action would seriously interfere with California's  
capacity to fulfill its sovereign responsibilities. California, and the FTB in particular, have the  
sovereign responsibility to administer California's tax laws for the benefit of California's citizens.  
Hyatt's case seeks to punish the FTB for making minimal disclosures in Nevada of identifying



1 information about Hyatt for the purpose of checking his compliance with these laws. Allowing Hyatt  
2 to litigate these acts further without applying California law exposes the FTB to additional legal  
3 expenses and the threat of punishment for trying to obtain relevant information located in other states  
4 during residency audits. The FTB would incur these additional litigation expenses before it has even  
5 finalized its proposed tax assessment against Hyatt, something that the FTB should never have to do.  
6 This necessarily interferes with the FTB's ability to administer California's tax laws, as consulting out-  
7 of-state sources and performing out-of-state investigations are things that the nature of a change of  
8 residency claim often requires.

9 For a Nevada Court to decline to apply California's governmental immunity and administrative  
10 exhaustion laws to Hyatt's case, which arises entirely from acts incident to California tax  
11 administration, would violate the Full Faith and Credit Clause of the United States Constitution. This  
12 Court should apply these laws to avoid such a violation, and as a result dismiss Hyatt's case.

13 **B. The Supreme Court's recent sovereign immunity decisions confirm that this Court**  
14 **should reject Hyatt's claims.**

15 If there was ever any doubt that the Court must give effect to California's governmental  
16 immunity and administrative exhaustion laws, the Supreme Court's recent sovereign immunity  
17 decisions dispel it. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), was the beginning of the  
18 Supreme Court's recent revisiting and clarification of states' expansive sovereign immunity, a process  
19 that continues to the present day. *E.g., Alden v. Maine*, — U.S. —, 119 S.Ct. 2240, 144 L.Ed.2d 636  
20 (1999) (provision of the Fair Labor Standards Act purporting to authorize private actions against  
21 unconsenting states in state courts was an unconstitutional abrogation of state sovereign immunity); *see*  
22 *also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, — U.S. —, 119 S.Ct.  
23 2219, 144 L.Ed.2d 605 (1999) (federal Trademark Remedy Clarification Act did not validly abrogate  
24 state sovereign immunity); *Kimel v. Florida Bd. of Regents*, — U.S. —, 2000 WL 14165 (U.S. Fla. Jan.  
25 11, 2000) (federal Age Discrimination in Employment Act did not validly abrogate states' sovereign  
26 immunity from suit by private individuals); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281,  
27 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (the *Ex Parte Young* doctrine, a judicially created exception  
28 to state sovereign immunity, could not be applied in an action that implicated "special sovereignty

1 interests”).

2 Most notably for this case, the Supreme Court in *Alden* held that the States’ immunity from suit  
3 is a fundamental aspect of the sovereignty which the states enjoyed before ratification of the  
4 Constitution, and noted that “[t]he generation that designed and adopted our federal system considered  
5 immunity from private suits central to sovereign dignity.” *Alden*, 119 S.Ct. at 2247. The Court also  
6 noted that states’ sovereign immunity was merely “confirmed,” not “established,” by the Eleventh  
7 Amendment, and that the “fundamental postulates implicit in the constitutional design” are what courts  
8 must consider when evaluating a sovereign immunity claim:

9 The more natural inference is that the Constitution was understood, in  
10 light of its history and structure, to preserve the States’ traditional  
11 immunity from private suits. As the [Eleventh] Amendment clarified the  
12 only provisions of the Constitution that anyone had suggested might  
13 support a contrary understanding, there was no reason to draft with a  
14 broader brush. *Alden*, 119 S.Ct. at 2252.

12 \* \* \*

13 . . . The Eleventh Amendment confirmed rather than established  
14 sovereign immunity as a constitutional principle; it follows that the  
15 scope of the States’ immunity from suit is demarcated not by the text of  
16 the Amendment alone but by fundamental postulates implicit in the  
17 constitutional design. *Alden*, 144 S.Ct. at 2254 (emphasis added).

18 As Justice Rehnquist noted in his *Nevada v. Hall* dissent, one fundamental postulate implicit  
19 in the constitutional design is that an unconsenting state is not subject to suit in a sister state’s forum.  
20 *Nevada v. Hall*, 440 U.S. at 432-433. Thus, the Supreme Court’s recent sovereign immunity decisions  
21 both confirm that the FTB’s Full Faith and Credit analysis under *Nevada v. Hall* is correct, and act as  
22 an additional, separate basis for dismissing Hyatt’s case. By directing the Court to consider the  
23 “fundamental postulates implicit in the constitutional design,” as opposed to simply the text of  
24 constitutional provisions like the Eleventh Amendment, the Supreme Court has effectively announced  
25 that one state’s courts must respect a sister state’s sovereign immunity from suit. California’s  
26 governmental immunity and administrative exhaustion laws are reflections of that sovereignty, and thus  
27 the Court must apply them and dismiss this case.

27 \\\

28 \\\

1                   **C. Constitutional Choice of law principles also require this Court to apply**  
2                   **California's governmental immunity and administrative exhaustion laws.**

3           Constitutional choice of law principles also require application of California's governmental  
4 immunity laws regarding tax administration to the entirety of the FTB's conduct, and application of  
5 California's administrative exhaustion laws to the entirety of Hyatt's case. When faced with  
6 constitutional choice-of-law questions, the U.S. Supreme Court has invalidated the choice of law of a  
7 state which had no significant contact or significant aggregation of contacts, creating state interests, with  
8 the parties and the occurrence or transaction, such that the state's choice of its law is arbitrary or  
9 fundamentally unfair. *See, e.g., Home Insurance Co. v. Dick*, 281 U.S. 397, 408 (1930) (nominal  
10 residence was inadequate to justify application of forum law); *John Hancock Mutual Life Insurance Co.*  
11 *v. Yates*, 299 U.S. 178, 182 (1936) (post-occurrence change of residence to the forum state was  
12 insufficient to justify application of forum law); *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13  
13 (1981), *reh'g denied*, 450 U.S. 971 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-823  
14 (1985).

15           A plaintiff's residence and place of filing the action are generally accorded little or no  
16 significance in the constitutional analysis because of the dangers of forum shopping. *Phillips*  
17 *Petroleum*, 472 U.S. at 820. Fairness and expectation of the parties are more important. *Id.* at 822. As  
18 in the Full Faith and Credit analysis, the threat of interference with the other state's capacity to fulfill  
19 its own sovereign responsibilities plays an important role, because the Full Faith and Credit Clause is  
20 one of the several constitutional provisions relevant to making choice of law determinations. *Allstate*,  
21 449 U.S. 323 (Stevens, J., concurring) (the Full Faith and Credit Clause will not invalidate a forum's  
22 choice of law "unless that choice threatens the federal interest in national unity by unjustifiably  
23 infringing upon the legitimate interests of another state." (footnote omitted) (emphasis added)).

24           Even assuming that the FTB's Nevada's acts were tortious, this Court should apply California's  
25 governmental immunity and administrative exhaustion laws as a constitutional choice of law matter.  
26 The FTB's minimal contacts with Nevada make disregard of California's governmental immunity and  
27 administrative exhaustion laws fundamentally unfair. Although Hyatt attempts to portray FTB's  
28 contacts with Nevada as substantial with numerous references and averments (First. Am. Compl. ¶¶ 10-

23), FTB auditors spent less than three business days physically in Nevada on the Hyatt audit, and spent only nominal hours on phone and mail contacts from California to Nevada to check Hyatt's claims. (See Cox Aff. ¶ 34.) These contacts with Nevada are insignificant compared to the 624 total hours that the FTB spent trying to verify Hyatt's dubious residency claim for 1991. (*Id.*)

Reasonable parties' expectations compel the same conclusion. Any reasonable long-time California resident would expect that the FTB would audit his change of residency claim, if necessary, under California law. No reasonable person would expect Nevada law to govern the FTB's tax audit process merely because a former California resident made a questionable claim to have moved out of state. The only reasonable expectation of any person is that the entirety of FTB's actions, and the entirety of Hyatt's case, are subject to California's governmental immunity and administrative exhaustion laws. Furthermore, Nevada has no laws for the administration of income taxes, and thus there is no conflict between relevant Nevada and California laws.

Under these facts, Nevada's interest in this case is at most to provide a forum for Hyatt's convenience. On the other hand, California has an inherent sovereign interest in determining whether a long-time California resident remains liable for California state income taxes after he claims to have changed his residency to another state under suspicious circumstances. Here, residency itself was being investigated under California's inherent sovereign power to tax. Applying California's governmental immunity laws regarding tax administration to the entirety of the FTB's conduct, and California's administrative exhaustion requirements to the entirety of Hyatt's case, accommodates the important constitutional principles of federalism upon which our country was founded.

**D. The Court should decline to exercise jurisdiction over this case as a matter of comity.**

Even if the Court disagrees with all of the above, comity directs the Court to apply California's governmental immunity and administrative exhaustion laws and dismiss this case. Under the principle of comity, "the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect." *Mianecki*, 99 Nev. at 98, 658 P.2d at 425. Comity is particularly appropriate where a lawsuit poses a threat to a state's "capacity to fulfill its own sovereign responsibilities," as it furthers our constitutional system of cooperative federalism. See *Nevada v. Hall*,

1 440 U.S. at 424 n.24.

2 Under California law, the FTB enjoys governmental immunity from liability for the torts that  
3 Hyatt alleges, (Cal. Govt. Code. § 860.2), and Hyatt's tort claims are also jurisdictionally barred by the  
4 doctrines of exhaustion of administrative remedies and the claims filing requirements under the  
5 California Torts Claims Act. (*See supra* at 31-32.) Hyatt's concern FTB acts taken in connection with  
6 the administration of California's tax laws, a process in which California has "a special and fundamental  
7 interest," and that the FTB has not yet completed as to Hyatt. *ANR Pipeline*, 150 F.3d at 1193; *see*  
8 *supra* at 10. Because Hyatt's claims involve and affect an ongoing tax controversy between California  
9 and Hyatt, this Court should apply California's laws barring Hyatt's claims as a matter of comity, to the  
10 extent it is not required to do so otherwise. *See City of Philadelphia v. Cohen*, 184 N.E.2d 167, 169-70  
11 (N.Y. 1962), *cert. denied*, 371 U.S. 934 (1962) ("For our tribunals to sit in judgment on a tax  
12 controversy between another State and its present or former citizens would be an intrusion into the  
13 public affairs of [that other] State."). To decline application of California's laws to Hyatt's case would  
14 threaten the FTB's capacity to fulfill its sovereign responsibility to administer California's tax laws.

15 **E. The Court also lacks jurisdiction over this case under Nevada's own administrative**  
16 **exhaustion and ripeness law.**

17 This Court also lacks jurisdiction under Nevada law to proceed with Hyatt's claims before Hyatt  
18 exhausts the California administrative process. Nevada applies its ripeness doctrine to preclude  
19 jurisdiction over claims based upon a plaintiff's anticipation of final administrative adjudication.  
20 *Resnick v. Nevada Gaming Commission*, 104 Nev. 60, 65-66, 752 P.2d 229 (1988); *see also Public*  
21 *Service Commission v. Eighth Judicial District Court*, 107 Nev. 680, 683-85, 818 P.2d 396 (1991)  
22 (interlocutory review of agency determination "in any form" is precluded by the administrative  
23 exhaustion requirement). As previously discussed, Hyatt bases his tort claims upon actions taken by  
24 FTB personnel during the FTB's investigation into his claim of change of residency. But the FTB has  
25 only issued Notices of Proposed Assessments that Hyatt is still protesting through the FTB's  
26 administrative process. (Bauche Aff. ¶ 3, 5, 7 & Ex. 2.) As in *Resnick*, Hyatt is attempting to sue the  
27 FTB for matters that are still being adjudicated, something that Hyatt cannot do.

28 Application of Nevada's own administrative exhaustion/ripeness law to preclude Hyatt's case

1 is particularly appropriate because his claims arise out of a sister state's exercise of an inherent  
2 sovereign function essential to its existence, taxation. *See Shell Petroleum N.V. v. Graves*, 709 F.2d  
3 593, 597 (9th Cir. 1983). In *Shell*, a taxpayer brought a civil rights action against the FTB to enjoin it  
4 from assessing taxes based on a "unitary" business formula. As in this case, the FTB had merely issued  
5 notices of proposed assessments, and the taxpayer's formal protest had not reached final adjudication  
6 when the taxpayer sued the FTB. The Ninth Circuit affirmed dismissal of the case, in part because the  
7 controversy was still at the administrative stage and therefore unripe. *Shell*, 709 F.2d at 597.

8 If the FTB was a Nevada administrative agency, this Court would not hesitate to dismiss Hyatt's  
9 case for lack of jurisdiction based on Hyatt's failure to exhaust his administrative remedies. The fact  
10 that the FTB is California's tax agency makes such a dismissal even more appropriate. "[T]he proper  
11 procedure for raising a claim of an illegal [tax] agency proceeding is as a defense in the enforcement  
12 proceeding itself," not an anticipatory action of the type that Hyatt brings here. *Stankevitz v. IRS*, 640  
13 F.2d 205, 206 (9th Cir. 1981). Hyatt has not exhausted his administrative remedies with the FTB, and  
14 his case must therefore be dismissed under Nevada's administrative exhaustion/ripeness law.

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CONCLUSION

Hyatt has taken enough discovery to litigate ten cases, but there simply is no evidence entitling him to a trial. The FTB had every right to do what it did in Nevada, and the FTB is immune from Hyatt's suit in any event. The Court should grant the FTB's summary judgment motion, or alternatively dismiss this case.

DATED this 27<sup>th</sup> day of January, 2000.

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**DISTRICT COURT****CLARK COUNTY, NEVADA**

\*\*\*\*\*

**GILBERT P. HYATT,**

Plaintiff,

vs.

**FRANCHISE TAX BOARD OF THE  
STATE OF CALIFORNIA, and DOES 1-  
100, inclusive**

Defendants.

Case No.	:	A382999
Depl. No.	:	XVIII
Docket No.	:	R

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**UNDER NRCP 56(b), OR ALTERNATIVELY FOR DISMISSAL UNDER NRCP 12(h)(3)**



1  
2 **AND EVIDENCE IN SUPPORT OF FRANCHISE TAX BOARD'S MOTION FOR**  
3 **SUMMARY JUDGMENT UNDER NRCP 56(B), OR ALTERNATIVELY FOR**  
4 **DISMISSAL UNDER NRCP 12 (H)(3) is hereby acknowledged this 27<sup>th</sup> day of January,**  
5 **2000.**

6 Hutchison & Steffen

7  
8 By: Mark Hutchison / Danny  
9 Mark A. Hutchison, Esq.  
10 8831 W. Sahara Ave.  
11 Las Vegas, NV 89117

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin  
14 Frankovich & Hicks LLP., and that I served a true and correct copy of **MOTION FOR**  
15 **SUMMARY JUDGMENT UNDER NRCP 56(b), OR ALTERNATIVELY FOR**  
16 **DISMISSAL UNDER NRCP 12(h)(3) AND EVIDENCE IN SUPPORT OF FRANCHISE**  
17 **TAX BOARD'S MOTION FOR SUMMARY JUDGMENT UNDER NRCP 56(B), OR**  
18 **ALTERNATIVELY FOR DISMISSAL UNDER NRCP 12 (H)(3) on this 27<sup>th</sup> day of**  
19 **January, 2000, by depositing same in the United States Mail, postage prepaid thereon to the**  
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