

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 80884

Electronically Filed
~~Jul 31 2020~~ 11:42 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 6**

McDONALD CARANO LLP
Pat Lundvall (NSBN 3761)
lundvall@mcdonaldcarano.com
Rory T. Kay (NSBN 12416)
rkay@mcdonaldcarano.com
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966

LEMONS, GRUNDY, &
EISENBERG
Robert L. Eisenberg (NSBN 950)
rle@lge.net
6005 Plumas Street, Third Floor
Reno, Nevada 89519
Telephone: (775) 786-6868

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

DATE	DOCUMENT	VOLUME	PAGE	RANGE
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

DATE	DOCUMENT	VOLUME	PAGE	RANGE
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 NRCF 68	35	AA005519	AA005545

DATE	DOCUMENT	VOLUME	PAGE	RANGE
3/13/2020	Appendix to FTB's Motion for Attorney's Fees Pursuant to NRCF 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 NRCF 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 NRCF 68	37	AA005865	AA005868
6/8/2020	Notice of Entry of Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCF 68	37	AA005869	AA005875

DATE	DOCUMENT	VOLUME	PAGE	RANGE
7/2/2020	FTB's Supplemental Notice of Appeal	37	AA005876	AA005885

ALPHABETICAL INDEX TO APPELLANT'S APPENDIX

DATE	DOCUMENT	VOLUME	PAGE	RANGE
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
3/13/2020	Appendix to FTB's Motion for Attorney's Fees Pursuant to NRCF 68	36	AA005546	AA005722
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

DATE	DOCUMENT	VOLUME	PAGE	RANGE
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
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

DATE	DOCUMENT	VOLUME	PAGE	RANGE
2/26/2020	Appendix to FTB's Verified Memorandum of Costs – Volume 17	35	AA005405	AA005507
4/9/2020	Court Minutes	37	AA005794	AA005795
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
3/13/2020	FTB's Motion for Attorney's Fees Pursuant to NRCF 68	35	AA005519	AA005545
3/20/2020	FTB's Notice of Appeal of Judgment	37	AA005750	AA005762
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
4/14/2020	FTB's Reply in Support of Motion for Attorney's Fees	37	AA005796	AA005825
7/2/2020	FTB's Supplemental Notice of Appeal	37	AA005876	AA005885
2/26/2020	FTB's Verified Memorandum of Costs	10	AA001574	AA001585
2/21/2020	Judgment	10	AA001552	AA001561
2/26/2020	Notice of Entry of Judgment	10	AA001562	AA001573
6/8/2020	Notice of Entry of Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCF 68	37	AA005869	AA005875
8/13/2019	Notice of Hearing	1	AA000003	AA000004

DATE	DOCUMENT	VOLUME	PAGE	RANGE
6/08/2020	Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCF 68	37	AA005865	AA005868
8/5/2019	Order of Remand	1	AA000001	AA000002
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
3/27/2020	Plaintiff Gilbert P Hyatt's Opposition to FTB's Motion for Attorney's Fees Pursuant to NRCF 68	37	AA005763	AA005787
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
9/25/2019	Recorder's Transcript of Pending Motions	1	AA000005	AA000018
4/27/2020	Recorder's Transcript of Pending Motions	37	AA005826	AA005864

DATE	DOCUMENT	VOLUME	PAGE	RANGE
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

Dated this 31st day of July, 2020.

McDONALD CARANO LLP

By: /s/ Pat Lundvall
Pat Lundvall (NSBN 3761)
Rory T. Kay (NSBN 12416)
2300 W. Sahara Ave., 12th Floor
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
lundvall@mcdonaldcarano.com
rkay@mcdonaldcarano.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 31st 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

1 **BREF**

2 Mark A. Hutchison (4639)
3 Hutchison & Steffen, PLLC
4 10080 W. Alta Drive, Suite 200
5 Las Vegas, NV 89145
6 (702) 385-2500
7 mhutchison@hutchlegal.com

8 Peter C. Bernhard (734)
9 Kaempfer Crowell
10 1980 Festival Plaza Drive, Suite 650
11 Las Vegas, NV 89135
12 (702) 792-700
13 pbernhard@kcnvlaw.com

14 *Attorneys for Plaintiff Gilbert P. Hyatt*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 GILBERT P. HYATT,

18 Plaintiff,

19 v.

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

23 Defendants.

Case No. A382999
Dept. No. X

**PLAINTIFF GILBERT P. 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**

**[FILED UNDER SEAL PURSUANT
TO COURT ORDER FILED ON
MARCH 18, 1999]**

FILED

OCT 15 2019

Alan D. Blum
CLERK OF COURT

FUS

TABLE OF CONTENTS

		Page
1		
2		
3	1. Issue Presented:	1
4	2. Summary of Argument.	1
5	A. An Awards of Attorneys' Fees Would be Unreasonable and Inequitable	2
6	B. An Awards of Costs Would be Unreasonable and Inequitable	4
7		
8	3. The Procedural History of This Case.	5
9	A. Hyatt filed this action in 1998 based on the long-standing <i>Nevada v. Hall</i>	
10	precedent.	5
11	B. The FTB first tried and failed to remove this case to federal court (1998).....	6
12	C. The FTB then tried and failed to have this Court dismiss the action at the	
13	pleading stage (1999).	6
14	D. The FTB then sought and was denied summary judgment (2000).	7
15	E. The FTB then sought and was ultimately denied writ relief by the Nevada	
16	Supreme Court (2000 to 2002).....	7
17	F. The FTB then obtained review, but was denied relief, by the United States	
18	Supreme Court in a 9-0 decision against the FTB (2002 to 2003).....	8
19	G. After the United States Supreme Court and Nevada Supreme Court	
20	decisions, the parties conducted additional discovery including on whether	
21	the FTB acted in bad faith by delaying and extending the audit and protest	
22	process in order to put pressure on Hyatt to settle the tax proceeding in	
23	California (2003 to 2007).....	9
24	H. The FTB made an offer of judgment for \$110,000 (2007).	10
25	I. Hyatt won a jury verdict at trial (2008).....	10
26	J. Hyatt was awarded statutory costs.	11
27	K. FTB appealed the judgment (2009 to 2014) with no emphasis on seeking	
28	reversal of <i>Nevada v. Hall</i>	11
	L. The Nevada Supreme Court affirmed Hyatt's win on his fraud and	
	intentional infliction of emotional distress claims (2014).	12

TABLE OF CONTENTS

(continued)

		Page
1		
2		
3		
4	M. The United States Supreme Court accepted review of the case a second time but did not reverse <i>Nevada v. Hall</i> (2015 to 2016).	13
5	N. The Nevada Supreme Court applied damage limitations from <i>Hyatt II</i> (2017).	14
6		
7	O. The FTB sought and obtained a third review of the case by the United States Supreme Court (2018).	14
8		
9	P. The United States Supreme Court reversed its long-standing <i>Nevada v. Hall</i> precedent (2019).	15
10		
11	Q. The Nevada Supreme Court remanded the case to this Court.	15
12	R. Judgement vacated.	15
13	4. Argument.	15
14	A. There is no prevailing party in this case.	15
15		
16	B. The FTB is not entitled to an award of attorneys' fees.	18
17	(1) The Beattie factors weigh heavily in favor of Hyatt and prohibit awarding attorneys' fees to the FTB under NRCP 68 or former NRS 17.115.	18
18		
19	(a) Hyatt filed the action in good faith given the state of the law in 1998 and pursued the case in good faith until the United States Supreme Court reversed the long-standing precedent on which Hyatt's action was based.	20
20		
21		
22	(b) Hyatt's rejection of the FTB offer was not unreasonable or in bad faith in light of the strong evidence he developed in discovery and the results he obtained at trial.	20
23		
24	(c) The FTB's offer was not reasonable nor could the FTB have had a reasonable expectation of its offer being accepted in light of the same facts addressed above.	22
25		
26	(2) As a matter of equity, no attorneys' fees should be awarded to the FTB.	23
27		
28	C. The FTB should not be awarded statutory costs.	24

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

TABLE OF CONTENTS
(continued)

	Page
(1) The FTB is not a prevailing party entitled to statutory costs.	24
(2) The FTB should not be awarded costs under NRCP 68 and former NRS 17.115.	24
(3) This Court should exercise discretion and deny statutory costs to the FTB for its unclean hands consistent with federal law and other states that recognize such discretion.	25
(4) Nonetheless if the Court makes any cost award to the FTB, it must be limited to the period of 2015 to the present.	26
5. Conclusion.....	26

TABLE OF AUTHORITIES

Page

CASES

<i>A.V. DeBlasio Constr., Inc. v. Mountain States Constr. Co.,</i> 588 F.2d 259 (9th Cir. 1978).....	23
<i>Abreu v. Raymond,</i> 56 Haw. 613, 546 P.2d 1013 (1976)	26
<i>ADM Corp. v. Speedmaster Packaging Corp.,</i> 525 F.2d 662 (3d Cir. 1975).....	25
<i>Anderson v. Melwani,</i> 179 F.3d 763 (9th Cir. 1999).....	23
<i>Armstrong v. Riggi,</i> 92 Nev. 280 (1976)	18
<i>Barry v. Quality Steel Products, Inc.,</i> 280 Conn. 1, 905 A.2d 55 (2006)	26
<i>Beattie v. Thomas,</i> 99 Nev. 579 (1983)	passim
<i>Bergmann v. Boyce,</i> 109 Nev. 670 (1993)	26
<i>Bobby Berosini, Ltd. v. PETA,</i> 114 Nev. 1348 (1998)	26
<i>Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.,</i> 532 U.S. 598 (2001).....	16, 18
<i>Bush v. Remington Rand, Inc.,</i> 213 F.2d 456 (2nd Cir. 1954).....	25
<i>Butler v. Eaton,</i> 141 U.S. 240, 35 L. Ed. 713, 11 S. Ct. 985 (1891).....	16
<i>C.J.C., Inc. v. W. States Mech. Contractors, Inc.,</i> 834 F.2d 1533 (10th Cir. 1987).....	23
<i>City of Birmingham v. City of Fairfield,</i> 396 So. 2d 692 (Ala. 1981)	25
<i>Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP,</i> 583 F.3d 1232 (9th Cir. 2009).....	19

TABLE OF AUTHORITIES
(continued)

	Page
<i>Dillard Dep't Stores, Inc. v. Beckwith</i> , 115 Nev. 372 (1999)	19
<i>Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Ct.</i> , 2002 Nev. LEXIS 57 (Nev. Apr. 4, 2002)	1
<i>Franchise Tax Bd. of Cal. v. Hyatt</i> , 130 Nev. 662 (2014)	1, 12, 13
<i>Franchise Tax Bd. of Cal. v. Hyatt</i> , 133 Nev. 826 (2017)	14
<i>Franchise Tax Bd. of Cal. v. Hyatt</i> , 136 S. Ct. 1277 (2016)	13, 14, 23
<i>Franchise Tax Bd. of Cal. v. Hyatt</i> , 139 S. Ct. 1485 (2019)	15, 16, 23
<i>Franchise Tax Bd. of Cal. v. Hyatt</i> , 538 U.S. 488 (2003)	passim
<i>Franchise Tax Bd. v. Hyatt</i> , No. 53264, 2019 Nev. Unpub. LEXIS 852 (Aug. 5, 2019)	16
<i>Frank Settelmeier & Sons, Inc. v. Smith & Harmer, Ltd.</i> , 124 Nev. 1206 (2008)	18
<i>Frazier v. Drake</i> , 131 Nev. 632 (2015)	19
<i>Glenbrook Homeowners Ass'n v. Glenbrook Co.</i> , 111 Nev. 909 (1995)	17
<i>Golden Gaming, Inc. v. Corrigan Mgmt.</i> , Nos. 61696, 62200, 2015 Nev. Unpub. LEXIS 417 (Mar. 26, 2015)	24
<i>Golightly & Vannah, PLLC v. TJ Allen, LLC</i> , 132 Nev. 416 (2016)	16
<i>Hanrahan v. Hampton</i> , 446 U.S. 754 (1980)	15, 16
<i>Hashimoto v. Marathon Pipe Line Co.</i> , 767 P.2d 158 (Wyo. 1989)	26

TABLE OF AUTHORITIES
(continued)

		Page
3	<i>John W. Muije, Ltd. v. A North Las Vegas Cab Co.,</i>	
4	106 Nev. 664 (1990)	19
5	<i>Klinke v. Mitsubishi Motors Corp.,</i>	
6	219 Mich. App. 500, 556 N.W.2d (1996)	26
7	<i>Kralik v. 239 E. 79th St. Owners Corp.,</i>	
8	93 A.D.3d 569, 940 N.Y.S.2d 488 (1st Dep't 2012).....	17
9	<i>Las Vegas Metro. Police Dep't v. Buono,</i>	
10	127 Nev. 1153, 2011 Nev. Unpub. LEXIS 1384 (Dec. 27, 2011)	24
11	<i>Loman Dev. Co., Inc. v. Daytona Hotel and Motel Suppliers, Inc.,</i>	
12	817 F.2d 1533 (11th Cir. 1987).....	23
13	<i>Mansourian v. Bd. of Regents of Univ. of Cal. at Davis,</i>	
14	566 F. Supp. 2d 1168 (E.D. Cal. 2008).....	25
15	<i>McDonald's Corp. v. Watson,</i>	
16	69 F.3d 36 (5th Cir. 1995).....	23
17	<i>Meiri v. Hayashi,</i>	
18	No. 71120, 2018 Nev. Unpub. LEXIS 885 (Sept. 28, 2018)	24
19	<i>Milton v Shalala,</i>	
20	17 F.3d 812 (5th Cir. 1994).....	17
21	<i>Nevada v. Hall,</i>	
22	440 U.S. 410 (1979).....	passim
23	<i>Owen Jones & Sons, Inc. v. C. R. Lewis Co.,</i>	
24	497 P.2d 312 (Alaska 1972).....	26
25	<i>Ozawa v. Vision Airlines, Inc.,</i>	
26	125 Nev. 556 (2009)	19
27	<i>Pardee Homes of Nevada v. Wolfram,</i>	
28	444 P.3d 423 (Nev. 2019)	16
	<i>Petrone v. Sec'y of Health & Human Servs.,</i>	
	936 F.2d 428 (9th Cir. 1991).....	17
	<i>Rose v. Montt Assets, Inc.,</i>	
	187 Misc. 2d 497 (N.Y. App. T. 1st Dep't 2000)	17

	TABLE OF AUTHORITIES	
	(continued)	
		Page
1	<i>Rossmiller v. Romero,</i>	
2	625 P.2d 1029 (Colo. 1981)	26
3	<i>Sands Expo & Convention Ctr., Inc. v. Bonvouloir,</i>	
4	385 P.3d 62, 2016 WL 5867493 (Nev. Oct. 6, 2016)	19
5	<i>Smith v. Se. Pa. Transp. Auth.,</i>	
6	47 F.3d 97 (3d Cir. 1995) (per curiam)	23
7	<i>United States Dept. of Labor v. Rapid Robert's Inc.,</i>	
8	130 F.3d 345 (8th Cir. 1997)	23
9	<i>Vance v. Roedersheimer,</i>	
10	64 Ohio St. 3d 552, 1992-Ohio-89	26
11	<i>Wells v. East 10th St. Assocs.,</i>	
12	205 A.D.2d 431, 613 N.Y.S.2d 634 (1st Dep't 1994)	17
13	<i>Wheeler v. John Deere Co.,</i>	
14	935 F.2d 1090 (10th Cir. 1991)	16
15	<i>Yamaha Motor Co., U.S.A. v. Arnoult,</i>	
16	114 Nev. 233, 955 P.2d 661 (1998)	19
17	STATUTES	
18	10 Del. C. § 5106 (2017)	26
19	Del. Ct. Ch. R. 54(d)	26
20	NRS 17.115	passim
21	NRS 18.005	26
22	NRS 18.020	passim
23	NRS 18.050	26
24	RULES	
25	Fed. R. Civ. P. § 54	25
26	Fed. R. Civ. P. § 68	4
27	OTHER AUTHORITIES	
28	6 Moore's Federal Practice s ¶ 54.70(5) (1976)	25

1 Plaintiff Gilbert P. Hyatt (“Plaintiff” or “Hyatt”) files this brief in support of his
2 accompanying proposed form of judgment and in opposition to Defendant California Franchise
3 Tax Board’s (the “FTB”) proposed form of judgment. Hyatt’s proposed form of judgment is
4 attached hereto as Exhibit A.

5 **1. Issues Presented:**

6 In this case Hyatt sought relief for intentional torts committed by the FTB, an agency of
7 the State of California. *The case lasted more than 21 years.* Before trial, Hyatt prevailed once in
8 the United States Supreme Court¹ and twice in the Nevada Supreme Court,² which rulings
9 confirmed that this Court had jurisdiction over a California agency based on *Nevada v. Hall*, 440
10 U.S. 410 (1979) and that this case could proceed to a jury trial in Nevada. Hyatt then prevailed at
11 trial, and the Nevada Supreme Court later affirmed part of the judgment in Hyatt’s favor. Having
12 exhausted its appeals in Nevada and lost virtually every phase of the case, the FTB asked the
13 United States Supreme Court—17 years after this case was filed—to reverse its long-standing
14 *Nevada v. Hall* precedent and retroactively strip this Court of jurisdiction. After two reviews over
15 a four-year period, the United States Supreme Court granted the FTB’s request and reversed
16 *Nevada v. Hall*, leaving this Court without jurisdiction over the FTB.

17 The Court must now decide the form of judgment to enter and whether either party is a
18 prevailing party entitled to an award of attorneys’ fees or costs.

19 **2. Summary of Argument.**

20 This case has spanned more than 21 years from its filing in January 1998 until the present.
21 During these two-plus decades, this case has been reviewed three times by the United States
22 Supreme Court and four times by the Nevada Supreme Court. There was a four-month jury trial
23 in this Court, which was preceded by lengthy and contentious discovery and motion practice that
24 included over 100 days of deposition, dozens of discovery motions and hearings, and multiple
25 dispositive motions by the FTB and accompanying hearings. Hyatt won virtually every contested
26

27 ¹ *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) (“*Hyatt I*”).

28 ² *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Ct.*, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) and
Franchise Tax Bd. of Cal. v. Hyatt, 130 Nev. 662, 710 (2014).

1 phase of the case, until the United State Supreme Court's recent reversal of its long-standing
2 *Nevada v. Hall* precedent.

3 This procedural history, particularly this Court's and Hyatt's reliance on *Nevada v. Hall*,
4 and the FTB's after-the-fact challenge to the *Nevada v. Hall* precedent, is detailed below and
5 demonstrates there is no prevailing party entitled to an award of attorneys' fees or costs. The
6 Court should therefore enter Hyatt's proposed form of judgment, which states: (i) the case is
7 dismissed in accord with the most recent United State Supreme Court decision, and (ii) neither
8 party is entitled to an award of attorneys' fees or costs.

9 The FTB has nonetheless asserted that it will seek: (i) fees and costs under NRCP 68
10 and/or former NRS 17.115 based on a pretrial offer of judgment, or (ii) statutory costs under NRS
11 18.020(3) as the purported prevailing party. Neither avenue provides a basis for the FTB to be
12 deemed the prevailing party and awarded fees and costs in this case. Indeed, if the Court is to
13 award costs it is Hyatt who should be awarded statutory costs for the 17-year period between
14 1998 and 2015. Only in 2015, after it had lost the case on the merits and having exhausted all
15 appeals in Nevada, did the FTB seek reversal of the long-standing *Nevada v. Hall* precedent.
16 Hyatt's costs for that 17-year period dwarf the FTB's costs from 2015 forward.

17 **A. An Awards of Attorneys' Fees Would be Unreasonable and Inequitable.**

18 The *Beattie* factors³ specified by the Nevada Supreme Court require that this Court reject
19 any request by the FTB for attorneys' fees under NRCP 68 or former NRS 17.115 based on the
20 offer of judgment the FTB made in 2007 for \$110,000 (inclusive of costs).⁴ Specifically, the
21 Court must decide whether to use its discretion and award attorneys' fees based on whether: (i)
22 Hyatt filed and pursued the action in good faith; (ii) the FTB's pretrial offer of judgment was
23 reasonable and in good faith in both its timing and amount; and (iii) Hyatt's rejection of the offer
24 and proceeding to trial was grossly unreasonable or in bad faith.⁵

25
26 ³ *Beattie v. Thomas*, 99 Nev. 579, 588-89 (1983).

27 ⁴ NRS 17.115 has been repealed by the Nevada Legislature effective October 1, 2015.

28 ⁵ *Id.* If a court decides to award fees under NRCP 68 or former NRS 17.115, it must determine whether the fees sought are reasonable and justified in amount. *See Beattie*, 99 Nev. at 588-89. That issue is not currently before the Court.

1 In considering the *Beattie* factors, it is evident that Hyatt filed, and then pursued the case
2 for 21 years, in good faith. To conclude otherwise, the Court would have to come to the
3 extraordinary conclusion that somehow Hyatt knew that the *Nevada v. Hall* precedent would be
4 reversed 21 years after he filed the case, and therefore he filed the complaint in bad faith. The
5 FTB cannot argue this in good faith or with a straight face.

6 Further, all evidence confirms that Hyatt had a good faith belief in the merits of his case at
7 its outset, which continued throughout the case. The jury, the trial court, the Nevada Supreme
8 Court, and the United States Supreme Court all agreed with Hyatt. Hyatt prevailed at virtually
9 every phase of the litigation, until *ex post facto* the FTB sought and obtained this change in the
10 law, after the FTB had lost the case on the merits and exhausted its appeals. As described in the
11 detailed procedural history set forth below, Hyatt prevailed before trial in the United States
12 Supreme Court and the Nevada Supreme Court, obtaining their respective approvals for the
13 litigation to proceed to trial. Hyatt then prevailed at trial, receiving a large jury verdict for the
14 damages caused by the FTB's intentional misconduct. The Nevada Supreme Court confirmed
15 part of the verdict in Hyatt's favor, including over \$1 million in damages, and making
16 conclusions that the record supported the jury's finding that the FTB committed fraud and
17 intentional infliction of emotional distress directed at Hyatt.

18 No interpretation of this case's 21-year history can conclude that Hyatt brought the case
19 and pursued the case in anything other than good faith. This first and most crucial *Beattie* factor
20 negates any request by the FTB for an attorneys' fee award under NRCP 68 or former NRS
21 17.115.

22 Similarly, the second and third *Beattie* factors also negate any FTB request for attorneys'
23 fees under NRCP 68 or former NRS 17.115. The FTB's offer of judgment of \$110,000, inclusive
24 of all costs, was neither reasonable nor made in good faith in its timing or amount. The United
25 States Supreme Court and Nevada Supreme Court both had already ruled, at the time FTB served
26 its pretrial offer of judgment, that this Court had jurisdiction and the case could proceed to trial in
27 accord with the *Nevada v. Hall* precedent. And the FTB had not directly challenged that long-
28 standing precedent, nor indicated it would do so. Further, in terms of the value of the offer, the

1 jury's substantial award of damages and the partial confirmation by the Nevada Supreme Court
2 for an amount substantially more than the FTB's offer establish that the offer was not reasonable
3 at the time. Similarly, it was not grossly unreasonable or in bad faith for Hyatt to reject the FTB's
4 offer. In accord with these mandatory *Beattie* factors, there is no basis upon which the Court
5 could award the FTB attorneys' fees under NRCP 68 or former NRS 17.115.

6 Additionally, equitable principles and the FTB's own unclean hands prevent it from being
7 deemed the prevailing party and awarded attorneys' fees in this case. Where a party may be
8 deemed the technical prevailing party due to an after-the-fact change in law, discretion and equity
9 authorize and compel the Court to deny that party an award of attorneys' fees. The most glaring
10 defect in any request by the FTB for an award of attorneys' fees—besides that it lost virtually
11 every phase of the litigation—is that it had an opportunity early in the case, on the United States
12 Supreme Court's *pretrial review* of the case, to request the very relief it waited to seek some 17
13 years after the case commenced. The equities therefore are even less favorable for the FTB in
14 this case than in other cases that have denied fees where a fortuitous change in the law benefits a
15 party that had clearly lost.

16 **B. An Award of Costs Would be Unreasonable and Inequitable.**

17 A request by the FTB for an award of costs under Rule 68 or former NRS 17.115 should
18 be denied on the same basis as described above for denying the FTB an award of attorneys' fees.
19 Hyatt brought his case and pursued it in good faith. At the time of the FTB's offer, *Nevada v.*
20 *Hall* was still long-standing good law, and the United States Supreme Court had already rejected
21 the FTB's request for an exception or distinguishing of that precedent. The FTB's offer was not
22 reasonable in terms of its timing or amount, and it was not unreasonable or in bad faith for Hyatt
23 to reject the offer.

24 In regard to statutory costs under NRS 18.020(3), it provides for an award of limited
25 statutory costs to a party that prevails in the litigation. But the record of this case does not
26 establish that the FTB prevailed at any phase, including this end phase. The fact that the Court
27 cannot award Hyatt affirmative relief in the judgment does not mean that the FTB was the
28 prevailing party. There was no prevailing party in this case, and the FTB therefore is not entitled

1 to any award of statutory costs under NRS 18.020(3).

2 Nonetheless, even if the Court were to deem the FTB the technically prevailing party, it
3 should exercise its discretion to deny the FTB costs based on the facts and history of this case.
4 To the extent that NRS 18.020(3) requires a mandatory award of statutory costs to a technically
5 prevailing party, Nevada law is out of step with federal law and most state law that provides the
6 trial court has discretion to deny costs where there is no actual prevailing party, or where the facts
7 dictate the purportedly prevailing party should not be awarded costs as a matter of equity.

8 Finally, the Court has explicit discretion to strictly limit the costs awarded to a prevailing
9 party. Here, if the Court determines it is compelled to award some statutory costs, any award to
10 the FTB must be limited to statutory costs incurred after 2015 when the FTB first sought reversal
11 by the United States Supreme Court of the long-standing *Nevada v. Hall* precedent. In turn, Hyatt
12 should then also be awarded his costs for the 17-year period between 1998 to 2015. There is no
13 basis whatsoever to award the FTB statutory costs incurred between 1998 and 2015.

14 **3. The Procedural History of This Case.**

15 **A. Hyatt filed this action in 1998 based on the long-standing *Nevada v. Hall* precedent.**

16 Hyatt filed this action in this Court on January 6, 1998 against the FTB, the California
17 state agency responsible for assessing state income taxes.⁶ Hyatt's suit against the FTB in
18 Nevada was based on and consistent with the United States Supreme Court's holding in *Nevada*
19 *v. Hall* that a state could not claim immunity in the Courts of a sister state based on that state's
20 own immunity laws. In *Nevada v. Hall*, the California court refused to limit the liability of a
21 Nevada agency for tortious conduct committed in California, in accord with Nevada law. The
22 California court treated the Nevada agency as if it had no immunity in California. The United
23 States Supreme Court affirmed the California court's award of full damages to the California
24 resident against the Nevada agency.⁷

25 Hyatt's complaint in this case sought full recovery of damages he incurred due to tortious
26 actions of the FTB, which occurred in Nevada or were directed into Nevada while Hyatt was

27 _____
28 ⁶ Exhibit 1 to Appendix of Materials re Case Procedural History (the "Appendix").

⁷ 440 U.S. at 420-421.

1 residing in Nevada. He alleged that he moved from California to Nevada in September 1991.
2 Hyatt's complaint further alleged that during 1993 to 1997, the FTB conducted two tax audits of
3 him relating to California state income taxes for the 1991 tax-year and 1992 tax-year and, while
4 doing so, engaged in bad faith conduct and committed intentional torts directed at him, including
5 repeated intentional public disclosures of his social security number, intentional public
6 disclosures that he was under tax audit, and even an overt threat that he settle with the FTB and
7 agree to pay California state taxes for the period he claimed he resided in Nevada or face further
8 investigation from the FTB.⁸ Hyatt's complaint alleged the following torts against the FTB: (i)
9 invasion of privacy (intrusion upon seclusion); (ii) invasion of privacy (publicity of private facts);
10 (iii) invasion of privacy (false light); (iv) intentional and negligent infliction of emotional distress;
11 (v) abuse of process; (vi) fraud and (vii) breach of confidential relationship. Hyatt's complaint
12 sought damages from the FTB stemming from its bad faith and intentional misconduct.

13 **B. The FTB first tried and failed to remove this case to federal court (1998).**

14 The FTB's initial response to Hyatt's complaint in 1998 was to remove the action to the
15 United States District Court for the District of Nevada.⁹ Hyatt contested this by filing a motion to
16 remand arguing that the United States District Court lacked jurisdiction over the FTB, an agency
17 of the State of California, under the Eleventh Amendment to the United States Constitution. The
18 United States District Court granted Hyatt's motion and remanded the case back to this Court.¹⁰
19 Once back in this Court, Hyatt filed a First Amended Complaint which added three causes of
20 action: Sixth Cause of Action-Abuse of Process; Seventh Cause of Action-Fraud; and Eighth
21 Cause of Action-Negligent Misrepresentation.¹¹

22 **C. The FTB then tried and failed to have this Court dismiss the action at the pleading**
23 **stage (1999).**

24 After answering the First Amended Complaint,¹² the FTB moved for judgment on the
25

26 ⁸ Appendix Exh. 1.

27 ⁹ Appendix, Exh. 2.

¹⁰ Appendix, Exh. 3.

¹¹ Appendix, Exh. 4.

28 ¹² Appendix, Exh. 5.

1 pleadings arguing the FTB had immunity under California's own immunity laws.¹³ Hyatt
2 opposed, citing *Nevada v. Hall* and Nevada law on comity.¹⁴ In its motion, the FTB tried to
3 create an exception to, but did not challenge the continuing viability of *Nevada v. Hall*. On April
4 7, 1999, this Court, the Honorable Nancy Saitta, District Judge, presiding, denied the FTB's
5 motion as to Hyatt's tort claims, citing *Nevada v. Hall*, while granting the FTB's motion to
6 dismiss Hyatt's claim for declaratory relief.¹⁵

7 **D. The FTB then sought and was denied summary judgment (2000).**

8 After an initial discovery period, the FTB filed a motion for summary judgment, again
9 arguing California's immunity statute precluded this Court from hearing the case, as well as other
10 bases, including that Hyatt lacked sufficient facts to establish his claims.¹⁶ Hyatt opposed the
11 motion on all points, again citing *Nevada v. Hall* in opposing the FTB's immunity argument.¹⁷ In
12 its motion for summary judgment, the FTB did not challenge the continuing viability of *Nevada v.*
13 *Hall*. On May 31, 2000, this Court, the Honorable Nancy Saitta, District Judge, presiding, denied
14 the FTB's motion for summary judgment, citing *Nevada v. Hall*.¹⁸

15 **E. The FTB then sought and was ultimately denied writ relief by the Nevada Supreme**
16 **Court (2000 to 2002).**

17 Having been denied summary judgment by this Court, and having lost several discovery
18 motions, the FTB filed multiple writ petitions with the Nevada Supreme Court seeking review of
19 both discovery rulings and this Court's denial of the FTB's summary judgment motion.¹⁹ The
20 Nevada Supreme Court accepted review of both petitions.²⁰ The FTB's petition directed at the
21 Court's summary judgment ruling argued that the Nevada courts should recognize the FTB's
22 sovereign immunity granted it by the State of California. The petition did not question or argue
23 the continuing viability of *Nevada v. Hall*.²¹ Nor did the FTB's petition seek review of whether

24 ¹³ Appendix, Exhs. 6, 8, and 10.

25 ¹⁴ Appendix, Exhs. 7 and 9.

26 ¹⁵ Appendix, Exhs. 11 and 12.

27 ¹⁶ Appendix, Exhs. 13, 14, and 21.

28 ¹⁷ Appendix, Exhs. 16, 17, 18, 19, and 20.

¹⁸ Appendix, Exhs. 22 and 23

¹⁹ Appendix, Exhs. 15 and 25.

²⁰ Appendix, Exhs. 24 and 28.

²¹ Appendix, Exh. 25.

1 Hyatt had put forth sufficient evidence to establish each of his tort claims. Hyatt filed oppositions
2 to the FTB writ requests,²² again arguing that *Nevada v. Hall* and Nevada's law on comity
3 provided a basis for his case to proceed in this Court.²³

4 The Nevada Supreme Court initially issued a decision on June 13, 2001, granting the
5 FTB's petition for a writ of mandate and ordering this case dismissed on the basis that Hyatt did
6 not put forth sufficient evidence to establish his alleged tort claims.²⁴ On July 2, 2001, Hyatt filed
7 a petition for rehearing on the Nevada Supreme Court's order dismissing the case, arguing that
8 (i) FTB's petition for review had not raised the issue of the sufficiency of the evidence to support
9 Hyatt's tort claims, (ii) the parties had not briefed that issue, and (iii) Hyatt had sufficient
10 evidence to establish each tort claim.²⁵ On July 13 2001, the Nevada Supreme Court ordered
11 additional briefing from both sides on Hyatt's petition for rehearing.²⁶ Both sides submitted the
12 additional briefing.²⁷

13 On April 4, 2002, the Nevada Supreme Court granted Hyatt's petition for rehearing and
14 reversed its prior order dismissing the case after concluding that Hyatt had sufficient evidence for
15 his tort claims, that Nevada had jurisdiction to hear Hyatt's intentional tort claims against the
16 FTB under *Nevada v. Hall*, and that Nevada would adjudicate those claims as a matter of comity
17 because the State of Nevada allows its state agencies to be sued in Nevada's courts for intentional
18 torts.²⁸ The Nevada Supreme Court, however, dismissed Hyatt's single negligence claim against
19 the FTB on the ground of comity because the State of Nevada does not allow its state agencies to
20 be sued in Nevada's courts for negligence.

21 **F. The FTB then obtained review, but was denied relief, by the United States Supreme**
22 **Court in a 9-0 decision against the FTB (2002 to 2003).**

23 The United States Supreme Court granted the FTB's petition for writ of certiorari that
24

25 ²² Appendix, Exhs. 26 and 29.

26 ²³ Appendix, Exh. 29

27 ²⁴ Appendix, Exh. 31.

28 ²⁵ Appendix, Exh. 32.

²⁶ Appendix, Exh. 33.

²⁷ Appendix, Exhs. 34, 35, 36, and 37.

²⁸ Appendix, Exh. 38.

1 sought review of the Nevada Supreme Court's April 4, 2002 order.²⁹ The FTB's petition for
2 review and its briefing on the merits did not assert or seek review on the issue of whether *Nevada*
3 *v. Hall* was wrongly decided and should be reversed. Rather, it argued that an exception to
4 *Nevada v. Hall* should be established, so that certain "sovereign" functions, such as taxing
5 activities, be exempted from the holding in *Nevada v. Hall*.³⁰ Hyatt filed opposition briefing,
6 arguing that *Nevada v. Hall* was controlling and there was no basis for an exception as asserted
7 by the FTB.³¹

8 The United States Supreme Court issued its opinion denying the FTB's appeal in a
9 unanimous 9-0 decision, *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*").³²
10 The decision cited *Nevada v. Hall*, rejected the FTB's asserted exception to *Nevada v. Hall*, and
11 concluded that the Nevada Supreme Court had appropriately applied comity by allowing Hyatt's
12 intentional tort claims to proceed in Nevada state court while dismissing Hyatt's negligence
13 claim.

14 **G. After the United States Supreme Court and Nevada Supreme Court decisions**
15 **favorable to Hyatt, the parties conducted additional discovery including on whether**
16 **the FTB acted in bad faith by delaying and extending the audit and protest process**
in order to put pressure on Hyatt to settle the tax proceeding in California (2003 to
2007).

17 While Hyatt's tort action was pending in this Court, Hyatt's administrative tax proceeding
18 was pending in California in which Hyatt was appealing the FTB's audit conclusions. Although
19 those proceedings were always kept separate as specified in this Court's 1999 order on the FTB's
20 motion for judgment on the pleadings,³³ Hyatt sought and was allowed to take discovery on the
21 extreme delay by the FTB (10 years between 1997 to 2007) in issuing a final decision in the
22 administrative protest phase of the audit.³⁴

23 Regarding the FTB's delay related to the torts alleged in this case, Hyatt asserted the delay
24 was part of the FTB's effort to coerce him into settling the tax proceeding in return for avoiding

25 ²⁹ Appendix, Exh. 42.

26 ³⁰ Appendix, Exhs. 39, 41, 43, and 45.

27 ³¹ Appendix, Exhs. 40 and 44.

27 ³² Appendix, Exhs. 46 and 47.

28 ³³ Appendix, Exhs. 11 and 12.

³⁴ Appendix, Exhs. 48 and 50.

1 further lengthy investigations, as set forth by Hyatt in his fraud claim.³⁵ In 2005, The FTB moved
2 for summary adjudication seeking to remove the bad faith delay issue from the case.³⁶ But this
3 Court denied the FTB's motion and ruled that whether the FTB's 10 year delay in issuing a
4 decision in the protest phase of the audits was done in bad faith to pressure Hyatt could be
5 presented to the jury at trial as part of Hyatt's fraud claims.³⁷

6 In 2006, after obtaining leave of court,³⁸ Hyatt filed a Second Amended Complaint that
7 added a single cause of action: Eighth Cause of Action-Breach of Confidentiality.³⁹

8 **H. The FTB made an offer of judgment for \$110,000 (2007).**

9 On November 26, 2007, the FTB made an offer of judgment to Hyatt under NRCP 68 and
10 former NRS 17.115 in the amount of \$110,000 (inclusive of costs).⁴⁰ Hyatt did not respond to the
11 offer within the Rule's 10-day period, so it expired.

12 **I. Hyatt won a jury verdict at trial (2008).**

13 Trial before a jury commenced on April 14, 2008, the Honorable Jessie Walsh, District
14 Judge, presiding, and lasted for four months. The jury returned verdicts on August 6, 2008
15 (liability for and award of compensatory damages), on August 11, 2008 (liability for punitive
16 damages), and on August 14, 2008 (award of punitive damages).⁴¹

17 The jury rendered a verdict in favor of Hyatt and against the FTB on all causes of action
18 presented to the jury, specifically Hyatt's second cause of action for invasion of privacy (intrusion
19 upon seclusion), third cause of action for invasion of privacy (publicity of private facts), fourth
20 cause of action for invasion of privacy (false light), fifth cause of action for intentional infliction
21 of emotional distress, sixth cause of action for abuse of process, seventh cause of action for fraud,
22 and eighth cause of action for breach of confidential relationship. The jury awarded Hyatt
23 compensatory damages of \$85 million for emotional distress; compensatory damages of \$52
24

25 ³⁵ Appendix, Exh. 51

26 ³⁶ Appendix, Exh. 49.

27 ³⁷ Appendix, Exhs. 52 and 53.

28 ³⁸ Appendix, Exhs. 4, 55, 56, and 58.

³⁹ Appendix, Exh. 57.

⁴⁰ Appendix, Exh. 59.

⁴¹ Appendix, Exhs. 60, 61, and 62.

1 million for invasion of privacy; attorneys' fees as special damages of \$1,085,281.56 on Hyatt's
2 fraud claim; and punitive damages of \$250 million.⁴²

3 On September 8, 2008, Judge Walsh entered a judgment consistent with the jury's
4 verdicts.⁴³

5 **J. Hyatt was awarded statutory costs.**

6 On January 4, 2010, after a lengthy and contentious proceeding, including the
7 appointment of a special master, this Court awarded Hyatt costs in the amount of \$2,539,068.65
8 as the prevailing party in the case.⁴⁴

9 **K. FTB appealed the judgment (2009 to 2014) with no emphasis on seeking reversal of**
10 ***Nevada v. Hall*.**

11 The FTB appealed from the 2008 judgment to the Nevada Supreme Court.⁴⁵ In the FTB's
12 opening 100-plus-page brief filed on August 7, 2009, the FTB made reference to *Nevada v. Hall*,
13 but gave no emphasis to it. The FTB requested in a footnote that the Nevada Supreme Court
14 evaluate the continuing viability of *Nevada v. Hall* saying in footnote 80 that "it is questionable
15 whether there is still validity to" *Nevada v. Hall* and that the Nevada Supreme Court "may
16 evaluate the continuing validity of an old United States Supreme Court opinion."⁴⁶ Hyatt filed a
17 responding brief that focused on the issues raised by the FTB,⁴⁷ and therefore did not address the
18 jurisdiction issue and *Nevada v. Hall*, as that issue had been addressed and decided years earlier
19 when the Nevada Supreme Court and the United States Supreme Court each found jurisdiction
20 proper and allowed the case to proceed to trial.

21 The Nevada Supreme Court conducted two oral arguments on the FTB's appeal.⁴⁸ The
22 issue of reversing *Nevada v. Hall* was not raised in either argument by the parties or the Nevada
23 Supreme Court.

24 _____
⁴² *Id.*

25 ⁴³ Appendix, Exh. 63.

26 ⁴⁴ Appendix, Exh. 66.

27 ⁴⁵ Appendix, Exh. 64.

28 ⁴⁶ Appendix, Exh. 65. The FTB's 145-page Reply Brief did not address the validity of *Nevada v. Hall*. Appendix,
Exh. 68.

⁴⁷ Appendix, Exh. 67.

⁴⁸ Appendix, Exhs. 69 and 70.

1 **L. The Nevada Supreme Court affirmed Hyatt's win on his fraud and intentional**
2 **infliction of emotional distress claims (2014).**

3 In 2014, the Nevada Supreme Court affirmed in part and reversed in part the judgment
4 without any reference or discussion of *Nevada v. Hall*. See *Franchise Tax Bd. of Cal. v. Hyatt*,
5 130 Nev. 662 (2014).⁴⁹ The Nevada Supreme Court affirmed the portion of the judgment in favor
6 of Hyatt on his cause of action for fraud and the award of \$1,085,281.56, and rendered specific
7 conclusions as to the evidence that supported the fraud claim:

8 As to the fraud cause of action, sufficient evidence exists to support
9 the jury's findings that FTB made false representations to Hyatt
10 regarding the audits' processes and that Hyatt relied on those
11 representations to his detriment and damages resulted. (130 Nev. at
12 670)

13 . . .

14 FTB represented to Hyatt that it would protect his confidential
15 information and treat him courteously. At trial, Hyatt presented
16 evidence that FTB disclosed his social security number and home
17 address to numerous people and entities and that FTB revealed to
18 third parties that Hyatt was being audited. In addition, FTB sent
19 letters concerning the 1991 audit to several doctors with the same
20 last name, based on its belief that one of those doctors provided
21 Hyatt treatment, but without first determining which doctor actually
22 treated Hyatt before sending the correspondence. Furthermore,
23 Hyatt showed that FTB took 11 years to resolve Hyatt's protests of
24 the two audits. Hyatt alleged that this delay resulted in \$8,000 in
25 interest per day accruing against him for the outstanding taxes owed
26 to California. Also at trial, Hyatt presented evidence through
27 Candace Les, a former FTB auditor and friend of the main auditor
28 on Hyatt's audit, Sheila Cox, that Cox had made disparaging
comments about Hyatt and his religion, that Cox essentially was
intent on imposing an assessment against Hyatt, and that FTB
promoted a culture in which tax assessments were the end goal
whenever an audit was undertaken. Hyatt also testified that he
would not have hired legal and accounting professionals to assist in
the audits had he known how he would be treated. Moreover, Hyatt
stated that he incurred substantial costs that he would not otherwise
have incurred by paying for professional representatives to assist
him during the audits. (130 Nev. at 691)

24 The evidence presented sufficiently showed FTB's improper
25 motives in conducting Hyatt's audits, and a reasonable mind could
26 conclude that FTB made fraudulent representations, that it knew the
27 representations were false, and that it intended for Hyatt to rely on
28 the representations. . . .

Based on this evidence, we conclude that substantial evidence

⁴⁹ Appendix, Exh. 71.

1 supports each of the fraud elements. (130 Nev. at 692)

2 The Nevada Supreme Court also affirmed the portion of the judgment in favor of Hyatt as
3 to liability on his cause of action for intentional infliction of emotional distress (“IIED”) while
4 ordering a new trial as to damages for that claim:

5 Hyatt suffered extreme treatment from FTB. As explained above in
6 discussing the fraud claim, FTB disclosed personal information that
7 it promised to keep confidential and delayed resolution of Hyatt's
8 protests for 11 years, resulting in a daily interest charge of \$8,000.
9 Further, Hyatt presented testimony that the auditor who conducted
10 the majority of his two audits made disparaging remarks about
11 Hyatt and his religion, was determined to impose tax assessments
12 against him, and that FTB fostered an environment in which the
13 imposition of tax assessments was the objective whenever an audit
14 was undertaken. These facts support the conclusion that this case is
15 at the more extreme end of the scale, and therefore less in the way
16 of proof as to emotional distress suffered by Hyatt is necessary.
17 (130 Nev. at 697)

18 The Nevada Supreme Court reversed the judgment in favor Hyatt on his other claims for
19 invasion of privacy (intrusion upon seclusion), invasion of privacy (publicity of private facts),
20 invasion of privacy (false light), abuse of process, and breach of confidential relationship,
21 ordering Hyatt take nothing for those claims and ordering that award of costs be re-determined.⁵⁰

22 **M. The United States Supreme Court accepted review of the case a second time but did
23 not reverse *Nevada v. Hall* (2015 to 2016).**

24 Having exhausted its appeals in Nevada, the FTB sought and received a second review by
25 the United States Supreme Court in 2015. Unlike its positions and arguments in 2003, this time
26 FTB sought reversal of *Nevada v. Hall*. The FTB also alternatively argued that the award of
27 damages in favor of Hyatt must be limited to \$50,000 per claim in accord with Nevada law
28 limiting damages for claims made against Nevada state agencies.⁵¹ Hyatt opposed the FTB on
both grounds.⁵²

With only eight members due to Justice Scalia’s passing, the United States Supreme Court
rendered a 4 to 4 decision (divided along political lines) on the FTB’s request to reverse
Nevada v. Hall. See *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016) (“*Hyatt II*”).⁵³

⁵⁰ *Id.*

⁵¹ Appendix, Exhs. 72, 74, 75, and 77.

⁵² Appendix, Exhs. 73 and 76.

⁵³ Appendix, Exh. 78.

1 Relief was therefore denied as to that issue. A majority of the Court, however, granted the FTB's
2 alternative request that, in accord with *Hyatt I*, the FTB must be treated the same as a Nevada
3 state agency regarding damage limitations. The United States Supreme Court therefore ordered
4 the matter remanded to Nevada state court for processing consistent with its ruling.

5 **N. The Nevada Supreme Court applied damage limitations from *Hyatt II* (2017).**

6 The case then returned to the Nevada Supreme Court. At the FTB's request, the Nevada
7 Supreme Court ordered the parties to submit briefs regarding how the damage limitation from
8 *Hyatt II* should be applied in this case.⁵⁴ The FTB argued Hyatt was not entitled to any
9 damages.⁵⁵ Hyatt argued that for each of the two claims on which he prevailed (fraud and IIED)
10 he should be awarded \$50,000 and the case be returned to this Court for entry of judgment and
11 award of costs.⁵⁶ The issue of *Nevada v. Hall* was not addressed.

12 The Nevada Supreme Court ruled in favor of Hyatt and issued an opinion ordering that
13 Hyatt recover \$50,000 each for his fraud claim and for his IIED claim and remanded the case to
14 this Court to decide the issue of costs. *See Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. 826
15 (2017).⁵⁷

16 **O. The FTB sought and obtained a third review of the case by the United States**
17 **Supreme Court (2018).**

18 Although the Nevada Supreme Court's decision in 2017 had nothing to do with *Nevada v.*
19 *Hall*, the FTB again petitioned the United States Supreme Court to review this case and reverse
20 *Nevada v. Hall*.⁵⁸ Hyatt opposed the petition.⁵⁹ The United States Supreme Court again granted
21 the FTB's petition for review on the issue of whether the Court should reverse its long-standing
22 *Nevada v. Hall* precedent.⁶⁰

25 ⁵⁴ Appendix, Exh. 79.

26 ⁵⁵ Appendix, Exh. 80 and 82.

27 ⁵⁶ Appendix, Exh. 81.

28 ⁵⁷ Appendix, Exh. 83.

⁵⁸ Appendix, Exhs. 84 and 86.

⁵⁹ Appendix, Exh. 85.

⁶⁰ Appendix, Exh. 87.

1 **P. The United States Supreme Court reversed its long-standing *Nevada v. Hall***
2 **precedent (2019).**

3 After briefing and arguments by the parties,⁶¹ the United States Supreme Court in a 5-4
4 decision (again along political lines) reversed *Nevada v. Hall* and remanded this case to Nevada
5 state court for proceedings not inconsistent with the Court's opinion. See *Franchise Tax Bd. of*
6 *Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) ("*Hyatt III*").⁶²

7 **Q. The Nevada Supreme Court remanded the case to this Court.**

8 On the case returning to the Nevada Supreme Court, it remanded the case to this Court
9 ordering:

10 This case comes to us on remand from the United States Supreme
11 Court. In *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. —, —, 139 S. Ct. 1485, 1499 (2019), the Court concluded that states
12 retain sovereign immunity from private suits in other courts,
13 overruling *Nevada v. Hall*, 440 U.S. 410 (1979), and reversed our
14 December 26, 2017, opinion affirming in part and reversing in part
15 the district court's judgment in favor of respondent/cross-appellant
16 Gilbert Hyatt. Therefore, we remand this matter to the district court
with instructions that the Court vacate its judgment in favor of
Hyatt and take any further necessary action consistent with this
order and *Hyatt*, 587 U.S. —, 139 S. Ct. 1485. Accordingly, we

ORDER this matter REMANDED to the district court for
proceedings consistent with this order.⁶³

17 **R. Judgement vacated.**

18 On September 3, 2019, this Court vacated the prior judgment in favor of Hyatt and
19 ordered both Hyatt and the FTB to submit briefing by no later than October 15, 2019, to address
20 the form of judgment to be entered in this action and who, if either party, is the prevailing party.

21 **4. Argument.**

22 **A. There is no prevailing party in this case.**

23 A "prevailing party" is one who has been awarded some relief by a court. See, e.g.,
24 *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980).⁶⁴ Prevailing party status requires some judicial

25 ⁶¹ Appendix, Exhs. 88, 89, and 90.

26 ⁶² Appendix, Exh. 93.

27 ⁶³ Appendix, Exh. 94.

28 ⁶⁴ The Court was addressing the federal Civil Rights Attorney's Fees Act and held "that a person may in some
circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the
merits' . . . for example, 'parties may be considered to have prevailed when they vindicate rights through a consent
judgment or without formally obtaining relief,' [citations omitted] . . . the Senate Committee Report explained that

1 action that changes the legal relationship between the parties on the merits of the claim. *See*
2 *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598,
3 605 (2001).

4 The Nevada Supreme Court has interpreted this requirement to mean that “[a] party
5 prevails ‘if it succeeds on *any significant issue* in litigation which achieves some of the benefit it
6 sought in bringing suit.’” *Pardee Homes of Nevada v. Wolfram*, 444 P.3d 423, 427 (Nev. 2019);
7 *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 422 (2016) (“A prevailing party must
8 win on at least one of its claims.”).

9 In this matter, neither party prevailed. Hyatt did win affirmative relief on his intentional
10 tort claims. But his judgment was vacated this year based solely on a reversal by the United
11 States Supreme Court of its long-standing precedent of *Nevada v. Hall*, the very precedent on
12 which the case proceeded from the outset in 1998. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. at
13 1499. The United States Supreme Court remanded the case to the Nevada Supreme Court, which
14 then ordered this Court to “vacate its judgment in favor of Hyatt and take any further necessary
15 action consistent with this order and [the United States Supreme Court decision].” *See Franchise*
16 *Tax Bd. v. Hyatt*, No. 53264, 2019 Nev. Unpub. LEXIS 852, at *1 (Aug. 5, 2019).⁶⁵

17 On September 3, 2019, this Court vacated the prior judgment in favor of Hyatt. Hyatt’s
18 proposed judgment (submitted herewith) reflects this action of the Court and states the case is
19 dismissed, based on the United States Supreme Court’s decision in *Hyatt III*. No further action
20 can or should be taken by this Court.

21 “A judgment reversed by a higher court is ‘without any validity, force or effect, and ought
22 never to have existed.’” *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991)
23 (*quoting Butler v. Eaton*, 141 U.S. 240, 244, 35 L. Ed. 713, 11 S. Ct. 985 (1891)). Here, based on
24

25 the award of counsel fees pendente lite would be ‘especially appropriate where a party has prevailed on an important
26 matter in the course of litigation, even when he ultimately does not prevail on *all* issues.’” *Id.* at 756-58. These
27 concepts could be applied to Hyatt as he did vindicate his rights in obtaining finding by a jury and confirmation by
28 the Nevada Supreme Court that the FTB committed fraud and inflicted intentional emotional distress in certain of its
action directed at Hyatt, while he did not obtain formal relief due to the change in law when the United States
Supreme Court reversed the *Nevada v. Hall* precedent earlier this year.

⁶⁵ Appendix, Exh. 94.

1 the United States Supreme Court's reversal of its *Nevada v. Hall* precedent some 21 years after
2 Hyatt initiated this case, the case must be dismissed and "ought never to have existed" but in fact
3 did exist and did proceed through trial with all appeals to the Nevada Supreme Court exhausted.
4 Hyatt prevailed during the entirety of those proceedings, which were sanctioned by a prior United
5 States Supreme Court decision and two Nevada Supreme Court decisions.

6 Now that it has been determined, by a United States Supreme Court reversal of a long-
7 standing precedent, that the case never should have existed, there is no prevailing party. Hyatt
8 cannot take affirmative relief in the case, despite winning the case on the merits, and therefore is
9 not the prevailing party. The FTB lost at every phase of the case but avoided the consequences of
10 the Hyatt's prior judgment—which had resulted from decisions by the trial court, the jury, and
11 both the Nevada and the United States Supreme Courts—only because of the reversal by the
12 United States Supreme Court of a long-standing precedent. As a result, this case is *nunc pro tunc*,
13 as it never should have existed.

14 Under these circumstances there is no prevailing party in this case, as correctly reflected
15 in Hyatt's proposed judgment. There need not be a prevailing party in a case. *See, e.g.,*
16 *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909 (1995).⁶⁶

17 Moreover, the concept of a "prevailing party" has no meaning in the abstract. Rather, of
18 significance here is whether either party is a prevailing party entitled to an award of attorneys'
19 fees or costs. As discussed below, neither party is entitled to an award of attorneys' fees or costs
20 in this case.

21
22
23 ⁶⁶ Courts outside Nevada have ruled that a party who avoids defeat only by virtue of a change in law ought not to be
24 deemed a prevailing party and awarded costs or fees. *See Rose v. Montt Assets, Inc.*, 187 Misc.2d 497, 498–99 (N.Y.
25 App. T. 1st Dep't 2000) ("assumptions of the parties when the litigation began were revocably [*sic*] altered by a
26 change in the law" warranting finding neither party the prevailing party); *Wells v. East 10th St. Assocs.*, 205 A.D.2d
27 431, 613 N.Y.S.2d 634 (1st Dep't 1994) (holding it inequitable to award attorney's fees to the tenant since the
28 landlord had prosecuted a valid claim under previously existing law); *Kralik v. 239 E. 79th St. Owners Corp.*, 93
A.D.3d 569, 570, 940 N.Y.S.2d 488 (1st Dep't 2012) (affirming the order denying the prevailing plaintiffs attorneys'
fees "because the cooperative's position was justified by the state of the law when the action was commenced"); *see*
also Milton v Shalala, 17 F.3d 812, 814 (5th Cir. 1994); *Petrone v. Sec'y of Health & Human Servs.*, 936 F.2d 428,
430 (9th Cir. 1991) (noting plaintiff "was a fortuitous beneficiary" of congressional act, "and serendipity is not a
reason for rewarding lawyers").

1 **B. The FTB is not entitled to an award of attorneys' fees.**

2 Under the "American Rule," parties are ordinarily required to bear their own attorneys'
3 fees, and courts follow a general practice of not awarding fees to a prevailing party absent explicit
4 statutory authority. *See Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 598. Nevada is in
5 accord as attorneys' fees are not recoverable absent a statute, rule, or contractual provision
6 authorizing such an award. *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev.
7 1206, 1220, (2008).

8 There is no fee shifting statute directly applicable to the tort claims adjudicated in this
9 action, nor is there a contract between Hyatt and the FTB that provides for recovery of attorneys'
10 fees. The FTB is nonetheless expected to argue that it is entitled to attorneys' fees under NRCP
11 68 and/or former NRS 17.115, based on its offer of judgment of \$110,000 in 2007.

12 **(1) *The Beattie factors weigh heavily in favor of Hyatt and prohibit awarding***
13 ***attorneys' fees to the FTB under NRCP 68 or former NRS 17.115.***

14 NRCP 68 provides that, "[i]f the offeree rejects an offer and fails to obtain a more
15 favorable judgment . . . the offeree must pay the offeror's post-offer costs and expenses, including
16 . . . reasonable attorney fees, *if any be allowed*, actually incurred by the offeror from the time of
17 the offer."⁶⁷ (emphasis added) But NRCP 68 invests the trial court with significant discretion in
18 deciding whether to award attorneys' fees. *See Armstrong v. Riggi*, 92 Nev. 280, 282 (1976). In
19 exercising this discretion, "the trial court must carefully evaluate the following factors: (1)
20 whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of
21 judgment was reasonable and in good faith in both its timing and amount; (3) whether the
22 plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith;
23 and (4) whether the fees sought by the offeror are reasonable and justified in amount." *Beattie v.*
24 *Thomas*, 99 Nev. 579, 588-89 (1983).

25 "Specifically, the district court must determine whether the plaintiff's claims were brought
26 in good faith, whether the defendant's offer was reasonable and in good faith in both timing and

27 ⁶⁷ Former NRS 17.115, in relevant part, provides: "[I]f a party who rejects an offer of judgment fails to obtain a
28 more favorable judgment, the court ... [s]hall order the party to pay the taxable costs incurred by the party who made
the offer; and [m]ay order the party to pay to the party who made the offer ... [r]easonable attorney's fees"

1 amount, and whether the plaintiff's decision to reject the offer and proceed to trial was grossly
2 unreasonable or in bad faith. [Citation omitted.] The connection between the emphases that these
3 three factors place on the parties' good-faith participation in this process and the underlying
4 purposes of NRCP 68 and NRS 17.115 is clear. As the Nevada Supreme Court recognized, "[i]f
5 the good faith of either party in litigating liability and/or damage issues is not taken into account,
6 offers would have the effect of unfairly forcing litigants to forego legitimate claims." *Frazier v.*
7 *Drake*, 131 Nev. 632, 642-43 (2015) (quoting *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev.
8 233, 252, 955 P.2d 661, 673 (1998)).

9 The purpose of NRCP 68 is "to save time and money for the court system, the parties and
10 the taxpayers [and to] reward a party who makes a reasonable offer and punish the party who
11 refuses to accept such an offer." *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382 (1999)
12 (citing *John W. Muije, Ltd. v. A North Las Vegas Cab Co.*, 106 Nev. 664, 667 (1990)).

13 The Nevada Supreme Court has repeatedly approved the denial of attorneys' fees under
14 NRCP 68 where the action was brought in good faith, the offer of judgment was not reasonable,
15 and the rejection of the offer of judgment was not grossly unreasonable or in bad faith. See
16 *Frazier v. Drake*, 131 Nev. at 642-43 (reversing award of attorneys' fees where first three *Beattie*
17 factors establish good faith of the losing plaintiff); *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556,
18 562 (2009) (affirming district court denial of attorneys' fees based on finding that plaintiff's
19 claims were brought in good faith and that his rejection of \$2,500 offer of judgment was in good
20 faith and not grossly unreasonable); *Sands Expo & Convention Ctr., Inc. v. Bonvouloir*, 385 P.3d
21 62 (Table), 2016 WL 5867493, at *1 (Unpubl.) (Nev. Oct. 6, 2016)("[T]here is no assertion that
22 [plaintiff's] claim was brought in bad faith, and her decision to reject the \$12,000 all-inclusive
23 offer in the face of extensive anticipated damages and on-going discovery does not appear grossly
24 unreasonable"); see also *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 583 F.3d
25 1232, 1239 (9th Cir. 2009)(applying Nevada law and affirming denial of attorneys' fee award
26 where plaintiff recovered less than the offer of judgment citing "complexity of the claims, the
27 novelty of the legal questions presented, and the amount requested").
28

1 (a) *Hyatt filed the action in good faith given the state of the law in 1998 and*
2 *pursued the case in good faith until the United States Supreme Court*
3 *reversed the long-standing precedent on which Hyatt's action was based.*

4 Hyatt filed the case in 1998 and pursued it through trial and appeal on the basis of the
5 United States Supreme Court's decision in *Nevada v. Hall*. Twenty-one years later, the United
6 States Supreme Court reversed its long-standing precedent. The only reason Hyatt does not have
7 an affirmative judgment in his favor for the intentional misconduct of the FTB, as found by a jury
8 and affirmed by the Nevada Supreme Court as to the fraud and IIED claims, is this recent and
9 unanticipated reversal of prior law. There is no argument therefore that Hyatt filed or pursued his
10 winning claims in bad faith.

11 In regard to the FTB, not only did a jury and courts decide that the FTB engaged in bad
12 faith and intentional misconduct directed at Hyatt, it is the FTB that failed to mount a challenge to
13 *Nevada v. Hall* until after it had lost the case and exhausted all appeals in Nevada—17 years after
14 the case had commenced. Most egregiously, the FTB could have asserted this argument in the
15 first review of the case by the United States Supreme Court in 2002 and 2003. But the FTB chose
16 not to do so. The FTB instead sought an exception to *Nevada v. Hall*, which the United States
17 Supreme Court rejected in a 9-0 decision in *Hyatt I*.

18 As a result, the first *Beattie* factor of whether Hyatt filed and pursued this case in good
19 faith weighs heavily in favor of Hyatt. In fact, it weighs so heavily in his favor that it should be
20 dispositive of the issue of whether fees should be awarded to the FTB under NRCP 68 or former
21 NRS 17.115. A party cannot anticipate that the United States Supreme Court will reverse the
22 precedent on which the case is based 21 years after the case is filed.

23 (b) *Hyatt's rejection of the FTB offer was not unreasonable or in bad faith in*
24 *light of the strong evidence he developed in discovery and the results he*
25 *obtained at trial.*

26 In 1979 *Nevada v. Hall* established the basis for Hyatt's claim. He filed his complaint in
27 1998 and continuing for 21 years after the filing of Hyatt's case, the law favored Hyatt and
28 supported his basis for rejecting the FTB's offer of judgment. Moreover, the merits of the case
29 strongly support Hyatt's rejection of the FTB's offer and underscores that the rejection was
30 reasonable and not in bad faith. In this regard, not only did Hyatt have a good faith basis for

1 filing the lawsuit, but as the evidence developed, his case grew stronger and stronger. Hyatt's
2 view of the strength of his case in deciding to reject the FTB's offer in November 2007 was
3 vindicated by the large jury verdict he received in 2008 following a four-month jury trial.

4 The strength of Hyatt's case and supporting evidence developed as of 2007, and then
5 presented to the jury during the 2008 trial, is best summarized and annotated to the evidence in
6 Hyatt's briefing filed with the Nevada Supreme Court. Hyatt cites to and incorporates that
7 briefing here,⁶⁸ and briefly lists some of the key evidence contained in that briefing for the
8 purpose of establishing the additional *Beattie* factor that Hyatt's rejection of the FTB's offer in
9 2007 was not unreasonable and not in bad faith. That evidence, gathered in discovery, presented
10 to the jury in 2008 and summarized in his briefing to the Nevada Supreme Court,⁶⁹ included:

- 11 • In 1990 Hyatt won a 20-year contest with the United States Patent Office, securing
12 a patent for the single chip microprocessor that spawned the personal computer.
13 He was called an American hero by some, the 20th Century's Thomas Edison by
14 others.
- 15 • Hyatt moved to Nevada in September 1991.⁷⁰
- 16 • The FTB commenced an audit of Hyatt in 1993 solely on the basis that an FTB
17 employee read an article estimating how much money Hyatt made from his patent
18 royalties and that he had moved to Nevada.
- 19 • The FTB audited Hyatt between 1993 and 1997, during which time the FTB's lead
20 auditor repeatedly made anti-Semitic remarks against Hyatt; created a "fiction"
21 about him; during the audit she rummaged through his trash and peaked in the
22 windows at his Las Vegas house; after the audit she again visited his house to take
23 picture of her posing in front of it and called Hyatt's ex-wife to brag that Hyatt had
24 been "convicted"; she also expressed to a co-worker that she hoped the audit
25 advanced her career.
- 26 • The FTB promised Hyatt strict confidentiality in regard to his personal and
27 financial information, but then made massive public disclosures of the fact that
28 Hyatt was under audit, of his social security number, and of his private address.

⁶⁸ Appendix, Exh. 67.

⁶⁹ *Id.*

⁷⁰ The date when Hyatt moved to Nevada was the primary subject of the audits conducted by the FTB and the subsequent decades long administrative appeals in California relating to those audits. The FTB dragged out that process for over 20 years, seeking to collect tens of millions of dollars in taxes, penalties, and interest from Hyatt and claiming he did not move to Nevada when he said he did and that he therefore owed California state income taxes. Ultimately, after over 20 years, the California State Board of Equalization agreed with Hyatt, finding Hyatt moved to Nevada in 1991 as Hyatt contended all along and thereby reversed the FTB's erroneous audit conclusions on the residency issue. The FTB challenged the decision, but its request for a rehearing of the SBE's decision was rejected by the California Office of Tax Appeals. Appendix, Exhs. 91 and 92.

- 1 • The FTB suggested to Hyatt's tax attorney that absent a settlement of the tax
2 issues there would be a further "in-depth investigation and exploration of
3 unresolved fact questions" which Hyatt and his tax attorney understood to be a less
4 then subtle threat; and then when Hyatt did not settle the tax issues at the outset,
5 the FTB delayed the protest phase of the audit for over 10 years before issuing a
6 final decision and letting Hyatt appeal that decision to the more independent
7 California State Board of Equalization.⁷¹
- 8 • Hyatt and multiple other witnesses provided first hand testimony of the extreme
9 emotional distress and change in personality and physical condition suffered by
10 Hyatt during the 10 plus years that the FTB kept open the protest phase of the
11 audit.
- 12 • FTB auditors were evaluated in a manner that drove them to make assessments
13 without regard to the collectability of the assessments and were rewarded for
14 making high dollar assessments such as Hyatt's case given his extreme income.

15 At the trial in 2008, Hyatt presented this and additional evidence. He won a near half-
16 billion-dollar judgment as described above. These facts establish that it was not unreasonable or
17 in bad faith for Hyatt to reject the FTB's offer of judgment in 2007. This *Beattie* factor therefore
18 also weighs heavily in Hyatt's favor.

19 (c) *The FTB's offer was not reasonable nor could the FTB have had a*
20 *reasonable expectation of its offer being accepted in light of the same facts*
21 *addressed above.*

22 Based on the same facts described above, the FTB could not and did not have a reasonable
23 expectation that Hyatt would accept its \$110,000 offer of judgment when it was served in 2007—
24 nine years after the case was filed in 1998. Not only was *Nevada v. Hall* an unchallenged United
25 States Supreme Court precedent, the United States Supreme Court and Nevada Supreme Court
26 had each reviewed the case and affirmed that it could proceed to trial. The FTB knew that
27 \$110,000 would not even approach out-of-pocket costs incurred through the multiple appeals,
28 extensive motion practice, extensive discovery disputes, and ultimate discovery allowed over
FTB's constant objections. The FTB was also well aware of the strong evidence Hyatt had
compiled against it through discovery and would present to the jury. The FTB had lost numerous
discovery and dispositive motions. The offer was not reasonable in the amount or its timing.
This *Beattie* factor therefore also weighs heavily in Hyatt's favor.

 In sum, the three *Beattie* factors determinative of whether attorneys' fees should be

⁷¹ See above footnote regarding the results of the administrative appeal as decided in Hyatt's favor by the California State Board of Equalization.

1 awarded all favor Hyatt and require rejection of any request by the FTB for attorneys' fees under
2 NRCP 68 or former NRS 17.115.⁷²

3 **(2) As a matter of equity, no attorneys' fees should be awarded to the FTB.**

4 In addition to and consistent with the *Beattie* factors weighing against any award of
5 attorneys' fees to the FTB, a fee request by the FTB should be denied as a matter of equity.
6 Given the unique procedural posture of this case, it is reasonable for the Court to consider the
7 equities of these circumstances. *See Anderson v. Melwani*, 179 F.3d 763, 766 (9th Cir.
8 1999)(affirming denial of a fee request finding it would be "inequitable and unreasonable" under
9 the circumstances of the case); *A.V. DeBlasio Constr., Inc. v. Mountain States Constr. Co.*, 588
10 F.2d 259, 263 (9th Cir. 1978) (an award of fees *would* be "inequitable and unreasonable"); *see*
11 *also McDonald's Corp. v. Watson*, 69 F.3d 36, 45–46 (5th Cir. 1995); *Loman Dev. Co., Inc. v.*
12 *Daytona Hotel and Motel Suppliers, Inc.*, 817 F.2d 1533, 1537 n.7 (11th Cir. 1987); *C.J.C., Inc.*
13 *v. W. States Mech. Contractors, Inc.*, 834 F.2d 1533, 1548 (10th Cir. 1987).

14 The "unclean hands" factor is relevant in this regard. Courts have refused to award
15 attorneys' fees where it would be patently unjust. *United States Dept. of Labor v. Rapid Robert's*
16 *Inc.*, 130 F.3d 345, 349 (8th Cir. 1997) (reversing award of fees where it was patently unjust,
17 given the special circumstances of the case); *Smith v. Se. Pa. Transp. Auth.*, 47 F.3d 97, 99 (3d
18 Cir. 1995) (per curiam) (recognizing this factor) ("The denial of costs to the prevailing party . . .
19 is in the nature of a penalty for some defection on his part in the course of the litigation.")

20 Here, the FTB's adjudicated bad faith and intentional misconduct leave it with unclean
21 hands and ineligible to receive an award of attorneys' fees in this action. Further, the FTB sat on
22 its hands and did not seek reversal of *Nevada v. Hall* during the United States Supreme Court's
23 first review of the case between 2002 and 2003. The FTB cannot be rewarded with a windfall for
24 waiting 17 years after the case commenced, until it lost the case and exhausted its appeals in

25 _____
26 ⁷² The FTB may argue that even if *Nevada v. Hall* were not overturned in *Hyatt III*, under *Hyatt II* the judgment in
27 favor of Hyatt would have been only \$100,000 and thus less than the \$110,000 offer of judgment made by the FTB in
28 2007. This is false. The Nevada Supreme Court's decision in 2016 awarding Hyatt \$50,000 for each of his two
winning claims also would have entitled Hyatt to an award of costs as the prevailing party. These costs easily would
have exceeded \$10,000 and thereby provided Hyatt a total recovery well in excess of the FTB's offer of judgment,
which was inclusive of costs. The cost award in Hyatt's favor in 2010 exceeded \$2 Million. Appendix, Exh. 66.

1 Nevada, before seeking reversal of *Nevada v. Hall*.

2 **C. The FTB should not be awarded statutory costs.**

3 **(1) The FTB is not a prevailing party entitled to statutory costs.**

4 The Court has power to award costs to the prevailing party “[i]n an action for the recovery
5 of money or damages, where the plaintiff seeks to recover more than \$2,500.” NRS18.020(3). A
6 party must prevail, however, before it may be awarded costs. As established above, there is no
7 prevailing party entitled to an award of statutory costs.

8 Further, in unpublished opinions, the Nevada Supreme Court has determined there was no
9 prevailing party where unique circumstances existed. *See Meiri v. Hayashi*, No. 71120, 2018
10 Nev. Unpub. LEXIS 885, *6 (Sept. 28, 2018) (neither side was a "prevailing party"); *Las Vegas*
11 *Metro. Police Dep't v. Buono*, 127 Nev. 1153, 2011 Nev. Unpub. LEXIS 1384, *8 (Dec. 27,
12 2011) (no prevailing party for a costs award); *Golden Gaming, Inc. v. Corrigan Mgmt.*, Nos.
13 61696, 62200, 2015 Nev. Unpub. LEXIS 417, *8 (Mar. 26, 2015) (no prevailing party as cost
14 award vacated along with partial summary judgment order).

15 The unique circumstances of this case also require that the Court conclude there is no
16 prevailing party entitled to an award of statutory costs. For the Court to rule in favor of the FTB
17 on the prevailing party issue, the Court would have to acknowledge that (i) after considering the
18 evidence presented in a four-month trial the jury determined that the FTB committed fraud
19 against Hyatt; and (ii) after full briefing and arguments the Nevada Supreme affirmed the jury’s
20 fraud determination as well as its verdict that the FTB intentionally inflicted emotional distress on
21 Hyatt. Yet, the Court would then have to order Hyatt to write a check to the FTB for statutory
22 costs. This result would be OUTRAGEOUS. The FTB did not prevail in this action consistent
23 with the notion of awarding costs under NRS 18.020(3).

24 **(2) The FTB should not be awarded costs under NRCP 68 and former NRS 17.115.**

25 For the same reasons addressed above for denying the FTB attorneys’ fees under NRCP
26 68 and former NRS 17.115, any request the FTB makes for costs under these statutes should
27 likewise be denied. Hyatt filed and pursued the case in the good faith belief that this Court could
28 assert jurisdiction over the FTB under *Nevada v. Hall*. He similarly rejected the FTB’s offer of

1 judgment in 2007 on the basis that *Nevada v. Hall* was still solid United States Supreme Court
2 precedent, and on the basis that pretrial discovery confirmed that the FTB had committed fraud
3 and other intentional torts. Nor was the FTB's offer in 2007 of \$110,000 (inclusive of costs)
4 made with a good faith belief it would be accepted. The jury's verdict in 2008 and resulting
5 judgment awarding Hyatt nearly one-half Billion dollars confirmed Hyatt's good faith belief that
6 his case was worth substantially more than what the FTB offered.

7 (3) ***This Court should exercise discretion and deny statutory costs to the FTB for its***
8 ***unclean hands consistent with federal law and other states that recognize such***
9 ***discretion.***

10 Federal law and many states that have adopted the federal rules of civil procedure give the
11 trial court discretion to deny statutory costs to a prevailing party when the equities dictate no
12 award should be made given the unclean hands of the purported prevailing party or other basis
13 that dictate no costs should be awarded. Rule 54 of Federal Rules of Civil Procedure ("FRCP
14 54") provides that "[u]nless a federal statute, these rules, or a court order provides otherwise,
15 costs—other than attorney's fees—should be allowed to the prevailing party." FRCP 54(d)(1)
16 (emphasis added). The provision "a court order provides otherwise" has been interpreted to allow
17 the trial court to deny costs to a party even where it is technically deemed the prevailing party.
18 See *Bush v. Remington Rand, Inc.*, 213 F.2d 456, 466 (2nd Cir. 1954) (FRCP 54(d)(1) (gives the
19 court power to deny a prevailing party all or part of requested costs); *ADM Corp. v. Speedmaster*
20 *Packaging Corp.*, 525 F.2d 662, 665 (3d Cir. 1975) ("The denial of costs to the prevailing party . .
21 . is in the nature of a penalty for some defection on his part in the course of the litigation");
22 *Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*, 566 F. Supp. 2d 1168, 1171-72 (E.D. Cal.
23 2008) (denying costs to prevailing defendant government entity on the basis that it would be
24 inequitable because plaintiff was seeking vindication of an important right, pursued litigation in
25 good faith, and presented issues that were close and difficult for court to adjudicate); see also 6
26 Moore's Federal Practice s ¶ 54.70(5) (1976) and cases cited therein (discussing Rule 54(d)'s
27 language "[u]nless otherwise specifically provided").

28 Similarly, states have adopted the language from FRCP 54(d)(1) or otherwise recognized
that courts have discretion to deny an award of costs to a party that may have prevailed where it

1 would be inequitable to award costs. See *City of Birmingham v. City of Fairfield*, 396 So. 2d
2 692, 696–97 (Ala. 1981); *Owen Jones & Sons, Inc. v. C. R. Lewis Co.*, 497 P.2d 312, 313–14
3 (Alaska 1972); *Rossmiller v. Romero*, 625 P.2d 1029, 1030 (Colo. 1981); *Barry v. Quality Steel*
4 *Products, Inc.*, 280 Conn. 1, 24, 905 A.2d 55 (2006); 10 Del. C. § 5106 (2017); Del. Ct. Ch. R.
5 54(d); *Abreu v. Raymond*, 56 Haw. 613, 614, 546 P.2d 1013, 1014 (1976); *Klinke v. Mitsubishi*
6 *Motors Corp.*, 219 Mich. App. 500, 518, 556 N.W.2d (1996); *Vance v. Roedersheimer*, 64 Ohio
7 St. 3d 552, 555, 1992-Ohio-89; *Hashimoto v. Marathon Pipe Line Co.*, 767 P.2d 158, 168 (Wyo.
8 1989).

9 Nevada law should, if it does not already, recognize and apply this same level of
10 discretion and allow denial of an award of costs to a party that may technically assert prevailing
11 party status but for which countervailing reasons dictate no award of costs be made.

12 **(4) *Nonetheless if the Court makes any cost award to the FTB, it must be limited to***
13 ***the period of 2015 to the present.***

14 NRS 18.020 and NRS 18.050 give the Court wide, but not unlimited, discretion in
15 deciding what costs to award a prevailing party. See *Bergmann v. Boyce*, 109 Nev. 670, 678-79
16 (1993) (“The determination of which expenses are allowable as costs is within the sound
17 discretion of the trial court.”). Under NRS 18.005, costs awarded must be reasonable. See *Bobby*
18 *Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352 (1998).

19 Given the FTB did not seek to reverse *Nevada v. Hall* until 2015 when it sought United
20 States Supreme Court review of the Nevada Supreme Court’s 2014 decision, any costs awarded to
21 the FTB must be limited to statutory costs from the filing date of the petition in the United States
22 Supreme Court in 2015 first seeking reversal of *Nevada v. Hall*. The FTB has no basis to request
23 costs for the period of the case before it ever sought reversal of *Nevada v. Hall*.

24 **5. Conclusion.**

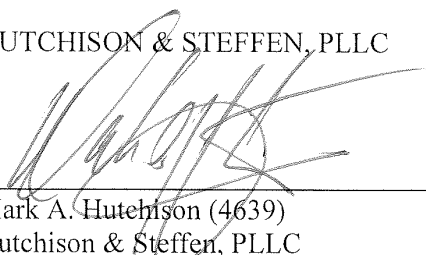
25 There was no prevailing party in this long-running dispute. Neither party should be
26 awarded attorneys’ fees or costs. The FTB cannot reasonably, rationally, or in good faith
27 challenge that Hyatt had a good faith basis for filing and pursuing this case under the long-
28 standing United States Supreme Court precedent, *Nevada v. Hall*. The FTB waited until 17 years

1 after this case was filed to seek reversal of that precedent, passing up an early chance to do so in
2 2002 when the United States Supreme Court first granted review of the case. It would not be
3 consistent with Nevada law, and it would be inequitable and a travesty of justice, to award the
4 FTB any amount of attorneys' fees or costs given both: (i) the FTB's conduct as determined by a
5 Nevada jury and as confirmed by the Nevada Supreme Court in committing fraud directed at
6 Hyatt and inflicting emotional distress on him, and (ii) its failure to seek reversal of *Nevada v.*
7 *Hall* until 17 years after the case was filed and all its appeals in Nevada of the fraud and
8 emotional distress judgment having been exhausted.

9 The Court should enter the proposed judgment submitted by Hyatt (Exhibit A hereto) with
10 each side bearing its own costs and attorneys' fees.

11
12 Dated this 15th day of October, 2019.

HUTCHISON & STEFFEN, PLLC

13
14 
15 Mark A. Hutchison (4639)
16 Hutchison & Steffen, PLLC
17 10080 W. Alta Drive, Suite 200
18 Las Vegas, NV 89145

19 Peter C. Bernhard (734)
20 KAEMPFER CROWELL
21 1980 Festival Plaza Drive, Suite 650
22 Las Vegas, NV 89135

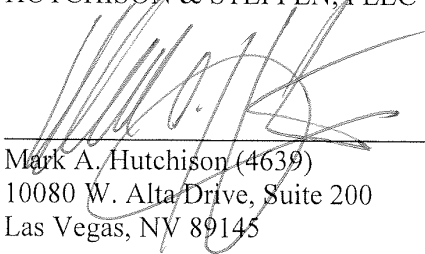
23
24 *Attorneys for Plaintiff Gilbert P. Hyatt*
25
26
27
28

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **PLAINTIFF GILBERT P. 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** filed in District Court Case No. A 382999 does not contain the social security number of any person.

Dated this 15th day of October, 2019.

HUTCHISON & STEFFEN, PLLC



Mark A. Hutchison (4639)
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145

Peter C. Bernhard (734)
KAEMPFER CROWELL
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135

Attorneys for Plaintiff Gilbert P. Hyatt

EXHIBIT A

AA000743

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

JUDG
Mark A. Hutchison (4639)
Hutchison & Steffen, PLLC
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
(702) 385-2500
mhutchison@hutchlegal.com

Peter C. Bernhard (734)
Kaempfer Crowell
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135
(702) 792-700
pbernhard@kcnvlaw.com

Attorneys for Plaintiff Gilbert P. Hyatt

DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiffs,

v.

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

Defendants.

Case No. A382999
Dept. No. X

JUDGMENT

1 This case has been remanded back to this Court by order of the Nevada Supreme Court
2 dated August 5, 2019 for proceedings consistent with its order and consistent with the United
3 States Supreme Court decision in this case, *Franchise Tax Bd. of California v. Hyatt*, 587 U.S.
4 139 S. Ct. 1485, 1499 (2019). In accord with those instructions, the Court enters judgment in this
5 action as follows:

6 **Case Procedural History**

7 *Complaint*

8 Plaintiff Gilbert Hyatt (“Hyatt”) filed this action against Defendant California Franchise
9 Tax Board (the “FTB”) on January 6, 1998, alleging: First Cause of Action—Declaratory Relief;
10 Second Cause of Action—Invasion Of Privacy-Unreasonable Intrusion Upon The Seclusion Of
11 Another; Third Cause of Action—Invasion Of Privacy-Unreasonable Publicity Given To Private
12 Facts; Fourth Cause of Action-Invasion Of Privacy-Casting Plaintiff In A False Light; and Fifth
13 Cause of Action—Tort Of Outrage.

14 On June 11, 1998, Hyatt filed a First Amended Complaint, which added three causes of
15 action: Sixth Cause of Action-Abuse of Process; Seventh Cause of Action-Fraud; and Eighth
16 Cause of Action-Negligent Misrepresentation.

17 *FTB Motion for Judgment on the Pleadings*

18 On February 9, 1999, the FTB filed a motion for judgment on the pleadings. The FTB
19 argued in its motion that this Court should dismiss the case in its entirety as a matter of comity in
20 order to give full faith and credit to California’s immunity laws that protect the FTB from suit in
21 California. The FTB cited *Nevada v. Hall*, 440 U.S. 410 (1979) and argued that its holding was
22 not applicable in this case because the FTB’s taxing power was a sovereign function. The FTB
23 did not argue that *Nevada v. Hall* was wrongly decided and should be reversed. Hyatt argued that
24 the Court could and should hear this case citing *Nevada v. Hall*, which held that a state court has
25 jurisdiction over an agency from a sister-state and is not required to provide immunity to the
26 sister state but can decide whether to grant any immunity to the sister state as a matter of comity.

27 On April 7, 1999, this Court, the Honorable Nancy Saitta, District Judge, presiding,
28

1 denied the FTB's motion for judgment on the pleadings as to Hyatt's tort claims, while only
2 granting the FTB's motion as to Hyatt's claim for declaratory relief.

3 *FTB Motion for Summary Judgment*

4 On January 27, 2000, the FTB filed a motion for summary judgment. The FTB again
5 argued in its motion, among other arguments, that this Court should dismiss the case in order to
6 give full faith and credit to California's immunity laws that protect the FTB from suit in
7 California. The FTB again cited *Nevada v. Hall*, 440 U.S. 410 (1979) and again argued that its
8 holding was not applicable in this case because the FTB's taxing power was a sovereign function.
9 The FTB again did not argue that *Nevada v. Hall* was wrongly decided and should be reversed.
10 Hyatt again argued that the Court has jurisdiction over the FTB and could and should hear this
11 case, again citing *Nevada v. Hall*.

12 On May 31, 2000, this Court, the Honorable Nancy Saitta, District Judge, presiding,
13 denied the FTB's motion for summary judgment.

14 *First Writ Proceeding in the Nevada Supreme Court*

15 On July 7, 2000, the FTB filed a petition for a writ of mandamus seeking review of this
16 Court's order denying the FTB's motion for summary judgment. On September 13, 2000, the
17 Nevada Supreme Court accepted review of the FTB's petition for writ of mandamus. The FTB's
18 petition again argued that this Court should dismiss the case in order to give full faith and credit
19 to California's immunity laws that protect the FTB from suit in California. The FTB again cited
20 *Nevada v. Hall*, 440 U.S. 410 (1979) and again argued that its holding was not applicable in this
21 case because the FTB's taxing power was a sovereign function.

22 On June 13, 2001, the Nevada Supreme Court issued an order granting the FTB's petition
23 for a writ of mandamus regarding this Court's order denying the FTB's summary judgment
24 motion on the basis that Hyatt did not put forth sufficient evidence to establish his alleged tort
25 claims.

26 On July 2, 2001, Hyatt filed a petition for rehearing of the Nevada Supreme Court's June
27 13, 2001 order dismissing the case. Hyatt argued that the FTB's petition had not raised the issue
28

1 of the sufficiency of the evidence to support Hyatt's tort claims, that the parties had not briefed
2 that issue, and that Hyatt had sufficient evidence to establish each tort claim. On July 13, 2001,
3 the Nevada Supreme Court ordered additional briefing from both sides on Hyatt's petition for
4 rehearing.

5 On April 4, 2002, the Nevada Supreme Court granted Hyatt's petition for rehearing and
6 reversed its prior order dismissing the case, concluding that Nevada had jurisdiction to hear
7 Hyatt's intentional tort claims against the FTB under *Nevada v. Hall* and that Nevada would not
8 dismiss those claims on the ground of comity because the State of Nevada allows its state
9 agencies to be sued in Nevada District Court for intentional torts. The Nevada Supreme Court,
10 however, dismissed Hyatt's Eighth Cause of Action-Negligent Misrepresentation against the FTB
11 on the ground of comity because the State of Nevada does not allow its state agencies to be sued
12 in Nevada District Court for negligence.

13 *First Review by the United States Supreme Court*

14 On October 15, 2002, the United States Supreme Court granted the FTB's petition for
15 certiorari, which sought review of the Nevada Supreme Court's April 4, 2002 order. The FTB's
16 petition for review and its briefing on the merits did not assert or seek review on the issue of
17 whether *Nevada v. Hall* was wrongly decided and should be reversed, but rather again argued that
18 an exception to *Nevada v. Hall* should be established, so that certain "sovereign" functions, such
19 as taxing activities, be exempted from the holding in *Nevada v. Hall*. Hyatt opposed the FTB's
20 arguments, again citing *Nevada v. Hall*.

21 On April 23, 2003, the United States Supreme Court issued a decision denying the FTB's
22 appeal in a unanimous 9 to 0 decision that cited *Nevada v. Hall*, rejected the FTB's asserted
23 exception to *Nevada v. Hall*, and concluded that the Nevada Supreme Court had appropriately
24 applied comity by allowing Hyatt's intentional tort claims to proceed in Nevada state court while
25 dismissing Hyatt's negligence claim. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003)
26 ("*Hyatt I*"). On May 23, 2003, the United States Supreme Court issued the mandate returning this
27 case to Nevada state court.
28

1 *Second Amended Complaint*

2 On April 18, 2006, after obtaining leave of court, Hyatt filed a Second Amended
3 Complaint that added a single cause of action: Eighth Cause of Action-Breach of Confidentiality.

4 *FTB Offer of Judgment*

5 On November 26, 2007, the FTB made an offer of judgment to Hyatt under Nev. R. Civ P.
6 68 and former Nevada Revised Statute 17.115 in the amount of \$110,000, inclusive of costs and
7 fees. Hyatt did not respond to the offer within the Rule's 10-day period, so it expired.

8 *Trial, Verdict and Judgment*

9 On April 14, 2008, this matter came on for trial before this Court, the Honorable Jessie
10 Walsh, District Judge, presiding, and a jury, concluding with the verdicts of the jury on August 6,
11 2008 (liability for and amount of compensatory damages), on August 11, 2008 (liability for
12 punitive damages), and on August 14, 2008 (amount of punitive damages). The jury rendered a
13 verdict in favor of Hyatt and against the FTB on all causes of action presented to the jury,
14 specifically Hyatt's second cause of action for invasion of privacy (intrusion upon seclusion),
15 third cause of action for invasion of privacy (publicity of private facts), fourth cause of action for
16 invasion of privacy (false light), fifth cause of action for intentional infliction of emotional
17 distress, sixth cause of action for abuse of process, seventh cause of action for fraud, and eighth
18 cause of action for breach of confidential relationship. The jury awarded Hyatt compensatory
19 damages of \$85,000,000.00 for emotional distress; compensatory damages of \$52,000,000.00 for
20 invasion of privacy; attorneys' fees as special damages of \$1,085,281.56; and punitive damages of
21 \$250,000,000.00.

22 On September 8, 2008, this Court entered a judgment consistent with the jury's verdicts.
23 On January 4, 2010, this Court awarded Hyatt costs in the amount of \$2,539,068.65 as the
24 prevailing party in the case.

25 *Appeal of the Judgment*

26 On February 10, 2009, the FTB filed a notice of appeal from the judgment with the
27 Nevada Supreme Court, and thereafter the FTB and Hyatt filed their respective briefs for the
28

1 appeal. The FTB filed an opening 100-plus-page brief on August 7, 2009. The FTB did not
2 request that the Court evaluate the continuing viability of *Nevada v. Hall*, but rather noted in
3 footnote 80 that “it is questionable whether there is still validity to” *Nevada v. Hall* and that the
4 Nevada Supreme Court “may evaluate the continuing validity of an old United States Supreme
5 Court opinion.”

6 On September 18, 2014, the Nevada Supreme Court affirmed in part and reversed in part
7 the judgment entered by this Court on September 8, 2009, without any reference to or discussion
8 of *Nevada v. Hall*. The Nevada Supreme Court affirmed the portion of the judgment in favor of
9 Hyatt on his cause of action for fraud and the award of \$1,085,281.56 in damages and affirmed
10 specific findings as to the evidence that supported the fraud claim. The Nevada Supreme Court
11 also affirmed the portion of the judgment in favor of Hyatt as to liability on his cause of action for
12 intentional infliction of emotional distress while ordering a new trial as to amount of damages for
13 that claim. The Nevada Supreme Court reversed the judgment in favor of Hyatt on his other
14 claims for invasion of privacy (intrusion upon seclusion), invasion of privacy (publicity of private
15 facts), invasion of privacy (false light), abuse of process, and breach of confidential relationship,
16 ordering Hyatt take nothing for those claims and ordering the award of costs to be re-determined.

17 *Second Review by the United States Supreme Court*

18 On June 30, 2015, the United States Supreme Court granted the FTB’s petition for
19 certiorari, which sought review of the Nevada Supreme Court’s September 18, 2014 decision.
20 The FTB’s petition for review and then briefing on the merits argued that *Nevada v. Hall* should
21 be reversed on the grounds that a state court has no jurisdiction over a sister state or its agencies
22 or, alternatively, that the award of damages in favor of Hyatt must be limited to \$50,000 per claim
23 in accord with Nevada law applicable to claims made against Nevada state agencies. Hyatt
24 opposed the FTB on both grounds.

25 On April 19, 2016, the United States Supreme Court in a 4 to 4 vote denied the FTB’s
26 request to reverse *Nevada v. Hall*, but granted the FTB’s alternative request for relief and ordered
27 that the FTB must be treated the same as a Nevada state agency in regard to damage limitations.
28

1 The United States Supreme Court ordered the case remanded to Nevada state court for treatment
2 consistent with the Court's ruling. *Franchise Tax Bd. of Cal. v. Hyatt*, 163 S. Ct. 1271 (2016)
3 ("*Hyatt II*"). On May 23, 2016, the United States Supreme Court issued the mandate returning
4 this case to Nevada state court.

5 *Revised Decision from the Nevada Supreme Court*

6 On December 26, 2017, the Nevada Supreme Court issued a decision ordering that Hyatt's
7 recovery for his fraud claim and his intentional infliction of emotional distress claim be limited to
8 \$50,000 each and remanded the case to this Court to decide the issue of costs.

9 *Third Review by the United States Supreme Court*

10 On June 28, 2018, the United States Supreme Court granted the FTB's petition for
11 certiorari, which sought review of the Nevada Supreme Court's December 26, 2017 decision.
12 The FTB's petition for review and then briefing on the merits again argued that *Nevada v. Hall*
13 should be reversed on the ground that a state court has no jurisdiction over a sister state or its
14 agencies. Hyatt again opposed the FTB's appeal on this ground.

15 On May 13, 2019, the United States Supreme Court in a 5 to 4 decision reversed *Nevada*
16 *v. Hall* and remanded the case to Nevada state court for treatment consistent with the Court
17 opinion. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) ("*Hyatt III*"). On June
18 17, 2019, the United States Supreme Court issued the mandate returning this case to Nevada state
19 court.

20 *Remand to this Court*

21 On August 5, 2019, the Nevada Supreme Court issued a remittitur returning the case to
22 this Court ordering that it vacate the judgment in favor of Hyatt and take any further necessary
23 action consistent with its order and the United States Supreme Court's order. On September 3,
24 2019, this Court vacated the prior judgment in favor of Hyatt and ordered both Hyatt and the FTB
25 to submit briefing by no later than October 15, 2019, to address the form of judgment to be
26 entered in this action and who, if either party, is the prevailing party in this action.
27
28

1 NOW, THEREFORE, and based on the foregoing, this Court has reviewed and considered
2 the procedural history in this case, including the decisions and orders in this case issued by the
3 United States Supreme Court and the Nevada Supreme Court, and the recent briefing submitted
4 by the parties on the form of judgment to be entered in this case and who, if either party, is the
5 prevailing party.
6

7 IT IS ORDERED, ADJUDGED AND DECREED that (i) this case is dismissed and Hyatt
8 take nothing from any of the causes of action he asserted in this action, and (ii) neither party is
9 deemed the prevailing party for the purpose of awarding costs or attorneys' fees, and neither party
10 is therefore awarded costs or attorneys' fees in this action.
11

12 Hyatt brought this action in good faith in reliance on the United States Supreme Court
13 precedent *Nevada v. Hall*. Hyatt would have prevailed in this action, except for the reversal of
14 the *Nevada v. Hall* precedent in *Hyatt III* same 21 years after this case was filed and 40 years
15 after *Nevada v. Hall* was decided. During the last 21 years while relying on *Nevada v. Hall*,
16 Hyatt won in both the Nevada Supreme Court (2002) and United States Supreme Court in 2003
17 (*Hyatt I*) and then obtained a large jury verdict and final judgment against the FTB (2008), which
18 the Nevada Supreme Court affirmed in part (2014). The United States Supreme Court's reversal
19 of its long-standing *Nevada v. Hall* precedent in *Hyatt III* in 2019 stripping this Court of
20 jurisdiction over the FTB could not have been anticipated by Hyatt.
21

22 Hyatt also had a good faith belief that he would prevail at trial on his claims and recover
23 in excess of the \$110,000 offer of judgment made by the FTB in 2007. Hyatt did obtain a verdict
24 and final judgment well in excess of that amount. The damages limitation to Hyatt's claims was
25 not decided and imposed until 2016 in *Hyatt II*. It was therefore not grossly unreasonable or in
26 bad faith for Hyatt to not accept the FTB's offer of judgment of \$110,000 in 2007. The FTB
27 conversely could not have believed when it served its offer of judgment that the offer was
28

1 reasonable in its amount or timing and would be accepted by Hyatt. As of 2007, the FTB had not
2 asserted any argument or taken any action seeking to reverse the *Nevada v. Hall* precedent.
3 Further, as of 2007, this case had been reviewed by both the Nevada Supreme Court (2002) and
4 the United States Supreme Court (2003), and the FTB had not argued that *Nevada v. Hall* was
5 wrongly decided and should be reversed. The FTB did not assert that argument or seek that relief
6 with the United States Supreme Court until 2015 after it had lost in this Court and exhausted all
7 appeals in the Nevada Supreme Court.
8

9 The Court therefore concludes that based on the lengthy and complex procedural history
10 of this case, and as a matter of law and equity, there is no prevailing party in this action and
11 neither party is entitled to an award of costs or attorneys' fees.
12

13 Dated this _____ day of October, 2019.

14
15 _____
District Judge
16
17
18
19
20
21
22
23
24
25
26
27
28

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

APEN
Mark A. Hutchison (4639)
Hutchison & Steffen, PLLC
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
(702) 385-2500
mhutchison@hutchlegal.com

Peter C. Bernhard (734)
Kaempfer Crowell
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135
(702) 792-700
pbernhard@kcnvlaw.com

Attorneys for Plaintiff Gilbert P. Hyatt

DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

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

Defendants.

Case No. A382999
Dept. No. X

**APPENDIX OF MATERIALS RE CASE
PROCEDURAL HISTORY IN SUPPORT OF
PLAINTIFF GILBERT P. HYATT'S
PROPOSED FORM OF JUDGMENT**

**[FILED UNDER SEAL PURSUANT
TO COURT ORDER FILED ON
MARCH 18, 1999]**

1 Plaintiff Gilbert P. Hyatt ("Plaintiff" or "Hyatt") submits this Appendix of Materials Re
2 Case Procedural History in support of his accompanying proposed form of judgment and in
3 opposition to Defendant California Franchise Tax Board's (the "FTB") proposed form of
4 judgment. Set forth below is an index of the exhibits.

Exhibit	Description
Exhibit 1	1998-01-06 Complaint
Exhibit 2	1998-02-17 FTB Petition for Removal
Exhibit 3	1998-05-01 U.S. District Court Motion to Remand - Hearing Transcript
Exhibit 4	1998-06-11 First Amended Complaint
Exhibit 5	1998-08-13 FTB Answer to First Amended Complaint
Exhibit 6	1999-02-10 FTB Motion for Judgment on the Pleadings
Exhibit 7	1999-03-15 Hyatt Opposition to FTB Motion for Judgment on the Pleadings
Exhibit 8	1999-03-29 FTB Reply ISO Motion for Judgment on the Pleadings
Exhibit 9	1999-04-02 Hyatt Motion to File Surreply and Surreply re Motion for Judgment on the Pleadings
Exhibit 10	1999-04-06 FTB Response to Plaintiff's Surreply re Motion for Judgment on the Pleadings
Exhibit 11	1999-04-07 Hearing Transcript - Motion for Judgment on the Pleadings (Judge Saitta)
Exhibit 12	1999-04-16 Order re Partial Judgment on the Pleadings
Exhibit 13	2000-01-27 Evidence ISO FTB Motion for Summary Judgment
Exhibit 14	2000-01-27 FTB Motion for Summary Judgment
Exhibit 15	2000-01-27 FTB Petition for Writ of Mandamus (No. 35549)
Exhibit 16	2000-03-22 Opposition to FTB Motion for Summary Judgment
Exhibit 17	2000-03-22 Bourke Affidavit ISO Hyatt Opposition to FTB Motion for Summary Judgment
Exhibit 18	2000-03-22 Cowan Affidavit ISO Hyatt Opposition to FTB Motion for Summary Judgment

1	Exhibit	Description
2	Exhibit 19	2000-03-22 Kern Affidavit ISO Hyatt Opposition to FTB Motion for Summary
3		Judgment
4	Exhibit 20	2000-04-13 FTB Objections to Affidavits and Erratas Filed ISO Hyatt Opposition
5		to Motion for Summary Judgment
6	Exhibit 21	2000-04-14 FTB Reply in Support of Motion for Summary Judgment
7	Exhibit 22	2000-04-21 Hearing Transcript - FTB Motion for Summary Judgment (Judge
8		Saitta)
9	Exhibit 23	2000-05-31 Order Denying FTB Motion for Summary Judgment
10	Exhibit 24	2000-06-07 NSC Order - accepting review of FTB Writ Petition (No. 35549)
11	Exhibit 25	2000-07-07 FTB Petition for Writ of Mandamus (No. 36390)
12	Exhibit 26	2000-07-10 Hyatt Answer to FTB Petition for Writ (No. 35549)
13	Exhibit 27	2000-08-08 FTB Reply ISO Writ Petition (No. 35549)
14	Exhibit 28	2000-09-13 NSC Order - (1) FTB Motion to Consolidate Writ Petitions (Nos.
15		35549 and 36390); (2) Accept review No. 36390
16	Exhibit 29	2000-10-17 Hyatt Answer to FTB Writ Petition (No. 36390)
17	Exhibit 30	2000-12-28 FTB Reply ISO Petition for Writ (No. 36390)
18	Exhibit 31	2001-06-13 NSC Order Granting FTB Writ Petition (No. 36390) and Dismissing
19		Writ Petition (No. 35549)
20	Exhibit 32	2001-07-02 Hyatt Petition for Rehearing & Appendix of Exhibits re NSC
21		6/13/2001 Order (No. 36390)
22	Exhibit 33	2001-07-13 NSC Order Granting Motion in Part, and Directing Answer (No.
23		36390)
24	Exhibit 34	2001-07-23 Hyatt Supplement to Petition for Rehearing & Appendix re NSC
25		6/13/2001 Order (No. 36390)
26	Exhibit 35	2001-08-07 FTB Answer to Hyatt Petition for Rehearing and Supplemental
27		Petition for Rehearing
28	Exhibit 36	2001-08-10 Hyatt Errata to Supplement to Petition for Rehearing
	Exhibit 37	2001-08-22 FTB Response to Hyatt 8/10/2001 Errata to Supplemental Petition for
		Rehearing

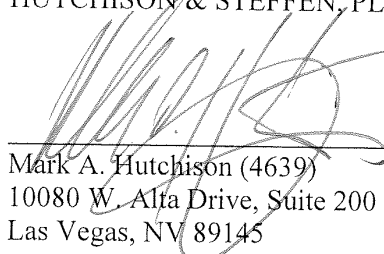
1	Exhibit	Description
2	Exhibit 38	2002-04-04 <i>Franchise Tax Bd. v. Eighth Judicial Dist. Court</i> ,
3		2002 Nev. LEXIS 57
4	Exhibit 39	2002-07-02 FTB Petition for Writ of Certiorari
5	Exhibit 40	2002-09-06 Hyatt Brief in Opposition to FTB Petition for Writ of Certiorari
6	Exhibit 41	2002-09-17 FTB Reply to Brief in Opposition to Petition for Writ of Certiorari
7	Exhibit 42	2002-10-15 USSC Order granting FTB Petition for Writ of Certiorari (No. 02-42)
8	Exhibit 43	2002-12-09 FTB Brief (USSC No. 02-42)
9	Exhibit 44	2003-01-21 Hyatt Respondent Brief (USSC 02-42)
10	Exhibit 45	2003-02-14 FTB Reply Brief (USSC No. 02-42)
11	Exhibit 46	2003-04-23 USSC Decision (FTB v. Hyatt 538 U.S. 488)
12	Exhibit 47	2003-05-23 USSC Mandate (No. 02-42)
13	Exhibit 48	2005-09-30 Discovery Commissioner Hearing Transcript
14	Exhibit 49	2005-11-04 FTB Partial Summary Judgment Motion re Protest Delay
15	Exhibit 50	2005-11-07 DCRR Court Signed re 9-30-2005 hearing
16	Exhibit 51	2005-11-23 Opposition to FTB Partial Summary Judgment Motion re Protest Delay
17		
18	Exhibit 52	2006-01-23 Hearing Transcript - FTB Partial Summary Judgment Motion re Protest Delay
19		
20	Exhibit 53	2006-03-14 Order re FTB Partial Summary Judgment Motion re Protest Delay
21	Exhibit 54	2006-03-24 Hyatt Motion for Leave to File Second Amended Complaint
22	Exhibit 55	2006-04-07 FTB Partial Opposition to Motion for Leave to File Second Amended Complaint
23	Exhibit 56	2006-04-10 Hyatt Reply ISO Motion for Leave to File Second Amended Complaint
24		
25	Exhibit 57	2006-04-18 Second Amended Complaint
26	Exhibit 58	2006-04-19 Order Granting Motion for Leave to File Second Amended Complaint
27	Exhibit 59	2007-11-26 FTB Offer of Judgment
28		

1	Exhibit	Description
2	Exhibit 60	2008-08-06 Special Verdict Form
3	Exhibit 61	2008-08-11 Special Verdict Form No 2 (Punitive damages)
4	Exhibit 62	2008-08-14 Special Verdict Form 3 (Punitive Damages)
5	Exhibit 63	2008-09-08 Judgment
6	Exhibit 64	2009-02-10 FTB Notice of Appeal and Case Appeal Statement
7	Exhibit 65	2009-08-07 Appellant FTB Opening Brief [Filed Stamped copy]
8	Exhibit 66	2010-01-04 Order (awarding costs to Hyatt)
9	Exhibit 67	2010-01-26 Hyatt NSC Answering Brief [Filed Stamped copy]
10	Exhibit 68	2010-06-11 FTB Reply Brief and Answering Brief [Filed Stamped copy]
11	Exhibit 69	2012-05-07 Transcript of NSC Oral Argument
12	Exhibit 70	2012-06-18 Transcript of NSC Oral Argument
13	Exhibit 71	2014-09-18 <i>Franchise Tax Bd. of Cal. v. Hyatt</i> , 130 Nev. 662
14	Exhibit 72	2015-03-23 FTB Petition for Writ of Certiorari
15	Exhibit 73	2015-05-26 Brief in Opposition for Respondent (Petition for Writ of Certiorari)
16	Exhibit 74	2015-06-08 FTB Reply Brief ISO Petition for Writ of Certiorari
17	Exhibit 75	2015-09-03 Petitioner FTB Merits Brief
18	Exhibit 76	2015-10-23 Brief for Respondent Hyatt
19	Exhibit 77	2015-11-23 FTB Reply Brief
20	Exhibit 78	2016-04-19 <i>Franchise Tax Bd. of California v. Hyatt</i> , 136 S. Ct. 1277
21	Exhibit 79	2016-06-24 Order Directing Supplemental Briefing following Mandate from USSC
22	Exhibit 80	2016-08-22 FTB Supplemental Opening Brief following Mandate from USSC
23	Exhibit 81	2016-10-25 Hyatt Supplemental Answering Brief Following Mandate from USSC
24	Exhibit 82	2016-12-05 FTB Supplemental Reply Brief Post-Mandate
25	Exhibit 83	2017-12-26 <i>FTB v. Hyatt</i> , 133 Nev. 826
26	Exhibit 84	2018-03-12 FTB Petition for Writ of Certiorari
27		
28		

Exhibit	Description
Exhibit 85	2018-05-31 Respondent Hyatt Brief in Opposition to FTB Petition for Writ of Certiorari
Exhibit 86	2018-06-06 FTB Reply Brief ISO Petition for Writ of Certiorari
Exhibit 87	2018-06-28 USSC Order List - Granting Cert
Exhibit 88	2018-09-11 FTB Merits Brief
Exhibit 89	2018-11-15 Brief for Respondent Gilbert P. Hyatt
Exhibit 90	2018-12-14 Reply Brief for Petitioner
Exhibit 91	2019-01-15 California Office of Tax Appeals Opinion on Petition for Rehearing - 1991 Tax Year
Exhibit 92	2019-01-15 California Office of Tax Appeals Opinion on Petition for Rehearing - 1992 Tax Year
Exhibit 93	2019-05-13 <i>Franchise Tax Board v. Hyatt</i> , 139 S. Ct. 1485
Exhibit 94	2019-08-05 Order of Remand

Dated this 15th day of October, 2019.

HUTCHISON & STEFFEN, PLLC


 Mark A. Hutchison (4639)
 10080 W. Alta Drive, Suite 200
 Las Vegas, NV 89145

Peter C. Bernhard (734)
 KAEMPFER CROWELL
 1980 Festival Plaza Drive, Suite 650
 Las Vegas, NV 89135

Attorneys for Plaintiff Gilbert P. Hyatt

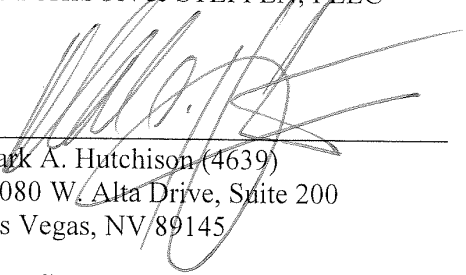
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **APPENDIX OF MATERIALS**
RE CASE PROCEDURAL HISTORY IN SUPPORT OF PLAINTIFF GILBERT P.
HYATT'S PROPOSED FORM OF JUDGMENT filed in District Court Case No. A 382999
does not contain the social security number of any person.

Dated this 15th day of October, 2019.

HUTCHISON & STEFFEN, PLLC



Mark A. Hutchison (4639)
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145

Peter C. Bernhard (734)
KAEMPFER CROWELL
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135

Attorneys for Plaintiff Gilbert P. Hyatt

EXHIBIT 1

FILED

JAN 6 4 41 PM '99

Loretta L. Luman
CLERK

1 COMP
2 Thomas L. Steffen (1300)
3 Mark A. Hutchison (4639)
4 HUTCHISON & STEFFEN
5 530 South Fourth Street
6 Las Vegas, NV 89101
7 (702) 385-2500

8 Attorneys for Plaintiff

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 GILBERT P. HYATT,
12 Plaintiff,

13 v.

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

Case No. *A382999*
Dept. No. *X11*
Docket No. *R*

COMPLAINT

Jury Trial Demanded

**Exempt from Arbitration:
Declaratory Relief, Significant
Public Policy and Amount in Excess
Of \$40,000**

18 Plaintiff, Gilbert P. Hyatt, complains against defendants, and each of them, as follows:

PARTIES

- 19 1. Plaintiff resides in Clark County, Nevada and has done so since September 26, 1991.
- 20 2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a
- 21 governmental agency of the State of California with its principal office located in Sacramento,
- 22 California, and a district office located in Los Angeles, California. The FTB's function is to ensure
- 23 the collection of state income taxes from California residents and from income earned in California
- 24 by non-residents.
- 25 3. The identity and capacities of the defendants designated as Does 1 through 100 are so
- 26 designated by plaintiff because of his intent by this complaint to include as named defendants every
- 27 individual or entity who, in concert with the FTB as an employee, representative, agent or
- 28 independent contractor, committed the tortious acts described in this complaint. The true names

1 and capacities of these Doe defendants are presently known only to the FTB, who committed the
2 tortious acts in Nevada with the assistance of said Doe defendants who are designated by fictitious
3 names only until plaintiff is able, through discovery, to obtain their true identities and capacities;
4 upon ascertaining the true names and capacities of these Doe defendants, plaintiff shall promptly
5 amend this complaint to properly name them by their actual identities and capacities. For pleading
6 purposes, whenever this complaint refers to "defendants," it shall refer to these Doe defendants,
7 whether individuals, corporations or other forms of associations or entities, until their true names
8 are added by amendment along with particularized facts concerning their conduct in the
9 commission of the tortious acts alleged herein.

10 4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting
11 or omitting to act as alleged, acted or omitted to act within the course and scope of their
12 employment or agency, and in furtherance of their employer's or principal's business, whether the
13 employer or principal be FTB or some other governmental agency or employer or principal whose
14 identity is not yet known; and that FTB and defendants were otherwise responsible and liable for
15 the acts and omissions alleged herein.

16 5. This action is exempt from the court-annexed arbitration program, pursuant to Rule 3,
17 because: (1) this is an action for, inter alia, declaratory relief; (2) substantial issues of public policy
18 are implicated concerning the sovereignty of the State of Nevada and the integrity of its territorial
19 boundaries as opposed to governmental agencies of another state who enter Nevada in an effort to
20 extraterritorially, arbitrarily and deceptively enforce their policies, rules and regulations on
21 residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular; and (3) the sums of
22 money and damages involved herein far exceed the \$40,000.00 jurisdictional limit of the arbitration
23 program.

24 6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, and Fifth Causes of
25 Action.

26 SUMMARY OF CLAIMS

27 7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 et seq. to
28 confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and continuing

1 to the present and, correspondingly, his non-residency during said period in California; (2) recovery
2 of compensatory and punitive damages against the FTB and the defendants for invasion of
3 plaintiff's right of privacy resulting from their investigation in Nevada of plaintiff's residency,
4 domicile and place of abode and causing (a) an unreasonable intrusion upon plaintiff's seclusion,
5 (b) an unreasonable publicity given to private facts, and (c) casting plaintiff in a false light; and (3)
6 recovery of compensatory and punitive damages against the FTB and the defendants for their
7 outrageous conduct in regard to their investigation in Nevada of plaintiff's residency, domicile and
8 place of abode. The claims specified in this paragraph constitute five separate causes of action as
9 hereinafter set forth in this complaint.

10 **FACTUAL BACKGROUND**

11 **Plaintiff's Residency in Nevada**

12 8. Plaintiff moved to the State of Nevada, County of Clark, and established full-time
13 residency here on September 26, 1991 and has remained a full-time, permanent resident since that
14 time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is a
15 highly successful inventor. Specifically, plaintiff has been granted numerous important patents for
16 a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the
17 creation and development of his inventions and greatly values his privacy both in his personal life
18 and business affairs. After certain of his important inventions were granted patents in 1990,
19 plaintiff began receiving a great deal of unwanted and unsolicited publicity, notoriety and attention.
20 To greater protect his privacy, to enjoy the social, recreational, and financial advantages Nevada
21 has to offer, and to generally enhance the quality of his life and environment, plaintiff relocated
22 to Nevada on September 26, 1991. This move took place after much consideration and almost an
23 entire year of planning.

24 9. The following events are indicative of the fact that on September 26, 1991, plaintiff
25 commenced both his residency and intent to remain in Nevada, and a continuation of both down
26 to the present: (1) the sale of plaintiff's California home in October 1991; (2) his renting and
27 residing at an apartment in Las Vegas commencing in October 1991 and continuing until April
28 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991, plaintiff

1 registered to vote in Nevada, obtained a Nevada driver's license, and joined a religious
2 organization in Las Vegas; (4) plaintiffs' extensive search, commencing in December 1991, for a
3 new home in Las Vegas, and in the process utilizing the services of various real estate brokers; (5)
4 during the process of finding a home to purchase, plaintiff made numerous offers to buy; (6)
5 plaintiff's purchase of a new home in Las Vegas on April 3, 1992; (7) plaintiff maintained and
6 expanded his business interests from Las Vegas; and (8) plaintiff has, through the years from
7 September 26, 1991 and down to the present, contacted persons in high political office, in the
8 professions, and other walks of life, as a true Nevada resident of some renown would, not
9 concealing the fact of his Nevada residency. In sum, plaintiff has substantial evidence, both
10 testimonial and documentary, in support of the fact of his full-time residency, domicile and place
11 of abode in Nevada commencing on September 26, 1991 and continuing to the present.

12 **The FTB and Defendants' Investigation of Plaintiff in Nevada**

13 10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a Part-
14 Year state income tax return with the State of California for 1991 (the "1991 Return"). Said return
15 reflects plaintiff's payment of state income taxes to California for income earned during the period
16 of January 1 through September 26, 1991.

17 11. In or about June of 1993 — 21 months after plaintiff moved to Nevada — for reasons
18 that have never been specified, but are otherwise apparent, the FTB began an audit of the 1991
19 Return. In or about July of 1993, as part of its audit, the FTB began to investigate plaintiff by
20 making or causing to be made numerous and continuous contacts directed at Nevada. Initially, the
21 FTB sent requests to Nevada government agencies for information concerning plaintiff — a paper
22 foray that continued for the next several years.

23 12. In or about January of 1995, FTB auditors began planning a trip to Las Vegas, the
24 purpose of which was to enhance and expand the scope of their investigation of plaintiff. In March
25 of 1995, the FTB and defendants commenced a "hands on" investigation of plaintiff that included
26 unannounced confrontations and questioning about private details of plaintiff's life. These
27 intrusive activities were directed at numerous residents of Nevada, including plaintiff's current and
28 former neighbors, employees of businesses and stores frequented by plaintiff, and alas, even his

1 trash collector!

2 13. Both prior and subsequent to the intrusive, "hands on" investigations described in
3 paragraph 12, above, the FTB propounded to numerous Nevada business and professional entities
4 and individual residents of Nevada "quasi-subpoenas" entitled "Demand to Furnish Information"
5 which cited the FTB's authority **under California law** to issue subpoenas and demanded that the
6 recipients thereof produce the requested information concerning plaintiff. Plaintiff is informed and
7 believes, and therefore alleges, that the FTB never sought permission from a Nevada court or any
8 Nevada government agency to send such "quasi-subpoenas" into Nevada where, induced by the
9 authoritative appearance of the inquisitions, many Nevada residents and business entities did
10 respond with answers and information concerning plaintiff.

11 14. Subsequent to the documentary and "hands on" forays into Nevada by the FTB and
12 defendants, the FTB also sent correspondence, rather than "quasi-subpoenas," to Nevada Governor
13 Bob Miller, Nevada Senator Richard Bryan and other government officials and agencies seeking
14 information regarding plaintiff and his residency in Nevada. Plaintiff is further informed and
15 believes, and therefore alleges, that the FTB intentionally sent unauthorized "quasi-subpoenas"
16 (i.e., "Demand to Furnish Information") to private individuals and businesses in a successful
17 attempt to coerce their cooperation through deception and the pretense of an authoritative demand,
18 while on the other hand, sending respectful letter requests for information to Nevada governmental
19 agencies and officials who undoubtedly would have recoiled at the attempt by the FTB to exercise
20 extraterritorial authority in Nevada through the outrageous means of the bogus subpoenas.

21 15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious
22 forays into Nevada, nor was plaintiff ever aware that such information was being sought in such
23 a manner until well after the "quasi-subpoenas" had been issued and the responses received.
24 Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to
25 investigate plaintiff or the FTB's correspondence with Nevada government agencies and officials
26 until well after such contacts had taken place. Upon information and belief, plaintiff alleges that
27 all of the above-described activities were calculated to enable the FTB to develop a colorable basis
28 for assessing a huge tax against plaintiff despite the obvious fact that the FTB was proceeding

1 against a bona fide resident of Nevada.

2 Assessment for 1991

3 16. On April 23, 1996, after the FTB had completed its audit and investigation of the 1991
4 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are owed)
5 to plaintiff in which the FTB claimed plaintiff was a resident of California — not Nevada — until
6 April 3, 1992. The FTB therefore assessed plaintiff California state income tax for the period of
7 September 26 through December 31 of 1991 in a substantial amount. Moreover, the FTB also
8 assessed a penalty against plaintiff in an amount almost equal to the assessed tax after summarily
9 concluding that plaintiff's non-payment of the assessed tax, based upon his asserted residency in
10 Nevada and non-residency in California, was fraudulent.

11 17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident
12 of Nevada should not be forced into a California forum to seek relief from the unjust and tortious
13 attempts by the FTB to extort unlawful taxes from this Nevada resident. Plaintiff avers that the
14 manufactured issue of his residency in Nevada for the period of September 26 through December
15 31 of 1991 should be determined in Nevada, the state of plaintiff's residence. The FTB is in effect
16 attempting to impose an "exit tax" on plaintiff by coercing him into administrative procedures and
17 possible future court action in California. The FTB has arbitrarily, maliciously and without support
18 in law or fact, asserted that plaintiff remained a California resident until he purchased and closed
19 escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTB's prolonged and
20 monumental efforts to find a way — any way — to effectively assess additional income taxes
21 against plaintiff after he changed his residency from California to Nevada is based upon
22 governmental greed arising from the FTB's eventual awareness of the financial success plaintiff
23 has realized since leaving California and becoming a bona fide resident of the State of Nevada.
24 The aforesaid date of Nevada residency accepted by the FTB with respect to the 1991 Report is
25 over six months after plaintiff moved to Nevada with the intent to stay and began, he thought, to
26 enjoy all the privileges and advantages of residency in his new state.

27 The FTB's Continuing Pursuit of Plaintiff in Nevada

28 18. On or about April 1, 1996, plaintiff received formal notice that the FTB had

1 commenced an investigation into the 1992 tax year and that its tentative determination was that
2 plaintiff would also be assessed California state income taxes for the period of January 1 through
3 April 3 of 1992.

4 19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received notices
5 from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in regard to the
6 1992 tax year in which it will seek back taxes from plaintiff for income earned during the period
7 of January 1 through April 2, 1992 and in addition would seek penalties for plaintiff's failure to
8 file a state income tax return for 1992.

9 20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax
10 year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such
11 assessments by the FTB always settle at this stage as taxpayers do not want to risk their personal
12 financial information being made public. Plaintiff understood this statement to be a strong
13 suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes
14 and penalties. Plaintiff refused, and continues to refuse to do so, as he has not been a resident of
15 California since his move to Nevada on September 26, 1991, and it remains clear to him that the
16 FTB is engaging in its highhanded tactics to extort "taxes and penalties" from him that he does not
17 legally or morally owe.

18 21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed
19 Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff
20 became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of Proposed
21 Assessment that "We [the FTB] consider you to be a resident of this state [California] through
22 April 2, 1992," such notice proceeded to assess California state income taxes on plaintiff's income
23 for the entire year of 1992. Specifically, the FTB assessed plaintiff state income taxes for 1992
24 in an amount five times greater than that for 1991, assessed plaintiff a penalty almost as great as
25 the assessed tax for alleged fraud in claiming he was a Nevada resident during 1992, and stated that
26 interest accrued through August 14, 1997 (roughly the equivalent of the penalty) was also owed
27 on the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff
28 a bill for the entire 1992 tax year, which was fourteen times the amount of tax it initially assessed

1 for 1991, and in so doing asserted that plaintiff was "a California resident for the entire year."
2 Without explanation the FTB ignored its earlier finding and written acknowledgment that plaintiff
3 was a Nevada resident at least as of April 3, 1992. This outrage is a transparent effort to extort
4 substantial sums of money from a Nevada resident.

5 22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage
6 in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within the State of
7 Nevada in an effort to conjure up a colorable basis for justifying its frivolous, extortionate Noticed
8 of Proposed Assessment for the 1992 tax year.

9 23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue to
10 assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996 and beyond
11 since the FTB has now disregarded its own conclusion regarding plaintiff's residency in Nevada
12 as of April 3, 1992, and is bent on charging him with a staggering amount of taxes, penalties and
13 interest irrespective of his status as a bona fide resident of Nevada. It appears from its actions
14 concerning plaintiff, that the FTB has embraced a new theory of liability that in effect declares
15 "once a California resident always a California resident" as long as the victim continues to generate
16 significant amounts of income. Thus, the FTB has raised an invisible equivalent of the iron curtain
17 that prohibits such residents from ever leaving the taxing jurisdiction of the FTB.

18 The FTB's Motive

19 24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no credible,
20 admissible evidence that plaintiff was a California resident at anytime after September of 1991,
21 despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has acknowledged
22 in its own reports that plaintiff sold his California home on October 1, 1991, that plaintiff rented
23 an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a
24 home in Las Vegas in April 1992.

25 25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the
26 FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff
27 moved from California to Nevada an FTB investigator read a magazine article about plaintiff's
28 wealth and the FTB thereafter launched its investigation in the hope of extracting a significant

1 settlement from plaintiff. Plaintiff is further informed and believes, and therefore alleges, that the
2 FTB has assessed a fraud penalty against plaintiff for the 1991 tax year and issued a Notice of
3 Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for the
4 same year to intimidate plaintiff and coerce him into paying some significant amount of tax for
5 income earned after September 26, 1991, despite its awareness that plaintiff actually became a
6 Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing
7 his hard-earned wealth despite having no lawful basis for doing so, constitutes malice and
8 oppression.

9 **Jurisdiction**

10 26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm"
11 statute, NRS 14.065 et seq., because of the FTB's tortious extraterritorial contacts and investigatory
12 conduct within the State of Nevada ostensibly as part of its auditing efforts to undermine plaintiff's
13 status as a Nevada resident, but in reality to create a colorable basis for maintaining that plaintiff
14 continued his residency in California during the period September 26, 1991 to December 31, 1991
15 and beyond.

16 27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern and
17 practice of entering into Nevada to investigate Nevada residents who were formerly residents of
18 California, and then assessing such residents California state income taxes for time periods
19 subsequent to the date when such individuals moved to and established residency in Nevada.

20 **FIRST CAUSE OF ACTION**

21 **(For Declaratory Relief)**

22 28. Plaintiff realleges and incorporates herein by reference each and every allegation
23 contained in paragraphs 1 through 27 above, as though set forth herein verbatim.

24 29. Pursuant to California law, in determining whether an individual was a resident of
25 California for a certain time period thereby making such individual's income subject to California
26 state income tax during such period, the individual must have been either domiciled in California
27 during such period for "other than a temporary or transitory purpose." See Cal. Rev. & Tax Code
28 § 17014. The FTB's own regulations and precedents require that it apply certain factors in

1 determining an individual's domicile and/or whether the individual's presence in California (or
2 outside of California) was more than temporary or transitory.

3 (a) Domicile.

4 Domicile is determined by the individual's physical presence in California with
5 **intent to stay** or if absent temporarily from California an **intent to return**. Such intent is
6 determined by the acts and conduct of the individual such as: (1) where the individual is
7 registered to vote and votes; (2) location of the individual's permanent home; (3)
8 comparative size of homes maintained by the individual in different states; (4) where the
9 individual files federal income tax returns; (5) comparative time spent by the individual in
10 different states; (6) cancellation of the individual's California homeowner's property tax
11 exemption; (7) obtaining a driver's license from another state; (8) registering a car in
12 another state; (9) joining religious, business and/or social organizations in another state;
13 and (10) establishment of a successful business in another state by an individual who is self
14 employed.

15 (b) Temporary or Transitory Purpose.

16 The following contacts which are similar although not identical to those used to
17 determine domicile are important in determining whether an individual was in California
18 (or left California) for a temporary or transitory purpose: (1) physical presence of the
19 individual in California in comparison to the other state or states; (2) establishment of a
20 successful business in another state by an individual who is self employed; (3) extensive
21 business interest outside of California and active participation in such business by the
22 individual; (4) banking activity in California by the individual is given some, although not
23 a great deal of, weight; (5) rental of property in another state by the individual; (6)
24 cancellation of the individual's California homeowner's property tax exemption; (7) hiring
25 professionals by the individual located in another state; (8) obtaining a driver's license from
26 another state; (9) registering a car in another state; (10) joining religious, business and/or
27 social organizations in another state; and (11) where the individual is registered to vote and
28 votes.

1 30. The FTB's assessment of taxes and a penalty for 1991 is based upon the FTB's
2 conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3,
3 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such
4 a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which
5 contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and
6 precedents require it to consider. Such facts include, but are not limited to, the following: (1)
7 plaintiff sold his California home on October 1, 1991; (2) plaintiff rented and resided at an
8 apartment in Las Vegas from October 1, 1991 until April of 1992; (3) plaintiff registered to vote,
9 obtained a Nevada's driver's license (thereby relinquishing his California driver's license), and
10 joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his
11 California home owner's exemption effective October 1, 1991; (5) plaintiff began actively
12 searching for a house to buy in Las Vegas, and submitted numerous offers on houses in Las Vegas,
13 commencing in December of 1991; (6) plaintiff's offer to purchase a home in Las Vegas was
14 accepted in March of 1992 and escrow closed on such purchase on April 3, 1992; and (7) plaintiff's
15 new home in Las Vegas was substantially larger than the home in Southern California, which he
16 sold in October of 1991.

17 31. An actual controversy exists as to whether plaintiff was a full-time resident of Nevada
18 — not California — commencing on September 26, 1991 through December 31, 1991 and
19 continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either
20 Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout the
21 referenced periods and down to the present, and that the FTB ignored its own regulations and
22 precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax
23 obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB had no
24 authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to
25 propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the
26 cooperation of said Nevada residents and businesses through an unlawful and tortious deception,
27 to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges, that
28 the FTB contends in all respects to the contrary.

1 32. Plaintiff therefore requests judgment of this Court declaring and confirming plaintiff's
2 status as a full-time, bona fide resident of the State of Nevada effective from September 26, 1991
3 to the present; and for judgment declaring the FTB's extraterritorial investigatory excursions into
4 Nevada, and the submission of "quasi-subpoenas" to Nevada residents without approval from a
5 Nevada court or governmental agency, as alleged above, to be without authority and violative of
6 Nevada's sovereignty and territorial integrity.

7
8 **SECOND CAUSE OF ACTION**

9 **(For Invasion of Privacy — Unreasonable Intrusion Upon The Seclusion of Another)**

10 33. Plaintiff realleges and incorporates herein by reference each and every allegation
11 contained in paragraphs 1 through 27, and 29 through 31, above, as though set forth herein
12 verbatim.

13 34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses,
14 government officials and others within Nevada with whom plaintiff has had and would reasonably
15 expect in the future to have social or business interactions, were approached and questioned by the
16 FTB and defendants who disclosed or implied that plaintiff was under investigation in California,
17 and otherwise acted in such a manner as to cause doubts to arise concerning plaintiff's integrity and
18 moral character. Moreover, as part of the audit/investigation in regard to the 1991 Return, plaintiff
19 turned over to the FTB highly personal and confidential information with the understanding that
20 it would remain confidential. The FTB even noted in its own internal documentation that plaintiff
21 had a significant concern in regard to the protection of his privacy in turning over such information.
22 At the time this occurred, plaintiff was still hopeful that the FTB was actually operating in good
23 faith, a proposition that, as noted throughout this complaint, proved to be utterly false.

24 35. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants
25 nevertheless violated plaintiff's right to privacy in regard to such information by revealing it to
26 third parties and otherwise conducting an investigation in Nevada through which the FTB and
27 defendants revealed to third parties personal and confidential information, which plaintiff had every
28 right to expect would not be revealed to such parties.

1 36. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants'
2 extensive probing and investigation of plaintiff, including their actions both occurring within
3 Nevada and directed to Nevada from California, were performed with the intent to harass, annoy,
4 vex, embarrass and intimidate plaintiff such that he would eventually enter into a settlement with
5 the FTB concerning his residency during the disputed time periods and the taxes and penalties
6 allegedly owed. Such conduct by the FTB and defendants did in fact harass, annoy, vex and
7 embarrass Hyatt, and syphon his time and energies from the productive work in which he is
8 engaged.

9 37. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants
10 through their investigative actions, and in particular the manner in which they were carried out in
11 Nevada, intentionally intruded into the solitude and seclusion which plaintiff had specifically
12 sought by moving to Nevada. The intrusion by the FTB and defendants was such that any
13 reasonable person, including plaintiff, would find highly offensive.

14 38. As a direct, proximate, and foreseeable result of the FTB and defendants'
15 aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential
16 damages in a total amount in excess of \$10,000.

17 39. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's
18 privacy was intentional, malicious, and oppressive in that such invasion was despicable conduct
19 by the FTB and defendants entered into with a willful and conscious disregard of plaintiff's rights,
20 and the efficacious intent to cause him injury. Plaintiff is therefore entitled to an award of punitive
21 damages against the FTB and defendants in an amount sufficient to satisfy the purposes for which
22 such damages are awarded.

23 **THIRD CAUSE OF ACTION**

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

25 40. Plaintiff realleges and incorporates herein by reference each and every allegation
26 contained in paragraphs 1 through 27, 29 through 31, and 34 through 37, above, as though set forth
27 herein verbatim.

28 41. As set forth above, plaintiff revealed to the FTB highly personal and confidential

1 information at the request of the FTB as an ostensible part of its audit and investigation into
2 plaintiff's residency during the disputed time periods. Plaintiff had a reasonable expectation that
3 said information would be kept confidential and not revealed to third parties and the FTB and
4 defendants knew and understood that said information was to be kept confidential and not revealed
5 to third parties.

6 42. The FTB and defendants, without necessity or justification, nevertheless disclosed to
7 third parties in Nevada certain of plaintiff's personal and confidential information which had been
8 cooperatively disclosed to the FTB by plaintiff only for the purposes of facilitating the FTB's
9 legitimate auditing and investigative efforts.

10 43. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion
11 of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in
12 excess of \$10,000.

13 44. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's
14 privacy was intentional, malicious, and oppressive in that such invasion constituted despicable
15 conduct by the FTB and defendants entered into with a willful and conscious disregard of the rights
16 of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an
17 amount sufficient to satisfy the purposes for which such damages are awarded.

18 **FOURTH CAUSE OF ACTION**

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

20 45. Plaintiff realleges and incorporates herein by reference each and every allegation
21 contained in paragraphs 1 through 27, 29 through 31, 34 through 37, and 41 and 42, above, as if
22 set forth herein verbatim.

23 46. By conducting interviews and interrogations of Nevada residents and by issuing
24 unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of
25 plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by stating or
26 insinuating to said Nevada residents that plaintiff was under investigation in California, thereby
27 falsely portraying plaintiff as having engaged in illegal and immoral conduct, and decidedly casting
28 plaintiff's character in a false light.

1 47. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast
2 plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those who
3 know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature and scope
4 of his work. Such publicity of the investigation was offensive and objectionable to plaintiff and
5 was carried out for other than honorable, lawful, or reasonable purposes. Said conduct by the FTB
6 and the defendants was calculated to harm, vex, annoy and intimidate plaintiff, and was not only
7 offensive and embarrassing to plaintiff, but would have been equally so to any reasonable person
8 of ordinary sensibilities similarly situated, as the conduct could only serve to damage plaintiff's
9 reputation.

10 48. As a direct, proximate, and foreseeable result of the FTB and defendants'
11 aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential
12 damages in a total amount in excess of \$10,000.

13 49. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's
14 privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable
15 conduct by the FTB and defendants, entered into with a willful and conscious disregard of the
16 rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in
17 an amount sufficient to satisfy the purposes for which such damages are awarded.

18 **FIFTH CAUSE OF ACTION**

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

20 50. Plaintiff realleges and incorporates herein by reference each and every allegation
21 contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47,
22 above, as if set forth herein verbatim.

23 51. The clandestine and reprehensible manner in which the FTB and defendants carried out
24 their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the
25 State of California, but without permission from the State of Nevada, and the FTB and defendants'
26 apparent intent to continue to investigate and assess plaintiff staggeringly high California state
27 income taxes, interest, and penalties for the entire year of 1992 — and possibly continuing into
28 future years — despite the FTB's own finding that plaintiff was a Nevada resident at least as of

1 April of 1992, was, and continues to be, extreme, oppressive and outrageous conduct. The FTB
2 has, in every sense, sought to hold plaintiff hostage in California, disdaining and abandoning all
3 reason in its reprehensible, all-out effort to extort significant amounts of plaintiff's income without
4 a basis in law or fact. Plaintiff is informed and believes, and therefore alleges, that the FTB and
5 defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth
6 concerning his place of residency, but the true purpose of which was to so harass, annoy,
7 embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as
8 to coerce him into paying significant sums to the FTB irrespective of his demonstrably bona fide
9 residence in Nevada throughout the disputed periods. As a result of such extremely outrageous and
10 oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief,
11 humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably
12 sensitive person would feel if subjected to equivalent unrelenting, outrageous personal threats and
13 insults by such powerful and determined adversaries.

14 52. As a direct, proximate, and foreseeable result of the FTB and defendants'
15 aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and
16 consequential damages in a total amount in excess of \$10,000.

17 53. Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting,
18 and outrageous conduct was intentional, malicious, and oppressive in that it was despicable
19 conduct by the FTB and defendants, entered into with a willful and conscious disregard of
20 plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in
21 an amount sufficient to satisfy the purposes for which such damages are awarded.

22 WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants
23 as follows:

24 **FIRST CAUSE OF ACTION**

25 1. For judgment declaring and confirming that plaintiff is a bona fide resident of the State
26 of Nevada effective as of September 26, 1991 to the present;

27 2. For judgment declaring that the FTB has no lawful basis for continuing to investigate
28 plaintiff in Nevada concerning his residency between September 26, 1991 through December 31,

1 1991 or any other subsequent period down to the present, and declaring that the FTB had no right
2 or authority to propound or otherwise issue a "Demand to Furnish Information" or other quasi
3 subpoenas to Nevada residents and businesses seeking information concerning plaintiff;

4 3. For costs of suit;

5 4. For reasonable attorneys' fees; and

6 5. For such other and further relief as the Court deems just and proper.

7 **SECOND CAUSE OF ACTION**

8 1. For actual and consequential damages in a total amount in excess of \$10,000;

9 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
10 damages are awarded;

11 3. For costs of suit;

12 4. For reasonable attorneys' fees; and

13 5. For such other and further relief as the Court deems just and proper.

14 **THIRD CAUSE OF ACTION**

15 1. For actual and consequential damages in a total amount in excess of \$10,000;

16 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
17 damages are awarded;

18 3. For costs of suit;

19 4. For reasonable attorneys fees; and

20 5. For such other and further relief as the Court deems just and proper.

21 **FOURTH CAUSE OF ACTION**

22 1. For actual and consequential damages in a total amount in excess of \$10,000;

23 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
24 damages are awarded;

25 3. For costs of suit;

26 4. For reasonable attorneys fees; and

27 5. For such other and further relief as the Court deems just and proper.

28 ...

1 **FIFTH CAUSE OF ACTION**

2 1. For actual and consequential damages in a total amount in excess of \$10,000;

3 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
4 damages are awarded;

5 3. For costs of suit;

6 4. For reasonable attorneys' fees; and

7 5. For such other and further relief as the Court deems just and proper.

8 DATED this 6th day of January, 1998.

9 HUTCHISON & STEFFEN

10
11 By: 

12 Thomas L. Steffen
13 Mark A. Hutchison
14 530 South 4th Street
15 Las Vegas, Nevada 89101

16 Attorneys for Plaintiff
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 2

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2300 WEST SAHARA AVENUE • NO. 10 SUITE 1000
LAS VEGAS NEVADA 89102-4354
(702) 873-4100

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

GILBERT P. HYATT,

Plaintiff,

vs.

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

Defendants.

CV-S-98-00284-HDM (LRL)

PETITION FOR REMOVAL

TO: Plaintiff Gilbert P. Hyatt and his counsel of record, Hutchison & Steffen

TO: Clerk of the Court,
United States District Court for the
District of Nevada, Southern Division

Defendant FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA ("FTB"), provides notice, pursuant to 28 USC §§ 1441 through 1446, the action filed by Plaintiff GILBERT P. HYATT ("Hyatt") on January 6, 1998, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, Department XII, Case No. A382999, is hereby removed to this Court. The grounds for removal are as follows:

1. Service of a Summons and Complaint were made upon FTB on January 16, 1998. FTB had not previously received any notice of the claims contained in Plaintiff's Complaint by any

RECEIVED
AND FILED
FEB 17 3 50 PM '98
LANCE S. WILSON
CLERK
BY _____
DEPUTY

AA000780

1 other means. This Petition is therefore timely filed pursuant to 28 USC § 1446 and FRCP 6(a). See
2 generally, Boulet v. Millers Mut. Ins. Assoc., 36 F.R.D. 99 (D.C. Minn. 1964); Johnson v. Harper,
3 66 F.R.D. 103 (E.D. Tenn. 1975).

4 2. The Summons and Complaint described above constitute all of the documents and/or
5 pleadings served by Plaintiff in the above-mentioned state court action. Copies of those pleadings
6 are attached hereto as Exhibits "A" and "B", respectively, and are filed herewith pursuant to 28 USC
7 § 1446 (a). Defendant FTB is aware and knows of no other defendant who/which has been served
8 with a Summons and Complaint in this matter because, other than DOES, no other defendants were
9 named in Plaintiff's state court action.

10 3. This action arises out of Plaintiff's past residency and earning of income in the State
11 of California. Plaintiff alleges, in general, he was a resident of Nevada, rather than California, during
12 a certain period of time so as to eliminate any obligation on his part to pay California state income
13 tax for that period. Plaintiff also generally alleges in the course of investigating his income and
14 residency, Defendant FTB improperly and illegally pursued him and committed various torts, under
15 the general theory of invasion of privacy, in Nevada. Specifically, Plaintiff has alleged as follows as
16 quoted from the paragraphs indicated (see Exhibit "B"):

17 Par. 5: "...substantial issues of public policy are implicated concerning the sovereignty
18 of the State of Nevada and the integrity of its territorial boundaries as opposed to
19 governmental agencies of another state who enter Nevada in an effort to
20 extraterritorially...enforce their policies, rules and regulations on residents of Nevada
in general, and plaintiff Gilbert P. Hyatt in particular;..." (Emphasis added.)

21 Par. 7: "Plaintiff...seeks: (1) declaratory relief...to confirm plaintiff's status as a
22 Nevada resident effective as of September 26, 1991 and continuing to the present and,
23 correspondingly, his non-residency during said period in California; (2) recovery of
24 compensatory and punitive damages against the FTB and the defendants for invasion
of plaintiff's right of privacy resulting from their investigation in Nevada of plaintiff's
residency, domicile and place of abode..." (Emphasis added.)

25 Par. 11: "...the FTB began an audit of the 1991 return...as part of its audit, the FTB
26 began to investigate plaintiff by making or causing to be made numerous and
27 continuous contacts directed at Nevada..."
28

1 Par. 22: "Plaintiff...alleges, that the FTB intends to engage in...extraterritorial
2 investigations directed at plaintiff within the State of Nevada..."

3 Par. 23: "Plaintiff...alleges, that the FTB may continue to assess plaintiff California
4 State Income Taxes...irrespective of his status as a bonafide resident of Nevada...the
5 FTB has embraced a new theory of liability that in effect declares "once a California
6 resident always a California resident"... the FTB has raised an invisible equivalent of
the iron curtain that prohibits such residents from ever leaving the taxing jurisdiction
of the FTB."

7 Part. 31: "An actual controversy exists as to whether plaintiff was a full-time resident
8 of Nevada - not California - commencing on September 26, 1991 through December
9 31, 1991 and continuing thereafter... Plaintiff contends...that the FTB has no
10 jurisdiction to impose a tax obligation on plaintiff during the contested periods.
11 Plaintiff also contends that the FTB had no authority to conduct an extraterritorial
12 investigation of plaintiff in Nevada... (Emphasis added.)

13 Par. 32: "Plaintiff therefore requests judgment of this Court declaring and confirming
14 plaintiff's status as a full-time bonafide resident of the State of Nevada effective from
15 September 26, 1991 to the present; and for judgment declaring that FTB's
16 extraterritorial investigatory excursions into Nevada...without approval from a
17 Nevada Court or governmental agency...to be without authority and violative of
18 Nevada sovereignty and territorial integrity." (Emphasis added.)

19 Par. 33: "Plaintiff's prayer for judgment against the FTB and its officers and
20 employees:

- 21 (1) "For judgment and declaring and confirming that plaintiff is a bonafide
22 resident of the State of Nevada effective as of December 26, 1991 to the
23 present;
- 24 (2) "For judgment declaring that the FTB has no lawful basis for continuing to
25 investigate plaintiff in Nevada concerning his residency between September
26 26, 1991 through December 31, 1991 or any other subsequent period down
27 to the present, and declaring that the FTB has no right or authority to
28 propound or otherwise issue a "demand" to furnish information"...to Nevada
residents and businesses seeking information concerning plaintiff. (Emphasis
added.)

4. The Federal Constitution presupposes authority in states to lay taxes. See generally,
Penn Dairies v. Milk Control Comm. of Penn., 318 U.S. 261, 270-71 (1943). This authority is an
"inherent power" of the states in our federal democracy. See generally, Application of Kaul, 933
P.2d 717, 725 (Kan. 1997). A state is free to exercise its taxing power unless there is some direct

1 and substantial interference with a federal right. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522,
2 526-27 (1959). Specifically, a state's right to assess, levy and collect income taxes for use in the
3 conduct of its governmental operations is "an essential attribute of its sovereignty", subject to the
4 constraints of the Federal Constitution. State Bd. Of Equal. v. American Airlines, 773 P.2d 1033,
5 1043 (Colo. 1989), cert. denied, United Air Lines, Inc. v. Bd. Of Assessment Appeals of Colo., 493
6 U.S. 851; see also, Commonwealth Edison Co. v. State, 615 P.2d 847, 861 (Mont. 1980), probable
7 juris. noted, 449 U.S. 1033, aff'd, 453 U.S. 609, reh'g denied, 453 U.S. 927.

8
9 Though Plaintiff attempts to disguise his causes of action with artful pleading, the face
10 of his Complaint reveals the very premise of those causes is an assertion that the Federal Constitution
11 limits the sovereign right of the State of California to even investigate Plaintiff's liability for California
12 state income taxes. He is also asserting a federal constitutional right to have the Nevada court
13 essentially determine whether he is liable for California income taxes. Finally, Plaintiff's causes of
14 action, if heard, would improperly infringe upon the State of California's inherent power and
15 sovereign right, under the Federal Constitution, to assess, levy and collect state income taxes. Since
16 these federal constitutional issues are the very premise of Plaintiff's causes of action, Plaintiff's action
17 is removable to this Court. See 28 USC § 1441 (b).

18 5. In Plaintiff's state court Complaint, he alleges current residency in Clark County,
19 Nevada. Venue is therefore proper in the Southern Division of the United States District Court,
20 District of Nevada. See Exhibit "B", par. 1.

21 6. Immediately following the filing of this Petition for Removal, Defendant FTB will file
22 a "Notice of Filing of Petition for Removal" with the Clerk of the Eighth Judicial District Court of
23 the State of Nevada in and for the County of Clark, Department No. XII, to which will be attached
24 a copy of this Petition, and serve those pleadings on Plaintiff's attorneys of record in order to affect
25 removal and halt that state court proceeding. Thereafter, Defendant FTB will file an "Affidavit of
26 Filing" in this Court confirming that filing and the service of both the "Notice of Filing" and "Petition
27 for Removal" on Plaintiff's counsel.
28

1 WHEREFORE, Defendant FTB respectfully requests Plaintiff and his attorneys take notice
2 their state court action has been removed, without waiver of any procedural or substantive defense,
3 including, but not limited to, the state court's lack of personal jurisdiction over FTB, from the Eighth
4 Judicial District Court of the State of Nevada in and for the County of Clark, Department No. XII,
5 to the United States District Court for the District of Nevada, Southern Division.

6 Dated this 17th day of February, 1998.

7 McDONALD CARANO WILSON McCUNE
8 BERGIN FRANKOVICH & HICKS LLP

9
10 By: 

11 Thomas R. C. Wilson, Esq.
12 Matthew C. Addison, Esq.
13 Bryan R. Clark, Esq.
14 2300 West Sahara Avenue, Suite 1000
15 Las Vegas, Nevada 89102
16 Attorneys for Defendant FTB
17
18
19
20
21
22
23
24
25
26
27
28

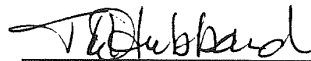
CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP and that on February 17, 1998, I served the within *PETITION FOR REMOVAL*, together with the exhibits thereto, on the parties in said case via facsimile (702) 385-3059 and by mailing a true copy thereof via U.S. first class, postage pre-paid at Las Vegas, Nevada enclosed in sealed envelopes addressed as follows :

Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
Hutchison & Steffen
530 South Fourth Street
Las Vegas, NV 89101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 17, 1998, at Las Vegas, Nevada.



An employee of McDonald Carano Wilson McCune
Bergin Frankovich & Hicks, LLP

EXHIBIT A

AA000786

[EPT9 ON X8/XL] 09:07 TEL 86/22/10

01/21/98 WED 11:15 FAX

A Bus & Tax

H

0004

01/28/98 11:19

FTB-LEGAL - 86478134

NO. 187

082

Served on me
1/28/98 1:54 PM (R)**SUMM**

Thomas L. Steffen (1300)
 Mark A. Hutchison (4639)
HUTCHISON & STEFFEN
 530 South Fourth Street
 Las Vegas, Nevada 89101
 (702) 385-2500 - Office
 (702) 385-3059 - Facsimile

Attorneys for Plaintiff

DISTRICT COURT**CLARK COUNTY, NEVADA****GILBERT P. HYATT,**

Plaintiff,

v.

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

Defendants.

Case No.
 Dept. No.
 Docket No.

A382999
 x11
 R

SUMMONS

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU
 WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS.
 READ THE INFORMATION BELOW.**

TO THE DEFENDANT: A civil Complaint has been filed by the plaintiff against you for the relief set forth in the Complaint.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

1. If you intend to defend this lawsuit, within 20 days after this Summons is

18419 ON XN/XLI 09:01 AM 88/22/10

01/21/98 WED 11:18 FAX

A

BUS & TAX

B

01/20/98

11:19

FTB-LEGAL + 86478134

0005

NO. 107

003

served on you exclusive of the day of service, you must do the following:

2. File with the Clerk of this court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.

a. Serve a copy of your response upon the attorney whose name and address is shown below.

3. Unless you respond, your default will be entered upon application for the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

4. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

Issued at the direction of:

Mark A. Hutchison
Hutchison & Steffen
510 South Fourth Street
Las Vegas, NV 89101

By:

Attorney for Plaintiff

LORETTA BOWMAN,
CLERK OF COURT

By:

ELAINE YORK

JAN 10 1997

DEPUTY CLERK

County Courthouse

200 South Third Street

Las Vegas, Nevada 89155

EXHIBIT B

[DATE ON FILE] 09: HL 86/ZZ/10
01/21/98 WED 11:18 FAX

A Bus & TAX B

01/22/98

11:19

FTP-LEGAL - 95478134

NO. 127

0006

084

FILED

JAN 6 4 42 PM '98

John L. L...
CLERK

1 COMP
2 Thomas L. Steffen (1300)
3 Mark A. Hutchison (4639)
4 HUTCHISON & STEFFEN
5 530 South Fourth Street
6 Las Vegas, NV 89101
7 (702) 385-3500
8
9 Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT.

Plaintiff,

v.

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

Defendants.

Case No. *A582999*
Dept. No. *X11*
Docket No. *R*

COMPLAINT

Jury Trial Demanded

Exempt from Arbitration:
Declaratory Relief, Significant
Public Policy and Amount in Excess
Of \$40,000

Plaintiff, Gilbert P. Hyatt, complains against defendants, and each of them, as follows:

PARTIES

1. Plaintiff resides in Clark County, Nevada and has done so since September 26, 1991.
2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and a district office located in Los Angeles, California. The FTB's function is to ensure the collection of state income taxes from California residents and from income earned in California by non-residents.
3. The identity and capacities of the defendants designated as Does 1 through 100 are so designated by plaintiff because of his intent by this complaint to include as named defendants every individual or entity who, in concert with the FTB as an employee, representative, agent or independent contractor, committed the tortious acts described in this complaint. The true names

HUTCHISON
& STEFFEN
530 S. FOURTH STREET
LAS VEGAS, NV 89101
(702) 385-3500
FAX (702) 385-3500

01/21/98 WUD 11:16 FAX 01/22/98

A BUS & TAX B

4007

01/20/98 11:20 FILE-LEGAL - 06470134

NO. 107 005

1 and capacities of these Doe defendants are presently known only to the FTB, who committed the
2 tortious acts in Nevada with the assistance of said Doe defendants who are designated by fictitious
3 names only until plaintiff is able, through discovery, to obtain their true identities and capacities;
4 upon ascertaining the true names and capacities of these Doe defendants, plaintiff shall promptly
5 amend this complaint to properly name them by their actual identities and capacities. For pleading
6 purposes, whenever this complaint refers to "defendants," it shall refer to these Doe defendants,
7 whether individuals, corporations or other forms of associations or entities, until their true names
8 are added by amendment along with particularized facts concerning their conduct in the
9 commission of the tortious acts alleged herein.

4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting or omitting to act as alleged, acted or omitted to act within the course and scope of their employment or agency, and in furtherance of their employer's or principal's business, whether the employer or principal be FTB or some other governmental agency or employer or principal whose identity is not yet known; and that FTB and defendants were otherwise responsible and liable for the acts and omissions alleged herein.

5. This action is exempt from the court-annexed arbitration program, pursuant to Rule 3, because: (1) this is an action for, inter alia, declaratory relief; (2) substantial issues of public policy are implicated concerning the sovereignty of the State of Nevada and the integrity of its territorial boundaries as opposed to governmental agencies of another state who enter Nevada in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules and regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular; and (3) the sums of money and damages involved herein far exceed the \$40,000.00 jurisdictional limit of the arbitration program.

24 6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, and Fifth Causes of
25 Action.

SUMMARY OF CLAIMS

27 7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 et seq. to
28 confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and continuing

MUTEMION
DE STEFFEN
200 E. 7TH ST. ST. LOUIS, MO. 63101
TEL: 363-4222

101/21/98 WED 11:17 FAX
 (877) ON X11 09 THU 88/22/10

A Bus & Tax

B

0008

21/22/98

11:28

FTB-LE99L - 66478134

NO. 127

006

1 to the present and, correspondingly, his non-residency during said period in California; (2) recovery
 2 of compensatory and punitive damages against the FTB and the defendants for invasion of
 3 plaintiff's right of privacy resulting from their investigation in Nevada of plaintiff's residency,
 4 domicile and place of abode and causing (a) an unreasonable intrusion upon plaintiff's seclusion,
 5 (b) an unreasonable publicity given to private facts, and (c) casting plaintiff in a false light; and (3)
 6 recovery of compensatory and punitive damages against the FTB and the defendants for their
 7 outrageous conduct in regard to their investigation in Nevada of plaintiff's residency, domicile and
 8 place of abode. The claims specified in this paragraph constitute five separate causes of action as
 9 hereinafter set forth in this complaint.

10 FACTUAL BACKGROUND

11 Plaintiff's Residency in Nevada

12 8. Plaintiff moved to the State of Nevada, County of Clark, and established full-time
 13 residency here on September 26, 1991 and has remained a full-time, permanent resident since that
 14 time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is a
 15 highly successful inventor. Specifically, plaintiff has been granted numerous important patents for
 16 a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the
 17 creation and development of his inventions and greatly values his privacy both in his personal life
 18 and business affairs. After certain of his important inventions were granted patents in 1990,
 19 plaintiff began receiving a great deal of unwanted and unsolicited publicity, notoriety and attention.
 20 To greater protect his privacy, to enjoy the social, recreational, and financial advantages Nevada
 21 has to offer, and to generally enhance the quality of his life and environment, plaintiff relocated
 22 to Nevada on September 26, 1991. This move took place after much consideration and almost an
 23 entire year of planning.

24 9. The following events are indicative of the fact that on September 26, 1991, plaintiff
 25 commenced both his residency and intent to remain in Nevada, and a continuation of both down
 26 to the present: (1) the sale of plaintiff's California home in October 1991; (2) his renting and
 27 residing at an apartment in Las Vegas commencing in October 1991 and continuing until April
 28 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991, plaintiff

KUTCHISON
 & STEFFEN
 ATTORNEYS AT LAW
 10101 W. 10TH AVE.
 SUITE 1000
 DENVER, CO 80202
 (303) 733-8888

- 3 -

[CPTB ON XL/LL] 05 JUL 86/22/10
01/21/86 WRD 11:18 FAX

A BUS & TAX

B

01010
NO. 187 DOB

01/20/98 11:22 FTB-LEGAL - 66478134

1 trash collector!

13. Both prior and subsequent to the intrusive, "hands on" investigations described in paragraph 12. above, the FTB propounded to numerous Nevada business and professional entities and individual residents of Nevada "quasi-subpoenas" entitled "Demand to Furnish Information" which cited the FTB's authority under California law to issue subpoenas and demanded that the recipients thereof produce the requested information concerning plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission from a Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada where, induced by the authoritative appearance of the inquiries, many Nevada residents and business entities did respond with answers and information concerning plaintiff.

14. Subsequent to the documentary and "hands on" forays into Nevada by the FTB and defendants, the FTB also sent correspondence, rather than "quasi-subpoenas," to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is further informed and believes, and therefore alleges, that the FTB intentionally sent unauthorized "quasi-subpoenas" (i.e., "Demand to Furnish Information") to private individuals and businesses in a successful attempt to coerce their cooperation through deception and the pretense of an authoritative demand, while on the other hand, sending respectful letter requests for information to Nevada governmental agencies and officials who undoubtedly would have recoiled at the attempt by the FTB to exercise extrajurisdictional authority in Nevada through the outrageous means of the bogus subpoenas.

15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious forays into Nevada, nor was plaintiff ever aware that such information was being sought in such a manner until well after the "quasi-subpoenas" had been issued and the responses received. Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to investigate plaintiff or the FTB's correspondence with Nevada government agencies and officials until well after such contacts had taken place. Upon information and belief, plaintiff alleges that all of the above-described activities were calculated to enable the FTB to develop a colorable basis for assessing a huge tax against plaintiff despite the obvious fact that the FTB was proceeding

NOTED
BY STEPHEN
ADD: COURTNEY STEPHEN
1001 665-0304

- 5 -

22/8 08:45:45# XEROX:W01 06/22/10

(00000000 010

73 0101 000 000 000 000 000 000 000

[C918 ON XB/XL] 07 HHL 88/22/10
01/21/98 WED 11:19 FAX

A BUS & Tax

B

NO. 107 011
009

01/22/98 11:22 FTE-LEGAL - 86472134

1 against a bona fide resident of Nevada.

2 Assessment for 1991

3 16. On April 23, 1996, after the FTE had completed its audit and investigation of the 1991
4 Return, the FTE sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are owed)
5 to plaintiff in which the FTE claimed plaintiff was a resident of California — not Nevada — until
6 April 3, 1992. The FTE therefore assessed plaintiff California state income tax for the period of
7 September 26 through December 31 of 1991 in a substantial amount. Moreover, the FTE also
8 assessed a penalty against plaintiff in an amount almost equal to the assessed tax after summarily
9 concluding that plaintiff's non-payment of the assessed tax, based upon his asserted residency in
10 Nevada and non-residency in California, was fraudulent.

11 17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident
12 of Nevada should not be forced into a California forum to seek relief from the unjust and tortious
13 attempts by the FTE to extort unlawful taxes from this Nevada resident. Plaintiff avers that the
14 manufactured issue of his residency in Nevada for the period of September 26 through December
15 31 of 1991 should be determined in Nevada, the state of plaintiff's residence. The FTE is in effect
16 attempting to impose an "exit tax" on plaintiff by coercing him into administrative procedures and
17 possible future court action in California. The FTE has arbitrarily, maliciously and without support
18 in law or fact, asserted that plaintiff remained a California resident until he purchased and closed
19 escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTE's prolonged and
20 monumental efforts to find a way — any way — to effectively assess additional income taxes
21 against plaintiff after he changed his residency from California to Nevada is based upon
22 governmental greed arising from the FTE's eventual awareness of the financial success plaintiff
23 has realized since leaving California and becoming a bona fide resident of the State of Nevada.
24 The aforesaid date of Nevada residency accepted by the FTE with respect to the 1991 Report is
25 over six months after plaintiff moved to Nevada with the intent to stay and began, he thought, to
26 enjoy all the privileges and advantages of residency in his new state.

27 The FTE's Continuing Pursuit of Plaintiff in Nevada

28 18. On or about April 1, 1996, plaintiff received formal notice that the FTE had

MUTCHISON
& STEFFEN
AND A. MURPHY
ATTORNEYS AT LAW
LAS VEGAS, NV 89101
(702) 391-1111
FAX (702) 391-1112

[8919 ON XH/XI] 09

HL 86/22/10

01/21/98 WED 11:20 FAX

A Bus & Tax

B

012

01/20/98

11:23

FTB-LEGAL + 86476134

NO. 127 011

1 commenced an investigation into the 1992 tax year and that its tentative determination was that
2 plaintiff would also be assessed California state income taxes for the period of January 1 through
3 April 3 of 1992.

4 19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received notices
5 from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in regard to the
6 1992 tax year in which it will seek back taxes from plaintiff for income earned during the period
7 of January 1 through April 2, 1992 and in addition would seek penalties for plaintiff's failure to
8 file a state income tax return for 1992.

9 20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax
10 year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such
11 assessments by the FTB always settle at this stage as taxpayers do not want to risk their personal
12 financial information being made public. Plaintiff understood this statement to be a strong
13 suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes
14 and penalties. Plaintiff refused, and continues to refuse to do so, as he has not been a resident of
15 California since his move to Nevada on September 26, 1991, and it remains clear to him that the
16 FTB is engaging in its highhanded tactics to extort "taxes and penalties" from him that he does not
17 legally or morally owe.

18 21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed
19 Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff
20 became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of Proposed
21 Assessment that "We [the FTB] consider you to be a resident of this state [California] through
22 April 2, 1992," such notice proceeded to assess California state income taxes on plaintiff's income
23 for the entire year of 1992. Specifically, the FTB assessed plaintiff state income taxes for 1992
24 in an amount five times greater than that for 1991, assessed plaintiff a penalty almost as great as
25 the assessed tax for alleged fraud in claiming he was a Nevada resident during 1992, and stated that
26 interest accrued through August 14, 1997 (roughly the equivalent of the penalty) was also owed
27 on the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff
28 a bill for the entire 1992 tax year, which was fourteen times the amount of tax it initially assessed

MUTCHISON
B STEFFEN
300 S. PIONEER STREET
LAS VEGAS, NV 89101
(702) 666-4000
FAX (702) 666-4000

- 7 -

10179 ON XB/XL OF
01/21/98 WRD 11:20 FAX
01/28/98 11:23

HL 86/22/10
FTB-LEGAL - 86478134

BUS & TAX

8

013

NO. 107 011

1 for 1991, and in so doing asserted that plaintiff was "a California resident for the entire year."
2 Without explanation the FTB ignored its earlier finding and written acknowledgment that plaintiff
3 was a Nevada resident at least as of April 3, 1992. This outrage is a transparent effort to extort
4 substantial sums of money from a Nevada resident.

5 22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage
6 in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within the State of
7 Nevada in an effort to conjure up a colorable basis for justifying its frivolous, extortionate Noticed
8 of Proposed Assessment for the 1992 tax year.

9 23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue to
10 assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996 and beyond
11 since the FTB has now disregarded its own conclusion regarding plaintiff's residency in Nevada
12 as of April 3, 1992, and is bent on charging him with a staggering amount of taxes, penalties and
13 interest irrespective of his status as a bona fide resident of Nevada. It appears from its actions
14 concerning plaintiff, that the FTB has embraced a new theory of liability that in effect declares
15 "once a California resident always a California resident" as long as the victim continues to generate
16 significant amounts of income. Thus, the FTB has raised an invisible equivalent of the iron curtain
17 that prohibits such residents from ever leaving the taxing jurisdiction of the FTB.

18 The FTB's Motive

19 24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no credible,
20 admissible evidence that plaintiff was a California resident at anytime after September of 1991,
21 despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has acknowledged
22 in its own reports that plaintiff sold his California home on October 1, 1991, that plaintiff rented
23 an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a
24 home in Las Vegas in April 1992.

25 25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the
26 FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff
27 moved from California to Nevada an FTB investigator read a magazine article about plaintiff's
28 wealth and the FTB thereafter launched its investigation in the hope of extracting a significant

MUTCHISON
A STEFFEN
200 S. MONTE STREET
LAS VEGAS, NV 89101
(702) 382-0000
FAX (702) 382-0000

184719 ON XN/ILI 09

HL 86/22/10

01/21/98 WED 11:21 FAX

A

BUS & Tax

H

01/20/98

11:24

FTB-LEGAL + 85478134

0014
NO. 107 01.

1 settlement from plaintiff. Plaintiff is further informed and believes, and therefore alleges, that the
2 FTB has assessed a fraud penalty against plaintiff for the 1991 tax year and issued a Notice of
3 Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for the
4 same year to intimidate plaintiff and coerce him into paying some significant amount of tax for
5 income earned after September 26, 1991, despite his awareness that plaintiff actually became a
6 Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing
7 his hard-earned wealth despite having no lawful basis for doing so, constitutes malice and
8 oppression.

9 Jurisdiction

10 26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm"
11 statute, NRS 14.055 et seq., because of the FTB's tortious extraterritorial contacts and investigatory
12 conduct within the State of Nevada ostensibly as part of its auditing efforts to undermine plaintiff's
13 status as a Nevada resident, but in reality to create a colorable basis for maintaining that plaintiff
14 continued his residency in California during the period September 26, 1991 to December 31, 1991
15 and beyond.

16 27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern and
17 practice of entering into Nevada to investigate Nevada residents who were formerly residents of
18 California, and then assessing such residents California state income taxes for time periods
19 subsequent to the date when such individuals moved to and established residency in Nevada.

20 FIRST CAUSE OF ACTION

21 (For Declaratory Relief)

22 28. Plaintiff realleges and incorporates herein by reference each and every allegation
23 contained in paragraphs 1 through 27 above, as though set forth herein verbatim.

24 29. Pursuant to California law, in determining whether an individual was a resident of
25 California for a certain time period thereby making such individual's income subject to California
26 state income tax during such period, the individual must have been either domiciled in California
27 during such period for "other than a temporary or transitory purpose." See Cal. Rev. & Tax Code
28 § 17014. The FTB's own regulations and precedents require that it apply certain factors in

MUTCHISON
& STEFFEN
415 P. STREET
LOS ANGELES, CA 90013
1700 200-2200
FAX 1700 200-2200

[ISPTB ON YB/XL] 09: HL 88/22/10
01/21/98 WRD 11:22 FAX

A BUS & TAX

B

NO. 187 015
013

01/22/98 11:25 FTE-LEGAL → 86478134

1 determining an individual's domicile and/or whether the individual's presence in California (or
2 outside of California) was more than temporary or transitory.

3 (a) Domicile.

4 Domicile is determined by the individual's physical presence in California with
5 intent to stay or if absent temporarily from California an intent to return. Such intent is
6 determined by the acts and conduct of the individual such as: (1) where the individual is
7 registered to vote and votes; (2) location of the individual's permanent home; (3)
8 comparative size of homes maintained by the individual in different states; (4) where the
9 individual files federal income tax returns; (5) comparative time spent by the individual in
10 different states; (6) cancellation of the individual's California homeowner's property tax
11 exemption; (7) obtaining a driver's license from another state; (8) registering a car in
12 another state; (9) joining religious, business and/or social organizations in another state;
13 and (10) establishment of a successful business in another state by an individual who is self
14 employed.

15 (b) Temporary or Transitory Purpose.

16 The following contacts which are similar although not identical to those used to
17 determine domicile are important in determining whether an individual was in California
18 (or left California) for a temporary or transitory purpose: (1) physical presence of the
19 individual in California in comparison to the other state or states; (2) establishment of a
20 successful business in another state by an individual who is self employed; (3) extensive
21 business interest outside of California and active participation in such business by the
22 individual; (4) banking activity in California by the individual is given some, although not
23 a great deal of, weight; (5) rental of property in another state by the individual; (6)
24 cancellation of the individual's California homeowner's property tax exemption; (7) hiring
25 professionals by the individual located in another state; (8) obtaining a driver's license from
26 another state; (9) registering a car in another state; (10) joining religious, business and/or
27 social organizations in another state; and (11) where the individual is registered to vote and
28 votes.

MUTENISON
& STEFFEN
300 S. PULASKI AVENUE
LOS ANGELES, CA 90011
(213) 240-8800

[C419 ON XH/XL] 09: HL 66/22/10
01/21/98 WED 11:22 FAX

A Buy & Tel

B

NO. 127

P14

01/20/98

11:25

FTB-LEGAL - 86478134

1 30. The FTB's assessment of taxes and a penalty for 1991 is based upon the FTB's
 2 conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3,
 3 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such
 4 a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which
 5 contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and
 6 precedents require it to consider. Such facts include, but are not limited to, the following: (1)
 7 plaintiff sold his California home on October 1, 1991; (2) plaintiff rented and resided at an
 8 apartment in Las Vegas from October 1, 1991 until April of 1992; (3) plaintiff registered to vote,
 9 obtained a Nevada's driver's license (thereby relinquishing his California driver's license), and
 10 joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his
 11 California home owner's exemption effective October 1, 1991; (5) plaintiff began actively
 12 searching for a house to buy in Las Vegas, and submitted numerous offers on houses in Las Vegas,
 13 commencing in December of 1991; (6) plaintiff's offer to purchase a home in Las Vegas was
 14 accepted in March of 1992 and escrow closed on such purchase on April 3, 1992; and (7) plaintiff's
 15 new home in Las Vegas was substantially larger than the home in Southern California, which he
 16 sold in October of 1991.

17 31. An actual controversy exists as to whether plaintiff was a full-time resident of Nevada
 18 — not California — commencing on September 26, 1991 through December 31, 1991 and
 19 continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either
 20 Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout the
 21 referenced periods and down to the present, and that the FTB ignored its own regulations and
 22 precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax
 23 obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB had no
 24 authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to
 25 propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the
 26 cooperation of said Nevada residents and businesses through an unlawful and tortious deception,
 27 to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges, that
 28 the FTB contends in all respects to the contrary.

NUTCHISON
 & STEFFEN
 100 S. TENTH STREET
 LAS VEGAS, NV 89101
 (702) 435-4500
 FAX (702) 435-4500

- 11 -

[CATE ON XH/XLI] 09: IL 98/22/10

01/21/98 WED 11:23 FAX

A Bus & Fax

B

0017

NO. 127

015

01/28/98

11:26

FTB-LEGAL - 66478134

32. Plaintiff therefore requests judgment of this Court declaring and confirming plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada residents without approval from a Nevada court or governmental agency, as alleged above, to be without authority and violative of Nevada's sovereignty and territorial integrity.

SECOND CAUSE OF ACTION

(For Invasion of Privacy — Unreasonable Intrusion Upon The Seclusion of Another)

33. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, and 29 through 31, above, as though set forth herein verbatim.

34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses, government officials and others within Nevada with whom plaintiff has had and would reasonably expect in the future to have social or business interactions, were approached and questioned by the FTB and defendants who disclosed or implied that plaintiff was under investigation in California, and otherwise acted in such a manner as to cause doubts to arise concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential information with the understanding that it would remain confidential. The FTB even noted in its own internal documentation that plaintiff had a significant concern in regard to the protection of his privacy in turning over such information. At the time this occurred, plaintiff was still hopeful that the FTB was actually operating in good faith, a proposition that, as noted throughout this complaint, proved to be utterly false.

35. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants nevertheless violated plaintiff's right to privacy in regard to such information by revealing it to third parties and otherwise conducting an investigation in Nevada through which the FTB and defendants revealed to third parties personal and confidential information, which plaintiff had every right to expect would not be revealed to such parties.

MUTENSON
A STEFFEN
ATTORNEYS AT LAW
LAS VEGAS, NV 89101
(702) 398-1000
FAX (702) 398-0088

- 12 -

01/22/98 10:56AM JEFF #594 Page 18/22

01/22/98 10:56AM JEFF #594 Page 18/22

01/22/98 10:56AM JEFF #594 Page 18/22

AA000801

[EFTB ON XH/XL] 09: EL 96/22/10

01/21/98 WED 11:24 FAX

A

BUS & TAX

B

018

01/20/98

11:26

FTB-LEGAL - 86478134

NO. 187

Q

36. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants' extensive probing and investigation of plaintiff, including their actions both occurring within Nevada and directed to Nevada from California, were performed with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such that he would eventually enter into a settlement with the FTB concerning his residency during the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in fact harass, annoy, vex and embarrass Hyatt, and syphon his time and energies from the productive work in which he is engaged.

37. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants through their investigative actions, and in particular the manner in which they were carried out in Nevada, intentionally intruded into the solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The intrusion by the FTB and defendants was such that any reasonable person, including plaintiff, would find highly offensive.

38. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of \$10,000.

39. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion was despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is therefore entitled to an award of punitive damages against the FTB and defendants in an amount sufficient to satisfy the purposes for which such damages are awarded.

THIRD CAUSE OF ACTION

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

40. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, and 34 through 37, above, as though set forth herein verbatim.

41. As set forth above, plaintiff revealed to the FTB highly personal and confidential

MUTENISON
B. STEFFEN
100 N. PULASKI STREET
LAS VEGAS, NV 89101
702-399-0000
Fax 702-399-0000

- 13 -

[0419 ON XH/XL] 09:11 HL 88/22/10
01/21/98 WED 11:25 FAX

FID-LEAD - 88478134

Bus & Tax

B

4019
NO. 107 01

1 information at the request of the FTB as an ostensible part of its audit and investigation into
2 plaintiff's residency during the disputed time periods. Plaintiff had a reasonable expectation that
3 said information would be kept confidential and not revealed to third parties and the FTB and
4 defendants knew and understood that said information was to be kept confidential and not revealed
5 to third parties.

6 42. The FTB and defendants, without necessity or justification, nevertheless disclosed to
7 third parties in Nevada certain of plaintiff's personal and confidential information which had been
8 cooperatively disclosed to the FTB by plaintiff only for the purposes of facilitating the FTB's
9 legitimate auditing and investigative efforts.

10 43. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion
11 of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in
12 excess of \$10,000.

13 44. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's
14 privacy was intentional, malicious, and oppressive in that such invasion constituted despicable
15 conduct by the FTB and defendants entered into with a willful and conscious disregard of the rights
16 of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an
17 amount sufficient to satisfy the purposes for which such damages are awarded.

18 FOURTH CAUSE OF ACTION

19 (For Invasion of Privacy — Casting Plaintiff in a False Light)

20 45. Plaintiff realleges and incorporates herein by reference each and every allegation
21 contained in paragraphs 1 through 27, 29 through 31, 34 through 37, and 41 and 42, above, as if
22 set forth herein verbatim.

23 46. By conducting interviews and interrogations of Nevada residents and by issuing
24 unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of
25 plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by stating or
26 insinuating to said Nevada residents that plaintiff was under investigation in California, thereby
27 falsely portraying plaintiff as having engaged in illegal and immoral conduct, and decidedly casting
28 plaintiff's character in a false light.

MUTCHISON
& STEPPEN
320 N. FOURTH STREET
LAS VEGAS, NV 89101
(702) 393-8100

[8719 ON XR/XL] 09:00 XL 86/22/10
01/21/98 WED 11:25 FAX

A Bus & Tax

B

0020

NO. 107 018

01/20/98

11:27

FTB-LEGL - 86478134

1 47. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast
2 plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those who
3 know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature and scope
4 of his work. Such publicity of the investigation was offensive and objectionable to plaintiff and
5 was carried out for other than honorable, lawful, or reasonable purposes. Said conduct by the FTB
6 and the defendants was calculated to harm, vex, annoy and intimidate plaintiff, and was not only
7 offensive and embarrassing to plaintiff, but would have been equally so to any reasonable person
8 of ordinary sensibilities similarly situated, as the conduct could only serve to damage plaintiff's
9 reputation.

10 48. As a direct, proximate, and foreseeable result of the FTB and defendants'
11 aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential
12 damages in a total amount in excess of \$10,000.

13 49. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's
14 privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable
15 conduct by the FTB and defendants, entered into with a willful and conscious disregard of the
16 rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in
17 an amount sufficient to satisfy the purposes for which such damages are awarded.

18 FIFTH CAUSE OF ACTION

19 (For the Tort of Outrage)

20 50. Plaintiff realleges and incorporates herein by reference each and every allegation
21 contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47,
22 above, as if set forth herein verbatim.

23 51. The clandestine and reprehensible manner in which the FTB and defendants carried out
24 their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the
25 State of California, but without permission from the State of Nevada, and the FTB and defendants'
26 apparent intent to continue to investigate and assess plaintiff staggeringly high California state
27 income taxes, interest, and penalties for the entire year of 1992 — and possibly continuing into
28 future years — despite the FTB's own finding that plaintiff was a Nevada resident at least as of

MUTCHISON
& STEFFEN
400 N. RENO AVENUE
SUITE 1000, RENO, NV 89501
TEL: 795-2000
FAX: 795-2000

[C918 ON X8/LL] 09: LL 58/22/10

01/21/98 WED 11:28 FAX

A Bus & Tax

B

021

01/28/98

11:28

FTB-LEGAL - 06478134

NO. 187 019

1 April of 1992, was, and continues to be, extreme, oppressive and outrageous conduct. The FTB
 2 has, in every sense, sought to hold plaintiff hostage in California, disdaining and abandoning all
 3 reason in its reprehensible, all-out effort to extort significant amounts of plaintiff's income without
 4 a basis in law or fact. Plaintiff is informed and believes, and therefore alleges, that the FTB and
 5 defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth
 6 concerning his place of residency, but the true purpose of which was to so harass, annoy,
 7 embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as
 8 to coerce him into paying significant sums to the FTB irrespective of his demonstrably bona fide
 9 residence in Nevada throughout the disputed periods. As a result of such extremely outrageous and
 10 oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief,
 11 humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably
 12 sensitive person would feel if subjected to equivalent unrelenting, outrageous personal threats and
 13 insults by such powerful and determined adversaries.

14 52. As a direct, proximate, and foreseeable result of the FTB and defendants'
 15 aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and
 16 consequential damages in a total amount in excess of \$10,000.

17 53. Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting,
 18 and outrageous conduct was intentional, malicious, and oppressive in that it was despicable
 19 conduct by the FTB and defendants, entered into with a willful and conscious disregard of
 20 plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in
 21 an amount sufficient to satisfy the purposes for which such damages are awarded.

22 WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants
 23 as follows:

24 **FIRST CAUSE OF ACTION**

- 25 1. For judgment declaring and confirming that plaintiff is a bona fide resident of the State
 26 of Nevada effective as of September 26, 1991 to the present;
 27 2. For judgment deciding that the FTB has no lawful basis for continuing to investigate
 28 plaintiff in Nevada concerning his residency between September 26, 1991 through December 31.

MUTCHISON
 & STEVEN
 100 S. JEFFERSON STREET
 LAS VEGAS, NV 89101
 (702) 390-2500
 FAX (702) 390-2500

[CMT9 ON XH/XL] 09:11 LL 88/22/10

01/21/98 WED 11:28 FAX

A Bus & Tax

B

4001

01/20/98

11:28

FTB-LEGAL - 86478134

NO. 107

020

1 1991 or any other subsequent period down to the present, and declaring that the FTB had no right
 2 or authority to propound or otherwise issue a "Demand to Furnish Information" or other quasi
 3 subpoenas to Nevada residents and businesses seeking information concerning plaintiff;

4 3. For costs of suit;

5 4. For reasonable attorneys' fees; and

6 5. For such other and further relief as the Court deems just and proper.

7 SECOND CAUSE OF ACTION

8 1. For actual and consequential damages in a total amount in excess of \$10,000;

9 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
 10 damages are awarded;

11 3. For costs of suit;

12 4. For reasonable attorneys' fees; and

13 5. For such other and further relief as the Court deems just and proper.

14 THIRD CAUSE OF ACTION

15 1. For actual and consequential damages in a total amount in excess of \$10,000;

16 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
 17 damages are awarded;

18 3. For costs of suit;

19 4. For reasonable attorneys' fees; and

20 5. For such other and further relief as the Court deems just and proper.

21 FOURTH CAUSE OF ACTION

22 1. For actual and consequential damages in a total amount in excess of \$10,000;

23 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
 24 damages are awarded;

25 3. For costs of suit;

26 4. For reasonable attorneys' fees; and

27 5. For such other and further relief as the Court deems just and proper.

28 ...

NOTARISEN
 A STEPHEN
 400 S. COURT ST. SUITE 100
 LAS VEGAS, NV 89101
 (702) 312-1800
 FAX (702) 312-1800

- 17 -

[3719 ON XR/XL] 09:01 98/22/10

21/22/98

11:29

FTB-LEGAL → 86478134

NO. 127

V21

1 FIFTH CAUSE OF ACTION

- 2 1. For actual and consequential damages in a total amount in excess of \$10,000;
- 3 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
- 4 damages are awarded;
- 5 3. For costs of suit;
- 6 4. For reasonable attorneys' fees; and
- 7 5. For such other and further relief as the Court deems just and proper.

8 DATED this 6th day of January, 1998.

HUTCHISON & STEFFEN

By: 

Thomas L. Steffen
Mark A. Hutchison
530 South 4th Street
Las Vegas, Nevada 89101

Attorneys for Plaintiff

HUTCHISON
& STEFFEN
14 S. Fourth Street
Las Vegas, NV 89101
(702) 384-8888
Fax (702) 384-8888

- 18 -

22/22 86478134 09/22/10

09/22/10

VVA 87111 NRM 88/12/10

AA000807

EXHIBIT 3

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

GILBERT P. HYATT,
Plaintiff,

-vs-

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA, et al.,
Defendants.

NO. CV-S-98-284-HDM(LRL)
UNITED STATES COURTHOUSE
RENO, NEVADA
MAY 1, 1998

ORIGINAL

TRANSCRIPT OF MOTIONS (#5) and (#12)
MOTION TO REMAND AND MOTION TO QUASH
BEFORE THE HONORABLE HOWARD D. MCKIBBEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

THOMAS L. STEFFEN
Attorney at Law

MARK A. HUTCHISON
Attorney at Law

FOR THE DEFENDANT:

THOMAS R.C. WILSON
Attorney at Law

JAMES GUIDICI
Attorney at Law

Proceedings recorded by mechanical stenography produced by
computer-aided transcript

OFFICIAL COURT REPORTER:

KATHRYN M. FRENCH, CSR, RPR
NEVADA LICENSE NO. 392
CALIFORNIA LICENSE NO. 8536

KATHRYN M. FRENCH, CCR (702) 786-5584

AA000809

1 Reno, Nevada, Friday, May 1, 1998, 2:00 p.m.

2 ---OoO---

3 THE CLERK: Case number CV-S-98-284-HDM(LRL),
4 Gilbert P. Hyatt versus Franchise Tax Board of the State of
5 California, et al.

6 Thomas L. Steffen and Mark Hutchison, you're both
7 present on behalf of plaintiff?

8 MR. STEFFEN: That's correct.

9 MR. HUTCHISON: Yes.

10 THE CLERK: And Thomas R.C. Wilson, Matthew C.
11 Addison and James Guidici, you're all present on behalf of
12 defendant?

13 MR. WILSON: Yes, we are.

14 THE COURT: Who will be making the argument on
15 behalf of the parties here; on behalf of the plaintiff?

16 MR. HUTCHISON: Your Honor, this is Mark Hutchison.
17 Tom Steffen will be making the argument for the plaintiff on
18 the motion for remand, and Mark Hutchison will be making the
19 argument on the motion to quash.

20 THE COURT: All right. On behalf of the defendants?

21 MR. WILSON: This is Mr. Wilson, judge. I'll be
22 making the argument on behalf of the defendant.

23 THE COURT: All right. I would like to, at least
24 initially, confine the argument to the motion for remand.

25 If I decide that this case should be remanded, I will not

1 consider the other motions. So I'll proceed first with the
2 motion for remand.

3 You may proceed.

4 MR. STEFFEN: Thank you, Your Honor. This is Tom
5 Steffen speaking on behalf of the plaintiff.

6 Your Honor, our position is rather simple and
7 straightforward. First, referring to U.S. Supreme Court
8 case of Caterpillar v. Williams, a 1987 case cited in our
9 brief, the Court states, quote: Only state court actions
10 that originally could have been filed in Federal Court may be
11 removed to Federal Court by the defendant, end quote.

12 It's our simple and straightforward position that
13 the Eleventh Amendment would have precluded the filing of this
14 case in Federal Court by Mr. Hyatt, the plaintiff.

15 Secondly, we would move directly to a case which
16 Your Honor is very familiar with. And that is, the Austin v.
17 State Industrial Insurance System case where Your Honor
18 determined that, quote: In the absence of consent to a suit
19 in which the state or one of its agencies or departments is
20 named as a defendant, such action is proscribed by the
21 Eleventh Amendment, end quote.

22 The FTB, Your Honor, has made no pretense of either
23 consent or waiver. There has been no hint at all in any of
24 their papers that that has occurred. And we've cited several
25 cases where it's clear the State of California has never

1 consented to waive its Eleventh Amendment immunity.

2 So as we see it, Your Honor, and I would state,
3 unfortunately, the Eleventh Amendment stands as an absolute
4 bar to Federal Court jurisdiction in this case.

5 Now, the FTB has come up with what I would refer to
6 as the FTB doctrine, which would indicate that the Eleventh
7 Amendment problem maybe avoided by two methods.

8 First, they suggest that since the plaintiff
9 could have sued the head of the FTB in her official or
10 personal capacity, somehow that dissolves the Eleventh
11 Amendment barrier altogether. I am at a loss as to explain
12 this mystical evaporation of the Eleventh Amendment, but that
13 is, nevertheless, their argument. They cite absolutely no
14 case support for it.

15 Again, in Your Honor's case of Austin v. SIIS, in
16 that particular case, both the system and its general manager,
17 Mr. Lewis (phonetic), were sued. And Your Honor noted in your
18 opinion that Lewis was named as a defendant, but there were
19 absolutely no allegations concerning his involvement in that
20 case.

21 In this case, we have no idea who the head of
22 the FTB is, even if we were to decide that it would have
23 been preferable to join him or her. And we have not done so.

24 In the Austin case, Your Honor did not hold that
25 since Mr. Lewis could have been sued in his personal capacity,

1 thereby obviating the Eleventh Amendment barrier, that barrier
2 no longer existed. You didn't proceed with the case. Rather,
3 you remanded it to state court. And that was unanimously
4 affirmed by the Ninth Circuit. Again, in that case, the Ninth
5 Circuit noted that if Mr. Lewis had been sued in his personal
6 capacity, there would not have been an Eleventh Amendment
7 problem. In a footnote it stated, if he had been sued in his
8 official capacity only for declaratory or injunctive relief,
9 there would have been no Eleventh Amendment problem.

10 The difficulty here, Your Honor, is that's not our
11 case. It's a "could have" case that doesn't exist. So
12 we're then left with -- and by the way, with Your Honor's
13 permission, I would also like to cite the Southern Pacific
14 Transportation v. City of Los Angeles case, a 1990 Ninth
15 Circuit case where, in that situation, the Ninth Circuit noted
16 that the plaintiff could have sued officials of CalTrans in
17 their official capacity, but elected not to do so. And,
18 therefore, since CalTrans was the defendant, that was an
19 agency of state government, and the Eleventh Amendment barred
20 Federal Court jurisdiction.

21 So the other theory that the FTB has raised in an
22 effort to subject the State of California and the FTB to
23 Federal Court jurisdiction, is Article III, Section 2, clauses
24 one and two of the United States Constitution. And for the
25 life of me, Your Honor, I have been totally unable to decipher

1 what they're trying to claim in that, obviously, they're
2 citing Article III as a basis for circumventing Eleventh
3 Amendment immunity. I have simply been unable to find any
4 basis at all for recognizing a kernel of relevance in any of
5 their arguments, including their third argument, which that
6 even the FTB -- rather, even Mr. Hyatt admits that a state can
7 bring an action against a citizen.

8 Well, we stated that in our brief, and there's no
9 question but that the FTB could sue a citizen. However, that
10 is not our case, despite the fact that they are -- that they
11 are suggesting that somehow their petition for removal in
12 effectuates a reversal of roles on the part of the parties so
13 that we now have the case of FTB against Hyatt, rather than
14 the actual case of Hyatt v. the FTB.

15 So, Your Honor, I suppose the thrust of this
16 position as I indicated at the beginning, is we do not see a
17 means of gaining access to Federal Court jurisdiction in this
18 case because the Eleventh Amendment clearly precludes it.

19 THE COURT: Thank you.

20 Mr. Wilson.

21 MR. WILSON: Thank you, judge.

22 I don't disagree with some of what Mr. Steffen
23 has said, and cutting through a lot of the rhetoric of
24 briefs on both sides, let me make some observations and then
25 I would like to suggest what we see as some possible options

1 for the Court.

2 By way of observation, let me just say that this
3 complaint, I think, is rather thin on tort. And while that's
4 not a principal issue before Your Honor, tort allegations are
5 stated in Paragraphs 14 -- 12, 13, 14 and 15. And I realize
6 this is a noticed pleading state, but this is predicate, I
7 guess, simply to say that this case really is about, I think,
8 federal issues having to do with a sovereign's power to tax.

9 Federal and constitutional issues are replete
10 through this complaint. They are stated in paragraphs, 5, 7,
11 11, 17, 22, 23, 26, and 27. I won't bother to go through
12 and characterize those, they're in the complaint and they're
13 discussed in the briefs, but, clearly, they address powers and
14 responsibilities of sovereign states and the administration of
15 that sovereign power.

16 THE COURT: Even if I were to read the complaint
17 broadly to encompass what you're suggesting it does, isn't a
18 substantial argument made here that poses some substantial
19 difficulties for you that the Eleventh Amendment would have
20 precluded the filing of this action in Federal Court?

21 MR. WILSON: I take your point, and I took
22 Mr. Steffen's, in reading his briefs and in his comments. But
23 I think, frankly, the jurisdiction of the relationship between
24 state sovereigns and their relationship to the federal
25 sovereign warrants some discussion.

1 The relief which is asked by the plaintiff, of
2 course, is for a declaratory judgment that this plaintiff is
3 no longer domiciled; they're a resident in California and,
4 therefore, are immuned from its tax.

5 It also seeks a declaratory subject that a sovereign
6 neighbor state cannot investigate here in a different state
7 without having either the approval or sanction of a state
8 agency or the courts of this state. And that's a direct
9 challenge, it seems to me, to any state's ability to exercise
10 its responsibility, especially in a union defined as ours.

11 I can see how the Nevada Gaming Board, struggling
12 under that kind of a restriction on its powers to investigate
13 interstate with respect to licensing the gaming industry in
14 this State. We couldn't operate. The State could not operate
15 and exercise its regulatory jurisdiction under the relief
16 sought by the plaintiff.

17 So, yes, I understand the questions raised by
18 Mr. Steffen. What's troubling me, is that the case law that's
19 been developed with respect to the balance and resolution of
20 conflicts between different sovereign states and states of
21 the federal sovereign as citizens of one state or another,
22 frankly, are a tangled fiction. They're distinct without
23 differences, and they're given to manipulation.

24 I guess what we're saying is, and what we will be
25 saying and in suggesting the options that that we do, is that

1 that warrants consideration by this court because the -- I
2 understand what the cases say, and I understand the problems
3 that they pose to our position, but I'm also suggesting that
4 the jurisprudence of the balance of sovereign powers ought not
5 to be subject to manipulation.

6 It's true, and I think it's acknowledged by the
7 plaintiff here that this case could have been brought in
8 Federal Court by suing the representatives of FTB only, either
9 to seek damages in tort, or exercising the long-arm statute,
10 or to obtain declaratory or injunctive relief which is sought
11 here with respect to limiting California's powers of taxation
12 and investigation. I think that's a given. There's no
13 dispute about that.

14 THE COURT: But that's not the case --

15 MR. WILSON: Of course, the plaintiff could define
16 its own case, and has, but I don't think there's any dispute
17 over the law that we're only the principals of the FTB named,
18 and not the FTB which stands in the place of a sovereign, that
19 the Eleventh Amendment would not be at bar because of the
20 immunity it provides against a suit.

21 I suggest to you that that's a fiction. It's a
22 convenient one. I understand why the circuit courts and the
23 Supreme Court have narrowed the application of the Eleventh
24 Amendment. I mean that's understood. In the days when the
25 Eleventh Amendment was adopted, as commented upon by I think

1 Justice Rehnquist in Nevada versus Hall, it was a given that
2 the states were immune, had immunity with respect to suits by
3 other states or in the courts of other states.

4 It was -- the amendment was adopted only in reaction
5 to a suit apparently filed in Federal Court by the citizens of
6 another state against a state. And in reaction, it was
7 passed. But it was given, based upon the general system of
8 collective states, each being sovereign in a union such as
9 ours, that as between the states and the citizens of one state
10 and another state; that the immunity would be absolute and
11 that, here, we find it's not. And in reaction to that of
12 course, why, the Supreme Court has seen fit to narrow the
13 application of the Eleventh Amendment because, obviously, it
14 needs to be narrowed.

15 I understand a plaintiff controls its own case and
16 has defined its own case for a reason. And that is, to keep
17 out of Federal Court, to prevent its removal to Federal Court
18 because we know that the FTB is not a done necessary party
19 either under Nevada versus Hall or Kennedy -- Kentucky versus
20 Gray (phonetic). And that's because simply by naming the
21 requisite of parties or representatives only of the FTB,
22 plaintiff would have jurisdiction in Federal Court to obtain
23 all the relief for which it has sued.

24 The problem here is that by the contrivance of
25 naming FTB, which is what the case is as Mr. Steffen says, and

1 not eliminating the FTB, which is not the case as Mr. Steffen
2 has said, that technicality frustrates the jurisdiction of the
3 court, as he argues, to entertain this case. The result,
4 frankly, is a quandary which really requires judicial repair.
5 And the issues in this case, frankly, transcends what's at
6 issue of whether Mr. Hyatt owes taxes or doesn't owe taxes, or
7 whether he has a domicile in Nevada from November the 26th,
8 '91, or he does not. We're really talking about issues that
9 are a lot more important.

10 I would suggest a couple of options. The issues
11 here are really narrow, I think. And the first is whether the
12 state of the law on this question is in such disrepair and is
13 so vulnerable to manipulation, that it really requires the
14 Court to, frankly, sustain removal and let it be tested on
15 appeal.

16 I suppose an alternative to that would be for the
17 Court to grant the motion to quash with respect to both the
18 federal constitutional issues about which we're also talking,
19 as well as the tort issues, if the Court were to conclude that
20 the tort issues haven't been sufficiently pled.

21 A third alternative, of course, would be to
22 grant the motion to quash with respect to the federal and
23 constitutional issues as so boldly set forth in the complaint
24 and in the relief requested, and to remand to the state trial
25 court only the tort issues.

1 It seems to me, that the Court, frankly, in its
2 discretion, can almost go either way. I understand the
3 motivation and what prompts the Court's question of me as to
4 how one argues around the Eleventh Amendment. I guess what
5 I'm honestly saying to the Court is that in a jurisprudential
6 sense, the sections narrowing the Eleventh Amendment as
7 defined by at least the two cases that I've discussed --
8 Kennedy (sic.) Gray and Nevada Hall -- that we really are
9 dealing with fictions here. And I guess I'm being blunt in
10 saying so, but it makes no sense to me at all that the
11 jurisprudence in this country is going to resolve conflicts
12 in state sovereignty as between states, and between citizens
13 of one state and another state, by applying the fictitious
14 distinctions that are discussed in those two cases.

15 I understand that one can say, well, it's the law,
16 and, Mr. Steffen will argue that, and Mr. Steffen will argue
17 we're here in district court, we're not here to settle policy.
18 We're here to adjudicate these facts as affected by existing
19 precedent. But I guess what I'm saying is that we're really
20 dealing with a larger question, and the frustration of these
21 fictions, if you will. And I don't mean to overstate it,
22 but I will admit my impatience in reading distinctions such
23 as the Eleventh Amendment doesn't apply, which, obviously,
24 as a constitutional provision which has to do with state
25 sovereignty, it doesn't apply at all, it's immunities don't

1 apply, if you simply don't name the agency, you simply name
2 its employees, and if so, can get the same declaratory and
3 injunctive relief which you would have sought had you named
4 the agency. That is a fiction.

5 And simply, in being honest with the Court, I have
6 to say, frankly, that it's a fiction. I guess the question is
7 how long we're going to tolerate it.

8 It sounds more like a political speech, Your Honor.
9 I'm sorry. I apologize for that, but I think it's a fair
10 reading of the case.

11 THE COURT: Thank you very much.

12 A brief response?

13 MR. STEFFEN: Your Honor, briefly. It's not a
14 fiction. Plaintiff had every right to sue the FTB, and I
15 can assure you -- I know they indicated that we had a year to
16 artfully plead this to avoid federal jurisdiction, for which
17 that we have the highest respect -- we haven't sought, by
18 artful pleading or otherwise, to avoid Federal Court
19 jurisdiction. It was not available to us.

20 Mr. Wilson said the complaint is replete with
21 federal Constitutional issues. We see none.

22 He indicates that Mr. Hyatt is alleging that the
23 FTB cannot investigate his possible tax liability in Nevada
24 without approval of government agencies. I think we've
25 covered that adequately in our surrepley, Your Honor. That's

1 not the position at all.

2 If the FTB had in a non-tortious way sought so
3 investigate the subject, this lawsuit would not exist.
4 They have not done that. They have flaunted Nevada's
5 sovereignty. They violated Mr. Hyatt's privacy in ways that
6 the Court cannot even at this juncture, appreciate. But that
7 is the case. There is no contrivance in the naming of the
8 FTB, and I can't understand with all due respect to
9 Mr. Wilson, his reference to it's a fiction. There is nothing
10 about it being a fiction.

11 In the CalTrans case, the Ninth Circuit certainly
12 didn't indicate that it was a fiction for them to have named
13 CalTrans rather than the officials of CalTrans.

14 Your Honor, I think the academic discussion is
15 interesting and theory is interesting, but I'm not aware of
16 any way to overcome the Eleventh Amendment barrier. And I
17 respectfully submit to the Court that that's dispositive of
18 this whole matter.

19 THE COURT: All right.

20 MR. STEFFEN: And that the case must be remanded.
21 And, quite frankly, if the Court agrees, we would also
22 strongly urge the Court to consider our request for costs.

23 THE COURT: All right. Thank you.

24 COURT'S RULING

25 THE COURT: The Court has carefully considered the

1 pleadings in this case together with the arguments that have
2 been rendered today. I think the issue turns, quite frankly,
3 on the Eleventh Amendment argument. That's the reason that I
4 scheduled the hearing on the motion to remand first. If the
5 Court determines that a remand is appropriate, then it is
6 unnecessary to address the remaining questions, which should
7 be properly addressed to the state court.

8 The Eleventh Amendment provides that the judicial
9 power of the United States shall not be construed to extend
10 to any suit in law or equity, commenced or prosecuted against
11 one of the United States by citizens of another state, or by
12 citizens or subjects of any foreign state.

13 Here, I think it's clear that the defendant -- and
14 in this case the defendant is the Franchise Tax Board of the
15 State of California. The plaintiff, of course, is free to
16 select the defendant as the plaintiff sees fit to proceed
17 against, but it's clear that the plaintiff has not sued any
18 individuals in their individual capacity, or any individuals
19 in the official capacity. And, instead, plaintiff has simply
20 named the Franchise Tax Board of the State of California,
21 which they are certainly permitted to do.

22 The defendant, Franchise Tax Board of the State of
23 California is a government agency of the State of California.
24 It has not received authorization to waive California state
25 immunity under the Eleventh Amendment. There's no suggestion,

1 nor do I think can there be, that there has been any
2 waiver of the Eleventh Amendment immunity. Under these
3 circumstances, I think this is a relatively straightforward
4 and clear case. The Supreme Court has held in the Jordan
5 case, 415 U.S. 658 at 679; Edelman versus Jordan: "When
6 we are dealing with the sovereign exemption from judicial
7 interference in the vital field of financial administration,
8 a clear declaration of the state's intention to submit its
9 fiscal problems to other courts than those of its own,
10 creation must be found."

11 The Court has always required a clear statutory
12 pronouncement that the protections of the Eleventh Amendment
13 are waived. There's no doubt that suit against the state
14 is barred by the Eleventh Amendment unless the state has
15 consented to the filing of such a suit. That was the
16 California State Board of Equalization case -- or V.O. Motors,
17 691 F.2d 871 at 874, a Ninth Circuit decision, 1982, where the
18 court stated specifically in the context of tax litigation,
19 the Supreme Court has stated that a state's consent to sue
20 against itself in the Federal Courts is required.

21 Here, the plaintiff points out, properly so, that
22 the FTB is a subdivision of the State BOARD of Equalization,
23 so the V.O. Motors ruling I think, clearly, is applicable.

24 I think it's clear that there has been no waiver of
25 sovereign immunity. There is no suggestion, nor do I think

1 can there be, that there has been any consent to sue. And
2 while I recognize the arguments that have been advanced by
3 the defense here, there's nothing to suggest to the Court
4 that this is -- that this pleading or the proceeding here is
5 a sham or has been addressed, as it has in connection to the
6 joining of parties, in such a way as to simply defeat any
7 effort to have this matter heard in Federal Court.

8 I do not see it as a particularly artful pleading in
9 the sense that the courts have addressed that. The Franchise
10 Tax Board of the State of California is a legitimate party to
11 be joined. A party doesn't have to name individuals for the
12 sole purpose of enabling another party to either remove the
13 case or not. And so under the circumstances, it just seems to
14 this court, notwithstanding the arguments that have been made
15 by the defense, that this is a clear Eleventh Amendment
16 immunity issue; that the Eleventh Amendment in this case bars
17 this action from being brought in the Federal Court; and there
18 is no waiver nor consent on the part of the defendant to have
19 this matter proceed by virtue of the waiver of immunity under
20 the Eleventh Amendment.

21 For that reason, the motion to remand is granted.
22 The Court concludes that it does not have jurisdiction
23 to proceed to hear the issues. Having so concluded, it's
24 unnecessary for the Court to determine whether the
25 controversy is founded on a federal question arising under

1 the Constitution laws or treaties of the United States. While
2 I think that was a relatively close issue, it is unnecessary
3 to resolve it because the Court finds that the provisions of
4 the Eleventh Amendment bar this action from being either filed
5 or removed to this court.

6 For that reason, the motion of the plaintiff to
7 remand is granted. The motion of the plaintiff for costs is
8 denied. The Court does not rule on the remaining motions.
9 Those will be reserved for the state court to address.

10 Miss Clerk, you'll enter the order, based upon the
11 findings and conclusions of the Court, that this action be,
12 and hereby is, remanded to the Eighth Judicial District Court
13 of the State of Nevada, in and for the County of Clark. I
14 direct the clerk to take the necessary steps to remand this
15 file to that Court for all further proceedings. It is so
16 ordered.

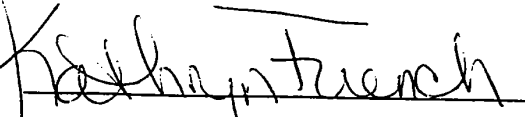
17 Thank you very much, counsel.

18 MR. STEFFEN: Thank you very much, Your Honor.

19 MR. WILSON: Thank you, Your Honor.

20 (Court adjourned.)

21 I certify that the foregoing is a correct transcript from
22 the record of proceedings in the above-entitled matter.

23 
24

25 KATHRYN M. FRENCH, CSR

5-15-98

DATE

EXHIBIT 4

1 COMP
2 Thomas L. Steffen (1300)
3 Mark A. Hutchison (4639)
4 HUTCHISON & STEFFEN
5 530 South Fourth Street
6 Las Vegas, NV 89101
7 (702) 385-2500

8 Attorneys for Plaintiff

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 GILBERT P. HYATT,

12 Plaintiff,

13 v.

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

17 Defendants.

) Case No. A382999

) Dept. No. X

) Docket No. R

18 **FIRST AMENDED COMPLAINT**

19 **Jury Trial Demanded**

20 **Exempt from Arbitration:**
21 **Declaratory Relief, Significant**
22 **Public Policy and Amount in Excess**
23 **Of \$40,000**

24 Plaintiff, Gilbert P. Hyatt, in this First Amended Complaint, complains against
25 defendants, and each of them, as follows:

26 **PARTIES**

27 1. Plaintiff resides in Clark County, Nevada and has done so since September 26, 1991.

28 2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a
governmental agency of the State of California with its principal office located in Sacramento,
California, and a district office located in Los Angeles, California. The FTB's function is to
ensure the collection of state income taxes from California residents and from income earned in
California by non-residents.

3. The identity and capacities of the defendants designated as Does 1 through 100 are
so designated by plaintiff because of his intent by this complaint to include as named
defendants every individual or entity who, in concert with the FTB as an employee,
representative, agent or independent contractor, committed the tortious acts described in this

1 complaint. The true names and capacities of these Doe defendants are presently known only to
2 the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants
3 who are designated by fictitious names only until plaintiff is able, through discovery, to obtain
4 their true identities and capacities; upon ascertaining the true names and capacities of these Doe
5 defendants, plaintiff shall promptly amend this complaint to properly name them by their actual
6 identities and capacities. For pleading purposes, whenever this complaint refers to
7 "defendants," it shall refer to these Doe defendants, whether individuals, corporations or other
8 forms of associations or entities, until their true names are added by amendment along with
9 particularized facts concerning their conduct in the commission of the tortious acts alleged
10 herein.

11 4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting
12 or omitting to act as alleged, acted or omitted to act within the course and scope of their
13 employment or agency, and in furtherance of their employer's or principal's business, whether
14 the employer or principal be the FTB or some other governmental agency or employer or
15 principal whose identity is not yet known; and that FTB and defendants were otherwise
16 responsible and liable for the acts and omissions alleged herein.

17 5. This action is exempt from the court-annexed arbitration program, pursuant to Rule
18 3, because: (1) this is an action for, *inter alia*, declaratory relief; (2) substantial issues of public
19 policy are implicated concerning the sovereignty of the State of Nevada and the integrity of its
20 territorial boundaries as opposed to governmental agencies of another state who enter Nevada
21 in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules and
22 regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular; and
23 (3) the sums of money and damages involved herein far exceed the \$40,000.00 jurisdictional
24 limit of the arbitration program.

25 6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, Fifth, Sixth,
26 Seventh and Eighth Causes of Action.

27 **SUMMARY OF CLAIMS**

28 7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 et seq. to

1 confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and
2 continuing to the present and, correspondingly, his non-residency during said period in
3 California (FIRST CAUSE OF ACTION); (2) recovery of compensatory and punitive damages
4 against the FTB and the defendants for invasion of plaintiff's right of privacy resulting from
5 their investigation in Nevada of plaintiff's residency, domicile and place of abode and causing
6 (a) an unreasonable intrusion upon plaintiff's seclusion (SECOND CAUSE OF ACTION); (b)
7 an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION); (c) casting
8 plaintiff in a false light (FOURTH CAUSE OF ACTION); (3) recovery of compensatory and
9 punitive damages against the FTB and the defendants for their outrageous conduct in regard to
10 their investigation in Nevada of plaintiff's residency, domicile and place of abode (FIFTH
11 CAUSE OF ACTION); (4) recovery of compensatory and punitive damages against the FTB
12 and defendants for an abuse of process (SIXTH CAUSE OF ACTION); (5) recovery of
13 compensatory and punitive damages against the FTB and defendants for fraud (SEVENTH
14 CAUSE OF ACTION); and (6) for compensatory damages against the FTB and defendants for
15 negligent misrepresentation (EIGHTH CAUSE OF ACTION). The claims specified in this
16 paragraph constitute EIGHT separate causes of action as hereinafter set forth in this complaint.

17 **FACTUAL BACKGROUND**

18 **Plaintiff's Residency in Nevada**

19 8. Plaintiff moved to the State of Nevada, County of Clark, and established full-time
20 residency here on September 26, 1991 and has remained a full-time, permanent resident since
21 that time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is
22 a highly successful inventor. Specifically, plaintiff has been granted numerous important
23 patents for a wide range of inventions relating to computer technology. Plaintiff primarily
24 works alone in the creation and development of his inventions and greatly values his privacy
25 both in his personal life and business affairs. After certain of his important inventions were
26 granted patents in 1990, plaintiff began receiving a great deal of unwanted and unsolicited
27 publicity, notoriety and attention. To greater protect his privacy, to enjoy the social,
28 recreational, and financial advantages Nevada has to offer, and to generally enhance the quality

1 of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move
2 took place after much consideration and almost an entire year of planning.

3 9. The following events are indicative of the fact that on September 26, 1991, plaintiff
4 commenced both his residency and intent to remain in Nevada, and a continuation of both down
5 to the present: (1) the sale of plaintiff's California home in October 1991; (2) his renting and
6 residing at an apartment in Las Vegas commencing in October 1991 and continuing until April
7 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991,
8 plaintiff registered to vote in Nevada, obtained a Nevada driver's license, and joined a religious
9 organization in Las Vegas; (4) plaintiffs' extensive search, commencing in early October 1991,
10 for a new home in Las Vegas, and in the process utilizing the services of various real estate
11 brokers; (5) during the process of finding a home to purchase, plaintiff made numerous offers to
12 buy; (6) plaintiff's purchase of a new home in Las Vegas on April 3, 1992; (7) plaintiff
13 maintained and expanded his business interests from Las Vegas; and (8) plaintiff has, through
14 the years from September 26, 1991 and down to the present, contacted persons in high political
15 office, in the professions, and other walks of life, as a true Nevada resident of some renown
16 would, not concealing the fact of his Nevada residency. In sum, plaintiff has substantial
17 evidence, both testimonial and documentary, in support of the fact of his full-time residency,
18 domicile and place of abode in Nevada commencing on September 26, 1991 and continuing to
19 the present.

20 **The FTB and Defendants' Investigation of Plaintiff in Nevada**

21 10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a Part-
22 Year state income tax return with the State of California for 1991 (the "1991 Return"). Said
23 return reflects plaintiff's payment of state income taxes to California for income earned during
24 the period of January 1 through September 26, 1991.

25 11. In or about June of 1993 — 21 months after plaintiff moved to Nevada — for
26 reasons that have never been specified, but are otherwise apparent, the FTB began an audit of
27 the 1991 Return. In or about July of 1993, as part of its audit, the FTB began to investigate
28 plaintiff by making or causing to be made numerous and continuous contacts directed at

1 Nevada. Initially, the FTB sent requests to Nevada government agencies for information
2 concerning plaintiff — a paper foray that continued for the next several years.

3 12. In or about January of 1995, FTB auditors began planning a trip to Las Vegas, the
4 purpose of which was to enhance and expand the scope of their investigation of plaintiff. In
5 March of 1995, the FTB and defendants commenced a “hands on” investigation of plaintiff that
6 included unannounced confrontations and questioning about private details of plaintiff’s life.
7 These intrusive activities were directed at numerous residents of Nevada, including plaintiff’s
8 current and former neighbors, employees of businesses and stores frequented by plaintiff, and
9 alas, even his trash collector!

10 13. Both prior and subsequent to the intrusive, “hands on” investigations described in
11 paragraph 12, above, the FTB propounded to numerous Nevada business and professional
12 entities and individual residents of Nevada “quasi-subpoenas” entitled “Demand to Furnish
13 Information” which cited the FTB’s authority **under California law** to issue subpoenas and
14 demanded that the recipients thereof produce the requested information concerning plaintiff.
15 Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission
16 from a Nevada court or any Nevada government agency to send such “quasi-subpoenas” into
17 Nevada where, induced by the authoritative appearance of the inquisitions, many Nevada
18 residents and business entities did respond with answers and information concerning plaintiff.

19 14. Subsequent to the documentary and “hands on” forays into Nevada by the FTB and
20 defendants, the FTB also sent correspondence, rather than “quasi-subpoenas,” to Nevada
21 Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and
22 agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is
23 further informed and believes, and therefore alleges, that the FTB intentionally sent
24 unauthorized “quasi-subpoenas” (i.e., “Demand to Furnish Information”) to private individuals
25 and businesses in a successful attempt to coerce their cooperation through deception and the
26 pretense of an authoritative demand, while on the other hand, sending respectful letter requests
27 for information to Nevada governmental agencies and officials who undoubtedly would have
28 recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the

1 outrageous means of the bogus subpoenas.

2 15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious
3 forays into Nevada, nor was plaintiff ever aware that such information was being sought in such
4 a manner until well after the "quasi-subpoenas" had been issued and the responses received.
5 Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to
6 investigate plaintiff or the FTB's correspondence with Nevada government agencies and
7 officials until well after such contacts had taken place. Upon information and belief, plaintiff
8 alleges that all of the above-described activities were calculated to enable the FTB to develop a
9 colorable basis for assessing a huge tax against plaintiff despite the obvious fact that the FTB
10 was proceeding against a bona fide resident of Nevada.

11 Assessment for 1991

12 16. On April 23, 1996, after the FTB had completed its audit and investigation of the
13 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are
14 owed) to plaintiff in which the FTB claimed plaintiff was a resident of California — not
15 Nevada — until April 3, 1992. The FTB therefore assessed plaintiff California state income tax
16 for the period of September 26 through December 31 of 1991 in a substantial amount.
17 Moreover, the FTB also assessed a penalty against plaintiff in an amount almost equal to the
18 assessed tax after summarily concluding that plaintiff's non-payment of the assessed tax, based
19 upon his asserted residency in Nevada and non-residency in California, was fraudulent.

20 17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide
21 resident of Nevada should not be forced into a California forum to seek relief from the unjust
22 and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident. Plaintiff
23 avers that the manufactured issue of his residency in Nevada for the period of September 26
24 through December 31 of 1991 should be determined in Nevada, the state of plaintiff's
25 residence. The FTB is in effect attempting to impose an "exit tax" on plaintiff by coercing him
26 into administrative procedures and possible future court action in California. The FTB has
27 arbitrarily, maliciously and without support in law or fact, asserted that plaintiff remained a
28 California resident until he purchased and closed escrow on a new home in Las Vegas on April

1 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a way — any way —
2 to effectively assess additional income taxes against plaintiff after he changed his residency
3 from California to Nevada is based on governmental greed arising from the FTB's eventual
4 awareness of the financial success plaintiff has realized since leaving California and becoming
5 a bona fide resident of the State of Nevada. The aforesaid date of Nevada residency accepted
6 by the FTB with respect to the 1991 Report is over six months after plaintiff moved to Nevada
7 with the intent to stay and began, he thought, to enjoy all the privileges and advantages of
8 residency in his new state.

9 **The FTB's Continuing Pursuit of Plaintiff in Nevada**

10 18. On or about April 1, 1996, plaintiff received formal notice that the FTB had
11 commenced an investigation into the 1992 tax year and that its tentative determination was that
12 plaintiff would also be assessed California state income taxes for the period of January 1
13 through April 3 of 1992.

14 19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received
15 notices from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in
16 regard to the 1992 tax year in which it will seek back taxes from plaintiff for income earned
17 during the period of January 1 through April 2, 1992 and in addition would seek penalties for
18 plaintiff's failure to file a state income tax return for 1992.

19 20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992
20 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes
21 over such assessments by the FTB always settle at this stage as taxpayers do not want to risk
22 their personal financial information being made public. Plaintiff understood this statement to
23 be a strong suggestion by the FTB that he settle the dispute by payment of some portion of the
24 assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not
25 been a resident of California since his move to Nevada on September 26, 1991, and it remains
26 clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties"
27 from him that he does not legally or morally owe.

28 21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed

1 Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff
2 became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of
3 Proposed Assessment that "We [the FTB] consider you to be a resident of this state [California]
4 through April 2, 1992," such notice proceeded to assess California state income taxes on
5 plaintiff's income for the **entire year of 1992**. Specifically, the FTB assessed plaintiff state
6 income taxes for 1992 in an amount five times greater than that for 1991, assessed plaintiff a
7 penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada
8 resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the
9 equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of
10 California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was
11 fourteen times the amount of tax it initially assessed for 1991, and in so doing asserted that
12 plaintiff was "a California resident for the entire year." Without explanation the FTB ignored
13 its earlier finding and written acknowledgment that plaintiff was a Nevada resident at least as of
14 April 3, 1992. This outrage is a transparent effort to extort substantial sums of money from a
15 Nevada resident.

16 22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to
17 engage in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within
18 the State of Nevada in an effort to conjure up a colorable basis for justifying its frivolous,
19 extortionate Noticed of Proposed Assessment for the 1992 tax year.

20 23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue
21 to assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996 and
22 beyond since the FTB has now disregarded its own conclusion regarding plaintiff's residency in
23 Nevada as of April 3, 1992, and is bent on charging him with a staggering amount of taxes,
24 penalties and interest irrespective of his status as a bona fide resident of Nevada. It appears
25 from its actions concerning plaintiff, that the FTB has embraced a new theory of liability that in
26 effect declares "once a California resident always a California resident" as long as the victim
27 continues to generate significant amounts of income. Thus, the FTB has raised an invisible
28 equivalent of the iron curtain that prohibits such residents from ever leaving the taxing

1 jurisdiction of the FTB.

2 **The FTB's Motive**

3 24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no
4 credible, admissible evidence that plaintiff was a California resident at anytime after September
5 of 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has
6 acknowledged in its own reports that plaintiff sold his California home on October 1, 1991, that
7 plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that
8 plaintiff purchased a home in Las Vegas in April 1992.

9 25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the
10 FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff
11 moved from California to Nevada an FTB investigator read a magazine article about plaintiff's
12 wealth and the FTB thereafter launched its investigation in the hope of extracting a significant
13 settlement from plaintiff. Plaintiff is further informed and believes, and therefore alleges, that
14 the FTB has assessed a fraud penalty against plaintiff for the 1991 tax year and issued a Notice
15 of Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for
16 the same year to intimidate plaintiff and coerce him into paying some significant amount of tax
17 for income earned after September 26, 1991, despite its awareness that plaintiff actually became
18 a Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into
19 sharing his hard-earned wealth despite having no lawful basis for doing so, constitutes malice
20 and oppression.

21 **Jurisdiction**

22 26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm"
23 statute, NRS 14.065 et seq., because of the FTB's tortious extraterritorial contacts and
24 investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to
25 undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for
26 maintaining that plaintiff continued his residency in California during the period September 26,
27 1991 to December 31, 1991 and beyond.

28 27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern

1 and practice of entering into Nevada to investigate Nevada residents who were formerly
2 residents of California, and then assessing such residents California state income taxes for time
3 periods subsequent to the date when such individuals moved to and established residency in
4 Nevada.

5 **FIRST CAUSE OF ACTION**

6 **(For Declaratory Relief)**

7 28. Plaintiff realleges and incorporates herein by reference each and every allegation
8 contained in paragraphs 1 through 27 above, as though set forth herein verbatim.

9 29. Pursuant to California law, in determining whether an individual was a resident of
10 California for a certain time period thereby making such individual's income subject to
11 California state income tax during such period, the individual must have been domiciled in
12 California during such period for "other than a temporary or transitory purpose." See Cal. Rev.
13 & Tax Code § 17014. The FTB's own regulations and precedents require that it apply certain
14 factors in determining an individual's domicile and/or whether the individual's presence in
15 California (or outside of California) was more than temporary or transitory.

16 (a) **Domicile.**

17 Domicile is determined by the individual's physical presence in California with
18 **intent to stay** or if absent temporarily from California an **intent to return**. Such intent
19 is determined by the acts and conduct of the individual such as: (1) where the individual
20 is registered to vote and votes; (2) location of the individual's permanent home; (3)
21 comparative size of homes maintained by the individual in different states; (4) where
22 the individual files federal income tax returns; (5) comparative time spent by the
23 individual in different states; (6) cancellation of the individual's California
24 homeowner's property tax exemption; (7) obtaining a driver's license from another
25 state; (8) registering a car in another state; (9) joining religious, business and/or social
26 organizations in another state; and (10) establishment of a successful business in another
27 state by an individual who is self employed.
28

1 (b) Temporary or Transitory Purpose.

2 The following contacts which are similar although not identical to those used to
3 determine domicile are important in determining whether an individual was in
4 California (or left California) for a temporary or transitory purpose: (1) physical
5 presence of the individual in California in comparison to the other state or states; (2)
6 establishment of a successful business in another state by an individual who is self
7 employed; (3) extensive business interest outside of California and active participation
8 in such business by the individual; (4) banking activity in California by the individual is
9 given some, although not a great deal of, weight; (5) rental of property in another state
10 by the individual; (6) cancellation of the individual's California homeowner's property
11 tax exemption; (7) hiring professionals by the individual located in another state; (8)
12 obtaining a driver's license from another state; (9) registering a car in another state; (10)
13 joining religious, business and/or social organizations in another state; and (11) where
14 the individual is registered to vote and votes.

15 30. The FTB's assessment of taxes and a penalty for 1991 is based on the FTB's
16 conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3,
17 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to
18 such a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts
19 which contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations
20 and precedents require it to consider. Such facts include, but are not limited to, the following:
21 (1) plaintiff sold his California home on October 1, 1991; (2) plaintiff rented an apartment in
22 Las Vegas on or about October 7, 1991 and, after a brief period of necessary travel to the east
23 coast, took possession of said apartment on or about October 22, 1991 and maintained his
24 residence there until April of 1992; (3) plaintiff registered to vote, obtained a Nevada driver's
25 license (relinquishing his California driver's license to the Nevada Department of Motor
26 Vehicles), and joined a Las Vegas religious organization in November of 1991; (4) plaintiff
27 terminated his California home owner's exemption effective October 1, 1991; (5) plaintiff
28 began actively searching for a house to buy in Las Vegas, commencing in early October 1991,

1 and submitted numerous offers on houses in Las Vegas beginning in December 1991; (6) one
2 of plaintiff's offers to purchase a home in Las Vegas was accepted in March of 1992 and
3 escrow on the transaction closed on April 3, 1992; and (7) plaintiff's new home in Las Vegas
4 was substantially larger than the home in Southern California, which he sold in October of
5 1991.

6 31. An actual controversy exists as to whether plaintiff was a full-time resident of
7 Nevada — not California — commencing on September 26, 1991 through December 31, 1991
8 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under
9 either Nevada or California law, or both, he was a full-time, bona fide resident of Nevada
10 throughout the referenced periods and down to the present, and that the FTB ignored its own
11 regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to
12 impose a tax obligation on plaintiff during the contested periods. Plaintiff also contends that
13 the FTB had no authority to conduct an extraterritorial investigation of plaintiff in Nevada and
14 no authority to propound "quasi-subpoenas" to Nevada residents and businesses, thereby
15 seeking to coerce the cooperation of said Nevada residents and businesses through an unlawful
16 and tortious deception, to reveal information about plaintiff. Plaintiff is informed and believes,
17 and therefore alleges, that the FTB contends in all respects to the contrary.

18 32. Plaintiff therefore requests judgment of this Court declaring and confirming
19 plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from
20 September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial
21 investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada
22 residents without approval from a Nevada court or governmental agency, as alleged above, to
23 be without authority and violative of Nevada's sovereignty and territorial integrity.

24 **SECOND CAUSE OF ACTION**

25 **(For Invasion of Privacy — Unreasonable Intrusion Upon The Seclusion of Another)**

26 33. Plaintiff realleges and incorporates herein by reference each and every allegation
27 contained in paragraphs 1 through 27, and 29 through 31, above, as though set forth herein
28 verbatim.

1 34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses,
2 government officials and others within Nevada with whom plaintiff has had and would
3 reasonably expect in the future to have social or business interactions, were approached and
4 questioned by the FTB and defendants who disclosed or implied that plaintiff was under
5 investigation in California, and otherwise acted in such a manner as to cause doubts to arise
6 concerning plaintiff's integrity and moral character. Moreover, as part of the
7 audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly
8 personal and confidential information with the understanding that it would remain confidential.
9 The FTB even noted in its own internal documentation that plaintiff had a significant concern
10 in regard to the protection of his privacy in turning over such information. At the time this
11 occurred, plaintiff was still hopeful that the FTB was actually operating in good faith, a
12 proposition that, as noted throughout this complaint, proved to be utterly false.

13 35. Plaintiff is informed and believes, and therefore alleges, that the FTB and
14 defendants nevertheless violated plaintiff's right to privacy in regard to such information by
15 revealing it to third parties and otherwise conducting an investigation in Nevada through which
16 the FTB and defendants revealed to third parties personal and confidential information, which
17 plaintiff had every right to expect would not be revealed to such parties.

18 36. Plaintiff is informed and believes, and therefore alleges, that the FTB and
19 defendants' extensive probing and investigation of plaintiff, including their actions both
20 occurring within Nevada and directed to Nevada from California, were performed with the
21 intent to harass, annoy, vex, embarrass and intimidate plaintiff such that he would eventually
22 enter into a settlement with the FTB concerning his residency during the disputed time periods
23 and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in
24 fact harass, annoy, vex and embarrass Hyatt, and syphon his time and energies from the
25 productive work in which he is engaged.

26 37. Plaintiff is informed and believes, and therefore alleges, that the FTB and
27 defendants through their investigative actions, and in particular the manner in which they were
28 carried out in Nevada, intentionally intruded into the solitude and seclusion which plaintiff had

1 specifically sought by moving to Nevada. The intrusion by the FTB and defendants was such
2 that any reasonable person, including plaintiff, would find highly offensive.

3 38. As a direct, proximate, and foreseeable result of the FTB and defendants'
4 aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential
5 damages in a total amount in excess of \$10,000.

6 39. Plaintiff is informed and believes, and therefore alleges, that said invasion of
7 plaintiff's privacy was intentional, malicious, and oppressive in that such invasion was
8 despicable conduct by the FTB and defendants entered into with a willful and conscious
9 disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is
10 therefore entitled to an award of punitive damages against the FTB and defendants in an
11 amount sufficient to satisfy the purposes for which such damages are awarded.

12 **THIRD CAUSE OF ACTION**

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

14 40. Plaintiff realleges and incorporates herein by reference each and every allegation
15 contained in paragraphs 1 through 27, 29 through 31, and 34 through 37, above, as though set
16 forth herein verbatim.

17 41. As set forth above, plaintiff revealed to the FTB highly personal and confidential
18 information at the request of the FTB as an ostensible part of its audit and investigation into
19 plaintiff's residency during the disputed time periods. Plaintiff had a reasonable expectation
20 that said information would be kept confidential and not revealed to third parties and the FTB
21 and defendants knew and understood that said information was to be kept confidential and not
22 revealed to third parties.

23 42. The FTB and defendants, without necessity or justification, nevertheless disclosed
24 to third parties in Nevada certain of plaintiff's personal and confidential information which had
25 been cooperatively disclosed to the FTB by plaintiff only for the purposes of facilitating the
26 FTB's legitimate auditing and investigative efforts.

27 43. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion
28 of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount

1 in excess of \$10,000.

2 44. Plaintiff is informed and believes, and therefore alleges, that said invasion of
3 plaintiff's privacy was intentional, malicious, and oppressive in that such invasion constituted
4 despicable conduct by the FTB and defendants entered into with a willful and conscious
5 disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or
6 exemplary damages in an amount sufficient to satisfy the purposes for which such damages are
7 awarded.

8 **FOURTH CAUSE OF ACTION**

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

10 45. Plaintiff realleges and incorporates herein by reference each and every allegation
11 contained in paragraphs 1 through 27, 29 through 31, 34 through 37, and 41 and 42, above, as if
12 set forth herein verbatim.

13 46. By conducting interviews and interrogations of Nevada residents and by issuing
14 unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of
15 plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by stating or
16 insinuating to said Nevada residents that plaintiff was under investigation in California, thereby
17 falsely portraying plaintiff as having engaged in illegal and immoral conduct, and decidedly
18 casting plaintiff's character in a false light.

19 47. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast
20 plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those
21 who know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature
22 and scope of his work. Such publicity of the investigation was offensive and objectionable to
23 plaintiff and was carried out for other than honorable, lawful, or reasonable purposes. Said
24 conduct by the FTB and the defendants was calculated to harm, vex, annoy and intimidate
25 plaintiff, and was not only offensive and embarrassing to plaintiff, but would have been equally
26 so to any reasonable person of ordinary sensibilities similarly situated, as the conduct could
27 only serve to damage plaintiff's reputation.

28 48. As a direct, proximate, and foreseeable result of the FTB and defendants'

1 aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential
2 damages in a total amount in excess of \$10,000.

49. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FIFTH CAUSE OF ACTION

(For the Tort of Outrage)

11 50. Plaintiff realleges and incorporates herein by reference each and every allegation
12 contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47,
13 above, as if set forth herein verbatim.

14 51. The clandestine and reprehensible manner in which the FTB and defendants carried
15 out their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority
16 from the State of California, but without permission from the State of Nevada, and the FTB and
17 defendants' apparent intent to continue to investigate and assess plaintiff staggeringly high
18 California state income taxes, interest, and penalties for the entire year of 1992 — and possibly
19 continuing into future years — despite the FTB's own finding that plaintiff was a Nevada
20 resident at least as of April of 1992, was, and continues to be, extreme, oppressive and
21 outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in
22 California, disdaining and abandoning all reason in its reprehensible, all-out effort to extort
23 significant amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed
24 and believes, and therefore alleges, that the FTB and defendants carried out their investigation
25 in Nevada for the ostensible purpose of seeking truth concerning his place of residency, but the
26 true purpose of which was to so harass, annoy, embarrass, and intimidate plaintiff, and to cause
27 him such severe emotional distress and worry as to coerce him into paying significant sums to
28 the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the

1 disputed periods. As a result of such extremely outrageous and oppressive conduct on the part
2 of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation,
3 embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive
4 person would feel if subjected to equivalent unrelenting, outrageous personal threats and insults
5 by such powerful and determined adversaries.

6 52. As a direct, proximate, and foreseeable result of the FTB and defendants'
7 aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and
8 consequential damages in a total amount in excess of \$10,000.

9 53. Plaintiff is informed and believes, and therefore alleges, that said extreme,
10 unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was
11 despicable conduct by the FTB and defendants, entered into with a willful and conscious
12 disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or
13 punitive damages in an amount sufficient to satisfy the purposes for which such damages are
14 awarded.

15 **SIXTH CAUSE OF ACTION**

16 **(For Abuse of Process)**

17 54. Plaintiff realleges and incorporates herein by reference each and every allegation
18 contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, and
19 51 and 53, above, as if set forth herein verbatim.

20 55. Despite plaintiff's ongoing effort, both personally and through his professional
21 representatives, to reasonably provide the FTB with every form of information it requested in
22 order to convince the FTB that plaintiff has been a bona fide resident of the State of Nevada
23 since September 26, 1991, the FTB has willfully sought to extort vast sums of money from
24 plaintiff through administrative proceedings unrelated to the legitimate taxing purposes for
25 which the FTB is empowered to act as an agency of the government of the State of California;
26 said administrative proceedings have been lawlessly and abusively directed into the State of
27 Nevada through means of administrative "quasi-subpoenas" that have been unlawfully utilized
28 in the attempt to extort money from plaintiff as aforesaid.

1 56. The FTB, without authorization from any Nevada court or governmental agency,
2 directed facially authoritative "**DEMAND[S] TO FURNISH INFORMATION**," also referred
3 to herein by plaintiff as "quasi-subpoenas," to various Nevada residents, professionals and
4 businesses, *requiring* specific information about plaintiff. The aforesaid "Demands"
5 constituted an actionable abuse of process with respect to plaintiff for the following reasons:

6 (a) Despite the fact that each such "Demand" was without force of law, they were
7 specifically represented to be "Authorized by California Revenue & Taxation Code Section
8 19504 (formerly 19254 (a) and 26423 (a)[]," sent out by the State of California, Franchise Tax
9 Board on behalf of "The People of the State of California" to each specific recipient, and were
10 prominently identified as relating to "*In the Matter of: Gilbert P. Hyatt*;" Plaintiff was also
11 identified by his social security number, and in certain instances **by his actual home address**
12 in violation of express promises of confidentiality by the FTB; although the aforesaid
13 "Demands" were not directed to plaintiff, the perversion of administrative process which they
14 represented was motivated by the intent to make plaintiff both the target and the victim of the
15 illicit documents;

16 (b) Each such "Demand" was unlawfully used in order to further the effort to extort
17 monies from plaintiff that could not be lawfully and constitutionally assessed and collected
18 because plaintiff was a bona fide resident of Nevada throughout the periods of time the FTB
19 has sought to collect taxes from him, and plaintiff has not generated any California income
20 during any of the pertinent time periods;

21 (c) Each such "Demand" was submitted to Nevada residents, professionals and
22 businesses for the ulterior purpose of coercing plaintiff into paying extortionate sums of money
23 to the FTB without factual or constitutional justification, and without the intent or prospect of
24 resolving any legal dispute; indeed, as noted above, many of the "Demands" were used as
25 vehicles for publicly violating express promises of confidentiality by the FTB, thus adding to
26 the pressure and anxiety felt by plaintiff as intended by the FTB in furtherance of its unlawful
27 scheme;

28 (d) Although the FTB was allegedly investigating plaintiff for the audit years 1991 and

1 1992, such audits were and are a "sham" asserted for the purposes of attempting to extort non-
2 owed monies from plaintiff, as demonstrated by the fact that several of the "Demands"
3 indicated that they were issued to secure information (about plaintiff) "for investigation, audit
4 or collection purposes pertaining to the above-named taxpayer for the years indicated," and
5 then proceeded to demand information pertaining to the years 1993, 1994, and 1995 "to
6 present;"

7 (e) Sheila Cox, a tax auditor for the FTB who has invested hundreds of hours in
8 attempting to gain unlawful access to plaintiff's wallet through means of extortion, was the
9 "Authorized Representative" who issued these abusive, deceptive and outrageous "Demands;"
10 and each of the "Demands" or quasi-subpoenas constituted legal or administrative process
11 targeting plaintiff that was not proper in the regular conduct of the FTB's administrative
12 proceedings against plaintiff;

13 (f) That each "Demand" was selectively, deliberately and calculatingly issued to Nevada
14 recipients who Sheila Cox and the FTB thought would most likely respond to the authoritative
15 nature and language of the documents, as opposed to courteous letters of inquiry that tax
16 auditors and the FTB sent to certain governmental agencies and officials who were viewed as
17 potential sources of criticism or trouble if confronted with the deceptive attempt to exact
18 sensitive information from them through means of facially coercive documents purporting to
19 have extraterritorial effect based upon the authority of California law;

20 (g) In conjunction with and in addition to the issuance of the aforesaid "Demands," and
21 the personal, investigative forays into Nevada by FTB agents, as detailed above, a
22 representative of the FTB, Anna Jovanovich, stated to plaintiff's tax counsel, Eugene Cowan,
23 Esq., that at this "stage" of the proceedings, these types of disputes involving wealthy or well-
24 known taxpayers over their contested assessments almost always settle because these taxpayers
25 do not want to risk having their personal financial information being made public, thus the
26 "suggestion" by Ms. Jovanovich concerning settlement was made with the implied threat that
27 the FTB would release highly confidential financial information concerning plaintiff if he
28 refused to settle, another deceptive and improper abuse of the proceedings instigated by the

1 FTB to coerce settlement by plaintiff;

2 (h) In conjunction with and in addition to the issuance of the aforesaid "Demands" and
3 the other improper methods of exerting coercive pressure on plaintiff to pay the FTB money
4 which it has sought to secure by extortion, and without justification in law or equity, the FTB
5 compounded its abuse of its administrative powers by assessing plaintiff huge penalties based
6 on patently false and frivolous accusations, including but not limited to, the concealment of
7 assets to avoid taxes, plus the outrageous contention that plaintiff was fraudulently claiming
8 Nevada residency;

9 (i) The FTB and Sheila Cox knew that they had no authority to issue "**DEMAND[S]**
10 **TO FURNISH INFORMATION**" to any Nevada resident, business or entity, and that it was
11 a gross abuse of Section 19504 of the California Revenue and Taxation Code, under which the
12 aforesaid "Demands" were purportedly authorized; that the aforesaid section of the California
13 Revenue and Taxation Code contains no provision that remotely purports to empower or
14 authorize the FTB to issue such facially coercive documents to residents and citizens of Nevada
15 in Nevada; and despite knowing that it was highly improper and unlawful to attempt to deceive
16 Nevada citizens and businesses into believing that they were under a compulsion to respond to
17 the "Demands" under pain of some type of punitive consequences, Sheila Cox and the FTB
18 nevertheless deliberately and calculatingly abused the process authorized by the aforesaid
19 section of the California Revenue and Taxation Code in order to promote their attempts to
20 extort money from plaintiff;

21 (j) From the outset, the determination by Sheila Cox and the FTB to utilize the
22 "**DEMAND[S] TO FURNISH INFORMATION**" in Nevada, constituted a deliberate,
23 unlawful, and despicable decision to embark on a course of concealment in the effort to
24 produce material, information, pressure and sources of distortion that would culminate in a
25 combination of sufficient strength and adversity to force plaintiff to yield to the FTB's
26 extortionate demands for money; and the course of concealment consisted of concealing from
27 plaintiff the fact that the aforesaid "Demands" were being sent to Nevada residents,
28 professional persons and businesses, and in hiding from the recipients of the "Demands" the

1 fact that despite their stated support in California law, the documents had no such support and
2 were deceitful and bogus documents; and

3 (k) The FTB further abused its legal, administrative process by issuing the bogus quasi-
4 subpoenas to Nevada residents, professionals, and businesses without providing plaintiff with
5 notice of such discovery as required by the due process clause of Article 1, Section 8 of the
6 Nevada Constitution and the applicable Nevada Rules of Civil Procedure.

7 57. As a direct, proximate and foreseeable result of the FTB and defendants' intentional
8 and malicious abuse of the administrative processes, which the FTB initiated and unrelentingly
9 pursued against plaintiff, as aforesaid, plaintiff has suffered actual and consequential damages,
10 including but not limited to fear, anxiety, mental and emotional distress in an amount in excess
11 of \$10,000.

12 58. Plaintiff is informed and reasonably believes, and therefore alleges, that said abuse
13 of the administrative processes initiated and pursued against plaintiff was willful, intentional,
14 malicious and oppressive in that it represented a deliberate effort to unlawfully extort
15 substantial sums of money from plaintiff that could not be remotely justified by any honorable
16 effort within the purview of the powers conferred upon the FTB by the State of California
17 relating to all aspects of taxation, including the powers of investigation, assessment and
18 collection. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an
19 amount sufficient to satisfy the purposes for which such damages are awarded.

20 **SEVENTH CAUSE OF ACTION**

21 **(For Fraud)**

22 59. Plaintiff realleges and incorporates herein by reference each and every allegation
23 contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, 51
24 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter paragraph, above,
25 as if set forth herein verbatim.

26 60. Plaintiff, who prior to September 26, 1991 had been a long-standing resident and
27 taxpayer of the State of California, placed trust and confidence in the bona fides of the FTB as
28 the taxing authority of the State of California when the FTB first contacted him on or about

1 June 1993 regarding the 1991 audit of his California tax obligation; by the time of this first
2 contact, plaintiff had become a recognized and prominent force in the computer electronics
3 industry, and he was vitally interested in maintaining both his personal and business security, as
4 well as the integrity of his reputation as a highly successful inventor and owner and licensor of
5 significantly valuable patents.

6 61. During the course of seeking information and documents relating to the 1991
7 "audit," and repeatedly thereafter, the FTB absolutely promised to maintain in the strictest of
8 confidence, various aspects of plaintiff's circumstances, including, but not limited to, his
9 personal home address and his business and financial transactions and status; and plaintiff's
10 professional representatives took special measures to maintain the confidentiality of plaintiff's
11 affairs, including and especially obtaining solemn commitments from FTB agents to maintain
12 in the strictest of confidence (assured by supposedly secure arrangements) all of plaintiff's
13 confidential information and documents; and the said confidential information and documents
14 were given to the FTB in return for its solemn guarantees and assurances of confidentiality, as
15 aforesaid.

16 62. Despite the aforesaid assurances and representations of confidentiality by the FTB,
17 said assurances and representations were false, and the FTB knew they were false or believed
18 they were false, or were without a sufficient basis for making said assurances and
19 representations. Even as the FTB and its agents were continuing to provide assurances of
20 confidentiality to plaintiff and his professional representatives, and without notice to either,
21 Sheila Cox and the FTB were in the process of sending the bogus **"DEMAND[S] TO**
22 **FURNISH INFORMATION"** to the utility companies in Las Vegas which demonstrated that
23 the aforesaid assurances and representations were false, as the FTB revealed plaintiff's personal
24 home address in Las Vegas, thus making this highly sensitive and confidential information
25 essentially available to the world through access to the databases maintained by the utility
26 companies. Specific representative indices of the FTB's fraud include:

27 (a) In a letter by Eugene Cowan, Esq., a tax attorney representing plaintiff, dated
28 November 1, 1993 and addressed to and received by Mr. Marc Shayer of the FTB, Mr. Cowan

1 indicated that he was enclosing a copy of plaintiff's escrow instructions concerning the
2 purchase of his Las Vegas residence, and that "[p]er our discussion, the address of the Las
3 Vegas home has been deleted." Mr. Cowan ended his letter with the following sentence: "As
4 we discussed, the enclosed materials are highly confidential and we do appreciate your
5 utmost care in maintaining their confidentiality." This letter is contained within the files of
6 the FTB, and the FTB noted in its chronological list of items, the receipt of the aforesaid
7 escrow instructions with "Address deleted;"

8 (b) In the FTB's records concerning its Residency Audit 1991 of Gilbert P. Hyatt, the
9 following pertinent excerpts of notations exist :

10 (I) 2/17/95 - "[Eugene Cowan] wants us to make as few copies as possible, as he is
11 concerned for the privacy of the taxpayer. I [the FTB agent] explained that we will need
12 copies, as the cases often take a long time to complete and that cases which go to protest can
13 take several years to resolve[;]"

14 (ii) 2/21/95 - "LETTER FROM REPRESENTATIVE MIKE KERN Earlier
15 document request was transferred to Eugene Cowan due to the sensitive and confidential nature
16 of documentation[;]"

17 (iii) 2/23/95 - "Meeting [between Sheila Cox and] . . . Eugene Cowan . . . Mr. Cowan
18 stressed that the taxpayer is very worried about his privacy and does not wish to give us copies
19 of anything. I [Sheila Cox] discussed with him our Security and Disclosure policy. He said
20 that the taxpayer is fearful of kidnapping." [sic] This latter reference to "kidnaping" is a
21 fabrication by Sheila Cox in an apparent effort to downplay in the FTB's records, the
22 importance of plaintiff's privacy concerns as those of an eccentric or paranoid; in reality, the
23 FTB, Sheila Cox and other FTB agents knew that plaintiff had genuine cause for being
24 concerned about industrial espionage and other risks associated with the magnitude of
25 plaintiff's position in the computer electronics industry;

26 (iv) On February 28, 1995, Eugene Cowan, Esq. sent a letter to Sheila Cox of the
27 FTB enclosing copies of various documents. He then stated: "As previously discussed with
28 you and other Franchise Tax Board auditors, all correspondence and materials furnished to the

1 Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you
2 will retain these materials in locked facilities with limited access[;]" and

3 (v) 8/31/95 - In a letter sent to Eugene Cowan, Esq. by Sheila Cox on 8/31/95
4 regarding the 1991 audit, Cox stated: "The FTB acknowledges that the taxpayer is a private
5 person who puts a significant effort into protecting his privacy[;]"

6 (c) Despite the meeting Sheila Cox had with Mr. Cowan on February 23, 1995, and Mr.
7 Cowan's expression of plaintiff's concern for his privacy, and the explanation by Cox of the
8 FTB's stringent Security and Disclosure policy (the violation of which may subject the
9 offending FTB employee to criminal sanctions or termination); and despite Mr. Cowan's letter
10 to Sheila Cox of February 28, 1995, discussing the highly confidential nature of "all
11 correspondence and materials furnished to the Franchise Tax Board" and his and plaintiff's
12 "understanding that you will retain these materials in locked facilities with limited access"
13 (thereby again underscoring the understanding that all information and documents provided to
14 the FTB would be confidential, including plaintiff's personal residence address), Sheila Cox
15 sent a "**DEMAND TO FURNISH INFORMATION**" to the Las Vegas utility companies
16 including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water
17 District, providing each such company with the plaintiff's personal home address, thereby
18 demonstrating disdain for plaintiff, his privacy concerns and the FTB's assurances of
19 confidentiality.

20 63. Plaintiff further alleges that from the very beginning of the FTB's notification to
21 plaintiff and his professional representatives of its intention to audit his 1991 California taxes,
22 express and implied assurances and representations were made to plaintiff through his
23 representatives, that the audit was to be an objective inquiry into the status of his 1991 tax
24 obligation; and that upon information and belief, based on the FTB's subsequent actions, the
25 aforesaid representations were untrue, as the FTB and certain of its agents were determined to
26 share in the highly successful produce of plaintiff's painstaking labor through means of truth-
27 defying extortion. Indications of this aspect of the fraud perpetrated by the FTB include:

28 (a) Despite plaintiff's delivery of copies of documentary evidence of the sale of his

1 California residence on October 1, 1991 to his business associate and confidant, Grace Jeng, to
2 the FTB, the FTB has contended that the aforementioned sale was a sham, and therefore
3 evidence of plaintiff's continued California residency and his attempt to evade California
4 income tax by fraud;

5 (b) Plaintiff supplied evidence to the FTB that he declared his sale, and income and
6 interest derived from the sale of his LaPalma, California home on his 1991 income tax return,
7 factors that were ignored by the FTB as it concluded that since the grant deed on the home was
8 not recorded until June, 1993, the sale was a sham, as aforesaid, and a major basis for assessing
9 fraud penalties against plaintiff as a means of building the pressure for extortion;

10 (c) Plaintiff, aware of his own whereabouts and domicile, alleges that the FTB has no
11 credible evidence, and can indeed provide none, that would indicate that plaintiff continued to
12 own or occupy his former home in La Palma, California which he sold to his business associate
13 and confidant, Grace Jeng on October 1, 1991;

14 (d) After declaring plaintiff's sale of his California home on October 1, 1991 a "sham,"
15 the FTB later declined to compare the much less expensive California home with the home
16 plaintiff purchased in Las Vegas, Nevada (a strong indication favoring Nevada residency)
17 stating that: "Statistics (size, cost, etc.) comparing the taxpayer's La Palma home to his Las
18 Vegas home will not be weighed in the determination [of residency], as the taxpayer sold the
19 La Palma house on 10/1/91 before he purchased the house in Las Vegas during April of
20 1992." (Emphasis added.); and

21 (e) The FTB's gamesmanship, illustrated in part, above, constituted an ongoing
22 misrepresentation of a bona fide audit of plaintiff's 1991 tax year, a factor compounded
23 egregiously by the quasi-subpoenas sent to Nevada residents, professionals and businesses
24 without prior notice to plaintiff, and concerning which a number of such official documents
25 indicated that plaintiff was being investigated from January 1995 to the present, all with the
26 intent of defrauding plaintiff into believing that he would owe an enormous tax obligation to
27 the State of California.

28 64. The FTB and its agents intended to induce plaintiff and his professional

1 representatives to act in reliance on the aforesaid false assurances and representations in order
2 to acquire highly sensitive and confidential information from plaintiff and his professional
3 representatives, and place plaintiff in a position where he would be vulnerable to the FTB's
4 plans to extort large sums of money from him. The FTB was keenly aware of the importance
5 plaintiff assigned to his privacy because of the danger of industrial espionage and other hazards
6 involving the extreme need for security in plaintiff's work and place of residence. The FTB
7 also knew that it would not be able to obtain (at least without the uncertain prospects of judicial
8 intervention) the desired information and documents with which to develop colorable,
9 ostensible tax assessments and penalties against plaintiff, without providing plaintiff and his
10 professional representatives with solemn commitments of secure confidentiality.

11 65. Plaintiff, reasonably relying on the truthfulness of the aforesaid assurances and
12 representations by the FTB and its agents, and having no reason to believe that an agency of the
13 State of California would misrepresent its commitments and assurances, did agree both
14 personally and through his authorized professional representatives to cooperate with the FTB
15 and provide it with his highly sensitive and confidential information and documents; in fact,
16 plaintiff relied on the false representations and assurances of the FTB and its agents to his
17 extreme detriment.

18 66. Plaintiff's reasonable reliance on the misrepresentations of the FTB and its agents,
19 as aforesaid, resulted in great damage to plaintiff, including damage of an extent and nature to
20 be revealed only to the Court *in camera*, plus actual and consequential damages, including but
21 not limited to fear, anxiety, mental and emotional distress, in a total amount in excess of
22 \$10,000.

23 67. The aforesaid misrepresentations by the FTB and its agents were fraudulent,
24 oppressive and malicious. Plaintiff is therefore entitled to an award of exemplary or punitive
25 damages in an amount sufficient to satisfy the purposes for which such damages are awarded.
26
27
28

1 **EIGHTH CAUSE OF ACTION**

2 **(For Negligent Misrepresentation)**

3 68. Plaintiff realleges and incorporates herein by reference each and every allegation
4 contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, 51
5 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter paragraph, and 60
6 through 65, above, as if set forth herein verbatim.

7 69. The FTB, in providing plaintiff and his professional representatives assurances of
8 strict confidentiality with respect to the sensitive and highly confidential information and
9 documents it sought to obtain from plaintiff concerning, allegedly, its 1991 tax year audit of
10 plaintiff, as detailed above, owed a duty to plaintiff to inform him that the FTB, through its
11 agents, may not have been able to maintain, or otherwise would not maintain, the strict
12 confidentiality it had promised plaintiff in order to secure confidential information and
13 documentation from him.

14 70. When the FTB revealed to public sources and third persons the highly sensitive and
15 confidential information and documentation it had promised to retain under conditions of strict
16 confidentiality, it breached its duty to plaintiff as described in paragraph 68, above.

17 71. The relationship between the FTB and plaintiff, was in every sense one of business
18 and trust, as plaintiff was required to employ professional tax attorneys and accountants in
19 order to deal with the FTB's demands, and the FTB's interest was in determining means and
20 methods whereby it could secure revenue from plaintiff. Although plaintiff was forced to deal
21 with the FTB as a matter of law, it was clear that the asserted purpose for the mutual intercourse
22 was a determination as to whether plaintiff may have owed additional taxes for calendar year
23 1991 for which he had enjoyed the benefits provided to him by the State of California. The
24 negotiations that occurred between plaintiff, through his professional representatives, and the
25 FTB and its agents, over terms under which information and documentation would be made
26 available to the FTB were also part of what must assuredly be viewed as a business
27 relationship.

28 72. As a direct, proximate and foreseeable result of the FTB's breach of duty to

1 plaintiff, as alleged above, plaintiff has sustained great damage, including damage of an extent
2 and nature to be revealed only to the Court *in camera*, plus actual and consequential damages,
3 including but not limited to fear, anxiety, mental and emotional distress, in a total amount in
4 excess of \$10,000.

5 WHEREFORE, plaintiff respectfully prays for judgment against the FTB and
6 defendants as follows:

7 **FIRST CAUSE OF ACTION**

- 8 1. For judgment declaring and confirming that plaintiff is a bona fide resident of the
9 State of Nevada effective as of September 26, 1991 to the present;
- 10 2. For judgment declaring that the FTB has no lawful basis for continuing to investigate
11 plaintiff in Nevada concerning his residency between September 26, 1991 through December
12 31, 1991 or any other subsequent period down to the present, and declaring that the FTB had no
13 right or authority to propound or otherwise issue a "Demand to Furnish Information" or other
14 quasi-subpoenas to Nevada residents and businesses seeking information concerning plaintiff;
- 15 3. For costs of suit;
- 16 4. For reasonable attorneys' fees; and
- 17 5. For such other and further relief as the Court deems just and proper.

18 **SECOND CAUSE OF ACTION**

- 19 1. For actual and consequential damages in a total amount in excess of \$10,000;
- 20 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
21 damages are awarded;
- 22 3. For costs of suit;
- 23 4. For reasonable attorneys' fees; and
- 24 5. For such other and further relief as the Court deems just and proper.

25 **THIRD CAUSE OF ACTION**

- 26 1. For actual and consequential damages in a total amount in excess of \$10,000;
- 27 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
28 damages are awarded;

- 1 3. For costs of suit;
- 2 4. For reasonable attorneys fees; and
- 3 5. For such other and further relief as the Court deems just and proper.

4 **FOURTH CAUSE OF ACTION**

- 5 1. For actual and consequential damages in a total amount in excess of \$10,000;
- 6 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
- 7 damages are awarded;
- 8 3. For costs of suit;
- 9 4. For reasonable attorneys fees; and
- 10 5. For such other and further relief as the Court deems just and proper.

11 **FIFTH CAUSE OF ACTION**

- 12 1. For actual and consequential damages in a total amount in excess of \$10,000;
- 13 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
- 14 damages are awarded;
- 15 3. For costs of suit;
- 16 4. For reasonable attorneys' fees; and
- 17 5. For such other and further relief as the Court deems just and proper.

18 **SIXTH CAUSE OF ACTION**

- 19 1. For actual and consequential damages in a total amount in excess of \$10,000;
- 20 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
- 21 damages are awarded;
- 22 3. For costs of suit;
- 23 4. For reasonable attorneys' fees; and
- 24 5. For such other and further relief as the Court deems just and proper.

25 **SEVENTH CAUSE OF ACTION**

- 26 1. For actual and consequential damages in a total amount in excess of \$10,000;
- 27 2. For punitive damages in an amount sufficient to satisfy the purposes for which such
- 28 damages are awarded;

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

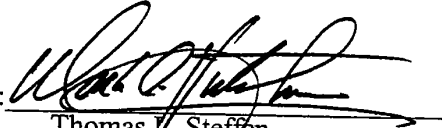
- 3. For costs of suit;
- 4. For reasonable attorneys' fees; and
- 5. For such other and further relief as the Court deems just and proper.

EIGHTH CAUSE OF ACTION

- 1. For actual and consequential damages in a total amount in excess of \$10,000;
- 2. For costs of suit;
- 3. For reasonable attorneys' fees; and
- 4. For such other and further relief as the Court deems just and proper.

DATED this 17th day of June 1998.

HUTCHISON & STEFFEN

By: 
Thomas L. Steffen
Mark A. Hutchison
530 South 4th Street
Las Vegas, Nevada 89101

Attorneys for Plaintiff

EXHIBIT 5

1 **ANS**

2 THOMAS R. C. WILSON, ESQ.

3 Nevada State Bar # 1568

4 MATTHEW C. ADDISON, ESQ.

5 Nevada State Bar # 4201

6 BRYAN R. CLARK, ESQ.

7 Nevada State Bar # 4442

8 McDONALD CARANO WILSON McCUNE

9 BERGIN FRANKOVICH & HICKS LLP

10 2300 West Sahara Avenue, Suite 1000

11 Las Vegas, Nevada 89102

12 (702) 873-4100

13 Attorneys for Defendants

Handwritten signature
RECEIVED
AUG 14 1998
HUTCHISON & STEFFEN

14 DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 *****

17 GILBERT P. HYATT,

18 Plaintiff,

19 vs.

20 FRANCHISE TAX BOARD OF THE
21 STATE OF CALIFORNIA, and DOES 1-
22 100, inclusive

23 Defendants.

Case No. : A382999

Dept. No. : X

Docket No. : R

**ANSWER TO FIRST AMENDED
COMPLAINT**

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

27 **ANSWER**

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

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2300 WEST SAHARA AVENUE, SUITE 1000
LAS VEGAS, NEVADA 89102-4354
(702) 873-4100

AA000859

McDONALD CARANO WILSON MCCOY BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2300 WEST SARAH AVENUE • NO. 10 SUITE 1000
LAS VEGAS, NEVADA 89102-4834
(702) 873-4100

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.

///

McDONALD CARANO WILSON & JANE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2900 WEST SARARA AVENUE • NO. 10 SUITE 1000
LAS VEGAS, NEVADA 89102-4354
(702) 878-4100

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.

McDONALD CARANO WILSON MCDONALD BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2000 WEST SAHARA AVENUE - NO 10 SUITE 1000
LAS VEGAS NEVADA 89102-4354
(702) 878-4100

- 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

MCDONALD CARANO WILSON MCCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2300 WEST SAHARA AVENUE • NO. 10 SUITE 1000
LAS VEGAS, NEVADA 89102-4894
(702) 873-4100

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), (I),
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

McDONALD CARANO WILSON MCGUINE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2008 WEST SAHARA AVENUE • NO. 10 SUITE 1000
LAS VEGAS, NEVADA 89102-4354
(702) 673-4100

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 ///

1 WHEREFORE, FTB prays the Court enter judgment as follows:

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

7 DATED this 13th day of August, 1998.

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

10 By by [Signature]
11 MATTHEW C. ADDISON #44/82
12 241 Ridge St., Fourth Floor
13 P. O. Box 2670
14 Reno, Nevada 89505

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2350 WEST SAHARA AVENUE - NO. 10 SUITE 1000
LAS VEGAS NEVADA 89102-4354
(702) 878-4100

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 13th day of August, 1998, by depositing same in the United States Mail, postage prepaid thereon, upon the following:

Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
Hutchison & Steffen
530 South Fourth Street
Las Vegas, NV 89101

Vanesa A. Sneider
An Employee of McDonald Carano Wilson
McCune Bergin Frankovich & Hicks LLP

15088

EXHIBIT 6

MOT

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

Shirley B. Panagiotou

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.

MC

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

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

6 DATED this 9th day of February, 1999.

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

10 By 

BRYAN R. CLARK, ESQ.

Nevada Bar #4442

2300 West Sahara Avenue, Suite 1000

Las Vegas, Nevada 89102

Attorneys for Defendant

13 **NOTICE OF MOTION**

14 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

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

19 DATED this 9th day of Feb., 1999.

22 McDonald Carano Wilson McCune
23 Bergin Frankovich & Hicks LLP

24 
25 BRYAN R. CLARK, ESQ.

Nevada Bar No. 4442

2300 West Sahara Avenue, #1000

Las Vegas, Nevada 89102

Attorneys for Defendants

TABLE OF CONTENTS

POINTS AND AUTHORITIES	1
I. BACKGROUND FACTS AND CIRCUMSTANCES.	1
II. ARGUMENT	4
A. PLAINTIFF'S DECLARATORY ACTION MUST BE DISMISSED BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION	5
B. PLAINTIFF'S DECLARATORY ACTION WOULD BE BARRED FROM BOTH CALIFORNIA AND UNITED STATES COURTS	8
C. THIS COURT SHOULD NOT EXERCISE JURISDICTION AS A MATTER OF COMITY	8
D. PLAINTIFF'S TORT CAUSES OF ACTION ARE BARRED IN CALIFORNIA COURTS	11
E. DECLARATORY RELIEF IS NOT AVAILABLE UNDER NEVADA LAW	12
F. THERE IS NO INVASION OF PRIVACY CAUSE OF ACTION PROPERLY PLED.	15
G. PLAINTIFF HAS FAILED TO PLEAD AN ACTIONABLE TORT OF OUTRAGE	25
H. PLAINTIFF HAS NOT PLED AN ACTIONABLE TORT OF ABUSE OF PROCESS.	26
I. NO FRAUD CLAIM IS PROPERLY ALLEGED.	29
J. NEGLIGENT MISREPRESENTATION IS NOT PROPERLY PLED	30
III. CONCLUSION	32

TABLE OF AUTHORITIES

Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291-306 (App. Ct.1941).....	5
Andrews v. Stallings, 892 P.2d 611, 626, 119 N.M. 478 (N.M. App. 1995)	25
Aronoff v. Franchise Tax Board, 60 Cal.2d 177, 180-81, 383 P. 2d 409 (1963)	5
Bernard v. Rockhill Dev. Co., 103 Nev. 132, 135 -36, 734 P.2d 1238 (1987)	4
Bill Stremmel Motors, Inc. v. First Nat. Bank of Nev., 94 Nev. 131, 134, 575 P.2d 938 (1978)	30
Bozaich v. State of California, 32 Cal.App.3d 688, 696-97 (Cal. App. 5 th Dist.1973)	11
Branda v. Sanford, 97 Nev. 643, 648, 637 P.2d 1223 (1981)	25
Builders Ass'n. of Northern Nev. v. City of Reno, 105 Nev. 368, 776 P.2d 1234, 1234 (1989)	13
California v. Grace Brethren Church, 457 U.S. 393, 407-11, 102 S.Ct. 2498, 2507-09, 73 L.Ed.2d 93 (1982)	8
Cervantes v. J.C. Penney, Inc., 595 P.2d 975 (Cal. 1979)	26
City of Philadelphia v. Cohen, 184 N.E.2d 167, 169-70 (N.Y.App. 1962), cert. denied 371 U.S. 934 (1962)	10
City of San Jose v. Superior Court, 12 Cal.3d 447, 454 (1974); Chase v. State, 67 Cal.App. 3d 808, 810 (1977)	11
Cox Broadcasting v. Cohn, 420 U.S. 469, 494-495, 95 S.Ct. 1029, 1045-1046, 43 L.Ed.2d 328 (1975)	22
Cox v. Glenbrook Co., 78 Nev. 254, 266-68, 371 P.2d 647 (1962)	14
Dutt v. Kremp, 111 Nev. 567, 575, 894 P.2d 354 (1995)	27
El Capitan Club v. Fireman's Fund Ins. Co., 89 Nev. 65, 506 P.2d 426 (1973)	15
Foothill Ind. Bank. v. Mikkelson, 623 P.2d 748, 757 (Wyo. 1981)	28
Hill v. Nat'l Collegiate Athletic Assoc., 865 P.2d 633, 648, 7 Cal.4th 1, 26 Cal.Rptr.2d 834 (1994)	18
Horack v. Franchise Tax Board, 18 Cal.App.3d 363, 368 (Cal. App. 4 th Dist.1971)	6

1	Jones v. Robertson, 180 P.2d 929, 933 (Cal App. 1947))	15
2		
3	Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 627 (9th Cir. 1988)	12
4	Keleher v. New England Tel. & Tel. Co., 947 F.2d 547, 548 (2d Cir. 1991)	8
5	Kovacs v. Acosta, 106 Nev. 57, 59, 787 P.2d 368, 369 (1990)	27
6	Kress v. Corey, 65 Nev. 1, 189 P.2d 352 (1948)	14
7		
8	Landex, Inc. v. State ex rel. List, 94 Nev. 469, 478, 582 P.2d 786 (1978)	29
9	Lawrence v. State Tax Comm., 286 U.S. 276 (1932)	13
10	Laxalt v. McClatchy Newspapers, 622 F. Supp. 737, 750-51 (Nev. 1985)	27
11	Lubbe v. Barba, 91 Nev. 596, 599, 540 P.2d 115 (1975)	29
12	M & R Inv. Co., Inc. v. Mandarino, 103 Nev. 711, 719, 748 P.2d 488 (1987)	22
13	Machleder v. Diaz, 801 F.2d 46, 55 (2d Cir. 1986), cert. denied, 479 U.S. 1088 (1987)	23
14		
15	McHugh v. County of Santa Cruz, 33 Cal.App.3d 533, 538-539 (Cal. App. 1 st Dist. 1973)	6
16		
17	McLain v. Boise Cascade Corp., 533 P.2d 343 (Ore. 1975)	16
18	Mianecki v. Second Jud. District Court, 99 Nev. 93, 98, 658 P.2d 422, 425 (1983) cert. dismissed,	
19	464 U.S. 806 (1983)	9
20	Montesano v. Donrey Media Group, 99 Nev. 644, 649, 668 P.2d 1081 (1983), Cert. Denied, 466 U.S.	
21	959 (1984)	21
22	Morrow v. II Morrow, Inc., 911 P.2d 964, 968, 139 Or. App. 212 (1996), Review denied, 916 P. 2d	
23	312 (Or. 1996)	24
24	Nevada Credit Rating Bur. v. Williams, 88 Nev. 601, 606, 503 P.2d 9 (1972)	27
25	Nevada v. Hall, 440 U.S. 410, 424 n.24 (1979), reh'g denied, 441 U.S. 917 (1979)	10
26	Nienstedt v. Wetzel, 651 P.2d 876, 880-81 (Ariz. App. 1982)	28
27		
28		

1	Ortega v. O'Conner, 764 F.2d 703, 707 (9th Cir. 1985), rev'd on other grounds, 480 U.S. 709 (1987)	11
2	.....
3	Pacific Tel. and Tel. Co. v. County of Riverside, 106 Cal.App.3d 183, 188 (Cal. App. 4 th Dist.1980)	11
4	.....
5	PETA v. Bobby Berosini, Ltd., 111 Nev. 615, 628-639, 895 P.2d 1269 (1995), Modified on other	
6	grounds, 113 Nev. 632, 637, 940 P. 2d 134, 138 (1997)	20
7	Phelps v. Second Judicial District Court., 106 Nev. 917, 803 P.2d 1101, 1103 (1990)	
8	.....	13
9	Prudential Ins. Co. v. Insurance Comm., 82 Nev. 1, 409 P.2d 248 (1966)	13
10	Public Serv. Comm. v. Eighth Judicial District Court, 107 Nev. 680, 683-85, 818 P.2d 396 (1991)	
11	.....	14
12	Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 116 S.Ct. 1712, 1721 (1996)	10
13	Randono v. Turk, 86 Nev. 123, 466 P.2d 218 (1970)	30
14	Reiter v. Cooper, 507 U.S. 258, 268 (1993)	10
15	Resnick v. Nevada Gaming Comm., 104 Nev. 60, 752 P.2d 229, 231 (1988)	15
16	Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983)	23
17	Rosewell v. LaSalle National Bank, 450 U.S. 503, 522, 101 S.Ct. 1221, 1231-32, 67 L. Ed. 2d 464,	
18	479 (1981) reh'g denied, 451 U.S. 1011(1981)	8
19	Schatz v. FTB, 1999 Cal.App. LEXIS 57, Court of Appeals of California, Third Appellate	
20	DISTRICT January 26, 1999	7
21	Sea-Pac Co., Inc. v. United Food & Commer. Worker's Loc. Union, 699 P.2d 217, 218-19, 103	
22	Wash.2d 800 (1985)	28
23	Senogles v. Security Benefit Life Ins. Co., 536 P.2d 1358, 1362-63, 217 Kan. 438 (1975)	
24	.....	17
25	Shiseido Cosmetics (American) Ltd. v. Franchise Tax Bd., 235 Cal.App.3d 478, 488 (Cal.App.3d	
26	Dist. 1991), cert. denied 505 U.S. 1205, leave denied 506 U.S. 947 (1992)	
27	.....	6
28	Simmons v. State, 670 P.2d 1372, 1385 (Mont. 1983)	9

McDONALD CARANO WILSON MCCORMIE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2300 WEST SAHARA AVENUE - NO. 10 SUITE 1000
LAS VEGAS, NEVADA 89102-4354
(702) 873-4100

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

Star v. Rabello, 97 Nev. 124, 625 P.2d 90 (1981)	25
Union Pacific Railroad Company v. Peniston, 85 U.S. 5, 29 (1873)	10
Woolsey v. State of California, 3 Cal. 4 th 758, 792 (Cal. 1992), cert. denied 508 U.S. 940 (1993)	7

1
2
3 **POINTS AND AUTHORITIES**

4 **I.**

5 **BACKGROUND FACTS AND CIRCUMSTANCES.**

6 Defendant, The FTB is the California government agency responsible for collecting income
7 taxes from California residents and non-residents with California income. Plaintiff, Gilbert Hyatt was
8 admittedly a long-time resident and taxpayer of the State of California t
9 1991. In 1990, he
10 income in 1991 and 1992. . Plaintiff alleges that on September 26, 1991, he became a resident of Clark
11 County, Nevada, shortly before receipt of millions of dollars of income resulting from issuance of his
12 patents. Plaintiff alleges various Nevada contacts developed by him as proof of residency such as
13 purchase of a home in Las Vegas on April 3, 1992. It is believed that at the time of his alleged move
14 to Nevada, Plaintiff enjoyed the certainty of realizing millions of dollars of income in the near future
15 as a result of the patent issuing.

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

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

- 23 1. Declaratory Relief;
- 24 2. Invasion of Privacy - Intrusion upon the Seclusion of Another;
- 25 3. Invasion of Privacy - Publicity Given to Private Facts;
- 26 4. Invasion of Privacy - Casting in False Light;
- 27 5. Tort of Outrage;
- 28 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

21 Plaintiff filed only a part-year state income tax return with the state of California for 1991.
22 Complaint par.10. In June of 1993, FTB began an audit of Plaintiff's 1991 return. In July of 1993,
23 FTB began to investigate Plaintiff's contacts with Nevada. Complaint par. 11. FTB investigated
24 Plaintiff's claim of Nevada residency by contacting various Nevada persons and entities which
25 included both government and private persons. Complaint par. 12. To gather information, FTB
26 corresponded with entities and persons using its "Demand to Furnish Information" form not issued
27 from a Nevada court or any Nevada government agency. Complaint par. 13. In addition to the
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. 4th 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. 1st 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

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

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

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

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

In this California matter, Plaintiff filed formal protests of FTB's assessments for 1991 and 1992, but FTB has not yet completed its review of either protest. FTB's evaluation of his protests was ongoing when Plaintiff filed this action and is currently pending. Those protests have not yet been decided and Plaintiff has not paid the disputed assessments. Thus, Plaintiff has no present right 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. 4th 758, 792 (Cal. 1992), cert. denied 508 U.S. 940 (1993). Nevertheless, Plaintiff now asks this Court to ignore

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

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

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

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

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

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

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

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

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

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

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

The principles of comity require this Court to decline jurisdiction 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." Mianeki v. Second Jud. District Court, 99 Nev. 93, 98, 658 P.2d 422, 425 (1983) cert. dismissed, 464 U.S. 806 (1983). A state is free to close its courts to suits against a sister state as a matter of comity, particularly where assertion of jurisdiction "would impinge unnecessarily upon harmonious interstate relations which were part and 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

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

Under California law, Plaintiff's causes of action would be barred by the doctrine of exhaustion of administrative remedies.

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

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

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

¹ Under the facts of this case, three other legal principles provide background on why this Court should exercise comity and defer to California's administrative process to resolve Plaintiff's residency claims: (1) "exhaustion of administrative remedies"; (2) the "primary jurisdiction doctrine"; and (3) the "abstention" doctrine. First, no action generally lies until a Plaintiff has first exhausted whatever administrative remedies are provided by statute (i.e. such an action is premature and must be dismissed). See generally, Bowen v. New York City, 476 U.S. 467 (1986). Second, the "primary jurisdiction doctrine" allows courts to stay or dismiss proceedings (over 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. 4th Dist.1980); Bozaich v.
24 State of California, 32 Cal.App.3d 688, 696-97 (Cal. App. 5th 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 justiciabale 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.

27 ...
28

**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.
25
26
27
28

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
false light before the public.

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

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

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

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

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

25 ... A court considering whether a particular action is "highly offensive" should consider
26 the following factors: "the degree of intrusion, the context, conduct and circumstances
27 surrounding the intrusion as well as the intruder's motives and objectives, the setting
28 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 Even the prevailing law of invasion of privacy generally recognize that the
17 interest of privacy fades when the information involved already appears on the public
18 record. The conclusion is **compelling** when viewed in terms of the First and
19 Fourteenth Amendments and in light of the public interest in a free press.

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

24 In M & R Inv. Co., Inc. v. Mandarino, 103 Nev. 711, 719, 748 P.2d 488 (1987), the Nevada
25 Supreme Court held that publication of facts which the plaintiff himself made public did not constitute
26 a publication of private facts and that there is no reasonable expectation of privacy when the plaintiff
27 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 One who gives publicity to a matter concerning another that places the
26 other before the public in a false light is subject to liability to the other
27 for invasion of his privacy, if
28

(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-

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

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

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

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

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. Complaint par. 56. Plaintiff characterizes these actions as "intentional and malicious abuse of the administrative processes,...". Complaint par. 57.

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
28

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

I. NO FRAUD CLAIM IS PROPERLY ALLEGED.

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

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

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

The elements of intentional misrepresentation must be established by clear and convincing 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

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

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

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

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

- 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;

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

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

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

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

16 ...

17 ...

18 ...

19 ...

20 ...

21 ...

22 ...

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...

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 9th day of February, 1999.

McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS

By Bryan R. Clark
BRYAN R. CLARK, ESQ.
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
(702) 873-4100
Attorneys for Defendant

#9860


McDONALD CARANO WILSON
MCCUNE BERGIN FRANKOVICH & HICKS LLP
2300 WEST SAHARA AVENUE - NO. 10 SUITE 1000
LAS VEGAS, NEVADA 89102-4354
(702) 873-4100

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 **MOTION FOR JUDGMENT ON THE PLEADINGS** on this 9 day of February, 1999, by depositing same in the United States Mail, postage prepaid thereon to the numbers noted below, upon the following:

Felix Leatherwood, Esq.
Deputy Attorney General
Attorney General's Office
300 South Spring Street
Los Angeles, CA 90013

Thomas K. Bourke, Esq.
601 W. Fifth Street, 8th Floor
Los Angeles, CA 90071


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

AA000908

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
2300 WEST SAHARA AVENUE, SUITE 1000
LAS VEGAS, NEVADA 89102-4354
(702) 873-4100

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

DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT,
Plaintiff,

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

vs.

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

Defendants.

RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing **DEFENDANT'S MOTION FOR JUDGMENT**
ON THE PLEADINGS is hereby acknowledged this 9 day of February, 1999.

Hutchison & Steffen

By: Thomas L. Steffen, Esq.
Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
8831 W. Sahara Ave.
Las Vegas, NV 89117

12:10 P.M.

AA000909