

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 80884

Electronically Filed
~~Jul 31 2020~~ 11:43 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 7**

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8/5/2019	Order of Remand	1	AA000001	AA000002
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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
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Dated this 31st day of July, 2020.

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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

EXHIBIT 7

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DISTRICT COURT
CLARK COUNTY, NEVADA

13 GILBERT P. HYATT,
14 Plaintiff,
15 vs.
16 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA, and DOES 1-100,
17 inclusive,
18 Defendants.
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20

) Case No. A382999
) Dept No. XVIII
)
)
) **PLAINTIFF GIL HYATT'S**
) **OPPOSITION TO MOTION FOR**
) **JUDGMENT ON THE PLEADINGS**
)
) **FILED UNDER SEAL PURSUANT**
) **TO DISCOVERY COMMISSIONER**
) **RULING OF FEBRUARY 22, 1999**
)
) **Hearing Date: April 5, 1999**
) **Hearing Time: 3:00 p.m.**

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10	<i>United States Department of Justice v. Reporters Committee for Freedom of Press,</i>	
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12	<i>United States v. Carrozzella,</i>	
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15	379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964)	39
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1 **I. INTRODUCTION.**

2 Plaintiff Gil Hyatt has two answers to the FTB's misguided Motion for Judgment on the
3 Pleadings ("Motion"). Both require that the Motion be denied. One is conclusive but short;
4 the other long but equally compelling. The short answer applies long-settled standards under
5 Nev. R. Civ. P. 12(c) to the parties' pleadings. This rule requires that the Court deny the
6 Motion because the FTB waived its right to bring such a motion when it filed an Answer
7 denying virtually every allegation in Hyatt's First Amended Complaint. The long Answer then
8 refutes the FTB's thirty-two page motion point-by-point thereby demonstrating that, in addition
9 to the above waiver of its right to file the Motion, the Court must deny the Motion in its entirety
10 on the merits.¹

11 In short, this Motion is meritless and attempts to thwart the discovery process through
12 which Hyatt is obtaining damning admissions from FTB employees of their tortious conduct.
13 The FTB has previously delayed this action by an unsuccessful attempt to remove to federal
14 court, a peremptory challenge of an assigned judge, and a withdrawn Motion to Quash Service
15 of Process. The Motion is another attempt to avoid litigating the merits of the case and
16 amounts to little more than a rehash of the same old, thoroughly-treated and withdrawn Motion
17 to Quash.²

18 Hyatt gives a summary of his legal arguments after a brief Statement of Facts setting
19 forth the allegations the FTB must admit as true to have standing to file this Motion. Hyatt
20 then responds *seriatim* to the FTB's arguments and provides a detailed analysis as to why the
21 Motion fails on the merits of every point asserted by the FTB.

22
23
24
25 ¹It is well established that "a defendant may prevent a Rule 12(c) motion simply by denials
26 in his answer." (See *Nevada Civil Practices Manual* § 1221.) Here, the FTB explicitly prevented
27 a Rule 12 (c) motion by denying virtually every allegation in the Complaint, but then irresponsibly
28 filed such a motion.

²Hyatt predicts that this Court will see these same arguments time and time again in this
case, as the FTB has shown it will use every conceivable device to avoid facing Hyatt's allegations
at trial.

1 **II. STATEMENT OF FACTS.**

2 **A. GIL HYATT IS A VERY PRIVATE PERSON.**

3 Gil Hyatt is and has been a Nevada resident since 1991. (FAC, ¶ 8.)³ He brought this
4 case to vindicate his right to privacy and to be free from outrageous fraud and intrusion. He is
5 and has been a private person -- at least until the Defendant FTB entered his life and invaded
6 his privacy.

7 Hyatt's profession and business require security and privacy, and this lifestyle matches
8 his quiet, unassuming personality. Hyatt is by trade an engineer, scientist, and inventor. He
9 worked from the late 1960s to the 1990s in seclusion to conceive and patent some of the most
10 revolutionary inventions in computer history. *Id.*

11 During 20 years of struggle with the Patent Office, Hyatt persevered during hard times,
12 living a frugal lifestyle and making little income. Despite a self-imposed and preferred
13 anonymity during two decades of work -- with no government subsidies or research grants -- he
14 developed and eventually received patents on computer technology which helped create the
15 personal computer industry. (FAC, ¶¶ 8, 60.)

16 While working in the aerospace industry, Hyatt received top level security clearances
17 from the Department of Defense ("DOD"). He is an expert in security matters, having held
18 DOD secret clearances for almost 30 years and being director of security for his aerospace
19 consulting company. He uses this expertise to protect his secret technology and business
20 materials. He is justly concerned about industrial espionage and the theft of technology and
21 trade secrets. His early inventions were leaked to competitors, allowing them to capitalize on
22 his technology and reap billions of dollars in benefits derived from his inventions.

23 When the Patent Office finally issued certain of his pioneering patents in 1990, Hyatt
24

25
26 ³Consistent with Nevada's notice pleading rules, Hyatt's First Amended Complaint
27 (hereinafter "Complaint" or "FAC") sets forth Hyatt's claims with sufficient but not exhaustive
28 detail. The following narrative adds detail to the Complaint's allegations. All of these additional
factual allegations must be accepted as true for this Rule 12(c) motion because, if necessary, Hyatt
could amend his Complaint to include these details. Hyatt has already developed substantial
additional evidentiary support for such facts in the limited discovery conducted so far.

1 became the subject of a flurry of media and public attention in California. Despite his
2 accomplishment in obtaining these patents after 20 years of struggle, Hyatt had been victimized
3 in California by thefts of his intellectual property, by a continuing string of personal
4 harassments in California courts, and by a personal tragedy -- the murder of his son, the
5 perpetrator of which was never brought to justice by California authorities.

6 **B. IN 1991 HYATT MOVED TO NEVADA, AND EIGHT YEARS LATER**
7 **HE IS STILL LIVING IN HIS CHOSEN DOMICILE, NEVADA.**

8 For professional and personal reasons, Hyatt began planning a move to Las Vegas in
9 1990. After substantial preparation, Hyatt left California and permanently moved to Las Vegas
10 on September 26, 1991. (FAC, ¶ 8.)

11 Immediately after moving to Las Vegas, Hyatt sold his California house, leased and
12 moved into a Las Vegas apartment, and started looking for a new and larger house to purchase.
13 He started working with Las Vegas realtors within weeks of his move to Las Vegas. He
14 scouted dozens of houses between October 1991 and March 1992. He made the first of thirteen
15 offers and counteroffers on Las Vegas houses soon after his move into his leased apartment.
16 (FAC, ¶ 9.)

17 Within months after his move to Las Vegas, Hyatt was diagnosed with a malignant
18 cancer. He traveled to California a number of times to be treated by cancer specialists and
19 undergo major surgery. The FTB has used this fact -- Hyatt traveling to California for medical
20 treatment needed to save his life -- as a basis for asserting he was a California resident during
21 the six months Nevada residency now disputed by the FTB.

22 Shortly after Hyatt's cancer surgery, escrow closed on his Las Vegas house (April 2,
23 1992) and he moved from his leased apartment into his new house. Hyatt formed a Las Vegas
24 trust, with his Nevada CPA Michael Kern as trustee to protect his privacy, and purchased his
25 Las Vegas house through this trust so that his name would not appear on the public records.
26 Hyatt intended to keep a "low profile" and his colleagues shielded his name from public records
27 (utilities, property records and the like) so that his street address would remain private. (FAC,
28 ¶ 8.)

1 One of the security measures Hyatt has employed is to keep his most sensitive
2 documents in his private home-office. His Las Vegas house was specially equipped just for this
3 purpose, and his ownership of the house in the Trust's name preserved his anonymity.

4 **C. HYATT'S NEVADA BUSINESS HAS PROSPERED.**

5 After Hyatt moved to Las Vegas, his licensing business started to blossom, and until the
6 FTB destroyed his licensing program in 1995, his business was a significant success. Hyatt
7 personally ran and actively participated in his Las Vegas business, which at its start was a one-
8 person business.⁴ He has since formed a Nevada corporation and hired professionals for
9 employment. (FAC, ¶¶ 8, 60.)

10 **D. THE FTB CONDUCTED AN UNCONTROLLED INVESTIGATION,**
11 **SURVEILLANCE, AND AUDIT THAT INVADED HYATT'S PRIVACY**
AND DESTROYED HYATT'S LICENSING BUSINESS.

12 In 1993, two years after Hyatt moved to Nevada, an FTB employee read a news article
13 regarding Hyatt. Based upon nothing more, the FTB then commenced its efforts to secure
14 substantial sums from Hyatt even though Hyatt had long since become a Nevada resident.
15 (FAC, ¶ 11.)

16 For six years, the FTB has investigated, surveilled, and audited Hyatt and publicly
17 disclosed his confidential information, including the location of his secret technology. The
18 FTB investigated, questioned, demanded documents from, and surveilled Hyatt, his car, home,
19 business associates, doctors, rabbis, lawyers, accountants, partners, friends, enemies, ex-wife,
20 felon-brother, Las Vegas neighbors, former California neighbors, Las Vegas landlords, dating
21 service, professional organizations, banks, mutual funds, postman, and even his trash man.
22 They even went to his front porch to snoop at mail on the doorstep and recorded the timing,
23 description, and quantity of his trash. (FAC, ¶¶ 11-14.)

24 This relentless assault on Hyatt's right to be left alone interfered with his contacts with
25 Nevada public officials and government agencies and has resulted in a 3,000 page FTB audit
26

27 ⁴Hyatt's business is related to the more than 70 patents that have been issued to him,
28 including patents on computers, microprocessors, DRAMs (dynamic random access memories),
liquid crystal displays, and digital television.

1 dossier on Hyatt.

2 Assigning the work to an inexperienced auditor who was handling her first residency
3 case, the FTB concluded (surprise! surprise!) that Hyatt owed California a great deal of money.
4 The invasion of privacy the FTB practiced in the course of its relentless pursuit of Hyatt
5 included fraudulent promises and representations that it would keep Hyatt's secret information
6 strictly confidential. Statements in the FTB's own file acknowledge that Hyatt had a significant
7 concern regarding the protection of his privacy. (FAC, ¶ 61.)

8 The greatest damage Hyatt suffered as a result of the FTB's breaches of confidentiality
9 is the destruction of his patent licensing business. As part of its investigation, the FTB
10 demanded from Hyatt and agreed to keep confidential copies of Hyatt's confidential
11 agreements with his Japanese patent licensees, Hitachi and Matsushita, and his membership in
12 the Licensing Executives Society. Hyatt had promised his Japanese licensees these agreements
13 would be strictly confidential. (FAC, ¶¶ 61, 62.) Hyatt emphasized the extreme sensitivity of
14 these documents to the FTB, and the FTB promised to maintain their confidentiality.

15 The FTB, nonetheless, violated its obligation to keep the information confidential. The
16 FTB communicated with the Japanese licensees and the Licensing Executives Society making
17 clear that Hyatt was under investigation by the FTB. From the date of the FTB confidentiality
18 breaches, Hyatt has obtained no new licensees. His royalty income from new licensees has
19 since dropped to zero.

20 **E. THE MASSIVE INVASION OF HYATT'S PRIVACY WAS**
21 **UNNECESSARY AND THE FTB "INVESTIGATION" WAS AN**
OUTRAGEOUS SHAM.

22 The FTB conducted a biased investigation, in which the lead auditor destroyed key
23 evidence that supported Hyatt (*e.g.*, her contemporaneous handwritten notes and computer
24 records of bank account analysis) and relied heavily on three "affidavits" that do not exist.
25 Even more outrageous is that the FTB disregarded, refused to investigate, and "buried" the facts
26 favorable to Hyatt which it uncovered during its invasive audit. The FTB simply ignored:

- 27 • the current neighbors in Nevada who supported Hyatt's Nevada residency claim;
28 • the former neighbors in California who told of Hyatt's move to Nevada;
• the friends and business associates who told of Hyatt's move to Nevada;
• his adult son who witnessed Hyatt's move to Nevada;

- 300 Nevada credit card charges;
- Nevada rent, utilities, telephones, and insurance payments;
- Nevada voter registration and driver's license of Hyatt;
- Nevada home purchase offers and escrow papers of Hyatt; and
- Nevada religious, professional, and social affiliations of Hyatt.

The FTB only credited adversaries of Hyatt who had vengeful motives, such as his bitter ex-wife and his convicted-felon brother.⁵ Even then, the FTB auditor misrepresented that she had "affidavits" from them when she did not have any such affidavits.

Hyatt timely filed protests to the FTB's assessments. The FTB has sat on his protests for almost three years and has not to this day scheduled a hearing, asked for a single document, or sought clarification of a single fact. Meanwhile, interest compounds daily at almost \$5,000 per day.

Part of the outrageous conduct of the FTB came from the FTB's lawyers. One of those lawyers, Anna Jovanovich, pointedly stated that high profile or wealthy taxpayers such as Hyatt typically settle the proceedings before litigation, as they do not want to risk their personal financial information being made public. Hyatt clearly understood the threat that any challenge to the FTB's extortionate demands would result in the dissemination of Hyatt's personal and financial information at subsequent administrative and court proceedings. (FAC, ¶ 56(b).) Since that date the FTB has carried through with its threat and made public filings in this case, not under seal, revealing the amount of Hyatt's 1991 and 1992 income, further invading his common law privacy, violating privacy statutes, and breaching its false promises of confidentiality.

⁵The FTB chose to give credence to Michael "Brian" Hyatt, despite his acknowledged enmity towards his brother Gil, and despite his having been convicted of a felony involving dishonesty -- child stealing. See *People v. Hyatt*, 18 Cal. App. 3d 618, 96 Cal. Rptr. 156 (1971) (finding Michael Hyatt kidnaped his children in violation of court custody order and flew them out of California, hiding them in Utah, New York, and Kansas for two and a half years). The Court found he took on the name Brian to conceal his whereabouts, and fabricated phony addresses, causing his wife such distress she had to go on television *begging* for return of her children, which led to the discovery of her children. The court found Michael Hyatt's "conduct was intended to deceive and, as such, was fraudulent."

1 **F. THE FTB CONTINUES TO INVESTIGATE AND HARASS HYATT.**

2 Almost three years ago, the FTB proposed multi-million dollar tax and fraud penalty
3 assessments based on only a six-month period of disputed residency in 1991 and 1992,⁶ and
4 Hyatt promptly filed formal protests in regard to these proposed assessments. But the FTB has
5 stated that its investigation, surveillance, and audit of Hyatt is not yet complete even today.
6 The FTB has taken the position that it is continuing to investigate Hyatt. For example, about
7 two years after filing of the protests, the FTB's auditor filed a false declaration under penalty of
8 perjury and violated the California Right to Financial Privacy Act in one of its continuing
9 attempts to come up with some evidence against Hyatt. The FTB has put no limit on the scope
10 of the ongoing investigation of Hyatt or a deadline for its completion, even though Hyatt's
11 move to Las Vegas occurred in 1991. One FTB lawyer early in 1999 threatened that after this
12 motion "Hyatt won't be able to shit in Nevada or California without the FTB knowing about
13 it." Unless reigned in by this Court, the FTB has no intention of letting Hyatt enjoy the peace,
14 seclusion, and security he sought in moving to Nevada.

15 **G. THE FTB IS REHASHING OLD ARGUMENTS.**

16 The FTB's moving papers and reply to the Motion to Quash Service of Process argued
17 essentially the same points that are raised in this Motion. The FTB argued that this was a tax
18 case for which Nevada had no jurisdiction, and it discarded the tort claims as merely as a
19 "disguise."⁷

20 Hyatt's opposition and surreply addressed the FTB's arguments relating to comity and
21 subject matter jurisdiction. In short, the Motion to Quash, which essentially addressed the same
22 issues as this Motion, was fully briefed by the parties over a four month period in early 1998.
23 A hearing date of June 27, 1998 was set. Apparently fearing a decision on the merits to such
24 issue, the FTB withdrew its Motion to Quash at the eleventh hour proceeding the hearing.

26 ⁶In fact, the dispute is even more limited. During this six month period, Hyatt received the
27 royalty income during a short 2 1/2 month period from October 31, 1991 through January 15, 1992.

28 ⁷See FTB's Motion to Quash Service of Process filed in February 1998 and its reply papers
filed in April 1998.

1 **III. SUMMARY OF ARGUMENT.**

2 **A. THE SHORT ANSWER.**

3 A successful Rule 12(c) motion requires the pleadings to admit all material allegations
4 of fact leaving only questions of law outstanding. Defendants who bring a Rule 12(c) motion
5 must literally admit every allegation made by the plaintiff. If they admit the plaintiff's every
6 material allegation of fact, only issues of law will remain. But the defendant then risks a
7 judgment on the merits for the plaintiff as a matter of law. The FTB faced a clear choice: first,
8 admit Hyatt's allegations and risk everything in a judgment-on-the-pleadings showdown; or
9 second, deny Hyatt's charges for a full and fair hearing on the merits. The FTB's answer
10 records its decision: it denied 67 of 72 allegation paragraphs in Hyatt's First Amended
11 Complaint. Consequently, the Motion must be denied.

12 Moreover, this Motion is merely a repeat of the FTB's prior Motion to Quash which
13 was thoroughly treated by the parties and then withdrawn from the FTB. While challenging the
14 pleadings may have been proper at the pleadings stage, it is not allowed here where the FTB
15 has already filed a responsive pleading denying almost the entire Complaint.

16 **B. THE LONG ANSWER.**

17 In seeking a judgment on the pleadings for each claim, the FTB is nothing if not
18 ambitious. Its ambition outstrips its arguments. Without exception, each point raised by the
19 FTB is wholly lacking in merit:

20 *Declaratory relief.* Hyatt seeks a declaratory judgment from this court affirming his
21 Nevada residency. The FTB contends the court lacks subject matter jurisdiction over this
22 fundamental aspect of Nevada sovereignty. The FTB claims that pending California
23 administrative proceedings and Nevada law compel this Court to decline jurisdiction to allow
24 Hyatt to exhaust his administrative remedies. Moreover, it claims that the comity between
25 sister states requires abstention.

26 To the contrary, Nevada law unequivocally supports Hyatt's right to a declaratory
27 judgment on the issues raised given his current Nevada residency, the Court's personal
28 jurisdiction over the FTB, and the ongoing six-year dispute between Hyatt and the FTB.

1 The FTB wrongly contends that Hyatt's declaratory relief claim raises the same issues
2 as the alleged administrative "proceeding" in California. The issues, however, raised in the
3 FTB's ongoing "investigation" are vastly different in scope and effect from the declaratory
4 relief sought by Hyatt. Hyatt, therefore, has no other speedy or adequate remedy for the relief
5 sought in this case. Also, there is no administrative "proceeding" in California for Hyatt to
6 exhaust, only a six-year-and-counting "investigation" by the FTB. The FTB has refused to start
7 the administrative "proceeding."

8 The FTB entirely ignores the fact that Hyatt has never asked the court to halt or disrupt
9 the FTB's internal processes. No injunction is sought. Nor was the action filed in California or
10 in federal court. Rather, this case is first and last a tort action directed at FTB excesses. The
11 FTB may continue business as usual, but like any other tortfeasor it may be liable when its
12 actions harm the person or property of another. In this sense, Hyatt's declaratory relief and tort
13 claims are one. The FTB does not and cannot deny that in declaring Hyatt's Nevada residency
14 fraudulent it proposed enormous penalties, and Hyatt alleges these penalties, rooted in the
15 FTB's residency finding, show a tortious pattern of fraudulent conduct. The declaration Hyatt
16 seeks of his Nevada residency floats upon the waters of his claims for fraud and invasion of
17 privacy.

18 The FTB's comity arguments are also wholly frivolous. Comity is reciprocal: to get it
19 you must give it. California extends no immunity to Nevada for acts committed by Nevada
20 officials in California and Nevada returns the favor tit-for-tat. Both states place first a policy of
21 protecting their citizens from the acts of foreign state officials operating within their
22 boundaries.

23 **Immunity.** In pretending that California is immune from tort claims unless granted
24 under California law, the FTB has overlooked the dispositive case on the point, *Nevada v. Hall*,
25 440 U.S. 410 (1979). California is not immune from torts its employees commit in Nevada
26 against Nevada citizens while acting within the course and scope of their employment.

27 **Tort claims. Invasion of Privacy:** The FTB treats privacy as if it is insignificant, not
28 worthy of protection. It argues that the tort of privacy has no application to the information it

1 collected and released during its investigation. Yet, led by the United States Supreme Court,
2 case authority fully supports Hyatt's claims against the FTB for both invasion of
3 "informational" privacy and the more traditional forms of invasion of privacy.

4 ***Outrage:*** The FTB's analysis of Hyatt's claim for the tort of outrage is equally self-
5 serving. Hyatt's outrage, the FTB intones, stems from his discomfort at that agency's
6 efficiency in imposing additional taxes and penalties on his purse. Hyatt's Complaint,
7 however, never declares that the tort of outrage resides in the mere presentation of a bill for
8 more taxes. Instead, it speaks of holding the FTB accountable for that agency's extreme and
9 outrageous conduct towards a Nevada resident through its investigation in preparing and
10 justifying that exaction.

11 ***Abuse of process:*** The FTB is guilty of abuse of process by virtue of having issued and
12 sent into Nevada through the United States mail "Demands to Furnish Information" which
13 advised all addressees that they were required to furnish the information indicated in the forms.
14 The abuse was compounded since the form cited to California statutory law as authority for the
15 demand, and indicated that the information was "for investigation, audit or collection
16 purposes." (emphasis added.) Under a plethora of case authority, abuse of administrative
17 proceedings (including an official pretense of such proceedings) is actionable.

18 ***Fraud:*** The FTB's treatment of Hyatt's fraud claim shows its propensity for distortion.
19 It notes that fraud must be pleaded with particularity across five topics: falsity, scienter,
20 inducement, justifiable reliance, and damages. It then grandly proclaims that Hyatt's
21 allegations are "mere argument, conclusions and speculation." Even a cursory reading of
22 Hyatt's fraud claim shows five pages of detailed facts setting forth the five elements.
23 Moreover, Nevada law allows emotional distress damages rooted in fraud.

24 ***Negligent misrepresentation:*** The FTB takes no notice of the well-established case law
25 holding government agencies liable for negligent misrepresentations of fact.

26 Whether the answer is short or long makes no difference: the Court must deny the
27 FTB's Motion.

28

1 IV. ARGUMENT.

2 A. THE FTB'S MOTION FAILS TO MEET THE UNIQUE
3 REQUIREMENTS OF RULE 12(C) AND MUST BE DENIED ON SUCH
4 BASIS WITHOUT ANY FURTHER CONSIDERATION.

5 Courts must follow a strict standard in ruling on motions for judgment on the pleadings.
6 As expressly stated by the Nevada Supreme Court, a motion for judgment on the pleadings is
7 available "only when all material allegations of fact are admitted in the pleadings." *Bernard v.*
8 *Rockhill Development Co.*, 103 Nev. 132, 135-36, 734 P.2d 1238, 1241 (1987) (emphasis
9 added). Based on this standard of review, the FTB's motion dies aborning. The FTB
10 recognizes the futility of its Motion by confessing the inherently conflicting purpose for which
11 it was inappropriately filed, i.e., "to narrow the issues and avoid wasteful discovery expense."
12 (Motion, p. 2). A motion for judgment on the pleadings is not a proper vehicle for narrowing
13 the issues and managing discovery. It is, by nature, a dispositive motion, the resolution of
14 which must be found, if at all, within the four corners of the pleadings.

15 The Nevada Supreme Court has joined a number of other courts and commentators in
16 recognizing that a "motion for judgment on the pleadings cannot be granted if any material
17 issue cannot be resolved on the pleadings." 5A C. Wright & Miller, *Federal Practice and*
18 *Procedure* §§1368, p. 525 (1990). Thus, if a party's answer (here, the FTB's Answer) denies
19 any material issues of the complaint, the motion for judgment on the pleadings must be denied.

20 Since the FTB has denied virtually every material factual allegation in the Complaint
21 (the FTB denied 67 of 72 allegations), its Motion must be denied. It's just that simple. The
22 Nevada Supreme Court dealt with this exact issue in disposing of a motion for judgment on the
23 pleadings in *Bernard v. Rockhill Development Co.*, 103 Nev. 132, 135-36, 734 P.2d 1238, 1241
24 (1987). For example, in *Bernard* and similar to an allegation at issue here, one of the disputed
25 material fact was whether the defendant "intentionally induced the plaintiffs . . . or maliciously
26 made its promise with the intention not to perform." *Id.* at 135. A defendant's state of mind "is
27 a question of fact." *Id.* A dispute over such fact, requires denial of a motion for judgement on
28 the pleadings and, in *Bernard*, the Nevada Supreme Court reversed the partial judgment on the
pleadings ruling:

1 We further note that a resolution of this case on a Rule 12(c) motion was
2 inappropriate. A Rule 12(c) motion is designed to provide a means of disposing of
3 cases when material facts are not in dispute and a judgment on the merits can be
4 achieved by focusing on the content of the pleadings. (Citations omitted.) The motion
5 for judgment on the pleadings has utility only when all material allegations of fact are
6 admitted in the pleadings and only questions of law remain In Count II of their
7 complaint, the Bernhards alleged that Rockhill fraudulently misrepresented its intention
8 to perform when it induced them to execute the release and agreement. Rockhill's
9 denial of the allegations precluded the district court from granting [the] motion for
10 judgment on the pleadings. The pleadings did not resolve all the material issues of fact
11 in this case; there was a substantive dispute involving Rockhill's tort liability that would
12 justify a trial of the issue.

13 *Id.* at 135-136.

14 Without belaboring the point, Hyatt has made similar state of mind allegations,
15 ascribing the FTB's tortious actions to the passions of malice and extortion. (FAC, ¶25).
16 Indeed, every claim for relief in the Complaint, including the claim for declaratory relief,
17 abounds with material issues of fact controverted by the FTB's answer. The resulting issues
18 cannot be resolved by the pleadings, thus foreclosing the granting of any aspect of the Motion.

19 This rarely granted form of motion would be salvageable only if the FTB amends its
20 Answer to admit the truth of the allegations of the Complaint. Then, the only remaining burden
21 for this Court would be a determination of the amount of Hyatt's damages.

22 Additionally, Nev. R. Civ. P. 9(b) provides that a motion for a more definite statement
23 is the appropriate remedy wherein a complaint is insufficiently pled. The FTB, however,
24 waived its right to file such a motion when it filed an Answer denying virtually every allegation
25 in the Complaint. *See* Nev. R. Civ. P. 12(e). This is a confirmation that the Complaint is
26 sufficiently pled. There is simply no basis under Nevada law upon which the FTB's Motion
27 may be granted, nor should have been filed.

28 **B. DECLARATORY RELIEF IS AVAILABLE TO HYATT UNDER
NEVADA LAW AS THIS COURT DOES NOT LACK SUBJECT
MATTER JURISDICTION OVER SUCH CLAIM.**

Hyatt's complaint is based on the FTB's separate duty, independent of its lawful taxing
prerogatives, not to engage in fraudulent, extortive, and other tortious conduct against any
citizens, let alone residents of other states. The simple fact that the FTB continues to
investigate Hyatt and continues its tortious conduct in Nevada makes it imperative for Hyatt to
obtain a declaration that he is and has been a Nevada resident for the entire period he claims

1 residency in Nevada, September 26, 1991 to the present.

2 This Court clearly has subject matter jurisdiction over all of Hyatt's claims, including
3 declaratory relief. These points are discussed in detail below: (1) Nevada law entitles Hyatt to
4 declaratory relief; (2) There is no administrative "proceeding" in California and the FTB's
5 investigation relates to only a small subset of the issue on which declaratory relief is sought; (3)
6 Hyatt's claim for declaratory relief is inextricably intertwined with his tort claims and in no
7 way interferes with the FTB's collection of taxes; and (4) The authorities cited by the FTB have
8 no application here.

9 **1. Nevada law entitles Hyatt to declaratory relief.**

10 Under Nevada law, the elements necessary to support a claim for declaratory relief are:
11 "(1) there must exist a justiciable controversy; that is to say, a controversy in
12 which a claim of right is asserted against one who has an interest in contesting
13 it; (2) the controversy must be between persons whose interests are adverse; (3)
14 the party seeking declaratory relief must have a legal interest in the controversy,
15 that is to say, a legally protectible interest; and (4) the issue involved in the
16 controversy must be ripe for judicial determination.

17 *Nevada Mgt. Co. v. Jack*, 75 Nev. 232, 338 P.2d 71, 73 (1959). Also, Nevada's Uniform
18 Declaratory Judgment Act ("Act") specifies that "No action or proceeding shall be open to
19 objection on the ground that a declaratory judgment or decree is prayed for." Nev. Rev. Stat. §
20 30.030.

21 Here, a justiciable controversy exists. Hyatt is and has remained a Nevada resident
22 since September 26, 1991. He wishes to enjoy the peace and prosperity he expected when he
23 relocated to Nevada. Instead, the FTB has hounded him, and apparently will continue to hound
24 him, to the point of engaging in tortious invasions of his privacy and other outrageous acts.
25 The dispute is therefore ongoing as the FTB has continued to "investigate" Hyatt for years
26 subsequent to 1992. (FAC, ¶ 23.)

27 Hyatt, a long-time Nevada resident and unique entrepreneur, has been placed in a
28 position of insecurity and uncertainty over his rights as a Nevada resident because of the
unlawful, intrusive, predatory conduct of the FTB. These rights are inextricably related with
his tort claims against the FTB. In addition, the FTB conceded that this Nevada Court has
personal jurisdiction over it for claims stemming from its investigation, surveillance, and audit

1 of Hyatt. The aforesaid "insecurity and uncertainty," assures Hyatt of the right to have his
2 declaratory relief claim heard in this Court.

3 a. **Nevada law entitles Hyatt to a determination by a Nevada Court of his**
4 **residency for the entire period in question -- indeed such a determination is**
 necessary to determine Hyatt's standing to bring this suit.

5 Hyatt submits that in this action his residency status is to be determined according to
6 Nevada law which provides that:

7 Unless otherwise provided by specific [Nevada] statute, the legal residence of a
8 person with reference to his right to naturalization, right to maintain or defend
9 any suit at law or in equity, or any other right dependent on residence, is that
 place where he has been physically present within the state or county, as the
 case may be, during all of the period for which residence is claimed by him.

10 Nev. Rev. Stat. § 10.155 (emphasis added).

11 Hyatt is entitled to the benefit of the above statute based upon his long-standing
12 physical presence and his business in Nevada. This Court is in the best and most impartial
13 position to make the determination concerning Hyatt's residency. Moreover, Nevada's
14 Uniform Declaratory Judgments Act "[is] declared to be remedial; [its] purpose is to settle and
15 to afford relief from uncertainty and insecurity with respect to rights, status and other legal
16 relations; and [is] to be liberally construed and administered." Nev. Rev. Stat. § 30.140.

17 Hyatt seeks a determination of his residency for the entire period from September 26,
18 1991 through the present. (FAC, ¶ 32.) Based on the above statute, if he is a resident of
19 Nevada for any part of such period, Hyatt is entitled to a determination of his residency for the
20 entire period in dispute.

21 Also, based on the above statute, a determination of Hyatt's residency for the period in
22 question is absolutely necessary to determine Hyatt's standing to maintain this suit. The FTB
23 denies in its Answer to the Complaint that Hyatt was a Nevada resident through June of 1998.
24 (FTB Answer, ¶¶ 1, 8.) If the FTB is correct, Hyatt would have no standing to bring or
25 maintain this suit as he would not be a resident of Nevada during the time he claimed. Hyatt
26 obviously contends to the contrary, and a declaration from this Court is necessary to resolve the
27 matter.

28

1 In short, the two residency determinations are significantly different. The FTB is
2 determining only California residency for a very short six month period while the instant cause
3 of action seeks determination of Nevada residency for a period of eight years. The FTB is
4 asserting that it can tax Hyatt even if he is a Nevada resident by proposing "dual residency."
5 (Motion at 13.) Such notion requires separate determinations by each state. Further, it would
6 be a significant waste of judicial resources and would be inequitable to Hyatt to wait ten or
7 more years to receive a California residency determination for the six month period from the
8 FTB and then have to refile a declaratory relief claim in Nevada to make a Nevada residency
9 determination for the whole of the eight year period.

10 **b. Nevada law entitles Hyatt to declaratory relief as he has no other speedy**
11 **and adequate remedy -- administrative or otherwise.**

12 The court has no discretion to refuse to hear a declaratory relief claim where there is an
13 actual dispute and the plaintiff has no other speedy and adequate remedy. *El Capitan Club v.*
14 *Fireman's Fund Insur. Co.*, 89 Nev. 65, 70, 506 P.2d 426 (1973). Further, declaratory relief is
15 appropriate where it could lead to an early resolution of a matter which could otherwise "be in
16 limbo" for years. *Id.* at 69-70. For example, and highly relevant to this case, the Nevada
17 Supreme Court granted declaratory relief finding a party was not subject to a certain tax. The
18 Court made this determination before an audit and investigation were conducted to determine
19 the exact amount of the alleged tax. *Scotsman Manufacturing Co., Inc. v. State of Nevada*, 107
20 Nev. 127, 128, 808 P.2d 517 (1991), *cert. denied*, 502 U.S. 100 (1992)) (granting declaratory
21 relief before assessment of taxes).

22 In regard to the adequacy of any other remedy, Hyatt has none. The relief sought by
23 Hyatt is a declaration of his residency for the entire period of time from September 26, 1991 to
24 the present, a period of 81 months. The FTB's current investigation of Hyatt, to which the
25 FTB asks this Court to defer, is limited to a finite disputed six month period (September 26,
26 1991 to April 2, 1992). The FTB has made veiled threats of continuing to pursue Hyatt for
27 years beyond 1992 (FAC, ¶ 23), but Hyatt is not aware of any actual pending investigation
28 beyond 1992. He nonetheless desires and is entitled to resolution of this issue, and his only
adequate remedy is the declaratory relief claim.

1 In short, the administrative investigation being conducted by the FTB covers only a
2 small fraction (1/13th) of the time period put at issue by Hyatt's declaratory relief claim.
3 Therefore, the FTB's argument that declaratory relief is not available under Nevada law due to
4 alleged administrative proceedings in California on the same issue (Motion at 13) is based
5 upon a faulty premise. The alleged California administrative "proceeding" does not involve
6 the same issue as Hyatt's declaratory relief claim, and Hyatt therefore has no adequate remedy
7 for the residency issue he raises, other than declaratory relief from this Court.

8 In regard to speedy relief, the FTB's investigation for the 1991 tax year started in 1993,
9 but it is not complete even today, and there is no indication when it will be complete. The
10 FTB has now sat on Hyatt's official protest to the "proposed" assessment of taxes for almost
11 three years. If and when the FTB completes its investigation, only then can an administrative
12 proceeding be conducted by the FTB's parent organization, the California State Board of
13 Equalization, after which Hyatt may finally challenge the FTB's investigative findings in a
14 California court with a declaratory relief claim. Cal. Rev. & Tax Code § 19381. One
15 California court, in upholding the appropriateness of a nonresident taxpayer's action seeking a
16 declaratory judgment on residency, found it was not a claim for injunctive relief and chided the
17 FTB for the seven year delay at the administrative level in that case. See *FTB v. Superior*
18 *Court (Bobby Bonds)*, 212 Cal. App. 3d 1343, 1349, 261 Cal. Rptr. 236 (1989) ("Nor can we
19 blind ourselves to the fact that collection in this particular case was postponed seven years
20 while the State Board of Equalization mulled over the taxpayer's administrative appeal.").⁸

21 In sum, Hyatt has no speedy or adequate remedy other than the present declaratory
22 relief action to establish his Nevada residency.
23
24

25
26 ⁸Even assuming the FTB completed its investigation tomorrow and assessed Hyatt the
27 millions of dollars in taxes and penalties, according to the *Bonds* case, it may be another seven
28 years before the California State Board of Equalization completes its administrative review of the
FTB's assessment. Hyatt therefore may have no remedy in California courts until 15 or more years
after the tax year in question. Under any standard, this is not due process, and therefore not an
adequate and speedy remedy.

1 **2. There is no official administrative “proceeding” in California.**

2 The FTB’s argument that this Court cannot proceed with the declaratory relief cause of
3 action because an administrative “proceeding” is underway in California (Motion at 13) is
4 based on faulty premise. Contrary to the FTB’s assertion, there is no official administrative
5 “proceeding” pending in California.

6 In California, administrative proceedings are governed by and must be conducted in
7 accordance with the Administrative Procedure Act (“APA”). Cal. Gov’t. Code §§11400 *et.*
8 *seq.* The APA sets forth the procedure to be followed in administrative “proceedings.” It is
9 intended to ensure due process to participants. *Id.*

10 The FTB successfully campaigned to have the “protest” phase of its audits and
11 investigations -- the very phase at which Hyatt and the FTB now find themselves -- exempted
12 from the APA on the grounds that the “protest” phase is not an administrative proceeding for
13 which the targeted taxpayer need have adjudicative rights. *See* Cal. Rev. & Tax. Code
14 § 19044. Rather, the protest phase is an investigation:

15 [T]he general provisions of the Administrative Procedure Act do not apply to an
16 oral deficiency assessment protest hearing, which is investigative and informal
in nature.

17 California Law Revision Commission Comments to Cal. Gov’t. Code § 11400 *et. seq.*
18 (emphasis added); *see also* Cal. Gov’t Code § 11415.50 (“an adjudicative proceeding is not
19 required for informal fact finding or an informal investigatory hearing, or a decision to initiate
20 or not to initiate an investigation, prosecution, or other proceeding before the agency . . .”).

21 The FTB has made no final decision on Hyatt’s protest and has not completed its
22 investigation. As the FTB’s papers before Commissioner Biggar pointed out, it has not even
23 sent Hyatt a tax bill.⁹ Since the FTB is still investigating and deciding *whether* to institute a
24 proceeding after all these years, there is certainly not yet an official administrative
25 “proceeding” pending in California.

26
27
28

⁹*See* FTB Opposition to Motion to Compel filed on February 11, 1999.

1 **3. Hyatt's claim for declaratory relief is inextricably intertwined with his tort**
2 **claims and in no way interferes with the FTB's collection of taxes.**

3 Another false premise of the FTB is that Hyatt seeks to interfere with, stop, appeal, or
4 otherwise affect the investigative proceeding in California. This is not true, and the FTB
5 knows it is not true, having admitted in prior pleadings in this case that this lawsuit is in no
6 way interfering or in any way affecting the investigative proceedings. See Motion to Quash,
7 affidavit by FTB supervising attorney, Terry Collins, Esq., stating, "FTB intends to continue
8 processing, and continues to process, Hyatt's Protests with the FTB's investigative procedure
9 set forth under California law for both tax years (1991 and 1992) despite his filing of this legal
10 action in Nevada."¹⁰

11 Rather, Hyatt's tort claims are inextricably intertwined with a determination of his
12 residency. Indeed, Plaintiff has alleged that the FTB's claim that Hyatt's averment of Nevada
13 residency during the latter part of 1991 and at least the first quarter of 1992 was a pretense and
14 a basis for assessing Hyatt enormous penalties was fraudulent and a substantive part of Hyatt's
15 fraud cause of action against the FTB. (FAC, ¶¶ 24-26.) This alone places in issue the
16 question of Hyatt's residency during 1991 and 1992. The FTB's right to tax Hyatt in
17 California requires proving Hyatt to be a California domiciliary or resident; however, this
18 incidental fact has no bearing on Hyatt's right to hold the FTB accountable for the torts it has
19 committed against him as a citizen of Nevada.

20 In addition to the fraud claim, Hyatt asserts his privacy was invaded in great part
21 because he moved to Nevada to obtain the security and seclusion he had lost in California. For
22 example, in 1992, he purchased and equipped his home-office in Las Vegas specifically for
23 such reasons, and kept his name off the public records associated with the home-office so it
24 could not be publically associated with him. If he really was not a Nevada resident in 1992
25 when he says he was, his related claims for invasion of privacy -- which are dependent on his
26

27 ¹⁰Hyatt has never disputed this. Hyatt has preserved his rights in regard to the assessment
28 of taxes in California by filing the appropriate protests specified above. This tort action is pending
in Nevada, while the proceeding as to any alleged taxes, penalties, and interest allegedly owed by
Hyatt will take place in California.

1 expectations of privacy in Nevada -- are diminished.

2 Similarly, Hyatt was the subject of an FTB "investigation," and the FTB has made it
3 known to friends, neighbors, relatives, business associates, and all others who had contact with
4 Hyatt that he was under "investigation." If, however, Hyatt was not a resident of Nevada
5 during the time in question, his complaint about being cast in a false light is similarly
6 diminished.

7 In sum, the declaratory relief claim will have no effect on the investigative proceeding
8 in California, but it is an essential part of Hyatt's tort claims.

9 **4. The authorities cited by the FTB have no application here.**

10 The cases cited by the FTB regarding exhaustion of administrative remedies in
11 California (Motion at 6) are all inapposite. The subject of exhaustion of remedies has no place
12 in the Motion, since there is no existing administrative proceeding in Nevada or California. As
13 the case cited by the FTB notes: "The doctrine of exhaustion of administrative remedies was
14 evolved by the courts to promote comity between coequal branches of government and to
15 relieve overburdened courts from the need to deal with cases where effective administrative
16 remedies are available." *Shiseido Cosmetics (America) Ltd. v. FTB*, 235 Cal. App.3d 478, 286
17 Cal Rptr. 690, 695 (1991), *cert. denied*, 505 U.S. 1205 (1992) (emphasis added). This Court,
18 however, does not represent a "coequal branch" with any branch of government in the State of
19 California. This Court is part of the Judicial Branch of the State of Nevada, charged with
20 protecting the rights of Nevada citizens. Moreover, the declaratory relief claim seeks entirely
21 different relief than what is at issue in the FTB's pending investigation. Finally, no "effective
22 administrative remedies" exist in either California or Nevada for Hyatt's tort claims, which are
23 intertwined with the declaratory relief claim. The only proper and competent forum for all of
24 these claims is therefore this Court, which has jurisdiction over both the FTB and the entire
25 subject matter of Hyatt's complaint.

26 Other cases cited by the FTB involve attempts to enjoin the collection of taxes or to
27 obtain a tax refund. This case, however, is a tort action against the FTB for which declaratory
28 relief is necessary and appropriate under Nevada law. There is no attempt or desire to enjoin,

1 interfere, or in any way impair the FTB's collection of taxes from Hyatt or anyone else. It will
2 be up to the FTB and California courts to later decide what, if any, effect this Court's decision
3 on residency will have on the tax proceedings in California. Under no circumstances, however,
4 will this Court's decision on residency enjoin the FTB from collecting taxes.

5 Hyatt is asserting the privileges and protections afforded to a Nevada resident against
6 the FTB, which in turn has an interest in contesting that right. Again, declaratory relief is
7 needed to resolve the ongoing dispute.

8 **C. THIS ACTION IS NOT IN CALIFORNIA OR FEDERAL COURT AND**
9 **NO INJUNCTIVE RELIEF IS SOUGHT BY HYATT.**

10 The FTB's argument that the Tax Injunction Act would bar this action in California or
11 the Federal Courts is frivolous. The FTB complains that, if Hyatt had sought relief in either
12 California or in federal court rather than Nevada state court, his remedies would be foreclosed.
13 Even if these propositions were true, they ignore the fact that this action is in Nevada state
14 court. And Nevada courts decide cases all the time which could not be brought in another state
15 or federal court. Hyatt is neither seeking an injunction against California tax proceedings nor
16 relief from a state tax case. This Nevada Court can and must hear this Nevada case challenging
17 the FTB's tortious conduct.

18 **D. COMITY HAS NO APPLICATION TO THIS CASE.**

19 The FTB's "comity" argument, like so many others, simply has no place in its Motion.
20 The subject of comity is not mentioned in the pleadings, nor was it the subject of an affirmative
21 defense in the FTB's Answer. Moreover, it was given lengthy attention in the pleadings
22 involving the FTB's Motion to Quash Service of Process -- a motion that was appropriately
23 withdrawn by the FTB. Hyatt repeats here the position he took in opposition to the FTB's plea
24 for comity in its Motion to Quash. There are compelling reasons why comity should not be
25 entertained by this Court.

26 **1. California has not and will not extend comity to Nevada.**

27 "The rule of comity . . . is reciprocal." *Kroc v. Sheriff of Clark County*, 85 Nev. 91, 94,
28 450 P.2d 788, 790 (1969). California clearly refused comity to Nevada before the United
States Supreme Court in the seminal case of *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59

1 L. Ed. 2d 416 (1979).

2 In *Hall*, the United States Supreme Court noted California's position: "the California
3 courts have told us that whatever California law may have been in the past, it no longer extends
4 immunity to Nevada as a matter of comity." *Id.* at 418 (emphasis added). The Court
5 determined that "the Full Faith and Credit Clause does not require a State to apply another
6 State's law in violation of its own legitimate public policy." *Id.* at 422 (citing *Pacific*
7 *Employers Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 59 S. Ct. 629, 83 L.
8 Ed. 940 (1939)).

9 In his dissenting opinion, Justice Blackmun further emphasized California's attitude
10 toward Nevada on the subject of comity by quoting the California Court of Appeal's decision
11 in the case. "When the sister state enters into activities in this state, it is not exercising
12 sovereign power over the citizens of this state and is not entitled to the benefits of the sovereign
13 immunity doctrine as to those activities unless this state has conferred immunity by law or as a
14 matter of comity." *Id.* at 428 (Blackmun, J., dissenting). Justice Blackmun further observed
15 that the California Court of Appeals concluded that "Nevada was not a 'sovereign' when its
16 agent entered California and committed a tort there. Indeed, they said flatly that "state
17 sovereignty ends at the state boundary." *Id.* (quoting 141 Cal. Rptr. at 441 (quoting 503 P.2d at
18 1365)).

19 When the FTB crossed into Nevada by mail, automobile, and airplane to commit torts
20 against Hyatt, California's sovereignty ended at the Nevada border. The FTB was not free to
21 "disengage" Nevada's sovereignty and, as an agent of California, commit fraud, abuse of
22 process, and privacy torts and other misconduct in Nevada under the mantra of the FTB's
23 taxing authority on behalf of California.

24 In its moving papers, the FTB quotes a footnote from *Nevada v. Hall* arguing that
25 Hyatt's tort case poses a threat to California's "capacity to fulfill its own sovereign
26 responsibilities." (Motion at 10.) The FTB then argues that California's "taxing power" is an
27 attribute of California's sovereignty. *Id.* Such footnote and its progeny apply, at most, to cases
28 challenging high level policy decisions by a sister state. This potential but narrow issue in the

1 broad holding in *Nevada v. Hall* has no application where, as here, the torts were committed
2 during "operational acts" by FTB personnel.

3 Furthermore, Hyatt does not seek to challenge any governmental tax policies of the
4 State of California. This is a tort case. The relief sought in the Complaint is for *respondent*
5 *superior* liability against the FTB for tortious actions of its employees while acting within the
6 course and scope of their employment. In that regard, this tort case is remarkably similar to
7 *Nevada v. Hall*, where one state was found liable to a resident of a sister state for tortious
8 conduct by state employees occurring within the course and scope of their employment.

9 **2. Nevada's important state interests in protecting its citizens and providing a**
10 **fair, effective, speedy, and impartial forum for redress favor jurisdiction**
and a denial of comity.

11 In *Mianecki v. District Court*, 99 Nev. 93, 658 P.2d 422 (1983), the Nevada Supreme
12 Court approved the rationale expressed by the California Supreme Court in *Hall v. University*
13 *of Nevada*, 8 Cal. 3d 522, 503 P.2d 1363 (1973), *aff'd*, 440 U.S. 410 (1979). "We approve the
14 reasoning of the California court and hold that where the injured party is a citizen of this state,
15 injured in this state and sues in the courts of this state, there is no immunity, by law or as a
16 matter of comity, covering a sister state activities in this state." *Id.* at 423-24 (emphasis
17 added).

18 The reasoning in *Mianecki* is wholly applicable to this case. The court first recognized
19 that "Nevada has a paramount interest in protecting its citizens" *id.* at 424, and that comity
20 cannot trump the rights of the citizens of Nevada. "[I]n considering comity, there should be
21 due regard by the court to the duties, obligations, rights and convenience of its own citizens
22 and of persons who are within the protection of its jurisdiction." *Id.* at 425 (quoting *State ex*
23 *rel. Speer v. Haynes*, 392 So. 2d 1183, 1185 (Ala. Civ. App. 1979), *rev'd on other grounds*,
24 392 So. 2d 1187 (1980). With these principles in mind, the *Mianecki* court held:

25 [W]e believe greater weight is to be accorded Nevada's interest in protecting its
26 citizens from injurious operational acts committed within its borders by
27 employees of sister states, than Wisconsin's policy favoring governmental
immunity. Therefore we hold that the law of Wisconsin should not be granted
comity where to do so would be contrary to the policies of this state.

28 *Id.* at 425 (emphasis added).

1 Indeed, the United States Supreme Court has recognized that a state has a particular
2 interest in exercising jurisdiction over those responsible for engaging in tortious activity within
3 its state.

4 A state has an especial interest in exercising judicial jurisdiction over those who
5 commit torts within its territory. This is because torts involve wrongful conduct
6 which a state seeks to deter, and against which it attempts to afford protection,
by providing that a tortfeasor shall be liable for damages which are the
proximate result of his tort.

7 *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)
8 (quoting *Leeper v. Leeper*, 319 A.2d 626, 629 (N.H. 1974) (quoting *Restatement (Second) of*
9 *Conflict of Law* sec. 36, comment c (1971)).

10 Hyatt is a resident and citizen of Nevada. The FTB has crossed Nevada's state border,
11 entered Nevada, and commenced a paper foray and "hands on" investigation of Hyatt that
12 included unannounced interrogation and observation of Hyatt's neighbors, associates, health
13 care providers, landlord, mail carrier, and trash collector as well as the propounding of "quasi-
14 subpoenas" to Nevada citizens and businesses in an effort to collect taxes from a Nevada
15 resident on income earned while residing in Nevada. The FTB's conduct in Nevada readily
16 supports Hyatt's tort and declaratory relief claims.

17 In a very real sense, this Court is duty-bound to exercise jurisdiction over the FTB to
18 support these important interests and rights. *Compare Fegert, Inc. v. Chase Commercial*
19 *Corp.*, 586 F.Supp. 933, 935 (D. Nev. 1984) (holding that states have an "especial interest in
20 asserting jurisdiction over those who commit torts within [their] territory" and are "motivated
21 by the objectives of deterring wrongful conduct and protecting [their] residents").

22 **3. The FTB's shotgun approach to alternative theories for dismissal similarly**
23 **fails.**

24 Finally, the FTB includes a footnote citing to three other legal principles it claims are
25 applicable to this case. (Motion at 10.) The first, "the exhaustion of administrative remedies,"
26 has been previously discussed. There is no administrative remedy in California for the relief,
27 tort and declaratory, sought here by Hyatt.

28 The second, the "primary jurisdiction doctrine," is equally inapplicable. In *Reiter v.*
Cooper, 507 U.S. 258, 268, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993), the Court stated that

1 such doctrine "is a doctrine specifically applicable to claims properly cognizable in court that
2 contain some issue within the special competence of an administrative agency." *Id.* The
3 FTB's intentional torts against Hyatt, committed against him in the state of his residence, are
4 not before an administrative agency in any jurisdiction, including California, and thus the FTB
5 has no "special competence" to decide tort cases.

6 Finally, the FTB contends that "courts have the power to abstain in cases where
7 resolution of certain issues might unnecessarily interfere with a state system for the collection
8 of taxes." (quoting "generally," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct.
9 1712, 1721, 135 L. Ed. 2d 1 (1996)). The *Quackenbush* ruling is limited to the power of
10 federal courts refraining from the exercise of jurisdiction over several matters, including "cases
11 whose resolution by a federal court might unnecessarily interfere with a state system for the
12 collection of taxes." *Id.* (emphasis added). That is not this case. Here, a Nevada court
13 providing redress for torts and related declaratory relief will not interfere with the FTB's ability
14 to collect taxes. This Court's rulings will not interfere at all with California's system for
15 collection of taxes. California courts and the FTB will decide what, if any, weight to give this
16 Court's judgment stemming from the FTB's torts.

17 In conclusion, the FTB's plea for comity has no merit. It would be a travesty of justice
18 to recognize any comity in favor of the FTB, and thus deny Hyatt his day in a Nevada court to
19 prove that the FTB has tortiously assailed his Nevada residency in the course of committing
20 highly injurious, intentional torts against him in Nevada in total disregard of Nevada's
21 sovereignty.

22 **E. HYATT'S TORT CLAIMS ARE NOT BARRED IN NEVADA.**

23 The FTB proclaims that Hyatt's action is barred because "California, as a sovereign, is
24 immune from tort lawsuits except to the extent it allows itself to be sued pursuant to the
25 California Tort Claims Act." This averment is also meritless and frivolous as is the entirety of
26 the FTB's Motion. Both *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d. 416
27 (1979) and *Miannecki v. District Court*, 99 Nev. 93, 658 P.2d 422 (1983), dispose of this
28 argument. The FTB must accept the reality that if it commits torts in someone else's backyard,

1 it will have to pay according to the laws of its neighbors, irrespective of what any California
2 law may say about torts in California.

3 **F. HYATT PROPERLY PLED INVASION OF PRIVACY.**

4 Hyatt had a reasonable expectation of privacy. His expectation of privacy in his home,
5 papers, and government records about him is guaranteed by the United States, Nevada, and
6 California Constitutions, statutes, case law, and the FTB's own policies, notices, regulations,
7 handbooks, guidelines, and written and oral promises to Hyatt.

8 In considering this recently emerged tort in its various and still multiplying forms, the
9 historical origins of the right of privacy are instructive and therefore reviewed briefly below.
10 In particular the new right to "informational privacy" is discussed as it is now well-recognized
11 by courts. Hyatt then addresses the FTB's inherently inconsistent assertion that its invasive
12 conduct was privileged and therefore not on actionable invasion of privacy. Lastly, Hyatt
13 establishes that each of the traditional forms of invasion of privacy have been properly pled in
14 the Complaint.

15 **1. The right to privacy -- in particular "informational privacy" -- protects an**
16 **individual such as Hyatt from the type of abuse committed by the FTB.**

17 The U.S. Constitution (specifically the Fourth Amendment) and the Constitutions of
18 many states -- including Nevada and California -- forbid unreasonable searches and seizures.
19 Springing forth from this constitutional right, is the right of privacy.¹¹ Nevada, California, and
20 the U.S. Supreme Court enshrine privacy as a fundamental right.¹²

21 Nevada has "long recognized the existence of the right to privacy." *People for the*
22 *Ethical Treatment of Animals (PETA) v. Bobby Berosini, Ltd.*, 111 Nev. 615, 895 P.2d 1269
23 (1995), *modified on other grounds*, 113 Nev. 622, 940 P.2d 134 (1993) (crediting Justice Louis
24 Brandeis and Professor William Prosser for the invention of the tort of privacy, noting that the

25
26 ¹¹*Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L. Ed. 2d 570 (1965). The
27 Fourth Amendment, including the right to privacy, applies in a civil context as well as criminal.
28 *Soldal v. Cook County*, 506 U.S. 56, 87, n. 11, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) (holding
"the protection against unreasonable searches and seizures fully applies in the civil context").

¹²See Request for Judicial Notice, at 5.

1 Restatement language, drafted by Dean Prosser, has been "adopted, often verbatim, by the vast
2 majority of American jurisdictions."). *PETA* further held that in determining whether a
3 particular action is "highly offensive," courts should and do consider the degree of intrusion,
4 the intruder's objectives, and the expectations of those whose privacy is invaded. *PETA*, 111
5 Nev. at 634 (emphasis added).

6 The Nevada Supreme Court articulated one of the reasons that the FTB's massive
7 intrusion into Hyatt's life infringed on his privacy: "The principle is well established that
8 'searches conducted outside the judicial process, without prior approval by judge or magistrate,
9 are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically
10 established and well-delineated exceptions.'" *Alward v. State*, 112 Nev. 141, 151, 912 P.2d
11 243, 250 (1996) (citing to U.S. Supreme Court precedent and earlier Nevada Supreme Court
12 precedent).¹³

13 **a. Actions for invasion of privacy against a taxing body are increasingly**
14 **frequent.**

15 Of importance to Hyatt's action,"[d]uring the past five years about 150 lawsuits have
16 been filed against the IRS claiming wrongful disclosure of confidential information." Louis R.
17 Mizell, Jr., *Invasion of Privacy* 127 (Berkley Books 1998) (relevant excerpts attached as
18 Exhibit to Appendix). In 1997, a Denver Colorado judge awarded \$250,000 in punitive
19 damages against the IRS for being "grossly negligent" and "reckless" in placing a woman in a
20 false light by claiming she owed \$380,000 more than she in fact owed. *Id.* at 127-128.
21 Consider the damage, as here, when a taxing agency recklessly, intentionally, and fraudulently
22 claims millions of dollars in unpaid taxes and penalties are owed. This is in addition to the
23 destruction of Hyatt's licensing business.

24 Another recent large verdict against tax authorities for invasion of privacy rights and
25 abuse of authority is *Jones v. United States*, 9 F. Supp. 2d 1119 (D. Neb. 1998). There the

26
27 ¹³The Court is asked to take judicial notice of the Nevada Attorney General's opinions
28 setting forth the right of privacy pursuant to the accompanying Request to Take Judicial Notice,
which is filed as separate document but incorporated herein by reference. In sum, the Nevada
Attorney General has concluded privacy is an important right.

1 district court awarded two taxpayers over \$5,700,000, including over \$325,000 in emotional
2 distress damages for the destruction of their business caused by an IRS agent leaking
3 confidential information that damaged their sterling reputation in the oil business. There are
4 striking parallels between this case and *Jones*. For the businesses involved in each case,
5 morals, character, and integrity are extremely important. *Id.* at 1134. A potential patent
6 infringer has much more to fear from a patent holder known to be honest, than one suspected of
7 multi-million-dollar tax fraud. An infringer has little incentive to take a license from a patent
8 owner who is under a cloud of suspicion. Here the FTB alerted over one hundred sources,
9 including three newspapers, two reporters, a dozen neighbors, the Licensing Executives
10 Society, and Hyatt's Japanese licensees that he was under a cloud of suspicion.

11 *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, L. Ed. 2d 576 (1967), held that
12 a person can have a reasonable expectation of privacy "even in an area accessible to the public"
13 since "the Fourth Amendment protects people not places." Justice Harlan's influential
14 concurring opinion set out a two part formula for assessing whether governmental action
15 violates the Fourth Amendment.

16 The first question is whether a person has exhibited an actual or subjective expectation
17 of privacy. Gil Hyatt will easily pass muster on this subjective prong of the test for he is very
18 private.

19 The second question is whether that expectation is one that society deems to be
20 reasonable. Here the FTB announced in its very first contact letter with him that he could
21 expect confidential treatment of all of his personal information. Subsequently, FTB auditors
22 promised Hyatt confidential treatment both orally and in writing. In addition, the FTB
23 publishes on its web page and in booklets that taxpayers have a right to confidential treatment.

24 Ironically, the FTB's own internal policies, notices, regulations, handbooks, guidelines
25 -- all of which were ignored by the FTB in this case -- also promise the right to privacy.

26 The FTB nonetheless shrugs off as insignificant its disclosure of Hyatt's private
27 information through "mandatory" Demands for Information to individuals, government
28 agencies, and businesses for which no judicial permission was sought or received and no notice

1 was given to Hyatt.

2 **b. Courts are particularly vigilant in enforcing informational privacy rights**
3 **related to social security numbers, addresses, and other private**
4 **information.**

5 Contrary to the FTB's bald assertion that disclosing Hyatt's social security number and
6 secret address to dozens of third parties was no big deal; courts of every level -- including the
7 United States Supreme Court -- find such disclosures actionable and a violation of an
8 individual's "informational privacy" rights.

9 **i. United States Supreme Court informational privacy cases.**

10 The United States Supreme Court has issued three opinions bearing on the issue.
11 *United States Department of Defense v. Federal Labor Relations Authority (FLRA)*, 510 U.S.
12 487, 489, 502, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994), held that disclosure of employees
13 home addresses to their union was a "clearly unwarranted invasion of privacy." (emphasis
14 added.) That case was largely based on *United States Dept. of Justice v. Reporters Committee*
15 *for Freedom of Press*, 489 U.S. 749, 763, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989)
16 (recognizing that "both the common law and the literal understandings of privacy encompass
17 the individual's control of information concerning his or her person."); see also *United States*
18 *Department of State v. Ray*, 502 U.S. 164, 177, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991)
19 (holding that the disclosure of names and addresses would be a clearly unwarranted invasion of
20 privacy because confidentiality had been promised and disclosure of the information would be
21 "a special affront to his or her privacy").

22 **ii. State and Federal Courts also protect informational privacy (social**
23 **security numbers and home addresses).**

24 *State ex rel. Beacon Journal Publishing Co. v. City of Akron*, 70 Ohio St. 3d 605, 607,
25 640 N.E.2d 164, 166 (Ohio 1994), found that the disclosure of social security numbers "would
26 violate the federal constitutional right of privacy" and held that because the Privacy Act of
27 1974 regulates the use of Social Security numbers, individuals "have a legitimate expectation
28 of privacy in their Social Security numbers." Two recent Washington cases have found
disclosure of social security numbers to be highly offensive. *Progressive Animal Welfare*
Society v. University of Washington, 125 Wash. 2d 243, 884 P.2d 592 (Wash. 1994), held that

1 "[T]he disclosure of a public employee's social security number would be highly offensive to a
2 reasonable person" Furthermore, in *Tacoma Public Library v. Woessner*, 90 Wash. App.
3 205, 951 P.2d 357 (Wash. App. 1998), opinion amended on remand on other grounds ___ P.2d
4 ___, 1999 WL 126948 (Wash. App. Feb. 5, 1999), the Court similarly held that "[w]e agree
5 that release of employees' identification number would be highly offensive."¹⁴

6 Other cases concluded that certain citizens -- such as Gil Hyatt -- have a particular need
7 and/or a desire to keep their address confidential. *National Association of Retired Federal*
8 *Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990), held
9 that "[i]n our society, individuals generally have a large measure of control over the disclosure
10 of their own identities and whereabouts. That people expect to be able to exercise that control
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12
13 ¹⁴Other cases where social security numbers were given protection under the right of
14 privacy include: *Sheet Metal Workers International Association, Local Union No. 19 v. United*
15 *States Department of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (holding that disclosures of
16 names, **social security numbers** and addresses of employees would constitute an unwarranted
17 invasion of personal privacy); *Sapp Roofing Co. v. Sheet Metal Workers' International Ass'n,*
18 *Local Union No. 12*, 552 Pa. 105, 713 A.2d 627, 630 (1998) (forbidding "the disclosure of personal
19 information (names, addresses, **social security numbers**, and phone numbers)" because of the
20 individual employees' "strong privacy interests"); *Tribune-Review Co. v. Allegheny County*
21 *Housing Authority*, 662 A.2d 677, 682 (Pa. Cmwlth. 1995) (concluding that "the Privacy Act of
22 1974 limits the availability of **social security numbers** and creates an expectation of privacy in
23 the minds of all employees concerning the use and disclosure of their social security numbers" and
24 finding that since the social security number is an identifier, "If stolen it can create a new identity
25 for the thief. When misused it can destroy a life."); *Times Publishing Co. v. Michel*, 633 A.2d 1233
26 (Pa. Comwlth. Ct. 1993) (holding that disclosure of gun licensees' home telephone number, **social**
27 **security number**, and address would constitute an unwarranted invasion of personal privacy);
28 *Greidinger v. Davis*, 988 F.2d 1344, 1352, 1354 (4th Cir. 1993) (finding that the Virginia voter
registrar's public disclosure of voters' **social security numbers** brought the attendant possibility
of "a serious invasion of privacy" and detailing horror stories of stolen identities and concluding
that "the harm that can be inflicted from the disclosure of a **social security number** to an
unscrupulous individual is alarming and potentially financially ruinous."); *Oliva v. U.S. Dept. of*
HUD, 756 F.Supp. 105, 107 (E.D.N.Y. 1991) (holding that disclosure of **social security numbers**
and dates of birth would be a "clearly unwarranted invasion of personal privacy" since "**social**
security numbers and dates of birth, are a private matter"); *Yeager v. Hackensack Water Co.*, 615
F. Supp. 1087, 1091-92 (D.N.J. 1985) (citing to Federal Privacy Act, Public Law No. 93-579 and
holding that **social security numbers** were "within the constitutionally protected right of privacy"
as Congress designed the Federal Privacy Act of 1974 to discourage improper uses of **social**
security numbers and to allow individuals the opportunity to make an intelligent decision
regarding disclosure). The foregoing is far from an exhaustive list of cases on this issue.

1 is 'evidenced by . . . unlisted telephone numbers by which subscribers may avoid publication of
2 an address in the public directory, and postal boxes, which permit the receipt of mail without
3 disclosing the location of one's residence.'" Moreover, the court could have had Gil Hyatt in
4 mind when it noted that it is public knowledge that when one gains wealth, "that individual
5 may become a target for those who would like to secure a share of that sum by means
6 scrupulous or otherwise." *Id.* at 876 (emphasis added).¹⁵

7 *American Federation of Government Employees, AFL-CIO, Local 1923 v. United*
8 *States*, 712 F.2d 931 (4th Cir. 1983), expresses privacy concerns similar to those alleged by
9 Hyatt in this case. The court held that union members had a privacy right not to disclose their
10 home addresses to their own union, because disclosure could subject the employees to an
11 unchecked barrage of mailings and perhaps personal solicitations. The court then observed that
12 no effective constraints could be placed on the range of uses to which the information, once
13 revealed, might be employed. *Id.* at 932. The dissent pointed out that only a rare person -- like
14 Hyatt -- conceals his address from real property records, voting lists, motor vehicle registration,
15 licensing records and telephone directories. The court majority nevertheless recognized the
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19 ¹⁵Other cases where home addresses were given protection under the right of privacy
20 include: *Painting Industry of Hawaii Market Recovery Fund v. United States Dept. of Air Force*,
21 26 F.3d 1479, 1486-1487 (9th Cir. 1994) (forbidding disclosure of social security numbers, names,
22 and **home addresses** with concurring opinion stating "publishing your phone number may invite
23 annoying phone calls, but publishing your address can lead to far more intrusive breaches of
24 privacy, and even physical danger."); *FLRA v. United States Dept. of Veterans Affairs*, 958 F.2d
25 503, 516 (2d Cir. 1992) (holding that disclosure of federal employees' names and **home addresses**
26 to their union "would result in a clearly unwarranted invasion of personal privacy."); *Painting and*
27 *Drywall Work Preservation Fund, Inc. v. Dept. of HUD*, 936 F.2d 1300, 1303 (D.C. Cir. 1991)
28 (concluding that disclosure of names and **addresses** of construction workers would be "a
substantial invasion of privacy," indeed, "a clearly unwarranted invasion of personal privacy.");
Hopkins v. United States Dept. of HUD, 929 F.2d 81 (2d Cir. 1991) (holding that because privacy
encompasses all interest involving the individual's control of information concerning his or her
person, "we have no doubt that individual private employees have a significant privacy interest in
avoiding disclosure of their names and **addresses**."); *FLRA v. United States Dept. of Navy*, 941
F.2d 49 (1st Cir. 1991) (finding individuals have a discernable interest in "the ability to retreat to
the seclusion of one's home and to avoid enforced disclosure of one's **address**"). Again, the
foregoing is far from an exhaustive list of cases on this issue.

1 privacy right even for those less sensitive about secrecy.¹⁶

2 **2. Hyatt has pled invasion of his informational privacy.**

3 As the cases cited above demonstrate, courts recognize an individual's right to privacy
4 in personal information gathered by government agencies and then placed in government
5 records. The right of informational privacy is a significant part of Hyatt's invasion of privacy
6 claim.

7 Because Nevada is a notice pleading state (see Nev. R. Civ. P. 8(a)), Hyatt has alleged
8 more than sufficient facts to recover from the FTB for its invasion of his informational privacy
9 as well as a myriad of other privacy claims supported by both the United States and Nevada
10 Constitutions. (*E.g.*, FAC, ¶¶ 8, 34, 35, 61, 62.)

11 **3. Hyatt has also pled the traditional forms of invasion of privacy.**

12 Moreover, Hyatt has pled viable causes of action in regard to the three more traditional
13 forms of invasion of privacy claims: (1) unreasonable intrusion upon the seclusion of another,
14 (2) unreasonable publicity given to private facts, and (3) casting in a false light.

15 **a. The FTB unreasonably intruded upon Hyatt's seclusion.**

16 For Hyatt to recover for intrusion upon his seclusion, he must "prove the following
17 elements: (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of
18 another; and (3) that would be highly offensive to a reasonable person." *PETA*, 111 Nev. 615,
19 630, 895 P.2d 1269 (1995). In addition, Hyatt must show that he had "an actual expectation of
20 seclusion or solitude and that expectation was objectively reasonable." *Id.* at 631.

21 Hyatt has alleged a litany of facts which if proven would establish each of these

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23 ¹⁶One of the first home address cases, *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 n.
24 15 (3d Cir. 1974), forbade disclosure of individual home-wine-maker names and home addresses
25 since "there are few things which pertain to an individual in which his privacy has traditionally
26 been more respected than his own home. Mr. Chief Justice Burger recently stated: 'The ancient
27 concept that "a man's home is his castle" into which "not even the king may enter" has lost none
28 of its vitality.'" It also held that "That society recognizes an interest in keeping his address private
is indicated in such practices as non-listing of telephone numbers and the renting of post office
boxes." One of the most recent cases, *Scottsdale Unified School Dist. No 48 of Maricopa County
v. KPNX Broadcasting Co.*, 191 Ariz. 297, 955 P.2d 534, 536 (1998), held that school districts
need not disclose the home addresses or birth dates of teachers to reporters since "birth dates, like
social security numbers are private information."

1 elements and support recovery. (E.g. FAC, ¶¶ 12-15, 20, 34-37.) Hyatt's need and desire for
2 privacy and seclusion was pled in significant detail. That the FTB's conduct in intruding on
3 Hyatt's seclusion was highly offensive is set forth in the above cited cases protecting
4 information privacy.

5 **b. The FTB gave unreasonable publicity to private facts about Hyatt.**

6 A Nevada resident has a claim for unreasonable publicity given to private facts when
7 there is a public disclosure of private facts that would be offensive and objectionable to a
8 reasonable person of ordinary sensibilities. *Kuhn v. Account Control Technology, Inc.*, 865 F.
9 Supp. 1443, 1448 (D. Nev. 1994) (quoting *Montesano v. Donrey Media Group*, 99 Nev. 644,
10 668 P.2d 1081, 1084 (1983), *cert. denied*, 466 U.S. 959 (1984)). The FTB's disclosure to
11 dozens of third parties of sensitive documentation concerning Hyatt's private information falls
12 well within the ambit of the tort of unreasonable publicity. Contrary to the FTB's assertion
13 that its disclosures of Hyatt's personal information was not "publicity," the FTB's disclosure
14 was wide spread. The FTB communicated with businesses, governmental officials and
15 agencies, and individuals, including disclosures of his social security number to three
16 newspapers, two reporters and a key industry trade association -- the Licensing Executive
17 Society -- with thousands of members who were highly interested in Hyatt's licensing program.

18 Twenty two years ago when the *Restatement of Torts (Second)* was published,
19 Comment A to section 652(d) suggested that the courts might well relax the requirement of
20 wide spread publicity, at least in those cases where there were statutes regulating disclosure of
21 certain types of information. In this case, the Federal Privacy Act, the California Information
22 Practices Act, the California Revenue and Taxation Code, and the California Constitution all
23 forbid disclosures of the type made by the FTB as violations of informational privacy.¹⁷ The
24 California Supreme Court has made it clear that due to these statutes and the Constitution that
25 all individuals, including out of state residents, can have a reasonable expectation of privacy in
26 personal information about them which is maintained by government agencies, banks, hotels,
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¹⁷See accompanying Request for Judicial Notice, at 6.

1 and telephone companies.¹⁸

2 The Nevada Supreme Court has indicated that information relating to a person's
3 financial condition is private, and that even in litigation, the discovery of such information
4 should be scrupulously limited. *Hetter v. Eighth Judicial District*, 110 Nev. 513, 520-21, 874
5 P.2d 762 (1994) ("[S]acrifice of [privacy] should be kept to the minimum, and this requires
6 scrupulous limitation of discovery [P]ublic policy suggests that [discovery regarding] tax
7 returns or financial status not be had for the mere asking.").

8 In addition, under strict conditions of confidentiality guaranteed by the FTB, Hyatt
9 revealed to the FTB, among other things, his secret address in Nevada. Thereafter, the FTB
10 flaunted its obligation of confidentiality and in many instances even made Hyatt's address
11 known to various businesses in its deceitful, unauthorized Demands to Furnish Information.
12 As a result, Hyatt's home-office address may now be part of the public domain, a fact that is of
13 the utmost concern and disgust to Hyatt for reasons that any reasonable person in his situation
14 would consider to be of compelling importance. (FAC, ¶ 62.)

15 Contrary to the FTB's assertion, there was wide spread dissemination of Hyatt's
16 personal and confidential information. At least 90 pieces of correspondence were disseminated
17 by the FTB to individuals, businesses, trade groups, licensees, etc., whose collective
18 membership totaled in the thousands. In particular, the fact that he was under "investigation"
19 by a taxing authority was published virtually throughout the industry as the FTB "demanded"
20 information from a major industry trade association -- the Licensing Executives Society -- with
21 thousands of members as well as Hyatt licensees in Japan. Also, the FTB sent Demand letters
22 to three separate newspapers with millions of readers.

23 Hyatt has alleged that he turned over to the FTB highly personal and confidential
24 information with the understanding that it would remain confidential. Hyatt has alleged that he
25 had every right to expect that the FTB would hold this information in confidence. However,
26 the FTB violated Hyatt's privacy by revealing this information to third parties. (FAC, ¶¶ 34-
27

28

¹⁸See accompanying Request for Judicial Notice, at 3.

1 35.)

2 c. The FTB cast Hyatt in a false light.

3 In a false light claim, the focus of the plaintiff's injury is on mental distress from
4 having been disparaged by revealing false or misleading information to the public as opposed
5 to damage to his reputation. See *PETA*, 111 Nev. at 622, n. 4. According to the *Restatement*
6 (*Second*) of *Torts*,¹⁹ false light consists of: (1) giving publicity to a matter concerning another;
7 (2) that places the person in a false light; (3) that would be highly offensive to a reasonable
8 person; and (4) that the actor had knowledge of or acted in reckless disregard as to the falsity of
9 the publicized matter and the false light in which the other would be placed. See *Restatement*
10 (*Second*) of *Torts* § 652E (1977). Courts have held, however, that to recover for false light, the
11 subject of the publication need not necessarily be false.²⁰

12 Hyatt has alleged that during the FTB's contacts with Hyatt's neighbors, trade
13 association, licensees, employees of patronized businesses, and governmental officials in
14 Nevada, the FTB disclosed that Hyatt was under investigation in California, and engaged in
15 other conduct which would cause these persons to have doubts as to Hyatt's moral character
16 and his integrity. (FAC, ¶ 47.) In short, the FTB's actions in conducting interviews and
17 interrogations of Hyatt's neighbors, business associates, and other Nevada residents, and its
18 conduct in issuing deceitful, unauthorized "Demands to Furnish Information" gave the false,
19 yet distinct appearance that Hyatt was a fugitive from California being investigated for illegal
20 and immoral activities.

21 In sum, invasion of privacy takes many forms. Here, Hyatt has sufficiently pled the
22 newer form emanating from "informational" privacy as well as the traditional forms.

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25 ¹⁹ In dealing with claims of invasion of privacy, the Supreme Court of Nevada has relied
26 on the *Restatement* numerous times "for guidance in this area . . ." *PETA v. Bobby Berolini, Ltd.*,
111 Nev. 615, 630, 895 P.2d 1269 (1995).

27 ²⁰See, e.g., *Douglass v. Hustler Magazine*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 475
28 U.S. 1094 (1986) (reasoning that use of a photograph out of context was grounds for recovery on
false light theory even though photograph was not "false.").

1 **G. CONTRARY TO THE FTB, CALIFORNIA LAW DOES NOT**
2 **AUTHORIZE THE FTB TO DISCLOSE TAX INFORMATION --**
3 **PRECISELY THE OPPOSITE IS TRUE AS CALIFORNIA LAW**
4 **MAKES IT A CRIME.**

5 The FTB cites California Revenue & Taxation Code Section 19545 as support for its
6 premise that it was privileged to disclose Hyatt's secret information. Such statute has no
7 application of the facts alleged by Hyatt. On its face, the statutory provision states that "[a]
8 return or return information may be disclosed in a judicial or administrative proceeding
9 pertaining to tax administration" (emphasis supplied). That is not what the FTB did.
10 Rather, the FTB's publication of Hyatt's secret information to third parties was done wherever
11 and whenever the FTB deemed appropriate during its investigation. There is no, nor has there
12 ever been any kind of Judicial or administrative proceeding in California by the FTB regarding
13 Hyatt. Rather, there is only a six year investigation which the FTB still deems incomplete.

14 The FTB knows that disclosure of taxpayer information without permission is, not only
15 not privileged, but is in fact a crime in California. Cal. Rev. & Tax Code § 19542. The FTB
16 argued this point in a prior discovery motion.²¹

17 Nevertheless, the FTB cites *McLain v. Boise Cascade Corp.*, 533 P.2d 343 (Ore. 1975),
18 for the proposition that it was somehow justified in disclosing Hyatt's private information to
19 third parties, stating that the case "illustrates the privilege allowed state agencies to investigate
20 matters within their agencies' concern." (Motion at 16.) The *McLain* case, however, stands for
21 nothing of the sort. In *McLain*, a workers compensation case, the employer had a "day in the
22 life" videotape prepared through surveillance of an employee. The Court dismissed an
23 invasion of privacy claim brought by the employee; reasoning that the activities that had been
24 filmed "could have been observed by his neighbors or passersby on the road running in front of
25 his property." *Id.* at 346. The FTB's disclosure of private facts about Hyatt to third persons,
26 and its implicit suggestion that Hyatt was a tax evader or a law breaking citizen who was
27 refusing to pay his taxes is quite different from the facts described in *McLain*.

28 The FTB also misrepresents to this Court that "[t]he pleadings show that the FTB

²¹See FTB's Opposition to Motion to Compel, at 5-9, filed on February 11, 1999.

1 auditor was only verifying the truthfulness of the Hyatt's claim of Nevada residency and any
2 disclosures made were authorized under California law." (Motion at 16.) The "pleadings"
3 disclose no such thing. Hyatt has alleged repeatedly in the pleadings that the FTB's intrusive,
4 tortious investigative efforts in Nevada were designed to intimidate Hyatt and extort money
5 from him. (FAC, ¶ 17, 21, 23, 25, 56(c), (g), (j).) Moreover, the FTB disclosures were in
6 violation of California law.

7 The FTB knew that Hyatt and his representatives were extremely concerned about
8 maintaining the confidentiality of such things as his secret home address and social security
9 number. Hyatt's insistence upon confidentiality was so non-negotiable that the FTB was
10 forced to promise strict confidentiality as a *quid pro quo* for obtaining the information and
11 documents its auditors claimed it needed to complete the audit. (FAC, ¶ 62.) Moreover, the
12 FTB was fully aware that Hyatt placed title to his home in a trust bearing the name of his
13 trusted Nevada CPA in order to maintain the security and anonymity of his secret home-office
14 address. The FTB nonetheless made the wholesale disclosures alleged by Hyatt.

15 In sum, the FTB is not excused or privileged in regard to its damaging disclosures.

16 **H. HYATT PROPERLY PLED OUTRAGE.**

17 The FTB makes a short effort to strike Hyatt's claim for the tort of outrage. Hyatt's
18 outrage, the FTB intones, stems from his discomfort at that agency's efficiency in imposing
19 additional taxes and penalties on his purse. (Motion at 26.)

20 Hyatt's Complaint, however, never declares that the tort of outrage resides in the mere
21 presentation of a bill for more taxes. Instead, it speaks of holding the FTB accountable for that
22 agency's extreme and outrageous conduct in preparing and justifying that exaction from a
23 Nevada citizen. The relaxed standards of notice pleading are used to determine whether that
24 conduct provides an actionable tort of outrage. *See Branda v. Sanford*, 97 Nev. 643, 648, 637
25 P.2d 1223, 1228 (1981) citing Nev. R. Civ. P. 8. The tort itself has three elements: 1) extreme
26 or outrageous conduct showing an intention to inflict, or a reckless disregard for, the ensuing
27 emotional distress; 2) a plaintiff that suffered severe or extreme emotional distress; and 3)
28 actual or proximate causation. *See Shoen v. Amerco, Inc.*, 111 Nev. 735, 747, 896 P.2d 469,

1 477 (1995). Hyatt's Complaint must simply give adequate notice of these elements and the
2 relief he seeks; his pleadings should be liberally construed to do substantial justice. *Branda*,
3 *supra*.

4 Hyatt's Complaint meets these standards. The FTB's extreme or outrageous conduct
5 began with a "clandestine and reprehensible investigation" of Hyatt's Nevada residency.
6 (FAC, ¶ 51.) The FTB interrogated his neighbors and the businesses he patronized. (FAC,
7 ¶ 12.) Nevada citizens got authoritative Demands for Information. (FAC, ¶ 13.) Their elected
8 leaders and government officials received gently deferential requests. (FAC, ¶ 14.) The FTB
9 proposed an unsavory *quid pro quo*: you pay your taxes or we will not hold your personal
10 financial information with all the confidentiality that California law demands. (FAC, ¶ 20.)
11 The FTB's actions served not the goals of an honest investigation into Hyatt's residency, but
12 more base objectives of harassment, embarrassment, coercion, and intimidation. (FAC, ¶ 51.)
13 That conduct caused the effect the FTB sought: Hyatt's extreme emotional distress as
14 manifested by his "fear, grief, humiliation, embarrassment, anger and a strong sense of
15 outrage." (FAC, ¶ 51.)

16 Past Nevada Supreme Court precedent also shows the adequacy of Hyatt's Complaint
17 under the Nev. R. Civ. P 12(c) standard that his pleadings need only set out allegations
18 permitting recovery if proved true. See *Bernard v. Rockhill Development Co.*, 103 Nev. 132,
19 136, 734 P.2d 1238, 1241 (1987). Patrons who berate a restaurant busgirl with crude sexual
20 propositions, engendering predictable emotional distress, commit an actionable tort of outrage.
21 See *Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223 (1981). Companies that breach
22 employment contracts to harass an employee and engender financial hardships are similarly
23 liable. See *Shoen v. Amerco, Inc.*, 111 Nev. 735, 747, 896 P.2d 469, 477 (1995). City officials
24 that charge a police officer with perjury in a press release, exposing the officer to ridicule and
25 embarrassment, face potential liabilities for the officer's resulting emotional distress. See
26 *Posadas v. City of Reno*, 109 Nev. 448, 456, 851 P.2d 438, 444 (1993).

27 The FTB's actions are simply another example in this category of extreme and
28 outrageous conduct. The FTB's conduct is all the more outrageous given Hyatt's life

1 threatening battle with cancer during the period of time on which the FTB is focusing its
2 investigation. In any case, whether Hyatt's Complaint is measured by judicial precedent or a
3 recounting of the allegations his Complaint provides, the end result is the same: the FTB's
4 motion for judgment on the pleadings must be denied.

5 **I. HYATT PROPERLY PLED ABUSE OF PROCESS.**

6 **1. Abuse of process can occur in an administrative process.**

7 The FTB's contention that Hyatt does not state a viable claim for abuse of process
8 because no judicial process is involved is simply wrong. Since 1932, the courts (including the
9 9th Circuit) have clearly recognized the tort of abuse of process when it involves
10 administrative abuse, as opposed to judicial abuse. See *e.g. Hillside v. Stravato*, 642 A.2d 664,
11 666 (R.I. 1994) ("Numerous jurisdictions have recognized that misuse of certain administrative
12 proceedings may give rise to claims for malicious prosecution and abuse of process.")²²

13 **2. A government entity in particular may be held liable for administrative**
14 **abuse of process.**

15 The FTB then arrogantly contends that it alone may determine whether it abused its
16 powers because: "[w]hether or not the process of a non-judicial agency was used for an
17 improper purpose is for the agency to decide." (Motion, at 28-29.) This second notion put
18 forth by the FTB is also wrong. Significantly, the cases cited by the FTB involve no
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21 ²²See also *Melvin v. Pence*, 130 F.2d 423, 426-27 (D.C. Cir. 1942) ("The administrative
22 process is also a legal process, and its abuse in the same way with the same injury should receive
23 the same penalty When private as well as public rights more and more are coming to be
24 determined by administrative proceedings, it would be anomalous to have one rule for them and
25 another for the courts in respect to redress for abuse of their powers and processes."); *United States*
26 *v. Carrozzella*, 105 F.3d 796, 799 (2d Cir. 1997) (holding "abuse of judicial process seems to us
27 a term that . . . includes any serious misuse of judicial or administrative process proceedings
28 intended to inflict unnecessary costs or delay on an adversary or to confer undeserved advantages
on the actor."); *Clipper Express v. Rocky Mountain Motor*, 690 F.2d 1240, 1257 (9th Cir. 1982),
cert. denied, 459 U.S. 1227 (1983) (finding harassment through administrative proceedings has
same effect as harassment through the court system.); and *SEC v. ESM Government Securities, Inc.*,
645 F.2d 310 (5th Cir. 1981) ("The Supreme Court directives . . . leave no doubt that this power
(the equitable power of the courts of the United States . . . over their own process, to prevent abuse)
may be properly invoked in cases involving the enforcement of administrative subpoenas.")

1 government entities, rather a panoply of private litigants.²³ None of the private parties in the
2 cases cited by the FTB had the FTB's "subpoena" powers used so liberally as in this case, as a
3 voice of authority demanding information from individual and less powerful third parties. The
4 abuse of process standards are different for a government agency.

5 Agencies commit an abuse of process when their demands for information are
6 motivated by an improper purpose, such as to harass the taxpayer or to put pressure on him to
7 settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular
8 investigation. *United States v. Powell*, 379 U.S. 48, 58, 85 S. Ct. 248, 255, 13 L. Ed. 2d 112
9 (1964). An agency that obtains information by misleading a taxpayer's accountant acts beyond
10 the pale of good faith. *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977). An agency
11 that acquires information in an investigation by fraud, deceit, or trickery commits an abuse of
12 process. *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 317 (5th Cir. 1981). The
13 standards for abuse of process must remain flexible to safeguard citizen liberties:

14 Decency, security, and liberty alike demand that government officials shall be
15 subjected to the same rules of conduct that are commands to the citizen. In a
16 government of laws, existence of the government will be imperiled if it fails to
observe the law scrupulously. Our Government is the potent, the omnipresent
teacher. For good or for ill, it teaches the whole people by its example.

17 *Id.* at 316-17 quoting *Olmstead v. United States*, 277 U.S. 438, 483-85, 48 S. Ct. 564, 574, 72
18 L. Ed. 944 (1928).

19 The FTB's Demands for Information were issued for improper purposes devoid of good
20 faith. They provided Hyatt's social security number and his secret address to third parties,
21 violating the FTB's express promises of confidentiality. (FAC, ¶ 56(a).) FTB representatives
22 made *sotto voce* offers to protect Hyatt's confidentiality for cash. (FAC, ¶ 56(g).) Its actions
23

24 ²³*Sea-Pac Co., Inc. v. United Food and Commer. Worker's Loc. Union*, 699 P.2d 217
25 (Wash. 1985) (involves a union and the president of a fish processing company angered by labor
26 agitations); *Dutt v. Kremp*, 111 Nev. 567, 894 P.2d 354 (1995) (doctors versus a lawyer); *Nevada*
27 *Credit Rating Bureau v. Williams*, 88 Nev. 601, 503 P.2d 9 (1972) (creditor versus debtor);
28 *Foothill Indus. Bank v. Mikkelsen*, 623 P.2d 748 (Wyo. 1981) (borrower versus lender); *Laxalt v.*
McClatchy, 622 F. Supp. 737 (D.Nev. 1985) (a U.S. Senator alleging slander against a newspaper);
and *Nienstedt v. Wetzel*, 651 P.2d 876 (Ariz. 1982) (two neighbors squabbling over the costs of a
retaining wall).

1 violated the due process guarantees of Article 1, Section 8 of the Nevada Constitution. (FAC,
2 ¶ 56(d).) Each of these allegations, if proved, would permit recovery against the FTB for abuse
3 of process.²⁴ The FTB's Motion must therefore be denied.

4 **J. HYATT PROPERLY PLED FRAUD.**

5 The FTB's argument regarding Hyatt's fraud claims are fatally abstract and not tangibly
6 concrete. Of course, the FTB trots out the black-letter law that fraud is a tort of five pieces: 1)
7 *falsity* (a false representation by the FTB); 2) *scienter* (the FTB knew or believed its
8 representation was false); 3) *inducement* (the FTB intended Hyatt to act upon the
9 representation); 4) *justifiable reliance* (Hyatt acted and justifiably relied on the FTB's
10 representation; and 5) *damages* (Hyatt was damaged by his reliance). See *Albert H. Wohlers*
11 *and Co. v. Bartgis* 969 P.2d 949, 956 (Nev. 1998). Moreover, Nev. R. Civ. P. 9 (b), states that
12 "[m]alice, intent, knowledge, and other condition of mind [motive is also a condition of the
13 mind] of a person may be averred generally."

14 The FTB's notion that fraud requires allegations of fact essentially transforms this tort
15 into a balancing scale heavily weighted in that agency's favor. A viable fraud claim, the FTB
16 avows, requires Hyatt to tip those scales with the hard metal of particular factual allegations.
17 His failure to do so allows the FTB's motion for judgment on the pleadings to reach and decide
18 the merits of Hyatt's claims of fraud. The reality, of course, is quite different: A failure by
19 Hyatt to meet Nev. R. Civ. P. 9(b) exposes his complaint to a motion for a more definite
20

21 ²⁴For purposes of Hyatt's abuse of process claim, the FTB is estopped from asserting as a
22 defense, that no administrative process in California exists upon which the abuse of process claim
23 may be based. Each "Demand" cites to California law for its authority, and invariably included
24 Hyatt's social security number, and in many instances his actual, personal home address, making
25 this highly sensitive and confidential information a part of readily accessible databases. The FTB
26 knew that this abusive process was in direct violation of its commitments of confidentiality to
27 Hyatt. To now allow the FTB to avoid the consequences of its abuse of process would be the
28 height of injustice. See *McKeeman v. General American Life Ins.*, 111 Nev. 1042, 1050, 899 P.2d
1124 (1995) ("[T]he party to be estopped must have been aware of the facts; it must have intended
that its act or omission be acted upon, or act in such a manner that the party asserting estoppel had
a right to believe that it so intended; the party asserting estoppel must have been unaware of the
true facts; and it must have relied upon the other party's conduct to its detriment.") (quoting
Lusardi Const. Co. v. Aubry, 824 P.2d 643, 654 (Cal. 1992).

1 statement "or at the very worst dismissal with leave to amend." *See Britz v. Consolidated*
2 *Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 916 (1971). But we need not debate the
3 accuracy of the FTB's portrayal of the Nev. R. Civ. P. 9(b) standard; Hyatt's complaint
4 contains more than enough specific factual allegations to fulfill even the FTB's concocted
5 criterion. And unlike the FTB, Hyatt has no qualms about comparing his Complaint to the five
6 required elements of a fraud claim:

7 **Falsity**—The FTB "absolutely promised to maintain in the strictest of confidence" the
8 information it sought from Hyatt. (FAC, ¶ 60, ¶ 61.) Hyatt expressed his concerns repeatedly
9 both orally and in writing. (FAC, ¶¶ 62(a) & 62(b)(iii).) The FTB's own records verify these
10 concerns and its assurances of confidentiality. (FAC, ¶¶ 62(b)(i)-(v).)

11 **Scienter**—Hyatt has pleaded scienter in two ways. First, even as the FTB made
12 assurances of confidentiality it violated those assurances by releasing confidential data. (FAC,
13 ¶¶ 62 & 62(c).) Second, the FTB assurances were part of a pattern of extortionate conduct to
14 persuade Hyatt of a truly enormous tax liability. (FAC, ¶¶ 63(a)-(e).)

15 **Inducement**—The complaint alleges how the FTB sought to induce Hyatt's reliance on
16 its representations. The FTB's actions were part of a pattern of extortionate conduct (FAC, ¶
17 63) by which the agency sought to relieve itself of the uncertainties of a judicial process to
18 compel the production of Hyatt's confidential information. (FAC, ¶ 64.)

19 **Justifiable Reliance**—The complaint alleges the trust and confidence Hyatt afforded the
20 FTB based on this past dealings with that agency. (FAC, ¶ 60.) Moreover, he had no reason to
21 suspect that the FTB, as an organ of California government, would act in a less than truthful
22 manner. (FAC, ¶ 65.)

23 **Damages**—The FTB contends that fraud requires pecuniary losses. (Motion at 30.)
24 Hyatt's fraud claims, it argues, embrace only matters of "emotional distress or hurt feelings."
25 The FTB is doubly wrong. First, Hyatt's Complaint avers pecuniary losses of "an extent and
26 nature to be revealed only to the Court *in camera*." (FAC, ¶ 66.) Second, the FTB misstates
27 the law; fraud actions provide a redress for emotional distress. The Nevada Supreme Court
28 upheld a compensatory damages award for emotional distress "as a result of [a defendant's]

1 fraudulent misrepresentations, concealment, and bad faith course of conduct." *See Wohlers*,
2 969 P.2d at 958.

3 In sum, Hyatt's allegations are legally sufficient to provide fair notice to the FTB as to
4 the nature and basis of the fraud. *See Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216
5 (1979) ("the pleading of conclusions, either of law or fact, is sufficient so long as the pleading
6 gives fair notice of the nature and basis of the claim"). *See also Hay v. Hay*, 100 Nev. 196,
7 198, 678 P.2d 672 (1984) ("Because Nevada is a notice-pleading jurisdiction, our courts
8 liberally construe pleadings to place into issue matters which are fairly noticed to the adverse
9 party . . .").

10 **K. HYATT PROPERLY PLED NEGLIGENT MISREPRESENTATION.**

11 We finally reach the FTB's last flawed argument that Hyatt improperly pleaded a cause
12 of action for negligent misrepresentation. The FTB styles his allegations as
13 "incomprehensible." (Motion at 30.) We are puzzled too. How could an agency of the FTB's
14 resources and sophistication be baffled by this simple claim: You asked me to give you my
15 sensitive and highly confidential information. You promised to hold this information in the
16 strictest confidence. Rather than contesting your request, I trusted you and voluntarily
17 disclosed the information you sought. After obtaining the information, you broke your
18 promise. And you knew when you made the promise that you could not or would not keep it.
19 Reduced to their essence, Hyatt's allegations say exactly this. (FAC, ¶¶ 69 & 70.)

20 The FTB, however, hears something else. Hyatt's claims illicitly superimpose a
21 "business relationship" of "trust" on the FTB's statutory and regulatory duties under
22 California law. (Motion at 30.) Those laws allow it to use taxpayer information. *Id.* The
23 unstated thrust of the FTB's argument is that its veracity in obtaining information does not
24 matter. Taxes are too important to let things like fair play impede progress. To the FTB's
25 exclamation that Hyatt "would have it that the FTB be his trusted agent!" should be added
26 another: The FTB has a job to do! (Motion at 30.)

27 Contrary to the FTB's assertions, courts hold government agencies accountable for their
28 negligent misrepresentations of fact. The Minnesota Supreme Court explained the public

1 policy of doing so:

2 We will continue to allow a cause of action against government officers
3 and employees for negligent misrepresentation of fact because other public
4 policy considerations are more compelling in that context. Members of the
5 public have no other access to factual information maintained by the
6 government except through government officers and employees. Therefore, the
7 policy of promoting accuracy through the prospect of tort liability outweighs the
8 possibility of inhibiting performance of duties of office or employment.

9 *Northernair Productions, Inc. v. Crow Wing County*, 244 N.W. 2d 279, 282 (Minn. 1976).

10 Those public policies received further development in *M.H. v. Caritas Family Services*, 475
11 N.W. 2d 94 (Minn. App. 1991). Holding the agency accountable for negligent
12 misrepresentation promoted the accuracy of its communications and posed no dangers to its
13 performance. *Id.*

14 The FTB's citations to cases applying negligent misrepresentation in commercial
15 transactions between private parties of equal power does not allow it to escape a fundamental
16 common law rule: "even if one has no duty to disclose a particular fact, if one chooses to
17 speak he must say enough to prevent the words from misleading the other party." *M.H. v.*
18 *Caritas Family Services*, 488 N.W.2d 282, 288 (Minn.1992). That rule has a corollary: "a
19 duty to disclose facts may exist 'when disclosure would be necessary to clarify information
20 already disclosed, which would otherwise be misleading,' particularly when a confidential or
21 fiduciary relationship exists between the parties." *Id.* (omitting cited cases). Fidelity to either
22 rule imposes no hardships on the FTB; it merely requires the agency "to use due care to
23 ensure" that its factual statements disclose "information fully and adequately." *Id.*

24 Hyatt's complaint fully pleads these precepts. The FTB made affirmative statements of
25 fact about its confidentiality practices. (FAC, ¶ 69.) Its representations occurred in the context
26 of a confidential, business-like relationship involving tens of millions of dollars. (FAC, ¶ 71.)
27 The FTB's conduct departed from its factual representations. (FAC, ¶ 70.) And the FTB owed
28 a duty to Hyatt to inform him that it "may not have been able to maintain, or otherwise would
not maintain, the strict confidentiality" it promised. (FAC, ¶ 69.) The FTB is any taxpayer's
only channel of information about its practices. Once it speaks, the FTB, or any party in a
confidential relationship, should not be misleading. Adherence to that duty, and the imposition

1 of liability for negligent misrepresentation when it is breached, promotes the FTB's accuracy
2 without lessening its efficiency. However the principles are arranged or voiced, they all say the
3 same thing: Truth should matter.

4 **V. CONCLUSION.**

5 Hyatt brought this suit to resolve the dispute about his eight year Nevada residency and
6 to be compensated for damages resulting from the FTB's tortious conduct over the past six
7 years. Because of the exceptional circumstances of this case, Hyatt pled more facts than
8 necessary at the pleading stage. It is remarkable that the FTB, after denying 90% of the facts
9 that Hyatt alleges, now contends that the extensive number of facts are insufficient.

10 The FTB's false mantra that this is a tax case is now giving way to the real issues of
11 declaratory relief and torts. Nevertheless, old habits die hard and the FTB continues to distort
12 the facts and the law only to create a motion that is fatally defective in view of the clear
13 statutory requirements and the case law. Because the law is so clear, the main effect of this
14 Motion will be to waste this Court's precious time and resources and to cause Hyatt significant
15 expense and effort.

16 Hyatt has been a Nevada resident since September 1991 and continues to be a Nevada
17 resident into the next Millennium. Hyatt's life in Nevada was both private and prosperous until
18 the FTB destroyed his licensing business and distracted him from his research and
19 development and patent work by investigating him, harassing him, and then trying to extort
20 him with a \$21.8 million demand. Now, eight years after he left California, unable to find
21 Hyatt in California, the FTB continues to investigate Hyatt in Nevada and to threaten him in
22 Nevada with impunity. This Court is Hyatt's only remedy against the FTB's invasive and
23 never ending vendetta, carried out only because Hyatt chose to leave California and then
24 succeeded in Nevada. This matter can only be resolved by an award of compensatory damages
25 to Hyatt for the FTB's tortious acts and a declaratory judgment as to Hyatt's residency for the

26
27
28

1 entire period in dispute up to the present time, not just the few months from almost a decade
2 ago upon which the FTB has focused its investigation.

3 The motion should be denied.

4
5 DATED this 15th day of March, 1999.

6 HUTCHISON & STEFFEN

7
8 By: 

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**Hyatt's Request for
Judicial Notice – In Opposition to
the FTB's Motion for
Judgment on the Pleadings**

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DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT,
Plaintiff,

vs.

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

) Case No. A382999
) Dept No. XVIII

) **HYATT'S REQUEST FOR
JUDICIAL NOTICE -- IN
OPPOSITION TO THE FTB'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

) **FILED UNDER SEAL PURSUANT
TO DISCOVERY COMMISSIONER
RULING OF FEBRUARY 22, 1999**

) **Hearing Date: April 5, 1999
Hearing Time: 3:00 p.m.**

Hyatt requests that this Court take judicial notice as authorized by Nevada law of certain
Constitutional provisions, statutes, case law, and Nevada Attorney General opinions relating to
privacy.

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Shirley B. R...

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1 Nevada law authorizes this Court to take judicial notice of both facts¹ and law.² Case
2 law extends this to such matters as the decisional law of California and sister states.³ Judicial
3 notice is mandatory under Nev. Rev. Stat. § 47.150, if requested to do so by counsel and if
4 provided the necessary information.⁴ Here and in the Appendix of Authorities, Hyatt provides
5 this Court with the necessary information.

6 The Nevada Supreme Court has declared that formal requests for judicial notice are "the
7 better procedure" although not absolutely necessary.⁵ Nevada law allows judicial notice of
8 opinions of the executive branch such as opinions of the Attorney General.⁶

9 Here Hyatt requests judicial notice of the following six matters of law and fact:
10

11 ¹Nev. Rev. Stat. § 47.130 makes facts in issue subject to judicial notice if they are "(a)
12 Generally known within the territorial jurisdiction of the trial court; or "(b) Capable of accurate and
13 ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that
the fact is not subject to reasonable dispute."

14 ²Nev. Rev. Stat. § 47.140 makes certain laws subject to judicial notice, including:
15 "1. The Constitution and statutes of the United States,
16 2. The constitution of this state and Nevada Revised Statutes, and . . .
17 8. The constitution, statutes or other written law of any other state . . . as contained in a book or
pamphlet published by its authority or proved to be commonly recognized in its courts."

18 ³*Andolino v. State*, 99 Nev. 346, 662 P.2d 631, 633 (1983) (collecting cases); *Kraemer v.*
19 *Kraemer*, 79 Nev. 287, 290, 382 P.2d 394, 395 (1963) (taking judicial notice of California law as
20 expressed in reported court opinions of that state); *Choate v. Ransom*, 74 Nev. 100, 107, 323 P.2d
700, 703-704 (1958) ("[T]he statutes and reported court opinions of our sister states are a proper
subject for judicial notice.").

21 ⁴Nev. Rev. Stat. § 47.150 distinguishes between permissive and mandatory judicial notice:
22 "1. A judge or court *may* take judicial notice, whether requested or not.
23 "2. A judge or court *shall* take judicial notice if requested by a party and supplied with the
24 necessary information." (emphasis added.); *Andolino v. State*, *supra*, 99 Nev. at 351, 662 P.2d at
633 (1983) (reversing judgment where court failed to take mandatory judicial notice).

25 ⁵*Choate v. Ransom*, 74 Nev. 100, 107, 323 P.2d 700, 703-704 (1958) (finding it was proper
to take judicial notice of Idaho law).

26 ⁶*Peardon v. Peardon*, 65 Nev. 717, 737, 201 P. 2d 309, 319 (1948) ("We believe we have
27 the right to take judicial notice of the official acts of the head of an executive department or agency
28 of the government, of general public interest. [Citation.] The foregoing conclusion as to
disqualification is in accord with the opinion of Attorney General Biddle rendered April 23, 1942.
..."))

1
2 1. **The Constitutions of the United States, Nevada, California, and many other**
3 **states prohibit unreasonable searches and seizures of an individual's**
4 **"papers."**

5 In support of this request, Hyatt refers to the Constitutions of the many states
6 (including, Nevada and California) that forbid unreasonable searches and seizures, and enshrine
7 privacy as a fundamental right. The Fourth Amendment to the United States Constitution
8 protects against unreasonable searches and seizures. The State Constitutions of Alaska,
9 Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, Nevada, New York,
10 Pennsylvania, South Carolina, and Washington enshrine privacy as a Constitutional right.
11 Hyatt attaches hereto as Exhibits A, B, and C the Constitutional provisions of Nevada, the
12 United States, and California forbidding unreasonable searches and seizures.

13 2. **The Constitutions forbid intrusion into personal records in such detail as to**
14 **obtain a "virtual current biography" of individuals which is exactly what**
15 **Hyatt contends the FTB did — with no warrant, no disinterested judge or**
16 **magistrate —conduct a limitless "fishing expedition," involving "unbridled**
17 **discretion" and the sort of "general search" that the Constitutions of**
18 **Nevada, California, and the United States forbid.**

19 In support of this request, Hyatt refers this Court to the following cases:

- 20 • *Burrows v. Superior Court*, 13 Cal. 3d 238, 118 Cal. Rptr. 166, 529 P.2d 590,
21 (1974) (The reason the Constitution requires legal process is distrust of
22 **"unbridled discretion"** exercised by government law enforcers.) (emphasis
23 added);
- 24 • *People v. Tarantino*, 45 Cal. 2d 590, 594, 290 P.2d 505 (1955) ("The right of
25 privacy was deemed too precious to entrust to the discretion of those whose job
26 is the detection of crime and the arrest of criminals.");
- 27 • *People v. Chapman*, 36 Cal. 3d 98, 109, 111, 201 Cal. Rptr. 628, 679 P.2d 62
28 (1984) (a holder of an unlisted telephone number had a constitutional privacy
 interest in maintaining her anonymity);
- *People v. Blair*, 25 Cal. 3d 640, 651, 159 Cal. Rptr. 818, 602 P.2d 738 (1979)
 ("As with bank statements, a person who uses a credit card may reveal his habits,
 his opinions, his tastes, and political views, as well as his movements and
 financial affairs. No less than a bank statement, the charges made on a credit
 card may provide a **'virtual current biography'** of an individual.") (emphasis
 added).

1 Hyatt contends that the FTB engaged in an unreasonable search of records intended to
2 create a "virtual current biography" of Hyatt. He points out that the FTB auditor considered
3 relevant and asked from Gil Hyatt and others the papers evidencing his every:

- 4 • move for three years
- purchase
- 5 • haircut
- check
- 6 • credit card charge
- subscription
- 7 • motel rental
- car rental
- 8 • apartment rental
- video rental
- 9 • home purchase
- home sale
- 10 • dues payment
- gift to his adult children
- 11 • gift to his grandchildren
- gift to foreign relatives
- 12 • gift to his alma mater
- contribution to politician
- 13 • gift to charity
- deposit
- 14 • withdrawal
- doctor visit
- 15 • lawyer visit
- accountant visit
- 16 • rabbi visit
- application for drivers' license
- 17 • application to vote
- tax return
- 18 • cash receipt
- cash payment
- 19 • telephone call

20 A more far reaching search for three entire years could not be imagined. The FTB lead
21 auditor could not think of any area of Hyatt's life that was "out of bounds."

22 ///

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1 3. **The Nevada Attorney General stated in his Opinion 80 (October 18, 1963),**
2 **found that “Perhaps no right of the individual in America is more**
 fundamental than that of being secure against the invasion of privacy.”

3 In support of this request Hyatt attaches Opinion 80 as Exhibit D, in which the Attorney
4 General concluded that the Nevada Constitution, Article I, Section 18 forbade any Nevada
5 government agency from inspecting private papers without a warrant: “And the prohibition
6 there imposed likewise applies to investigations, examinations, or any other procedure whereby
7 the contents of a private paper may become revealed. The content of any such papers may be
8 made available for investigative or informational purposes only by voluntary consent of the
9 owner or pursuant to proper legal process.”

10 4. **California affords its Constitutional privacy protections to all “people,” not**
11 **just all California citizens, and its statutory privacy protections also protect**
12 **all individuals and persons submitting tax information, not just California**
 residents.

13 In support of this Request, Hyatt attaches as Exhibit C the relevant portion of the
14 California Constitution, i.e.:

15 Article 1, Section 1, of the California Constitution, adopted by the people by popular
16 vote in 1972, which provides [as reworded by Constitutional amendment in 1974] that:

17 “All *people* are by nature free and independent, and have certain inalienable rights.
18 Among these are enjoying and defending life and liberty, acquiring, possessing, and
 protecting property, and pursuing and obtaining safety, happiness, and *privacy*.”

19 (Emphasis added.) The language of the Constitution, by its terms, protects Nevada residents
20 touched by California government as well as California citizens.

21 *White v. Davis*, 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222 (1975),
22 enumerated the principal evils to which California’s Constitutional on privacy amendment was
23 directed: “(1) ‘*government snooping*’ and the secret gathering of personal information; (2) the
24 overbroad collection and retention of unnecessary personal information by government and
25 business interests; (3) the improper use of information properly obtained for a specific purpose,
26 for example, the use of it for another purpose *or the disclosure of it to some third party*; and (4)
27 the lack of a reasonable check on the accuracy of existing records.” *Id.*, 13 Cal. 3d at 775
28 (emphasis added).

1 **5. The California legislature made a finding that privacy is a personal and**
2 **fundamental right protected by Section 1 of Article I of the Constitution of**
3 **California and by the United States Constitution and that all individuals**
4 **have a right of privacy to information pertaining to them.**

5 In support of this request Hyatt attaches as Exhibit E, Cal. Civ. Code § 1798.1. Hyatt
6 also requests the Court to take notice that the California Legislature did not limit its protection
7 to Californians, but rather make it available to all "individuals." The Legislature further found
8 several facts that are of particular applicability to Gil Hyatt, among them:

9 “(a) The right to privacy is being threatened by the indiscriminate
10 collection, maintenance, and dissemination of personal information and the lack
11 of effective laws and legal remedies.”

12 “(b) The increasing use of computers and other sophisticated technology
13 has greatly magnified the potential risk to individual privacy that can occur from
14 the maintenance of personal information.”

15 “(c) In order to protect the privacy of individuals, it is necessary that the
16 maintenance and dissemination of personal information be subject to strict
17 limits.”

18 *Id.* (emphasis added).

19 **6. The Nevada Attorney General, interpreting Nevada’s Constitutional**
20 **provision on privacy, has defined a search warrant to be “essentially an ex**
21 **parte order issued in the name of the state.”**

22 In support of this request, Hyatt submits as Exhibit F, Nevada Attorney General
23 Opinion No. 79-2, 1979 Nev AG LEXIS 67, 1979 Op. Atty. Gen. Nev. 5 (Feb. 6, 1979). In it,
24 the Attorney General opined that the Nevada Constitution requires the government, acting
25 civilly in investigating suspected violations of civil law, to nevertheless protect the privacy of
26 Nevada citizens by obtaining search warrants from disinterested magistrates and serving them
27 by the sheriff:

- 28 • “[A] search authorized by state law may be an unreasonable one under the
 Fourth Amendment. . . .”
- “Generally, the only constitutional requirement is that the issuing court be a
 disinterested magistrate.”
- The district court is the proper issuing court having jurisdiction of the matter.
- “All warrants, whether civil or criminal in nature, must be directed to and
 executed by the sheriff, or other peace officer having like authority.”

1 *Id.* In short, Nevada protects its citizens' privacy zealously, and Nevada citizens have
2 legitimate expectation that their personal privacy will not lawfully be invaded, even by its giant
3 sister State's tax auditors coming into Nevada, flashing their "badges," conducting their secret
4 surveillance, and sending out dozens of unconstitutional search warrants termed "Demands for
5 Information."

6 Hyatt respectfully requests that this Court take judicial notice of these matters.

7
8 DATED this 15th day of March, 1999.

9
10 HUTCHISON & STEFFEN

11
12 By: 

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EXHIBIT 8

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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. : XVIII
Docket No. : F

24 **DEFENDANT'S REPLY TO**
25 **PLAINTIFF'S OPPOSITION TO MOTION**
26 **FOR JUDGMENT ON THE PLEADINGS**

27 **FILED UNDER SEAL PURSUANT TO**
28 **DISCOVERY COMMISSIONER'S**
FEBRUARY 22, 1990 RULING

29 COMES NOW, Defendant, the Franchise Tax Board of the State of California (the
30 "FTB" or the "Board") and replies to Plaintiff's Opposition to Defendant's Motion for
31 Judgment on the Pleadings (the "Motion"). The Plaintiff's Opposition raises issues not in
32 the pleadings, such as interference with Plaintiffs "licensing business." Pursuant to NRCP
33 15(b), the FTB objects to trial of issues not pled.

34 At the outset, it should be noted that Mr. Hyatt does not allege that he has ever
35 actually paid California income tax. The actual income tax assessment is a small fraction

1 of the current potential liability which include accruing interest and penalties that might be
2 applied if Mr. Hyatt is not successful in his agency protest and subsequent administrative
3 appeal or judicial review. His reference to a multi-million dollar levy is not an allegation of
4 actual tax assessment under threat of collection. The risk of interest and penalties is
5 assumed by a taxpayer who elects not to pay the amount noticed. This risk is avoided by
6 simply paying the tax and applying for a refund. Mr. Hyatt elected to pay no tax, instead
7 protesting the FTB's determination. This stays collection of the tax, but interest and
8 penalties may continue to accrue.

9 The Nevada contacts alleged by Mr. Hyatt are largely matters which are easy for
10 a wealthy taxpayer to establish, whether or not actual domicile in the state is intended.
11 Even purchase of a middle-class neighborhood home in a rapidly growing and appreciating
12 market may evidence mere pretext or investment rather than change in residency.
13 Although Mr. Hyatt has a self-serving explanation for his significant California contacts
14 which continued well after he supposedly moved to Nevada, he does not deny that such
15 contacts existed in the tax years audited.

16 The Plaintiff has filed two briefs in opposition to Defendant's Motion for Judgment
17 on the Pleadings. In addition to a 45 page document captioned as his opposition, Plaintiff
18 also filed a 7 page brief captioned: "HYATT'S REQUEST FOR JUDICIAL NOTICE - IN
19 OPPOSITION TO THE FTB'S MOTION FOR JUDGMENT ON THE PLEADINGS" (the
20 "supplemental brief"). This is really an expanded brief regarding invasion of privacy,
21 presumably filed separately to draw special attention to the privacy torts. Rather than
22 responding separately to this additional brief, the FTB will address these and other issues
23 relating to invasion of privacy where captioned below.

24 The Opposition and supplemental brief argue many more facts than are actually
25 alleged in the Complaint. Although there are references to Complaint paragraphs, in many
26 instances these do not actually quote or even paraphrase Complaint allegations. Many
27 facts argued have no support in the record. The FTB objects to the unsupported facts as
28

1 hearsay and lacking in authentication or foundation. Some facts argued to the court are
2 obviously calculated to gain the Court's sympathy or bias the Court in deciding the Motion.
3 Matters such as Mr. Hyatt's cancer or his brother's felony background are not alleged to
4 have been known by the FTB. The FTB requests that the Court disregard the embellished
5 version of the "facts" and consider only the limited facts actually pled as stated in the
6 Motion.

7 The tort causes of action are really secondary to the salient issue of California
8 income tax liability which is determined by deciding the residency issue. The tort causes
9 of action are an obvious attempt to bootstrap the California income tax issues into Nevada
10 tort litigation. This is clear from the face of the Complaint. Determination of Mr. Hyatt's
11 residency in 1991 and 1992 is irrelevant to every tort cause of action purportedly pled.

12 **A. AN NRCP 12(C) MOTION IS APPROPRIATE AT ANY TIME**
13 **AS LONG AS TRIAL IS NOT DELAYED.**

14 Plaintiff's Opposition devotes considerable argument to the effect that an NRCP
15 12(c) motion for judgment on the pleadings is inappropriate or has somehow been waived
16 by the FTB filing its Answer, attempting to remove to federal court or engaging in prior
17 motion practice. There has been no prior motion by the FTB under NRCP 12(c). The
18 withdrawn Motion to Quash Service of Summons related to personal jurisdiction.
19 Withdrawal of the Motion to Quash only resolved the issue of personal jurisdiction. The
20 instant Motion tests subject matter jurisdiction which cannot be waived (See , NRCP
21 12(h)(3)) and raises the issue of failure to state claims upon which relief can be granted
22 which is appropriate either before answering or in a motion for judgment on the pleadings
23 (See, NRCP 12(h)(2)). Plaintiff's references case law regarding waiver which preceded the
24 amendment of NRCP 12. The amended NRCP 12 (h) makes it clear that failure to make
25 a motion to dismiss for failure to state a claim upon which relief can be granted prior to
26 answering does not result in a waiver. The court simply accepts the complaint fact
27 allegations as true in deciding the motion. See, Nevada Civil Practice Manual, 4th Edition,
28

1 Sec. 1212.

2 NRCP 12(c) provides that any party may move for judgment on the pleadings after
3 the pleadings are closed, provided that trial is not delayed by the motion. The pleadings
4 are closed. The FTB is a party. This case does not come to trial until the Court's October
5 4, 1999 stack. Thus, the time is ripe for an NRCP 12(c) motion. Even accepting the fact
6 allegations of the Complaint as true, no claim against defendant upon which relief can be
7 granted is stated, Thus, judgment on the pleadings is appropriate.

8 **B. NEVADA'S COURTS LACK SUBJECT MATTER JURISDICTION OVER**
9 **CALIFORNIA INCOME TAX MATTERS.**

10 Although Plaintiff's Opposition and supplemental briefs attempt to focus the Court
11 on this matter as a tort case, Plaintiff's first and foremost cause of action is for declaratory
12 relief as to his California income tax liability for 1991 and 1992. The First Amended
13 Complaint (the "Complaint") purports to state facts in paragraphs 1 through 27 consisting
14 almost entirely of references to California income tax matters. These allegations include
15 the Plaintiff's slanted description of the FTB's audit and tax assessment. Immediately
16 following are the Complaint allegations purporting to state the First Cause of Action.
17 Complaint paragraph 29 purports to state the California tax law regarding determination
18 of California domicile and residence. Paragraph 30 purports to criticize and disagree with
19 the FTB's determination of Mr. Hyatt's tax liability for 1991 and 1992. Paragraph 31 informs
20 us that there is a controversy as to Plaintiff's residency for 1991-1992. Paragraph 32 prays
21 for the Nevada Court's judgment declaring that Plaintiff was a resident of Nevada from
22 September 26, 1991 and that the FTB's audit activities in Nevada were therefore without
23 lawful authority. This, of course, is a request for the Nevada Court to determine Mr. Hyatt's
24 California income tax liability.

25 In essence, the Plaintiff contends that it is tortious to audit a California taxpayer's
26 claim of change of residency from California to Nevada. However, as shown below, the
27 law is clear that the state of California has the authority to perform such an audit, including
28

1 inquiry in and directed to Nevada. Further, Mr. Hyatt had the burden of proof in the FTB's
2 audit as well as the obligation to cooperate with the FTB by providing information
3 substantiating his residency. Finally, as shown below, the FTB was absolutely privileged
4 to use information provided by Mr. Hyatt to verify his claim of residency and sources of
5 income, including the use of his identity, address and social security number.

6 Plaintiff argues that the Court has no choice but to declare him as a Nevada
7 resident from September 26, 1991 through the present time. Otherwise, it is argued that
8 Mr. Hyatt would have no standing to bring his tort causes of action and the FTB's
9 investigation might continue. A review of the elements of the tort causes of action fails to
10 reveal any requirement that a plaintiff be a resident of any particular state or even of this
11 country. A tort cause of action may be brought by any injured person. Even a tourist or
12 alien can sue for torts committed against him in Nevada. If the tort occurs in Nevada and
13 is committed by a Nevada resident, personal jurisdiction may lie only in Nevada. Venue
14 may be appropriate in the county where the injury occurred or where the plaintiff or
15 defendant reside. However, these are issues of personal jurisdiction rather than subject
16 matter jurisdiction. Mr. Hyatt's residency is relevant only to his first cause of action for
17 declaratory relief.

18 The Nevada statute cited by Hyatt, NRS 10.115, relates only to matters where a
19 person's rights depend on the place of his legal residence. None of the tort causes of
20 action pled by Hyatt depend on or relate to his legal residence. This case is not a divorce
21 action, nor are there naturalization, out-of-state tuition or voting rights at issue. Mr. Hyatt's
22 right to maintain this lawsuit does not depend on his residency, nor does the FTB's right
23 to defend require determination of Hyatt's residency. This is simply Hyatt's attempt to
24 obtain a Nevada Court's declaration which he will later argue in California tax proceedings
25 is res judicata or collateral estoppel. He has already attempted to argue in the FTB's
26 California administrative proceedings that his ex-wife's California court proceedings
27 (contesting the Hyatt's divorce decree) occurring after the period in question for 1991 and
28

1 1992 taxes should be determinative of his Nevada residency. In that California divorce
2 action, Mr. Hyatt was apparently able to convince a California Superior Court that by late
3 1992 he was a Nevada resident requiring his deposition to be taken in Nevada or his
4 expenses paid to go to California. He was actually served with process by his ex-wife in
5 December, 1992 at his home in La Palma, California which he had supposedly already
6 "sold" to his "associate", Grace Jeng on October 1, 1991. Of course, Mr. Hyatt's story is
7 that he was just passing through on his way to host a contingency of Russian scientists.
8 However, this illustrates Mr. Hyatt's true purpose in seeking a Nevada Court's
9 determination of his California income tax liability.

10
11 1.
12 **THE FRANCHISE TAX BOARD HAS THE STATUTORY DUTY AND**
13 **BROAD POWER TO AUDIT A CALIFORNIA NON-RESIDENCY CLAIM**
14 **INCLUDING INTERVIEWING WITNESSES, DEMANDING**
15 **DOCUMENTATION AND CONDUCTING INSPECTIONS BOTH**
16 **WITHIN AND WITHOUT THE STATE OF CALIFORNIA**

17 Defendant Franchise Tax Board ("FTB") has the statutory duty to administer
18 California's Personal Income Tax Law and Bank and Corporation Tax Law, which are
19 elements of the California Revenue and Taxation Code (R&TC). (Rev. & Tax. Code §
20 19501.) To accomplish its duty under California law, FTB has the power to examine
21 records, require attendance, take testimony, and issue subpoenas. These powers are set
22 forth in R&TC § 19504, set forth in its entirety here:

23 (a) The Franchise Tax Board, for the purpose of administering
24 its duties under this part, including ascertaining the
25 correctness of any return; making a return where none has
26 been made; determining or collecting the liability of any person
27 in respect of any liability imposed by Part 10 (commencing with
28 Section 17001), Part 11 (commencing with Section 23001), or
this part (or the liability at law or in equity of any transferee in
respect of that liability); shall have the power to require by
demand, that an entity of any kind including, but not limited to,
employers, persons or financial institutions provide information
or make available for examination or copying at a specified
time and place, or both, any book, papers, or other data which
may be relevant to that purpose. Any demand to a financial

1 institution shall comply with the California Right to Financial
2 Privacy Act set forth in Chapter 20 (commencing with Section
3 7460) of Division 7 of Title 1 of the Government Code.
4 Information which may be required upon demand includes, but
5 is not limited to, any of the following:

(1) Address and telephone numbers of persons designated by
the Franchise Tax Board.

(2) Information contained on Federal Form W-2 (Wage and
Tax Statement), Federal Form W-4 (Employee's Withholding
Allowance Certificate), or State Form DE-4 (Employee's
Withholding Allowance Certificate).

(b) The Franchise Tax Board may require the attendance of
the taxpayer or of any other person having knowledge in the
premises and may take testimony and require material proof
for its information and administer oaths to carry out this part.

(c) The Franchise Tax Board may issue subpoenas or
subpoenas duces tecum, which subpoenas must be signed by
any member of the Franchise Tax Board and may be served
on any person for any purpose

(d) Obedience to subpoenas or subpoenas duces tecum
issued in accordance with this section may be enforced by
application to the superior court as set forth in Article 2
(commencing with Section 11180) of Chapter 2 of Part 1 of
Division 3 of Title 2 of the Government Code.

16 In Franchise Tax Board v. Superior Court, 164 Cal.App.3d 526, 536-37, 210
17 Cal.Rptr. 695 (1985) the Court of Appeal commented at length on the legislature's grant
18 of investigatory power under R&TC § 19504 (then R&TC § 19254) and the mechanisms
19 for enforcing administrative process under California Government Code §§ 11180-11191:

20 The Franchise Tax Board is charged with the duties of
21 administering and enforcing the Personal Income Tax Law.
22 (Rev & Tax Code §§ 17001, 19251.) For the purpose of
23 administering those duties, including determining or collecting
24 the liability of any person imposed by the Personal Income Tax
25 Law, the FTB has been given broad statutory powers. Those
26 powers include the power to examine any data relevant to that
27 purpose, to require the attendance of any person having
28 knowledge in the premises, to take testimony, administer oaths
and to require material proof for its information. The FTB
may also issue subpoenas duces tecum which may be served
on any person for any purpose. (Rev & Tax Code § 19254, fn.
1, ante.) (Emphasis added)

1 The court further explained at 537:

2 Sections 11180-11191 statutorily authorize investigations by
3 each department of the executive branch of our state
4 government of all matters under the jurisdiction of the
5 department. As a part of those investigations, section 11181
6 authorizes the department to inspect books and records and
7 to "[i]ssue subpoenas for the attendance of witnesses and the
8 production of papers, books, accounts, documents and
9 testimony in any inquiry, investigation, hearing or proceeding
10 pertinent or material thereto..." This authority is substantially
11 the same as that granted specifically to the FTB by Revenue
12 and Taxation Code section 19254, ante (fn. 1). 5(6) These
13 investigations are not judicial proceedings, they are
14 administrative inquiries. "[S]ections 11180-11191 relate not to
15 judicial proceedings but instead to statutorily permitted
16 investigations in which the court ordinarily plays no part."
17 (Emphasis in original.) (People v. West Coast Shows, Inc.
18 (1970) 10 Cal.App.3d 462, 470, 89 Cal.Rptr. 290.

19 California Government Code § 11186, 11187 and 11188 relating to investigations
20 and hearings by an executive department provide:

21 Section 11186: The Superior Court ... has jurisdiction to
22 compel the attendance of witnesses, the giving of testimony
23 and the production of papers, books, accounts and documents
24 as required by any subpoena..."

25 Section 11187: If any witness refuses to attend or testify or
26 produce any papers required by such subpoena, the head of
27 the department may petition the superior court in the county in
28 which the hearing is pending for an order compelling the
person to attend and testify or produce the papers required by
the subpoena before the officer named in the subpoena.

Section 11188: Upon the filing of the petition, the court shall
enter an order directing the person to appear before the court
at a specific time and place and then and there show cause
why he has not attended or testified or produced the papers as
required. A copy of the order shall be served upon him. If it
appears to the court that the subpoena was regularly issued
by the head of the department, the court shall enter an order
that the person appear before the officer named in the
subpoena at the time and place fixed in the order and testify or
produce the required papers. Upon failure to obey the order,

the person shall be dealt with as for contempt of court.”

California Government Code § 11189 specifically provides for the enforcement of R&TC 19504 demands for documentation outside the state of California:

In any matter pending before a department head, the department head may cause the deposition of persons residing within or without the state to be taken by causing a petition to be filed in the Superior Court in the County of Sacramento reciting the nature of the matter pending, the name and residence of the person whose testimony is desired and asking that an order be made requiring the person to appear and testify before an officer named in the petition for that purpose. Upon the filing of the petition, the court may make an order requiring the person to appear and testify in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure. In the same manner the superior courts may compel the attendance of persons as witnesses, and the production of papers, books, accounts, and documents under Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of the Code of Civil Procedure, and may punish for contempt. (Emphasis added)

Nevada process is also available to enforce the California requests for information through issuance of subpoenas. See, NRCP 45(d)(3) and NRS 53.050 et seq. (Uniform Foreign Deposition Act).

In the Hyatt residency audit, the FTB used its standard FTB Form 4973, which Mr. Hyatt describes as the “deceptive and outrageous” “quasi-subpoenas”. These information request forms were used to obtain basic information such as gas, water and disposal service utilization at Plaintiffs’ alleged new residence in Nevada. (FAC 22:22 and 24:16). The FTB’s reference to R&TC § 19504 on the letterhead of FTB Form 4973, to gather material proof of Mr. Hyatt’s assertion that he abandoned his California domicile and residence and established a new domicile and residence in Nevada was not, as Plaintiff states, “unlawfully used.” This was an appropriate and, as it turned out, necessary tool for establishing the facts of the audit. The Plaintiff’s many arguments that rely on the theory

1 that Defendant was without authority to verify Plaintiff's assertions of fact regarding his
2 residency are without merit.

3
4 **2.**
5 **THE FTB PROPERLY USED PLAINTIFF'S TAX RETURN INFORMATION**
6 **DURING THE COURSE OF THE RESIDENCY AUDIT**

7 The audit of Mr. Hyatt was conducted by the FTB in conjunction with the FTB's
8 administration of California tax laws. R&TC § 19545 provides:

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

12 (a) The taxpayer is a party to the proceeding, or the
13 proceeding arose out of, or in connection with, determining the
14 taxpayer's civil or criminal liability, or the collection of the
15 taxpayer's civil liability with respect to any tax imposed under
16 this part.

17 (b) The treatment of an item reflected on the return is directly
18 related to the resolution of an issue in the proceeding.

19 (c) The return or return information directly relates to a
20 transactional relationship between a person who is a party to
21 the proceeding and the taxpayer which directly affects the
22 resolution of an issue in the proceeding." (Emphasis added).

23 California law provides for the disclosure of return information for tax administration.
24 The FTB auditor was only verifying the truthfulness of the Plaintiff's allegations and any
25 disclosures made were authorized under California law for the administration of income
26 taxes.

27 **3.**
28 **THE FTB AND ITS EMPLOYEES ARE NOT LIABLE IN TORT**

All public employees have discretionary immunity pursuant to California
Government Code § 820.2 which provides:

Except as otherwise provided by statute, a public employee is
not liable for an injury resulting from his act or omission where
the act or omission was the result of the exercise of the
discretion vested in him, whether or not such discretion be

1 abused.

2 The FTB and its employees are afforded additional immunity in instituting any action
3 incidental to the assessment or collection of a tax. California Government Code section
4 860.2 provides:

5 Neither a public entity nor a public employee is liable for an
6 injury caused by:

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

9 (b) An act or omission in the interpretation or application of
10 any law relating to a tax.

11 The California Court of Appeal, in an action where the plaintiff sued the FTB for
12 negligence, slander of title, interference with credit relations and the taking of property
13 without due process, affirmed the trial court's dismissal of the complaint by holding that the
14 FTB cannot be held liable because it was afforded governmental immunity from such
15 actions. (Mitchell v. Franchise Tax Board, 183 Cal.App.3d 1133, 1136, 228 Cal.Rptr. 750
16 (1986).) Mr. Hyatt's actions premised on contrived allegations for tort causes of action are
17 equally barred under the governmental immunity as actions for or incidental to the
18 assessment or collection of taxes. The FTB and its employees are immune from tort
19 liability arising from governmental activities, both discretionary and ministerial duties.
20 (Ibid.)

21 **4.**

22 **BY PROTEST OF THE FTB'S PROPOSED ASSESSMENT MR. HYATT**
23 **AVAILED HIMSELF OF CALIFORNIA'S ADMINISTRATIVE REMEDIES**

24 Mr. Hyatt's allegation that his protest action does not constitute the administrative
25 process is without merit. The California Administrative Procedure Act (California
26 Government Code § 11400 et seq.) is not applicable to the FTB administrative remedies.
27 R&TC § 19044 provides for the protest, reconsideration of assessment and hearing as
28 follows:

(a) If a protest is filed, the Franchise Tax Board shall
reconsider the assessment of the deficiency and, if the

1 taxpayer has so requested in his or her protest, shall grant the
2 taxpayer or his or her authorized representatives an oral
3 hearing. Chapter 4.5 (commencing with Section 11400) of
4 Part 1 of Division 3 of Title 2 of the Government Code does
not apply to a hearing under this subdivision.

5 California Government Code § 11501 provides as follows:

6 (a) This chapter applies to any agency as determined by the
statutes relating to that agency.

7 (b) This chapter applies to an adjudicative proceeding of an
8 agency created on or after July 1, 1997, unless the statute
relating to the proceeding provide otherwise.

9 (c) Chapter 4.5 (commencing with Section 11400) applies to
10 an adjudicative proceeding required to be conducted under
this chapter, unless the statutes relating to the proceeding
11 provide otherwise.

12 The FTB administrative remedies are governed by the California Revenue and
13 Taxation Code which was explained by the California Supreme Court in Dupuy v. Superior
14 Court, 15 Cal.3d 410, 415-16, 541 P.2d 540 (1970) as follows:

15 Under the Revenue and Taxation Code, the administrative
16 remedies afforded a taxpayer differ widely according to
whether the board makes a 'deficiency assessment' under
17 section 18583 or, as here, a 'jeopardy assessment' under
section 18641. In the former case, the taxpayer, by filing a
18 written protest with the board within 60 days after the mailing
of the notice of deficiency (s. 18590), becomes entitled to a
19 hearing before the board to contest the validity of the
proposed assessment (s 18592). If the board determines the
20 matter adversely to the taxpayer, he may appeal to the Board
of Equalization (s 18593), in which event he becomes entitled
21 to a hearing before that body (s 18595). If the Board of
Equalization finds in favor of the board, the taxpayer may
22 petition for a rehearing. If such a petition is denied, the
deficiency assessment becomes final upon the expiration of 30
23 days from the time the Board of Equalization issues its opinion
(s 18596), and the amount assessed is then due and payable.
24 Thus, simply by availing himself of the administrative remedies
outlined above, a taxpayer against whom a deficiency tax
25 assessment has been made is able to stay collection of the tax
26
27
28

1 for a substantial period of time.¹

2 See, also Schatz v. FTB, 69 Cal.App.4th 595, 81 Cal.Rptr.2d 719, 720-721 (1999).

3 In California v. Grace Brethren Church, 457 U.S. 393, 407-411, 102 S.Ct. 2498, 73
4 L.Ed.2d 1982 (1982), the United States Supreme Court upheld the state remedy provided
5 by the California Unemployment Insurance Code procedures of administrative remedies
6 as "plain, speedy and efficient" in invoking the restraints of Tax Injunction Act, 28 U.S.C.
7 § 1341. The Ninth Circuit Court of Appeals made the same determination for the
8 administrative remedy provided by the California Revenue and Taxation Code by restating
9 the court holding of Aronoff v. Franchise Tax Board, 348 F.2d 9, 11 (9th Cir. 1965) as
10 follows:

11 It has consistently been held, without a single instance of
12 deviation, that the refund action provided by California
13 Personal Income Tax Law is a 'plain, speedy and efficient
14 remedy' such as to invoke the restraints of 28 U.S.C. § 1341.

15 Randall v. Franchise Tax Board, 453 F.2d 381, 382 (9th Cir. 1971).

16 The FTB has not assessed a tax against Mr. Hyatt, but issued a Notice of Proposed
17 Assessment. The Ninth Circuit Court of Appeals stated:

18 "If a protest is filed, the Franchise Tax Board shall reconsider the assessment of the
19 deficiency. Further appeal to the State Board of Equalization is permitted, with
20 finality dependent upon the extent to which a taxpayer pursues the appellate
21 process afforded."

22 King v. Franchise Tax Board, 961 F.2d 1423, 1425 (9th Cir. 1992).

23 Mr. Hyatt's protest of the FTB's Notice of Proposed Assessment availed him of the
24 administrative remedies and placed the proposed assessment in suspension. Mr. Hyatt's
25 failure to exhaust his administrative remedies bars his action from going forward.

26 The Plaintiff argues that declaratory relief is appropriate because the California
27 administrative proceedings are taking too long or, that there is no "administrative

28 ¹
Revenue and Taxation Code §§ 18583, 18641, 18590, 18592, 18593, 18595 and 18596 have
been renumbered to §§ 19033, 19081, 19041, 19044, 19045 and 19048 respectively.

1 proceeding" in California (Opposition pgs. 15-20). However, Plaintiff admits that his protest
2 is pending before the FTB. He wants to cut off the FTB's ability to audit tax years
3 subsequent to 1992 through this Court's declaration that he has been a resident of Nevada
4 since September 26, 1991.

5 Plaintiff argues that because he does not have adjudicative rights at the protest
6 phase of the California tax proceedings, that Nevada declaratory relief is appropriate.
7 Whether or not the California tax proceedings have entered the "adjudicative" phase is
8 irrelevant in determining a right to declaratory relief. The fact is that the tax issue (Mr.
9 Hyatt's residency) is in the California FTB's hands as a result of Mr. Hyatt's protest filing.
10 This precludes declaratory relief.

11 Nevada law is clear, declaratory relief is not available to review interlocutory
12 decisions of state agencies. Mr. Hyatt is a party to an administrative agency's action which
13 may result in adjudication of his California 1991-1992 residency status and income tax
14 liability. Even if Plaintiff is correct that the matter is only in the investigation stage, it is still
15 in the agency's purview as the California legislature has mandated and may result in
16 adjudication of Mr. Hyatt's residency. The matter could proceed from the investigation
17 phase through hearing before the California State Board of Equalization and then to the
18 California Superior Court for judicial review. Nevada's declaratory relief law does not
19 require that the issue be at any particular level of agency review to preclude the Court's
20 subject matter jurisdiction for declaratory relief. The case law cited by the FTB in its
21 Motion determines the issue:

22 We have recognized that interlocutory review of agency
23 determinations in any form could completely frustrate the legislative
24 purpose of relegating certain matters to an agency for speedy
25 resolution by experts. [citation omitted]. . . The legislature has not
26 authorized review of interlocutory decisions of the Commission in the
guise of a complaint for declaratory relief. [emphasis added].

27 ...
28 It is well-settled that courts will not entertain a declaratory judgment
action if there is pending, at the time of the commencement of the

1 action for declaratory relief, another action or proceeding to which the
2 same persons are parties and in which the same issues may be
3 adjudicated. [citation omitted]. Further, a court will refuse to consider
4 a complaint for declaratory relief if a special statutory remedy has
5 been provided. [citation omitted]. A separate action for declaratory
6 judgment is not an appropriate method of testing defenses in a
7 pending action, [citation omitted], nor is it a substitute for statutory
8 avenues of judgment and appellate review. [emphasis added].

9 Public Serv. Comm. v. Eighth Judicial District Court, 107 Nev. 680, 683-85, 818 P.2d 396
10 (1991). Mr. Hyatt must wait for the FTB's final decision on his 1991-1992 residency and
11 only then may he proceed with his rights of agency and judicial review in California.
12 There is no right of judicial review of a California tax assessment in Nevada's Courts.

13 Plaintiff cites the case of Scotsman Mfg. v. State, Dep't of Taxation, 107 Nev. 127,
14 128, 808 P.2d 517 (1991), *cert. denied*, 502 U.S. 100 (1992) for the proposition that
15 declaratory relief is appropriate even before an audit and investigation is conducted to
16 determine the amount of the alleged tax. Opposition pg. 15. This Nevada sales tax case
17 has no application to the instant case involving California income tax administration.
18 Scotsman Mfg. involved application of Nevada's sales tax to a federal government
19 contractor which had been forced to actually pay sales tax under circumstances which
20 were unconstitutional. After an adverse Department of Taxation decision, the federal
21 contractor appealed to the Nevada Tax Commission which refused its request for relief.
22 Thus, a final agency determination was made as to applicability of the tax. That final
23 decision was the subject of the declaratory relief action. Only the amount of the sales
24 taxes, penalties and interest due was to be determined by a subsequent audit. The federal
25 contractor sued for declaratory relief in District Court on the issue of the tax exemption
26 available to the federal government and its contractors under the Supremacy Clause of the
27 United States Constitution. Nevada's Supreme Court reversed and remanded to the
28 District Court which had erred by failing to recognize the federal contractor's exemption
as a purchasing agent of the United States. Id. at 133-134. On appeal after remand, the
Nevada Supreme Court confirmed that, as a general rule, a taxpayer must exhaust his

1 administrative remedies before seeking judicial relief. Failure to do so deprives the
2 District Court of subject matter jurisdiction. See, Scotsman Mfg. v. State, Dep't of Taxation,
3 109 Nev. 252, 254-5, 849 P.2d 317 (1993). Unlike Mr. Hyatt's situation, the issue in
4 Scotsman Mfg. subject to judicial relief related only to the interpretation or constitutionality
5 of the sales tax statute as applied to a federal government contractor acting as a
6 purchasing agent for the federal government.

7 By his own admission, Mr. Hyatt's tax matter is still under review by the FTB
8 and no final decision or order has been made. When the responsible agency has not
9 yet made a final decision or order, the matter is not ripe for judicial review. Resnick
10 v. Nevada Gaming Comm., 104 Nev. 60, 62-3, 752 P.2d 229 (1988). Mr. Hyatt is
11 seeking a Nevada judicial resolution of a California income tax matter before the
12 responsible tax authority decision is even rendered and before Mr. Hyatt has followed
13 any of his California statutory rights of administrative appeal or judicial review. There
14 is no right of declaratory relief under these circumstances. Nevada's Courts lack
15 subject matter jurisdiction to determine Mr. Hyatt's California income tax liability,
16 including the pivotal issue of residency.

17
18 **5.**
19 **NEVADA HAS NO LAWS FOR THE ADMINISTRATION OF STATE**
20 **INCOME TAXES THEREFORE CALIFORNIA LAW SHOULD APPLY**

21 Mr. Hyatt relies on the holding of Nevada v. Hall, 440 U.S. 410, 99 S.Ct. 1182, 59
22 L.Ed.2d 416 (1979), rehg denied 441 US 917, for his contention that Nevada may
23 disregard the statutory immunity of the FTB under California law from his tort lawsuit. In
24 this action, the FTB and its employees' actions in the administration of its income tax laws
25 are immune from suit in California as a matter of law. (Calif. Gov. Code §§ 820.2 & 860.2.)
26 The holding in Nevada v. Hall, is clearly distinguished from this action because in Nevada
27 v. Hall, the state of Nevada had unequivocally waived its own immunity from liability for a
28 car accident committed by its agent. (Id. at 412.) Nevada statute (Nev Rev Stat § 41.031

1 (1977)) had waived Nevada's sovereign immunity for the suit to go forward in Nevada.
2 Nevada, by statute, had waived its immunity from suit and therefore the suit was permitted
3 to go forward in California.

4 Far from waiving its sovereign immunity, California is not only immune from this
5 action by its sovereign immunity but furthermore, its legislature enacted laws which
6 specifically grant immunity to the FTB and its employees from this lawsuit under California
7 laws. (Calif. Rev. & Tax. Code §§ 19504 & 19545; Calif. Gov. Code §§ 820.2 & 860.2.)
8 This lawsuit cannot go forward in California, yet Mr. Hyatt brings the lawsuit in Nevada
9 where there are no income tax laws and no laws for the administration income taxes.
10 Because Nevada has no laws for the administration of income taxes there is no conflict
11 between non-existent Nevada laws and California laws for the administration of income
12 taxes, only California law can apply to the FTB's actions in administering California's
13 income tax laws.

14 Although Mr. Hyatt attempts to portray FTB's contact with Nevada as substantial
15 with numerous references and averments (FAC passim), the FTB auditor only made one
16 short trip to Nevada and sent correspondence to verify the truth of Mr. Hyatt's allegations.
17 This audit contact in Nevada constitutes insignificant contacts with Nevada in comparison
18 of the hundreds of hours auditing Mr. Hyatt in California. Contrary to Nevada v. Hall where
19 the totality of the contact (traffic accident in California) was in California, FTB's
20 insignificant contact in Nevada, would make the application of Nevada tort law obnoxious.
21 The Supreme Court in Allstate Ins. Co. v. Hague, 449 U.S. 302, 311, 101 S.Ct. 633, 66
22 L.Ed.2d. 521, (1981) reh'g den 450 US 971, recited a proposition that if a State had only
23 an insignificant contact with the parties and the occurrence or transaction, application of
24 its laws is unconstitutional. Clearly, based upon the FTB minimal contacts during this
25 audit, the applicable law for this Court to apply in this case would be California law.

26 In Bradford Elec. Co. v. Clapper, 286 U.S. 145, 151, 52 S.Ct. 571, 76 L.Ed. 1026
27 (1932), the United States Supreme Court required the federal court in New Hampshire to
28

respect a Vermont statute which precluded a worker from bringing a common-law action against his employer for job-related injuries where the employment relation was formed in Vermont, even though the injury occurred in New Hampshire. The majority opinion in Nevada v. Hall, *supra*, 440 U.S. 410 at 426-427 had to distinguish the holding of Bradford Elec. to be assured that the application of the Vermont statute would not be obnoxious to New Hampshire. Here, the application of California law cannot be obnoxious to the policies of Nevada which has no comparable statutes to the California statutes. Application of Nevada tort laws on California administration of its income tax laws would, however, be obnoxious to California and its fiscal stability.

The United States government has recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts by enacting the 28 U.S.C. § 1341. (Fair Assessment in Real Estate Assoc., Inc. v. McNary, 454 U.S. 100, 102-103, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981).) The Supreme Court has upheld the dismissal of a plaintiff's action pursuant to the Tax Injunction Act (28 U.S.C. §1341) on the grounds that tax collection constitutes an important local concern of the state and the state provides a plain, speedy and efficient remedy. (California v. Grace Brethren Church, *supra*, 457 U.S. at 408-411.) California income tax laws and the laws for the administration of income taxes are fundamental to its fiscal integrity and these laws should be respected by the state of Nevada which has no conflicting laws of its own.

Nevada courts must consider the requirements of the full faith and credit clause of the United States Constitution and apply California laws which were enacted to protect its fiscal integrity. These California laws present a clear and precise bar from this action on the principle of the exhaustion of administrative remedies and by the statutory immunity provided the FTB and its employees from liability from this action.

**C. NEVADA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR
ADMINISTRATIVE ABUSE OF PROCESS.**

The Plaintiff cites several cases purporting to support his Sixth Cause of Action for

1 abuse of process. Admittedly, this cause of action is not based on any court action or
2 actual issuance of subpoenas. Plaintiff cites foreign authority for the proposition that there
3 is a cause of action for "administrative" abuse of process. Nevada law is contrary, probably
4 for the same reasons that Nevada Courts do not give declaratory relief as to matters
5 pending before an administrative agency. That is, the Nevada legislature has vested the
6 agency with jurisdiction over the matter and provided for judicial review only following
7 exhaustion of the administrative process and remedies.

8 In its Motion, the FTB cited the appropriate Nevada and Ninth Circuit (applying
9 Nevada law) case law holding that no tort cause of action lies for abuse of process absent
10 misuse of court process. See, Nevada Credit Rating Bur. v. Williams, 88 Nev. 601, 606,
11 503 P.2d 9 (1972) and Laxalt v. McClatchy Newspapers, 622 F. Supp. 737, 750-51 (Nev.
12 1985).

13 The Complaint alleges that Demands to Furnish Information or "quasi subpoenas"
14 were sent by the FTB to persons and entities in Nevada. The requests are not alleged to
15 be actual administrative subpoenas issued by the FTB or a court of law. The information
16 requests are authorized by California law. These requests are a necessary and usual
17 means of gathering information for administration of California income tax. Under the
18 circumstances, there is no need to create a new tort cause of action.

19 **D. THE FACTS PLED PRECLUDE CAUSES OF ACTION FOR FRAUD.**

20 The Complaint purports to plead and Plaintiff's Opposition argues a purported
21 cause of action for fraud (Seventh Cause of Action). Although Plaintiff recites the correct
22 elements of these causes of action, the very facts alleged by Plaintiff defeat this claim.

23 There was no transaction as contemplated by the fraud tort between Mr. Hyatt, a
24 taxpayer under audit, and the Board, a government taxing agency performing an audit. The
25 gravamen of the Plaintiff's misrepresentation allegations is that he provided information
26 to the Board which the Board was obligated to keep confidential. The contention is that the
27 Board fraudulently concealed its intent not to maintain the confidentiality of Mr. Hyatt's
28

1 information. The confidential information as alleged in the Complaint or as argued in
2 Hyatt's Opposition (with maximum indignation) is said to consist of Mr. Hyatt's name,
3 "secret" address and social security number. The Board used this information in requesting
4 information from third parties about Mr. Hyatt in its residency audit. These persons and
5 entities include utilities, neighbors, Nevada contacts identified by Mr. Hyatt's
6 representatives as proof of his Nevada contacts and other organizations identified by Mr.
7 Hyatt's representatives which might have information regarding his residency contacts.

8
9 The applicable California tax law shows that Mr. Hyatt was required by law to
10 cooperate in the Board's residency audit and that the Board was privileged to use the
11 information Hyatt provided in administering California's income tax. The FTB purposes
12 authorized by law include not only verifying Mr. Hyatt's claim of change of residency, but
13 also determination of the source of his income. Either or both determinations are
14 dispositive of Mr. Hyatt's California income tax liability.

15 The FTB already had Mr. Hyatt's social security number, so this was obviously not
16 extracted from him by fraud. The use of a person's social security number for identification
17 in verifying Mr. Hyatt's residency is a standard means of taxpayer identification which
18 prevents confusion or mistake as to identity.

19 Mr. Hyatt was obligated by law to provide information verifying his claim of change
20 of residency, including his residential address, so that the FTB could verify the information.
21 It is not enough that Mr. Hyatt's CPA or attorney showed the FTB that Hyatt purchased a
22 house held in trust by his accountant. This could evidence investment or rental property
23 or a sham transaction. Given Mr. Hyatt's vast wealth, it would be a small thing to invest in
24 purchase of a middle class home to save millions in income tax liability. Verification of
25 residential use through occupancy, utility service and presence in Nevada was reasonable
26 and necessary. Although Mr. Hyatt argues that this activity is fraudulent, outrageous and
27 an invasion of privacy (and that the FTB should simply take the word of his paid
28 advocates), these activities are simply a reasonable and necessary part of conducting a

1 residential audit. Verification of Hyatt's residence would not be possible without reference
2 to the address of the home Hyatt claims to occupy.

3 Since Mr. Hyatt was obligated to provide the information and it was used for a lawful
4 purpose, no cause of action for fraud can lie.

5 **E. THE NEGLIGENT MISREPRESENTATION COUNT ALSO FAILS.**

6 Mr. Hyatt also purports to plead a cause of action for negligent misrepresentation
7 (Eighth Cause of Action). This count fails for the same reasons as the fraud cause of
8 action. There is simply no transaction between Hyatt and the FTB which is actionable
9 under this tort. Mr. Hyatt was obligated to provide his address. The FTB already had his
10 name and social security number. Use of this information for purposes of the residency
11 audit was reasonable, necessary and allowed by law. It was obvious to Mr. Hyatt's
12 attorney and CPA, and therefore to Mr. Hyatt, that a residency audit was in progress and
13 the information gathered was for that purpose. Thus, it cannot be actionable negligence
14 for the FTB to fail to disclose the obvious, that is, that the information being provided or
15 already known to the FTB was part of audit proceedings.

16 **F. PLAINTIFF'S CAUSES OF ACTION FOR INVASION OF PRIVACY FAIL**
17 **TO STATE CLAIMS FOR RELIEF GIVEN THE FACTS PLED.**

18 Much of Plaintiff's Opposition and Request for Judicial Notice concerns argument
19 and citation of authorities for the proposition that there is a general right of privacy and
20 right to be free from oppressive government intrusion into one's private life. This cannot
21 be disputed. However, a tax audit is not a tort. Although Plaintiff may not agree with the
22 scope, duration or determination resulting from the audit, audit activities are not
23 actionable. There has been no use of search warrants, no unlawful search and seizure
24 and no false imprisonment. There is not even any allegation that there was any direct
25 contact between Mr. Hyatt and the FTB agents performing the audit.

26 As with many activities performed by the State or federal governments, a tax audit
27 is a lawful and necessary exercise of government function. A police officer acts with lawful
28

1 authority when he stops a drunk driver and arrests and incarcerates the suspect. If a
2 private citizen engaged in the same activity as to an innocent person, a number of torts are
3 committed. If a person gathered an individual's private financial information and stalked
4 the individual, and such activities were performed by an unauthorized person without the
5 individual's consent, there could result a number of tort causes of action. However, when
6 these same activities are authorized by statute and performed by an authorized
7 government employee in the course of their employment, a discharge of lawful duty rather
8 than tortious activity results. The matters inquired into by the FTB are bitterly criticized by
9 Plaintiff as excessive and invasive. Nevertheless, an objective review of the matters
10 requested and reviewed by the FTB reveals that each item or topic would logically reveal
11 Mr. Hyatt's residential contact with either California or Nevada.

12 Plaintiff begins his argument in opposition to the FTB's motion for judgment on the
13 pleadings as to his privacy claims by admitting that the Court has the threshold duty to
14 determine if his privacy claims are actionable. Opposition at page 25, line 21 - page 26,
15 line 5, citing People for the Ethical Treatment of Animals (PETA) v. Bobby Berosini, Ltd.,
16 111 Nev. 615, 895 P.2d 1269 (1995), modified on other grounds 113 Nev. 632, 940 P.2d
17 134 (1997): "... courts should and do consider the degree of intrusion, the intruder's
18 objectives, and the expectations of those whose privacy is invaded."

19 Plaintiff then cites Alward v. State, 112 Nev. 141, 151, 912 P.2d 243, 250 (1996) for
20 the general principle that "searches conducted outside the judicial process, without prior
21 approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment."
22 Opposition at page 26, lines 6-12. Alward was a criminal case involving a warrantless
23 search of a tent in which the defendant and the victim had been camping when the victim
24 was shot and died. The officers had unzipped the tent, entered and searched, obtaining
25 incriminating evidence. The issue before the court was whether the officers had the
26 authority to search the tent once they determined that the victim was dead.

27 Alward has nothing to do with the dispute between Plaintiff and FTB. The language
28

1 “searches conducted outside the judicial process, without prior approval by judge or
2 magistrate” refers to just that, “searches.” There is no allegation that FTB entered
3 Plaintiff’s home, or anywhere else, to conduct an illegal search. Plaintiff is simply taking
4 language completely out of context in order to generate as much confusion and distraction
5 as possible to hide his true theory of this case: the FTB violated his privacy rights because
6 it investigated his claim of a change of residency instead of blindly accepting his story.

7 At Opposition page 26, line 13 - page 28, line 1, Plaintiff makes the general
8 argument that “actions for invasion of privacy against a taxing body are increasingly
9 frequent.” That is all fine and dandy, but totally irrelevant to whether Plaintiff’s purported
10 privacy claims in this case are valid.

11 For example, at page 26, lines 14-23, Plaintiff cites to a treatise as authority for a
12 case (unreported) in which the IRS was held liable. Since that case involved the IRS, it
13 had to be a federal question case that involved federal statutes not pertinent to this case.
14 Moreover, the Plaintiff did not bother to inform the Court of the true facts upon which
15 liability was imposed:

- 16 1. armed IRS agents raided the family business four weeks after
17 the woman insulted one agent;
- 18 2. the agents asserted the woman owed \$324,000 in income
19 taxes, when she actually owed only \$3,485;
- 20 3. the armed agents padlocked all three family stores;
- 21 4. the agents posted unjustified notices that some customers
22 interpreted as evidence that the woman was a drug dealer;
23 and
- 24 5. one agent was found to be “grossly negligent” and to have
25 acted with “reckless disregard” for the law after he made three
false statements to the court.

26 See Plaintiff’s Appendix of Non-Nevada Authorities at Tab No. 67. Instead, Plaintiff twists
27 the report of that case to argue the IRS was grossly negligent and reckless in placing the
28

1 woman in a false light by claiming she owed more money than she actually owed.
2 Opposition at page 26, lines 18-20.

3 Plaintiff's improper tactics of twisting authorities and taking them out of context
4 permeate his argument. As a further example, at Opposition page 26, line 24 - page 27,
5 line 10, Plaintiff cites Jones v. United States, 9 F. Supp.2d 1119 (D. Neb. 1998), as
6 "[a]nother recent large verdict against tax authorities for invasion of privacy rights and
7 abuse of authority." Contrary to Plaintiff's "spin," liability was imposed against the United
8 States in that case for an IRS criminal investigator's violation of specific federal statutes
9 when he unlawfully told a confidential informant that the government intended to execute
10 a search warrant at the plaintiffs' place of business. The court had concluded the
11 "disclosure amounted to notification that the tax returns of [plaintiffs] were 'subject to other
12 investigation or processing' as defined by 26 U.S.C. § 6103(b)(2)." Id. at 1123.

13 No such misconduct is alleged in this case, nor are any federal statutes involving
14 the IRS involved.

15 At Opposition page 28, lines 9-20, Plaintiff cites three U.S. Supreme Court
16 decisions as support for his claim that the FTB violated his privacy rights by disclosing his
17 name and home address when it attempted to verify his change of residency. All of those
18 cases deal with particular federal statutes and factual situations not involved in this case.

19 In United States Department of Defense v. Federal Labor Relations Authority, 510
20 U.S. 487 (1994), the issue was whether disclosure of the home addresses of federal civil
21 service employees by their employing agency, pursuant to a request made by the
22 employees' collective-bargaining representatives under the Federal Service Labor
23 Management Relations Statute (5 U.S.C. §§ 7101-7135), would violate the employees'
24 personal privacy within the meaning of the Freedom of Information Act (5 U.S.C. § 552).
25 The phrase "clearly unwarranted invasion of privacy", which Plaintiff emphasizes at
26 Opposition, page 28, line 12, is from Exemption 6 of the Freedom of Information Act, which
27 provides that FOIA's disclosure requirements do not apply to "personnel and medical files
28

1 and similar files the disclosure of which would constitute a clearly unwarranted invasion
2 of personal privacy.” 5 U.S.C. § 552 (b)(6).

3 United States Dept. of Justice v. Reporters Committee for Freedom of Press, 489
4 U.S. 749 (1989) also involved the FOIA. In that case, a news correspondent and an
5 association of journalists requested, under FOIA, that the Department of Justice and the
6 FBI disclose any criminal records in their possession concerning four brothers whose
7 family company allegedly had obtained defense contracts as a result of an improper
8 arrangement with a corrupt congressman. Id. at 757. The Court held that disclosure of
9 an FBI rap sheet to a third party would constitute an unwarranted invasion of personal
10 privacy under Exemption 7 of FOIA, Title 5, U.S.C. § 552(b)(7)(c), and was therefore
11 prohibited. Id. at 780.

12 United States Department of State v. Ray, 502 U.S. 164 (1991) also involved
13 Exemption 6 of FOIA. In that case, a private attorney sought the names of certain Haitian
14 nationals who had been involuntarily returned to Haiti after attempting to emigrate illegally
15 to the United States. Id. at 168. The attorney claimed he needed their names in order to
16 ensure the United States was properly monitoring the Haitian Government’s agreement not
17 to harass Haitians returned to Haiti after being caught trying to enter the United States
18 illegally. Id.

19 After taking those three Supreme Court cases completely out of context, Plaintiff
20 then string cites seventeen cases at Opposition pages 28-31 for the general proposition
21 that state and federal courts protect social security numbers and home addresses. All of
22 those cases arose under varying facts and involve different state and federal statutes. For
23 example, in State ex rel. Beacon Journal Publishing Co. v. City of Akron, 640 N.E. 2d
24 164, 165 (Ohio 1994), recon denied, 642 N.E.2d 388, a newspaper sought the social
25 security numbers of 2,500 city employees pursuant to the Ohio Public Records statute.
26 In Progressive Animal Welfare Society v. University of Washington, 884 P.2d 592, 595
27 (Wash. 1995), recon denied, an animal rights group requested a copy of an unfunded
28

1 grant proposal from the University of Washington pursuant to the Washington Public
2 Disclosure Act. The court held that, in that situation, disclosure of the researchers' social
3 security numbers would be highly offensive to a reasonable person and not of legitimate
4 concern to the public pursuant to the state statute, RCW 42.17.255. Id. at 598.

5 A union representative sought the names and social security numbers of all
6 employees who worked in a city library pursuant to Washington's Public Disclosure Act in
7 Tacoma Public Library v. Woessner, 951 P.2d 357, 359 (Wash. App. 1998), amended
8 1999 WL 126948. Exemption 6 of FOIA was again at issue in National Association of
9 Retired Federal Employees v. Horner, 879 F.2d 873, 874 (D.C. App. 1989), cert denied,
10 494 US 1078, when a union sought the names and addresses of retired or disabled federal
11 employees. The same statute was involved in American Federation of Government
12 Employees, AFL-CIO, Local 1923 v. United States, 712 F.2d 931, 932 (4th Cir. 1983)
13 when a union sought the addresses of some 15,000 employees.

14 And so it goes with all the other cases Plaintiff string cites. Not a single case cited
15 by Plaintiff dealt with a governmental agency's use of a person's name, address and social
16 security number to verify the person's claimed change of residency as part of a tax audit.

17 As Plaintiff conceded at pages 25-26 of his Opposition, this Court should decide as
18 a threshold matter whether Plaintiff's invasion of privacy claims are valid given the facts
19 alleged, not Plaintiff's self-serving, legal conclusions and string citations to cases that have
20 nothing to do with the facts of this case.

21 Any person in Plaintiff's position; i.e., a long time resident of California who claims
22 to change his residency just before he receives millions of dollars in income, can
23 reasonably expect that FTB will closely examine his claimed change of residency. All of
24 the facts alleged by Plaintiff taken together do not add up to any actionable invasion of
25 privacy. The FTB's Motion for Judgment on the Pleadings as to all of Plaintiff's privacy
26 claims should be granted.

27
28 ///

G. NO VIABLE CAUSE OF ACTION FOR OUTRAGE IS PLED.

Mr. Hyatt does not allege that he had any personal contact with the FTB during the residency audit. He contends that he was not even aware of the Nevada audit activities until after the fact. Nevertheless, he argues that the tort of outrage has been perpetrated and he has suffered compensable emotional stress as a result of learning of the FTB's audit activities. The acts complained of are that the FTB identified Mr. Hyatt to third parties in the course of its residency audit. California law authorizes the alleged audit activities. All taxpayers would probably consider a tax audit to be "outrageous." The actions of a taxing authority may well be actionable absent the statutory authority. However, where the same acts are authorized by law, no tort case of action arises.

Plaintiff's Opposition cites several Nevada cases regarding the tort of intentional infliction of emotional distress. These cases all involved direct acts of abuse or intimidation. See, Branda v. Sanford, 97 Nev. 643, 648, 637 P.2d 1223 (1981)(Public slander and sexual harassment of minor child); Posadas v. City of Reno, 109 Nev. 448, 456, 851 P.2d 438 (1993)(Employer's public slander of public employee); Shoen v. Amerco, Inc. 111 Nev. 735, 747, 896 P.2d 469 (1995)(Public threats and physical assault). None of these cases involved government employees performing their official duties.

The circumstances pled by Mr. Hyatt do not involve any direct contact between Mr. Hyatt and the FTB. The relationship was filtered through Mr. Hyatt's tax attorney and CPA. By admission, Mr. Hyatt only learned of the audit activities after the fact. Thus, his emotional distress relates only to learning of the acts authorized by law to verify his Nevada residency and notice of the proposed assessment. Any taxpayer would have the same anxieties. The mere fact that one suffers emotional distress caused by another performing government functions is not actionable. As a matter of law, a California residential audit using information to identify a taxpayer and gather verifying information is not a tort.

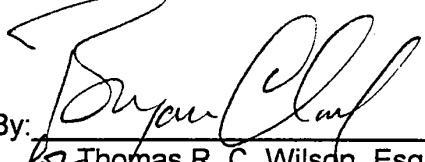
///

CONCLUSION

The Plaintiff's action for declaratory relief cannot be maintained due to lack of subject matter jurisdiction over the pending California administrative tax proceedings. Plaintiff's tort claims regarding acts or omissions in California are barred by his failure to comply with the California Tort Claims Act and applicable immunities. Under Nevada law, the tort claims are not proper given the facts pled. There are no allegations which, if proven, would permit recovery by Plaintiff. Accordingly, the Franchise Tax Board of the State of California is entitled to judgment on the pleadings.

DATED this 29th day of March, 1999.

McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS LLP

By: 
for Thomas R. C. Wilson, Esq.
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RECEIPT OF COPY

**RECEIPT OF A COPY of the foregoing DEFENDANT'S REPLY TO
PLAINTIFF'S OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS**

is hereby acknowledged this 29th day of March, 1999.

HUTCHISON & STEFFEN

By: Thomas L. Steffen / K.L.
Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
8831 W. Sahara Ave.
Las Vegas, NV 89117

and by depositing the same in the United States Mail, postage prepaid thereon to the
numbers noted below, upon the following:

Felix Leatherwood, Esq.
Deputy Attorney General
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300 South Spring Street
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Karen A. Smothers
An Employee of McDonald Carano Wilson
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11216

EXHIBIT 9

Shirley B. Pearson

APR 2 11 21 AM '99

FILED

1 0047
Thomas L. Steffen
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9 Attorneys for Plaintiff

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12)	Case No. A382999
13	GILBERT P. HYATT,)	Dept No. XVIII
14	Plaintiff,)	
15	vs.)	PLAINTIFF'S MOTION FOR
16	FRANCHISE TAX BOARD OF THE STATE)	LEAVE TO FILE SURREPLY
17	OF CALIFORNIA, and DOES 1-100,)	
18	inclusive,)	FILED UNDER SEAL BY
19	Defendants.)	STIPULATION AND ORDER
)	DATED FEBRUARY 1, 1999
)	
)	Date of Hearing: <i>5-6-99</i>
)	Time of Hearing:

20 Plaintiff Gil Hyatt ("Hyatt") respectfully moves this Court for leave to file a
21 surreply to Defendant Franchise Tax Board of the State of California's ("FTB") Reply to
22 Hyatt's Opposition to the FTB's Motion for Judgment on the Pleadings ("Reply"). This motion
23 ///
24 ///
25 ///

26
27
28

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1 is based on LR 2.20 and the following points and authorities.

2 DATED this 27 day of April, 1999.

3 HUTCHISON & STEFFEN

4 By: 

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11 Thomas K. Bourke
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13 Los Angeles, CA 90071

14 Attorneys for Plaintiff

15 **NOTICE OF MOTION**

16 TO: ALL INTERESTED PARTIES

17 NOTICE IS HEREBY GIVEN that Hutchison & Steffen will bring the foregoing
18 PLAINTIFF'S MOTION FOR LEAVE TO FILE SURREPLY for hearing on the 10
19 day of May, 1999, in Department XVIII.

20 DATED this ____ day of April, 1999.

21 HUTCHISON & STEFFEN

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Attorneys for Plaintiff

1 A. FACTS

2 On February 9, 1999, the FTB filed its Motion for Judgment on the Pleadings in
3 this case. Hyatt filed his Opposition on March 15, 1999. On March 26, 1999, the FTB filed its
4 Reply to Hyatt's Opposition to the FTB's Motion for Judgment on the Pleadings. The FTB's
5 Reply went beyond the scope of Hyatt's Opposition and raised new arguments not set forth in
6 the original moving papers. In so doing, the FTB also misstated the law in several respects.
7 Hyatt now moves for leave to file a surreply to the FTB's Reply brief. The proposed surreply is
8 attached hereto as Exhibit 1.

9 This motion is based on the following four issues improperly raised by the FTB
10 for the first time in its Reply.

11 First: the FTB improperly and unsuccessfully attempts to shift standards under
12 Rule 12(c) which were first asserted in its moving papers. It thereby concedes in its
13 reply the inappropriateness of its motion pursuant to legal authority cited in its own
14 moving papers; the FTB's reply also injects its version of the facts into the motion --
15 which contradict Hyatt's allegations -- thereby violating the most basic tenet of a Rule
16 12(c) motion that the facts alleged in Hyatt's First Amended Complaint (*i.e.*, Hyatt's
17 version of the facts), must be accepted as true.

18 Second: the FTB provides a new but equally flawed analysis concerning
19 declaratory relief and subject matter jurisdiction. Regardless of how many times the
20 FTB cries "tax case," this is not a tax case and declaratory relief is appropriate and
21 necessary in this action.

22 Third: the FTB spends four pages arguing its "Demands" were legal under
23 California law. If true, it is of no consequence. It is Nevada law that is relevant, and the
24 deceit, trickery, and fraud engaged in by the FTB in using such unauthorized
25 "Demands" in Nevada is unlawful under Nevada law.

26 Fourth: the FTB cites for the first time certain inapplicable California statutes in
27 making another but equally unsuccessful assertion that it has immunity to commit torts
28 in Nevada, against a Nevada resident, so long as its tortious conduct was in furtherance

1 of trying to collect taxes for California; but the holdings in *Nevada v. Hall*, 440 U.S.
2 410 (1979), and *Mianecki v. District Court*, 99 Nev. 93, 658 P.2d 422 (1983), do govern
3 this case and provide that the FTB can be held liable in Nevada for torts.

4 B. ANALYSIS

5 Because the FTB raises new facts and arguments in its Reply as summarized above,
6 Hyatt has not had an opportunity to address all of the FTB's arguments. Fairness and equity
7 dictate that Hyatt be given this opportunity by filing a surreply. Many courts have recognized
8 the importance and benefit of surreplies as an aid in assisting the court to address fully and
9 adequately the law and facts of individual cases. In *Newton v. N.B.C.*, 109 F.R.D. 522 (D. Nev.
10 1985), the court allowed defendants in a defamation case to file a surreply to a Motion to
11 Compel two television journalists to disclose sources used in preparing a nighttime news
12 broadcast regarding the plaintiff. Similarly, in *Seaman v. C.S.P.H., Inc.*, August 25, 1997 U.S.
13 Dist. N.D. Tex., Lexis 21177, (attached), the court allowed the plaintiff to file a surreply to the
14 defendant's motion for summary judgment because the defendant quoted the plaintiff's
15 deposition out of context.

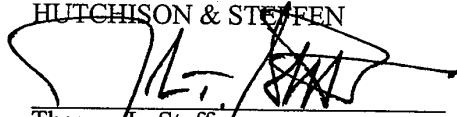
16 Other court decisions have allowed or recognized that surreplies can be helpful in
17 analyzing a broad variety of issues. See, e.g., *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065
18 (9th Cir. 1997) (reasoning in a case based on the Endangered Species Act that "If the Fisherman
19 wanted a chance to respond . . . [they] could have moved to file a surreply"); *Langlois v. Deja*
20 *Vu, Inc.*, 984 F. Supp. 1327 (D. Wash. 1997) (allowing surreply in a case regarding whether
21 court had personal jurisdiction over defendant); *Religious Tech. Ctr. v. Netcom On-line*
22 *Commun. Servs.*, 923 F. Supp. 1231 (N.D. Cal. 1995) (stating that filing of surreply was
23 justified by parties' mention of new instance of alleged contempt by opposing party); *Murrelet*
24 *v. Babbitt*, 918 F. Supp. 318 (D. Wash. 1996) (surreply allowed in case involving Endangered
25 Species Act); *accord Silver v. Babbitt*, 924 F. Supp. 972 (D. Ariz. 1995). *Kealoha v. E. I. Du*
26 *Pont De Nemours, Inc.*, 844 F. Supp. 590 (D. Haw. 1994) (allowing surreply in product liability
27 suit for allegedly defective oral implant device).

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C. CONCLUSION

Hyatt requests that this Court grant leave to file the attached surreply so that he may respond to the new facts and issues summarized above and which are addressed in more detail in his attached surreply.

Respectfully submitted this 2^d day of April, 1999.

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Exhibit 1

AA001010

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

12 GILBERT P. HYATT,
13 Plaintiff,

14 vs.

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

) Case No. A382999
) Dept No. XVIII
)

) **PLAINTIFF GIL HYATT'S**
) **SURREPLY**
)

) **FILED UNDER SEAL BY**
) **STIPULATION AND ORDER**
) **DATED FEBRUARY 1, 1999**
)

19 **I. INTRODUCTION.**

20 The FTB ignores most of the issues addressed by Gil Hyatt's opposition. It does so by
21 "supplementing" its motion with new issues and, incredibly, with its version of numerous
22 disputed facts. Hyatt therefore files this surreply to address the new issues and facts.¹

23 First, the FTB improperly and unsuccessfully attempts to shift standards under Rule
24 12(c) thereby conceding the inappropriateness of its motion pursuant to legal authority cited in
25 its own moving papers. The FTB also attempts to inject its version of contradictory facts into
26 the motion thereby violating the most basic tenet of a Rule 12(c) motion: the facts alleged in
27

28 ¹This surreply is not intended to nor does it address every issue raised in the FTB's Reply papers. The surreply is intended to address the new issues raised in the FTB's Reply for which Hyatt has had no opportunity to respond. Hyatt's opposition addressed and rebutted all of the "old" issues raised by the FTB in its Reply papers.

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AA001011

1 Hyatt's First Amended Complaint (*i.e.*, Hyatt's version of the facts), must be accepted as true.

2 Second, the FTB provides a new but equally flawed analysis concerning declaratory
3 relief and subject matter jurisdiction. Regardless of how many times the FTB cries "tax case,"
4 this is not a tax case. Declaratory relief is appropriate and necessary in this action.

5 Third, the FTB spends four pages arguing its "Demands" were legal under California
6 law. If true, it is of no consequence. The deceit, trickery, and fraud engaged in by the FTB in
7 using such unauthorized "Demands" in Nevada is not absolved by California law.

8 Fourth, the FTB cites for the first time certain inapplicable California statutes in making
9 another but equally unsuccessful assertion that its had immunity -- *i.e.* free reign -- under
10 California law to commit torts in Nevada, against a Nevada resident, so long as its tortious
11 conduct was in furtherance of trying to collect taxes for California. No matter how it tries, the
12 FTB can not avoid the holdings in *Nevada v. Hall*, 440 U.S. 410 (1979), and *Mianecki v.*
13 *District Court*, 99 Nev. 93, 658 P.2d 422 (1983).

14 **II. THE FTB'S MOTION FOR JUDGMENT ON THE PLEADINGS MUST BE**
15 **DENIED EVEN UNDER THE STANDARD OF 'FAILURE TO STATE A CLAIM**
16 **UPON WHICH RELIEF CAN BE GRANTED' WHICH WAS RAISED BY THE**
17 **FTB FOR THE FIRST TIME IN ITS REPLY.**

18 The FTB's treatment of the Rule 12(c) standards displays three themes: indecision,
19 sleight-of-hand and a mystifying urge for self destruction. The theme of indecision is most
20 easily visible; the FTB simply cannot stick with one standard of review for judgment on the
21 pleadings. It picked its first standard from *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 734
22 P.2d 1238 (1987). (Motion, at 4.) This standard provides that a motion for "judgment on the
23 pleadings has utility only when 'all material allegations of fact are admitted in the pleadings and
24 only questions of law remain. . . ." *Id.* citing *Bernard*, 103 Nev. at 135-36, 734 P.2d at 1241.

25 The FTB's fidelity to the *Bernard* standard was short-lived. Perhaps its disenchantment
26 sprang from Hyatt's opposition, which noted that the FTB's denial of the allegations in Hyatt's
27 Complaint precluded a viable motion for judgment on the pleadings. (Opposition, at 12,
28 quoting *Bernard*.) Because the FTB's answer denied 67 of the 72 paragraphs in the Complaint,
it naturally found the *Bernard* standard a bit daunting. Whatever the reasons for its fickleness,

1 the FTB's reply uses sleight-of-hand to replace the old standard with yet another: the defense of
2 failure to state a claim upon which relief can be granted. (Reply, at 3, citing Nev. R. Civ. P.
3 12(h)(2).)

4 While the FTB has swapped standards, it has not lessened its burden. Motions to
5 dismiss for failure to state a claim are "disfavored and rarely granted." 5A Wright & Miller,
6 *Federal Practice and Procedure* § 1357, at 321 (1990). The court reviews such a motion to
7 determine whether the complaint sets forth allegations sufficient to make out the elements of a
8 right to relief. *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 111 (Nev. 1985). All
9 factual allegations of Hyatt's Complaint must be accepted as true. *Vacation Village, Inc. v.*
10 *Hitachi America, Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). His Complaint will not be
11 dismissed for failure to state a claim "unless it appears beyond doubt that [he] could prove no
12 set of facts, which if accepted by the trier of fact, would entitle him . . . to relief." *Id.* In
13 Nevada, the question is whether in the light most favorable to Hyatt, taking every allegation as
14 true, and with every doubt resolved in his behalf, the Complaint states a claim for relief. *Id.*
15 Moreover, "[t]he test for determining whether the allegations of a complaint are sufficient to
16 assert a claim for relief is whether the allegations give fair notice of the nature and basis of a
17 legally sufficient claim and the relief requested. *Id.*

18 The FTB's motion self destructs under the weight of these principles. For example,
19 Hyatt alleges the FTB committed an abuse of process by issuing Demands for Information to
20 Nevada citizens. (FAC, ¶ 56.) The FTB initially sought judgment on the pleadings by
21 contending that a cause of action for abuse of process must involve judicial process. (Motion,
22 at 28.) Hyatt's opposition cited no fewer than eight court cases applying abuse of process to
23 administrative proceedings. (Opposition, at 38-40.) The FTB's reply dismisses this precedent
24 as mere "foreign authority" followed by the bald, unsupported assertion that "Nevada law is
25 contrary." (Reply, at 19.) Yet the FTB provides not a single Nevada case that even considers
26 abuse of process in agency proceedings; the cases it cites involve only private litigants who
27 must use judicial process to obtain subpoenas rather than administrative agencies with the
28 ability to abuse their native subpoena powers. Such an anemic showing hardly fulfills the

1 FTB's burden to show beyond a doubt that Hyatt could prove no set of facts, which if accepted
2 by the trier of fact, would entitle him to relief.

3 Without belaboring the point, Hyatt's 30 page Complaint is stocked with allegations
4 which, if true, easily entitles Hyatt to relief on each cause of action. Thus, even if the FTB is
5 permitted to circumvent the standard of review under the *Bernard* case (which the FTB cited in
6 its Motion as the proper standard), the result is the same -- its Motion must be denied.

7 **III. CONTRARY TO THE STRICT REQUIREMENTS OF A RULE 12(C) MOTION,**
8 **THE FTB REFUSES TO ADMIT HYATT'S ALLEGATIONS AND INSTEAD**
9 **ASSERTS ITS OWN VERSION OF THE "FACTS."**

10 The FTB makes the extraordinary statement in its reply that the Court should only
11 consider the facts "as stated in the Motion." (Moving papers, at 3.) The FTB's motion,
12 however, failed to state or acknowledge the vast majority of allegations in the Complaint.
13 Moreover, Hyatt's opposition merely added details to facts alleged in the Complaint, details
14 which have been developed through discovery and further investigation. The FTB cannot pick
15 and choose the facts on which this motion is based. As detailed below, it must assume Hyatt's
16 allegations in the Complaint are true.

17 The FTB first erroneously asserts that Hyatt "does not allege that he has ever actually
18 paid California income taxes." (Opposition, at 1.) In fact, just the opposite is true. Hyatt has
19 alleged that he paid California state income taxes through the date of his residency there,
20 September 26, 1991. (FAC, ¶ 10.)

21 The FTB then argues that Hyatt's purchase of a "middle class" home in Las Vegas may
22 have been for investment purposes given the rising Las Vegas real estate market,² and it is easy
23 for a wealthy person to establish contacts with Nevada in such manner and then claim residency.
24 (Reply, at 2.) The FTB's apparent implication is that a wealthy person must do more than the
25 average citizen to establish residency, *i.e.* because Hyatt obtained substantial wealth sometime
26 after moving to Nevada he must flaunt it. The assertion is absurd and it improperly attempts to

27 ²Even Sheila Cox, the FTB's key witness and lead auditor, acknowledged that the FTB did
28 not take into account the conditions of the Nevada real estate market in determining whether
Hyatt's Las Vegas home purchase was an indication of his residency.

1 contradict the facts pled by Hyatt. (FAC, ¶¶ 8-9.)

2 The FTB further argues facts such as Mr. Hyatt being “in his home” in La Palma,
3 California in 1992. The FTB questions whether such “home” was sold to his “associate,” Grace
4 Jeng. (Reply, at 6.) These assertions by the FTB are contrary to the facts alleged in the
5 Complaint. (FAC, ¶¶ 8-9.)

6 The most significant factual assertion made by the FTB, contrary to the allegations in the
7 Complaint, is that the FTB’s contact with Nevada in carrying out the torts alleged was minimal.
8 The FTB goes so far as to say that its lead auditor, Ms. Sheila Cox, had minimal contacts with
9 Nevada and visited, surveilled, spied on, etc. Hyatt on only one occasion in Las Vegas. Hyatt
10 has alleged to the contrary regarding the FTB’s conduct in Nevada, and such allegations must be
11 accepted as true for this motion. (FAC, ¶¶ 11-14.)³

12 **IV. THIS NEVADA COURT DOES HAVE SUBJECT MATTER JURISDICTION**
13 **OVER HYATT’S DECLARATORY RELIEF CLAIM.**

14 The FTB continues to fret over Hyatt’s declaratory relief claim despite its insistence that
15 “California would not give full faith and credit to a Nevada judgment purporting to determine
16 an action barred under California law.” (Motion, at 10.) It also wrongfully characterizes
17 Hyatt’s “first and foremost cause of action” as one for declaratory relief concerning “his
18 California income tax liability for 1991 and 1992.” This is a tort case. The FTB is in Nevada
19 answering for its tortious conduct here, and Hyatt’s tax representative is in California dealing
20 with the FTB’s tax investigation of Hyatt.

21 Seeking any port in a storm, the FTB shouts the ultimate: this Court is without subject
22 matter jurisdiction to hear the declaratory relief claim. The ploy is clever but disingenuous.
23 The FTB belatedly notes that the first 27 paragraphs of Hyatt’s Complaint “consist[s] almost
24 entirely of references to California income tax matters.” However, these references are
25 necessary to provide understanding and context to all of Plaintiff’s claims, and to lay the

26
27 ³The FTB’s representation in its Reply of only one surveillance of Hyatt’s Nevada home
28 is false. Sheila Cox has admitted to a second visit to view Hyatt’s Nevada home. Hyatt has also
developed information from other sources establishing that there were more than two occasions on
which the FTB surveilled Hyatt’s Nevada home.

1 foundation for refuting the FTB's mournful cry that it has simply, and lawfully, investigated
2 residency and income information given to it by a trusting but disgruntled Gil Hyatt.

3 The FTB contends that the residency issue in Hyatt's declaratory relief claim is relevant
4 only to the FTB's ongoing tax investigation against Hyatt in California, and thus (for
5 unsupported reasons) this Court is without subject matter jurisdiction to consider that issue. The
6 FTB is wrong for several reasons. In addition to Hyatt's Opposition to the FTB's Motion on
7 this issue, he submits the following:

8 In Hyatt's Seventh Cause of Action (for fraud), Hyatt alleges numerous
9 misrepresentations, including the fact that the FTB was using his information only to build a
10 basis for defrauding him into believing that he owed tremendous sums of money (like
11 \$21.8 million) to the FTB for taxes and fraud. In his Complaint, Hyatt alleges that:

12 (a) Despite plaintiff's delivery of copies of documentary evidence of
13 the sale of his California residence on October 1, 1991 to his business associate
14 and confidant, Grace Jeng, to the FTB, the FTB has contended that the
aforementioned sale was a sham, and therefore evidence of plaintiff's continued
California residency and his attempt to evade California income tax by fraud;

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

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

22 (d) After declaring plaintiff's sale of his California home on
October 1, 1991 a "sham," the FTB later declined to compare the much less
23 expensive California home with the home plaintiff purchased in Las Vegas,
Nevada (a strong indication favoring Nevada residency) stating that: "Statistics
24 (size, cost, etc.) comparing the taxpayer's La Palma home to his Las Vegas home
will not be weighed in the determination [of residency], as the taxpayer sold the
25 **La Palma house on 10/1/91 before he purchased the house in Las Vegas**
during April of 1992." (Emphasis added.) (FAC, at 24-25.)

26 Then after alleging in paragraph 63 (d) that "[t]he FTB's gamesmanship, illustrated in
27 part, above, constituted an ongoing misrepresentation of a bona fide audit of plaintiff's 1991 tax
28 year," the Complaint further alleges, at paragraph 67, that "[t]he aforesaid misrepresentations by

1 the FTB and its agents were fraudulent, oppressive and malicious.”

2 In brief, Hyatt is claiming that the FTB’s proposed tax and fraud assessment against him
3 for the periods from September 26, 1991 through April 2, 1992, were part of the malicious,
4 intentional, oppressive scheme to defraud him into paying the FTB a large compromise
5 settlement. That residency period is part and parcel of Hyatt’s fraud claim against the FTB.
6 And it is but the tip of the iceberg! Ongoing discovery has revealed other express
7 misrepresentations that are part of the calculus to defraud and extort money from Hyatt.

8 The case of *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110 (1985) is instructive in
9 the resolution of this issue. In *Edgar*, the district attorney, Wagner, had assisted a wildlife agent
10 in the preparation of an affidavit supporting the issuance of an arrest warrant resulting in the
11 arrest and incarceration of the wrong man. In his civil action against Wagner, plaintiff alleged
12 that the district attorney participated in the preparation of the affidavit with malice, and a
13 deliberate effort to deprive the plaintiff of due process. The *Edgar* court noted that “[a]
14 prosecutor who functions primarily as an administrator or investigator is accorded qualified
15 immunity, that is, protection from liability depends upon a showing that the prosecutor
16 entertained a good faith, reasonable belief in actions taken in an administrative or investigative
17 capacity.” *Id.* Then, the court held: “Assuming, as we must at this juncture, respondent
18 participated in the preparation of the affidavit with malice, and in a deliberately structured effort
19 to deprive appellant of due process, the allegations of the complaint state a claim which, if
20 accepted by the trier of fact, could entitle appellant to relief.” *Id.*

21 The *Edgar* case resulted in a reversal of the district court’s judgment dismissing the
22 action on a Rule 12(b)(5) motion for failure to state a claim upon which relief could be granted.
23 In addressing the standard that applies to such a motion, the court noted that the task for the
24 court was to determine “whether or not the challenged pleading sets forth allegations sufficient
25 to make out the elements of a right to relief.” The court further observed that in reaching such a
26 determination “the allegations in the complaint must be taken at ‘face value, and must be
27 construed favorably in the plaintiff’s behalf.” (Citation omitted.) The court then ruled: “The
28 complaint cannot be dismissed for failure to state a claim unless it appears beyond a doubt that

1 the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him
2 to relief." *Id.*

3 The *Edgar* case is of value to the instant issue because, interestingly, the district attorney
4 against whom the action was brought, was functioning in an "administrative" or "investigative"
5 capacity (like the FTB) as opposed to a prosecutorial capacity, and enjoyed a qualified
6 immunity based upon whether, in so functioning, he could prove that he "entertained a good
7 faith, reasonable belief" in the propriety of his actions.

8 The reasoning of *Edgar* applies here. The FTB, in its investigative capacity, came to
9 Nevada and committed acts Hyatt has alleged to be fraudulent, malicious, oppressive, and
10 violative of his privacy. These allegations, if believed by the trier of fact, would entitle Hyatt to
11 relief. They have compelling application to the FTB's fraudulent actions with respect to the
12 alleged pretense with which Hyatt sought to demonstrate his Nevada residency for the period
13 September 26, 1991 and beyond. It is unthinkable that this Court would be divested of subject
14 matter jurisdiction to decide whether Hyatt is entitled to the protection accorded all other
15 Nevada residents simply because the FTB contends that its investigative authority in tax matters
16 preempts the jurisdictional right of courts in other jurisdictions to hold it accountable for torts
17 committed in the course of its extraterritorial operations and investigations.

18 Additionally, the FTB cannot sustain its position, discussed in greater detail below, that
19 the doctrine of administrative remedies preempts the subject-matter jurisdiction of this Court
20 notwithstanding Hyatt's claim of fraud in the FTB's determination of residency. The Supreme
21 Court of Illinois grappled with an exhaustion claim in the context of nothing less than a
22 fraudulent tax case. In *Alerich v. Harding*, 172 N.E. 772, 775 (Ill. 1930), appellant contended
23 that the lower court judgment was faulty because of the failure to require the complainant to
24 exhaust his administrative remedies before the reviewing board. The court held that "[f]raud is
25 an independent ground for the exercise of equitable jurisdiction. In this case the bill alleges
26 facts which constitute fraud in the assessment of appellee's property, and of that subject the
27 court will take jurisdiction." *Id.* Moreover, the court stated that "[b]y their action the assessing
28 authorities defeated the remedy of appellee for pursuing his course of law. Under the facts

1 alleged in the bill appellee had the right to resort to a court of equity." *Id.*

2 As in the case of *Alerich*, the FTB, by its fraudulent actions, has prevented Hyatt from
3 obtaining any redress for the injuries inflicted on him.

4 The FTB also too quickly glosses over the effect of NRS 10.155 (which it erroneously
5 cited as NRS 10.115) on the instant action. In pertinent part, the statute provides that "the legal
6 residence of a person with reference to his . . . right to maintain . . . any suit at law or in equity,
7 or any other right dependent on residence, is that place where he has been physically present
8 within the state or county, as the case may be, during all of the period for which residence is
9 claimed by him." The FTB would have the Court believe that this statute is restricted to divorce
10 cases, out-of-state tuition, or voting rights even though it has not cited to any authority in
11 support of its restrictive interpretation.

12 Significantly, however, the FTB declared that this statute "relates only to matters where
13 a person's rights depend on the place of his legal residence." (Reply at 5.) Obviously, if Hyatt
14 was a Nevada resident as of September 26, 1991 and beyond, as he claims, he would have an
15 absolute right to invoke the jurisdiction of Nevada's civil justice system against an aggressive
16 out-of-state taxing agency who was tortiously and unconstitutionally attempting to extort taxes
17 from him for income earned in Nevada during the period of his Nevada residency. The statute
18 clearly applies, and Hyatt has every right to have his Nevada residency confirmed by this Court.

19 Casting aside all of the ornaments, the gist of Defendant's position is that Hyatt, by
20 protesting the FTB's notices of proposed assessment in California, has fallen into its clutches
21 from which there is no return until it finishes with him and thereafter releases him to the Board
22 of Equalization. Hyatt, according to the FTB, can move neither forward, backward, nor
23 sideways at least until the FTB concludes its six-plus year "audit/investigation" of him, and the
24 fact that he is a Nevada resident is not relevant because under some ethereal law, Hyatt has
25 become an FTB captive by virtue of his California protest, and cannot run to a Nevada court for
26 protection. "No subject matter jurisdiction in this Nevada court," protests the FTB. "Hyatt is
27 bound to exhaust his administrative remedies in California with the FTB and its parent, the
28 Board of Equalization, before he can pursue relief in Nevada concerning the issue of his

1 residency and his trumped-up tort claims." All of the foregoing is but symptomatic of the FTB's
2 complex that prevents it from contemplating limitations on its taxing powers. Since its taxing
3 powers are sacrosanct, so are its uses, thereby permitting the FTB to do anything, anywhere, to
4 anyone with impunity.

5 Case law does not support the FTB's claim of exclusivity of subject-matter jurisdiction.
6 In the first place, exhaustion of administrative remedies has no application to this tort case. In
7 the Nevada seminal case of *Hansen v. Harrah's*, 100 Nev. 60, 64-65, 675 P.2d 394, 397 (1984),
8 Hansen was discharged for filing a claim for workmen's compensation. In relevant part, the
9 Hansen court held that "[s]ince both the cause of action and the remedy are governed by the law
10 of torts, there is no basis for administrative relief within the framework of the state industrial
11 insurance system, and hence no need to exhaust purported administrative remedies as suggested
12 by employers." Again, in the case of *Ambassador Ins. Corp. v. Feldman*, 95 Nev. 538, 598 P.2d
13 630, 631 (1979), the court dispensed with the exhaustion of administrative remedies argument
14 in a defamation case and reversed the district court, ruling that "[s]ince the [insurance]
15 commissioner is powerless to grant the relief appellants seek in their suit, the doctrine of
16 exhaustion of administrative remedies is not applicable." This is a Nevada tort case, and there
17 are no administrative remedies in California which could provide Hyatt with redress for his
18 injuries.

19 Moreover, there is no law that supports the proposition that if an administrative agency
20 in California commences a tax investigation against a resident of Nevada which includes a
21 residency component, a Nevada court would be required to cede subject matter jurisdiction to
22 California. In fact, the law is to the contrary.

23 In the case of *Kaski v. First Federal*, 240 N.W.2d 367, 374 (Wis. 1974), the court
24 observed that "[i]n general . . . it can be said that, unless exclusive jurisdiction is given to the
25 administrative agency by statute, a court has subject-matter jurisdiction regardless of whether a
26 litigant ought to exhaust his administrative remedies before submitting his case to the courts."
27 There is no statute in Nevada that provides for an exclusive jurisdiction in an administrative
28 agency of another state, and in the event a Nevada court were to defer to the administrative

1 jurisdiction of the FTB in California, it would clearly be the result of a discretionary act of
2 comity -- dispensation that is unavailable to the FTB for reasons covered in Hyatt's Opposition
3 to the FTB's Motion. The *Kaski* court also noted, with respect to the doctrine of primary
4 jurisdiction that it is not a question of power but of comity. *Id.*

5 The court in *Glen Ridge v. Federal Savings & Loan Ins. Corp.*, 734 S.W.2d 374, 378
6 (Tex. App. 1987) rebuffed the argument asking for reversal based upon a failure to exhaust
7 administrative remedies, stating that "the doctrine of exhaustion of remedies is not a
8 jurisdictional rule but is a matter committed to judicial discretion and an exercise of comity
9 only." (Citing *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, 811 F.2d 1209, 1223
10 (9th Cir. 1987). See also, *Collins v. Elkay Mining Co.*, 371 S.E.2d 46, 51 (W.Va. 1988) ("the
11 doctrine of administrative exhaustion is not jurisdictional in nature: The general requirement of
12 the exhaustion of administrative remedies is not a jurisdictional doctrine, but is a matter of
13 comity, within the discretion of the trial court") (quoting *Wiggins v. Eastern Associated Coal*
14 *Corp.*, 357 S.E.2d 745 (W.Va. 1987). Moreover, the Supreme Court of New Jersey in *Abbott v.*
15 *Burke*, 495 A.2d 376, 391 (N.J. 1985), in the course of discussing exhaustion concepts, stated
16 "that the preference for exhaustion of administrative remedies is one of convenience, not an
17 indispensable pre-condition." (Quoting *Swede v. City of Clifton*, 125 A.2d 865 (N.J. 1956)).

18 Finally, the court in *Kramer v. Horton*, 383 N.W.2d 54, 59 (Wis. 1986), held that "[t]he
19 exhaustion doctrine applies only when administrative remedies are adequate and readily
20 available. If the administrative remedies are patently inadequate, or are adequate in theory but
21 not in practice due to bias or delay, then the basis for applying the exhaustion doctrine does not
22 exist, and one of the exceptions should allow the plaintiff to escape from the clutches of
23 bureaucratic tyranny." Suffice it to say, that in the FTB's six-plus year "investigation" of Hyatt,
24 there is an abundance of evidence of both bias and delay. This Court must enable Hyatt to
25 escape from the tortious tyranny of the FTB!

26 It should be clear as a matter of law that the FTB cannot invoke in Nevada a superior
27 right of subject matter jurisdiction regarding Hyatt's citizenship under any exhaustion doctrine
28 or other concept. Its only recourse would be to ask for comity, a plea akin to a house burglar

1 caught in the act who thereafter asks the court to grant him the right to have his case heard in his
2 home state where he has greater influence and is better known. As noted above, Hyatt has
3 previously addressed the issue of comity and will not burden the Court with further discussion
4 on the subject here.

5 Interestingly, the FTB accuses Hyatt of filing a "tax case" in Nevada in order to create a
6 barrier to its efforts to tax Hyatt in California by means of either res judicata or collateral
7 estoppel. The simple answer to this accusation is from the FTB's own mouth: "California would
8 not give full faith and credit to a Nevada judgment purporting to determine an action barred
9 under California law." (Motion, at 10.)

10 Finally, the FTB's premise that the Nevada declaratory relief claim is identical to that at
11 issue in the FTB protest proceeding pending in California is also wrong. There are different
12 issues pending in the different forums. The FTB does not have the authority to determine that
13 Hyatt is or is not a Nevada resident. It has authority only to make a preliminary determination
14 as to when Hyatt ceased to be a California resident. Only this Court can determine Hyatt's
15 Nevada residency. For example, the FTB is without authority to determine that Hyatt was and
16 is a Nevada resident after April 2, 1992. The California residency statute defines who is a
17 California resident and then states that all others are California non-residents. See California
18 Revenue & Tax Code § 17014 and 17015. A California non-residency determination is not
19 sufficient. Hyatt needs a Nevada residency determination, which the FTB is unable to provide.

20 **V. THE FTB CONTINUES TO ARROGANTLY ASSERT THAT IT CAN APPLY**
21 **AND ENFORCE CALIFORNIA LAW IN NEVADA, ON NEVADA RESIDENTS,**
22 **WITHOUT PERMISSION OR EVEN NOTICE TO NEVADA COURTS.**

23 The FTB's reply goes to great lengths to try to justify its fraudulent and abusive use of
24 its quasi-subpoena power. The FTB's Reply discusses California law and the authority the FTB
25 has under California law to seek information on taxpayers under investigation. (Reply, at 6-9.)

26 The FTB even makes reference to Nevada Rules of Civil Procedure relating to issuance
27 of a subpoena and the Uniform Foreign Deposition Act. (Reply, at 9.) The FTB, however,
28 ignored such statutes. Rather, as set forth in more detail in Hyatt's Opposition and Complaint,
the FTB abused its quasi-subpoena power by fraudulently demanding -- without authority to do

1 so -- that Nevada residents produce information concerning Hyatt. Moreover, this misuse of its
2 quasi-subpoena power is one of the means by which the FTB invaded Hyatt's privacy by
3 revealing very personal and private information about him to newspapers, utility companies,
4 government entities, etc. (FAC, ¶ 33, *et seq.*)

5 Whatever the FTB is empowered to do in California, it does not have such automatic
6 rights in Nevada. A government agency's misuse of its authority, or in this case apparent but
7 false authority, in furtherance of its attempt to collect taxes is tortious.

8 The FTB emphasizes that California law gives it the right to seek depositions within or
9 without the state of California. (Reply, at 9.) It is not the FTB's nor California's prerogative to
10 determine what the FTB can and cannot do in a sister state such as Nevada. Having cited to
11 Nevada's Rules on Civil Procedure and the Uniform Foreign Deposition Act, the FTB knew
12 what was required if it desired to subpoena Nevada residents or "demand" documents from
13 Nevada residents under the cover of official governmental authority. Nevertheless, it chose not
14 to follow such procedures.

15 The premise of the FTB's lengthy discussion of California law is that the FTB can do
16 what it wants to do, where it wants to do it, and when it wants to do it without the permission of
17 any other lawful authority. In other words, there are no limits on its investigative authority.
18 The FTB can and does use excessive force or other tortious conduct to obtain information from
19 Hyatt or any third-party witness, including the issuance of false and deceptive subpoenas in
20 furtherance of the collection of California taxes. Hyatt alleges the FTB cannot engage in such
21 conduct under Nevada law.⁴

22 **VI. CONTRARY TO THE FTB'S ASSERTION, IT IS BOUND BY *NEVADA V.***
23 ***HALL AND MLANECKI* AND IS LIABLE FOR TORTS COMMITTED IN**
24 **NEVADA.**

25 The FTB's liability for torts, and corresponding lack of sovereign immunity, in Nevada
26 based on *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed. 2d 416 (1979), reh'g denied,

27 ⁴Whether California law authorizing the FTB to conduct investigations immunizes it for
28 all torts while in California, as the FTB seemingly argues, is doubtful but irrelevant to this motion.

1 441 U.S. 917, and *Miannecki v. District Court*, 99 Nev. 93, 658 P.2d 422 (1983), was thoroughly
2 discussed in Hyatt's Opposition. (Opposition, at 20-23.) The FTB now attempts to put a new,
3 and baseless, twist on such precedents in an attempt to avoid their consequences.

4 The FTB cites Sections 820.2 and 860.2 of the California Government Code in asserting
5 that *Nevada v. Hall* has no application to this case. The FTB reasons that Nevada has no state
6 income tax law, and for that reason this Court must look to California law to determine whether
7 or not immunity in regards to the collection of taxes by a government agency.

8 First, as discussed below, the California Government Code sections cited by the FTB do
9 not give it immunity to commit torts under the protective guise of tax collecting. Secondly, the
10 FTB intentionally ignores the facts pled in Hyatt's Complaint which must be accepted as true
11 for the purposes of this motion; Namely, the FTB had substantial and significant tortious
12 contacts in and/or directed into Nevada.⁵

13 *Nevada v. Hall* unequivocally holds that one state may be held liable in the courts of
14 another state for torts. The FTB cites to other Supreme Court decisions mentioning
15 "insignificant contact" but such cases have no relevance to this analysis. Such cases do not
16 involve a state being sued in a sister state. Rather, the issue in such cases relates to choice of
17 law provisions.⁶ In short, the FTB cannot ignore *Nevada v. Hall* by simply asserting that
18 Nevada has no state income tax laws.⁷

19
20 ⁵The FTB also cites to §19504 and 19545 of the California Revenue and Taxation Code
21 in alleging that the FTB has immunity in carrying out its attempts to collect California state income
22 taxes. (Reply, at 17.) Such statutes merely set forth the framework under which the FTB may
23 pursue collection of California state income taxes. It gives no immunity to the FTB for tortious
24 conduct.

25 ⁶*Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932), was a workers compensation
26 and employment contract case. Application of another state's law was required in part due to the
27 contract. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1980), was a dispute of choice of law stemming
28 from an insurance coverage case. Neither implicates sovereign immunity nor rebuts, reverses, or
overrides *Nevada v. Hall*.

⁷In fact, Nevada has a taxpayer bill of rights (*e.g.*, NRS 360.291) which is even more
stringent and provides the taxpayer more protections than California law. The FTB therefore again
shows its contempt for Nevada law and Nevada sovereignty by again pretending that it is not
important.

1 For *Mianecki*, the FTB has no answer so it simply ignores the holding of the Nevada
2 Supreme Court wherein it held that government agencies from sister states do not have
3 immunity for torts committed in Nevada. In *Mianecki*, the only conduct engaged in by the out
4 of state agency was the negligent placement of a parolee in Nevada. Because such conduct
5 caused damage in Nevada, the Nevada Supreme Court found that Wisconsin was liable for the
6 tortious conduct.

7 Here, the FTB has engaged in, according to Hyatt's Complaint, a series of significant
8 tortious acts in or directed into Nevada. These acts were part of the FTB's attempt to carry out
9 the FTB's decision to pursue collection of taxes from Hyatt. The FTB's decision to pursue
10 collection of taxes from Hyatt is not at issue, but its conduct in implementing its decision is at
11 issue. Hyatt alleges that such conduct was tortious for which the FTB must now answer in a
12 Nevada court. *Nevada v. Hall* and *Mianecki* give Hyatt this right.

13 **VII. THE FTB DOES NOT HAVE IMMUNITY FOR TORTIOUS CONDUCT.**

14 For the first time, the FTB cites to California Government Code Sections 820.2 and
15 860.2. The FTB declares that these code sections give it and its employees immunity. The
16 immunity, however, has no application to the current case.

17 **A. Section 820.2 has no application here because Hyatt has not sued an FTB**
18 **employee.**

19 Section 820.2 by the very terms quoted in the FTB's reply papers, applies only to public
20 employees, not governmental agencies such as the FTB. Hyatt has not sued any FTB
21 employees.

22 Moreover, such statute applies only to "discretionary" acts of public employees. Such
23 discretionary act immunity has been specifically limited by California courts to basic policy
24 decisions. Conduct engaged in by a government employee in carrying out policy decisions is
25 not immune. *Bell v. State of California*, 63 Cal.App. 4th 919, 929, 74 Cal.Rptr. 2d 541 (1998)
26 held that state investigators' conduct resulting in a false arrest and other tortious acts was not
27 immune as it did not amount to "basic policy decisions" and therefore fell outside the ambit of
28 discretionary acts. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1379 (9th Cir. 1998), held
that Section 820.2 protects basic policy decisions but does not protect operational or ministerial

1 decisions. There, the court explained that state investigators could be held liable for the manner
2 in which the investigation was carried, but not for the decision to pursue the investigation.

3 As this Court is well-aware, only discretionary acts are immune. *O'Neal v. Annapolis*
4 *Hospital*, 454 N.W.2d 148 (Mich. App. 1990). Specifically, there are limits on what the FTB
5 and its employees may do in furtherance of the collection of taxes once a policy decision has
6 been made to pursue collection from an individual such as Gil Hyatt. Such cases establish that
7 in implementing the policies of an agency such as the FTB, its employees may not engage in
8 tortious conduct.

9 **B. Section 860.2 has no application here because Hyatt's claims are not based**
10 **on the FTB implementing a procedure or action to collect taxes.**

11 In regard to Section 860.2, the literal language of the statute makes clear that an
12 individual cannot sue the FTB in tort for injury caused by the FTB as a result of its "instituting"
13 a proceeding or an action to collect taxes. The case cited by the FTB, *Mitchell v. Franchise Tax*
14 *Board*, 183 Cal.App. 3d 1133, 228 Cal.Rptr.750 (1986), held that the plaintiff's complaint for
15 negligence, slander of title, and interference with credit relations were all directly based on the
16 fact that the FTB had instituted an action or proceeding to collect taxes against such individual
17 and placed a tax lien on such individual's property. In other words, the plaintiff was trying to
18 sue merely because an action to collect taxes had been instituted allegedly causing damages.
19 The very fact that the FTB initiated an action against an individual cannot be the basis of a tort
20 claim.

21 However, in the instant case, as Hyatt stated first in his original complaint, then his
22 current First Amended Complaint, and now numerous times in motion practice, this lawsuit in
23 no way attempts to nor does it interfere with the FTB's proceeding in California relating to the
24 tax issues. The torts alleged are not based on the fact that the FTB instituted a proceeding or
25 action to collect taxes. It has a right to do so.⁸

26 Rather, in attempting to collect taxes from Mr. Hyatt, the FTB cannot do so by engaging

27 ⁸ The FTB has previously stated that this lawsuit in no way affects its ongoing proceeding
28 in California. (See Affidavit of Terry Collins, attached to the FTB Motion to Quash filed on
February 1999.)

1 in tortious conduct. Just as a peace officer cannot enforce an arrest warrant with the use of
2 excessive force or other undue means, the FTB cannot implement its policy decision to pursue
3 taxes from Hyatt through excessive force, intimidation, or other tortious means.

4 While there is little case law interpreting Section 860.2, analogous provisions of the
5 California Government Code giving immunity to government agencies and their employees for
6 "instituting judicial or administrative proceedings" have been interpreted as giving immunity for
7 the act of filing or instituting the action, but not for torts committed by employees while
8 implementing the decision to pursue such an action. In short, the decision to initiate the
9 proceeding or action cannot be challenged, but tortious conduct engaged in while the proceeding
10 or action is pending is actionable.

11 Here, [Plaintiff]'s allegations, go beyond the contention that the LAPD
12 officers acted improperly in deciding to seek his arrest. He alleges they
acted negligently in conducting the investigation . . . , and they caused his
13 arrest and imprisonment in Mexico.

14 *Martinez*, 141 F.3d at 1379. The plaintiff in *Martinez* therefore was entitled to pursue his tort
15 claims. *Id.*, see also *Bell*, 63 Cal.App. 4th at 929 (held no immunity under Cal. Govt. Code
16 § 821.6 to state investigators for conduct in executing a search warrant.)

17 As has been its practice, the FTB attempts to misconstrue the language of Section 860.2.
18 It asserts without explanation or citation to authority that the statute means any action taken is
19 immune, thereby ignoring the plain language stating that it is the "institution" of a proceeding or
20 action which is immune. In any event, whether the FTB can commit torts in California, under
21 California law, while collecting taxes is not germane to this case. As set forth above, under
22 *Nevada v. Hall* and *Mianecki*, the FTB can and will be held liable for torts directed at Nevada,
23 causing damage in Nevada, aimed at a resident of Nevada.

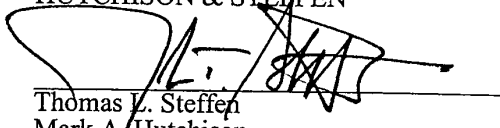
24 Try as it might by incessantly repeating its theme, the FTB cannot make this a tax case
25 or case of an individual attempting to interfere with tax collection. While the FTB cannot be
26 held liable for its decision to seek California state income taxes from Gil Hyatt, it can be held
27 liable for its excesses and intimidation in the form of fraud, invasion of privacy, abuse of
28 process, etc. as alleged by Hyatt. The FTB can collect its taxes, if any are owed, but it also must
pay for its torts if so ordered by a Nevada court.

1 **VIII. CONCLUSION.**

2 This Court has subject matter jurisdiction to hear and resolve all claims asserted by
3 Hyatt in this action, the FTB has no immunity in Nevada for the tortious conduct it commits in
4 or directs into Nevada. This case must be decided on its merits at trial.

5 Respectfully submitted this 22 day of April, 1999.

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EXHIBIT 10

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14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 * * * * *

17 GILBERT P. HYATT,
18
19 Plaintiff,

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

20 vs.

21 **DEFENDANT'S RESPONSE TO**
22 **PLAINTIFF'S SURREPLY**

23 FRANCHISE TAX BOARD OF THE
24 STATE OF CALIFORNIA, and DOES 1-
25 100, inclusive

26 **FILED UNDER SEAL**

27 Defendants.

28 Date of Hearing: 5/10/99

29 Plaintiff continues to obfuscate and makes new, incorrect statements in his proposed Surreply
30 brief. If the Court is inclined to consider that brief, Defendant respectfully requests the Court also
31 consider this response thereto.

32 **LACK OF SUBJECT MATTER JURISDICTION MAY BE RAISED AT ANY TIME**

33 In its Motion for Judgment on the Pleadings, the FTB has challenged this Court's exercise of
34 subject matter jurisdiction. *See, e.g. Motion at lines 24-28:*

35 The Plaintiff is currently engaged in "scorched earth" discovery
36 against the FTB as to matters for which the Nevada Court has no
37 subject matter jurisdiction, claims which are not properly pled, issues

1 per...ng in an ongoing California administrative proceeding, and
2 claims which are barred under Nevada and California law. (*Emphasis*
3 *added*).

4 Plaintiff spends most of his proposed Surreply arguing over whether the FTB's motion is
5 proper and what the standard is to decide the motion. Contrary to Plaintiff's arguments, lack of
6 subject matter jurisdiction may be raised at any time.

7 Nev.R.Civ.Pro. Rule 12(b)(1) authorizes a motion to dismiss for lack of subject matter
8 jurisdiction. Rule 12 (h)(3) further provides:

9 Whenever it appears by suggestion of the parties or otherwise that the
10 court lacks jurisdiction of the subject matter, the court shall dismiss
11 the action.

12 The Nevada Supreme Court has held that the absence of subject matter jurisdiction is never
13 waived and generally may be brought to the court's attention at any time and in almost any manner.
14 Meinhold v. Clark County School District, 89 Nev. 56, 59, 506 P.2d 420, 422 cert. denied, 414 U.S.
15 943 (1973). In fact, it is within the inherent powers of all courts to inquire into their own jurisdiction
16 and to determine if jurisdiction over the subject matter exists. In re: Estate of Singleton, 26 Nev. 106,
17 111, 64 P. 513 (1901). Where a court believes a doubt exists as to its jurisdiction, the court has a
18 duty to raise and decide the issue sua sponte. Phillips v. Welch, 11 Nev. 187 (1876).

19 Although the Nevada Supreme Court apparently has not addressed the precise issue, some
20 federal courts have permitted a defending party to raise a lack of subject matter jurisdiction on a Rule
21 12(c) motion for judgment on the pleadings. See Wright & Miller, Federal Practice and Procedure:
22 Civil 2d § 1350 at page 200 and § 1367 at page 515: "...Rule 12(h)(3) states that whenever it
23 appears that the court lacks jurisdiction over the subject matter the action may be dismissed, which,
24 of course, means that the defense may be raised on a motion under Rule 12(c)." The FTB's use of
25 Rule 12(c) to bring its motion in this case is appropriate given the language in Nev.R.Civ.Pro. Rule
26
27
28

12(h)(3) allowing lack of subject matter jurisdiction to be raised by a mere "suggestion of the parties or otherwise."

There are two types of challenges to subject matter jurisdiction: facial and factual. A facial attack argues that the allegations in the complaint are insufficient to show that the court has jurisdiction over the subject matter of the case. If the complaint does not properly invoke the court's jurisdiction, then the complaint is defective, and, unless the deficiency is cured, a motion to dismiss must be granted regardless of the actual existence of subject matter jurisdiction. A factual attack challenges the court's actual lack of jurisdiction over the subject matter, a defect that may exist despite the formal sufficiency of the allegations in the complaint. *See generally, Wright & Miller, § 1350 at pages 211-212.*

Here, this Court's lack of subject matter jurisdiction appears on the face of the complaint.

See, e.g.

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;...

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.

The prayer for judgment on Plaintiff's First Cause of Action is:

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

2. For judgment declaring that the FTB has no lawful basis for continuing to investigate plaintiff in Nevada concerning his residency between September 26, 1991 through December 31, 1991 or any other subsequent period down to the present, and declaring that the FTB had no right or authority to propound or otherwise issue a "Demand to Furnish Information" or other quasi-subpoenas to Nevada residents and businesses seeking information concerning plaintiff.

These are not just facial pleading defects. The defects are factual defects that go to the essential substance of the complaint. This Court does not, in fact, have subject matter jurisdiction, notwithstanding Plaintiff's conclusory legal allegations and argument to the contrary.

The party asserting jurisdiction has the burden of proving that subject matter jurisdiction exists. *Wright & Miller*, § 1350 at page 226. While the complaint will be construed broadly and liberally, the Court accepts only the well-plead factual allegations as true for purposes of deciding the motion, not conclusory or legal allegations. Argumentative inferences favorable to the pleader "will not be drawn." *Id.* at pages 218-220.

Although the FTB's motion was labeled as a Rule 12(c) motion for judgment on the pleadings, its title could just as easily have included a motion to dismiss under Rule 12(h)(3). As the FTB pointed out at page 3 of its Reply:

The instant Motion tests subject matter jurisdiction which cannot be waived (*See, NRCP 12(h) (3)*) and raises the issue of failure to state claims upon which relief can be granted which is appropriate either before answering or in a motion for judgment on the pleadings. (*See, NRCP 12(h)(2)*). (*Emphasis in original*).

The failure to include a motion to dismiss for lack of subject matter jurisdiction under Rule 12(h)(3) in the title of the motion is a mere matter of label over substance.

Whatever the label, the inquiry is the same: assuming the truth of all of Plaintiff's factual allegations (not his self-serving conclusory and legal allegations which permeate the complaint), has Plaintiff stated claims over which this Court may grant relief? In this regard, a Rule 12(c) motion for judgment on the pleadings raises the same challenge as a motion to dismiss for failure to state a claim;

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

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

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

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

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

not admit other assertions that constitute conclusions of law, legally impossible facts, or matters that would not be admissible in evidence at trial. (*citations omitted*).

That is the posture of the FTB's motion: assuming the truth of Plaintiff's factual allegations, Plaintiff has failed to state claims over which this Court has subject matter jurisdiction. The FTB did not have to admit to all of Plaintiff's allegations in order to bring its motion. See also Wright & Miller § 1370 at page 538:

In considering motions under Rule 12(c), courts frequently indicate that a party moving for a judgment on the pleadings impliedly admits the truth of his adversary's allegations and the falsity of his own assertions that have been denied by his adversary. These implied admissions are effective only for purposes of the motion and do not in any way bind the moving party in other contexts or constitute a waiver of any of the material facts that will be in issue if the motion is denied. (*Citations omitted*).

PLAINTIFF'S SURREPLY MISSCITES NEVADA v. HALL

At page 14, lines 13-14 of his proposed Surreply, Plaintiff argues:

Nevada v. Hall unequivocally holds that one state may be held liable in the courts of another state for torts.

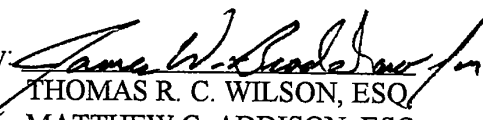
Contrary to what Plaintiff would have this Court think, Nevada v. Hall, 440 U.S. 410, *reh'g denied*, 441 U.S. 917 (1979), does not "unequivocally" hold any such thing. The majority opinion contains an important footnote that qualifies the entire decision. Plaintiff ignores that footnote:

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

1 For this Court to exercise subject matter jurisdiction in this case would constitute a substantial
2 threat to our constitutional system of cooperative federalism in that it would interfere with
3 California's capacity to fulfill its own sovereign responsibilities, namely to perform its administrative
4 responsibilities to determine whether or not Plaintiff was a permanent resident of California and
5 subject to California's tax on income. Accordingly, this Court must dismiss Plaintiff's complaint for
6 all the reasons previously stated by FTB.
7

8 Dated this 6 day of April, 1999.

9
10 Respectfully submitted,
11 McDonald Carano Wilson McCune
12 Bergin Frankovich & Hicks LLP

13
14 By: 
15 THOMAS R. C. WILSON, ESQ.
16 MATTHEW C. ADDISON, ESQ.
17 BRYAN R. CLARK, ESQ.

18 Attorneys for Defendants
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CERTIFICATE OF SERVICE

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 **DEFENDANT'S RESPONSE TO PLAINTIFF'S SURREPLY** via Facsimile to (702) 385-2086 and by U.S. Mail on this 6th day of April 1999, upon the following:

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Hutchison & Steffen
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and by depositing the same in the United States Mail, postage prepaid thereon to the numbers noted below, upon the following:

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Harold A. Shewer
An Employee of McDonald Carano Wilson
McCune Bergin Frankovich & Hicks LLP

EXHIBIT 11

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1 CASE NO. 98-A382999
 2 DEPARTMENT XVIII
 3 DISTRICT COURT
 4 CLARK COUNTY, NEVADA
 5 -oOo-
 6
 7 GILBERT P. HYATT,)
 8 Plaintiff,)
 9 vs.)
 10) OF
 11)
 12)
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 15)
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 18)
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 20)
 21)
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 23)
 24)
 25)

BEFORE THE HONORABLE NANCY SAIITA, DISTRICT JUDGE

WEDNESDAY, APRIL 07, 1999

10:00 a.m.

APPEARANCES:
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 JOHN T. STEFFEN, ESQ.
 THOMAS K. BOURKE, ESQ.
 DONALD J. KULA, ESQ.

For the Defendant: THOMAS R. C. WILSON II, ESQ.
 JAMES W. BRADSHAW, ESQ.
 GEORGE M. TAKENOUCHI, ESQ.
 FELIX LEATHERWOOD, ESQ.

Reported by: Karen G. Mell, CCR No. 412
 ALL-AMERICAN COURT REPORTERS (702)240-4394

0003

Page 98

1 MR. WILSON: Your Honor, if I may, I'm going
 2 to put this on the table for something to put my papers
 3 on. And I know that you have been inundated with a
 4 stack of papers, and I don't intend to revisit those.
 5 All I intend to do this morning is to try and provide
 6 some practical, if that's the word, context for the
 7 reasons why we're here and the history of this case,
 8 and I don't propose to revisit the cases or beat up on
 9 what already has been the subject of an awful lot of
 10 attention on paper.

11 MR. T. STEFFEN: Counsel, while you're having
 12 a sip of water -- may I, Your Honor, ask if the
 13 plaintiff's request for the filing of the surreply and
 14 the defendant's request for response thereto will both
 15 be considered by the Court?

16 THE COURT: Both are going to be considered.
 17 I'm prepared to go forward with that.

18 MR. T. STEFFEN: Thank you.

19 MR. WILSON: I'm glad we have water. Lawyers
 20 are like plants, Your Honor, and they have the same
 21 process of evapotranspiration. Instead of taking the
 22 water out of the ground and letting the sun take it,
 23 why, we talk a lot, and I apologize for that.

24 THE COURT: Precisely the same concept. I
 25 believe you.

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1 LAS VEGAS, CLARK COUNTY, NV.; WED., APRIL 07, 1999
 2 10:00 a.m.
 3 -oOo-
 4 PROCEEDINGS
 5 THE COURT: This is Hyatt versus California
 6 State Franchise Tax Board. This is the defendant's
 7 motion for judgment pleadings.
 8 You may rest assured, all of you, that I have
 9 spent countless hours reading everything that you have
 10 prepared. And the emphasis was on purpose just then,
 11 so what I'm going to ask you to do, please keep your
 12 arguments brief. What I generally ask people to do in
 13 this type of situation, highlight or emphasize for me
 14 those matters that you feel are most important, and
 15 trust me when I say I have read all the pleadings as
 16 well as the case law, the voluminous case law that was
 17 submitted in support of your documents.
 18 So with that in mind, Defense, would you like
 19 to start, please.

20 MR. WILSON: Thank you, Your Honor. My name
 21 is Thomas Wilson. I'm Nevada counsel for FTB. Let me
 22 introduce Jim Bradshaw, who also is; George Takenouchi,
 23 Deputy Attorney General from California; and Felix
 24 Leatherwood also.

25 THE COURT: Good morning, and welcome.

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1 MR. WILSON: Your Honor, this matter, of
 2 course, as you observed a moment ago, arises on the
 3 defendant's motion for lack of -- to be dismissed for
 4 lack of subject matter jurisdiction, and I really want
 5 to address broadly the two parts to that. One is the
 6 first cause of action for which the plaintiff seeks
 7 certain declaratory relief; and the second part, on the
 8 tort causes of action.

9 This case arose because a long-time
 10 California resident, Mr. Hyatt, moved to Nevada, which
 11 is a non-taxing state. And there's nothing wrong with
 12 that, and that's known as tax avoidance. And the
 13 issue, of course, is when he became domiciled here and
 14 whether he was here as a matter of permanent residence
 15 during the critical period of time, which seems to be
 16 September 26th of '91 to April the 3rd of '92. And
 17 when he was here in the permanent residence and whether
 18 his presence in California was merely transitory and
 19 temporary or whether it was the other way around, that
 20 really is the factual question which is the subject of
 21 the administrative process in California. And we have
 22 parts of two years which are in controversy, of course,
 23 the latter part of '91 and the earlier part of 1992.

24 Mr. Hyatt filed two protests in the
 25 administrative process. He entered an appearance, if

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1 you will, and filed a protest on June the 20th of 1996
2 for that part of the residency audit, an assessment
3 that was levied for 1991. Then, on October 20 of '97,
4 he filed a protest for that portion of the year of 1992
5 which is in controversy. Those were filed with the
6 California FTB, or Franchise Tax Board, as it's
7 called.

8 Two-and-a-half months after his protest of
9 October 20 of '97, he filed on January the 6th of '98,
10 just last year, his Complaint in this Nevada Court
11 seeking relief. And I had second thoughts about
12 bringing boards this morning because, A, you've read
13 the briefs and, B, we're not arguing to a jury, but on
14 that board is simply the prayer that the plaintiff has
15 made asking for a declaratory judgment and asking for,
16 I guess, certain injunctive relief.

17 And, of course, by that, he seeks a judgment
18 confirming that he, Mr. Hyatt, is a bona fide resident
19 of this state effective as of September the 26th of 91
20 forward to this date. And he asks for judgment
21 declaring that the FTB has no lawful basis for
22 continuing to investigate him -- that is, the residency
23 audit in Nevada -- for the same period of time or any
24 other subsequent period and declaring that the FTB had
25 no right or authority to propound or otherwise issue a

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1 domicile is. One can have multiple residences, only
2 one can be a domicile, as the Court knows. You've seen
3 litigation among states, usually trying to share in the
4 state taxes where one domicile in one state is wealthy
5 and has a home in Florida and maybe a home in Montana,
6 and so all the states decide they want to get in and
7 participate in the largess at the taxpayer's death and
8 litigate where he was domiciled. That's not unusual,
9 but I suppose it's similar to this case.

10 What the defense is troubled by is the nexus
11 between the declaratory judgment with respect to
12 residency and it's relevancy to the tort issue. And we
13 are told in Plaintiff's opposition to our motion for
14 judgment that the tort issues are inextricably
15 intertwined, if I recall the word, with the tort
16 action. They're one and the same, and they really
17 can't be separated.

18 I've always been of the view that the law was
19 quite clear that even a tourist could sue for tortious
20 conduct in a different state. And certainly one who
21 has a home here who may not be domiciled here can sue.
22 I'm never thought that one had to be either a resident
23 to sue when suffering tortious conduct or, even more,
24 be domiciled here to sue for tortious conduct. Yet,
25 that seems to be what the plaintiff is saying in

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1 demand to furnish information or other what the
2 plaintiff calls quasi subpoenas to Nevada residents
3 seeking information concerning.

4 The first part of the prayer, of course,
5 raises a question about the significance of that kind
6 of declaratory judgment with California's
7 administrative process and whether, as a practical
8 matter, it becomes entitled to full faith and credit
9 under the U.S. Constitution and thereby would be
10 preemptive of the FTB or the State of California's
11 jurisdiction to determine and resolve the residency
12 issue which was the subject of the audit.

13 This would mean that they could not in the
14 administrative process or by the Board of Equalization,
15 which reviews those decisions by the FTB -- or even a
16 California Superior Court could not review and
17 adjudicate that question, given full faith and credit.

18 And, of course, he also addresses the court case.

19 Now, Mr. Hyatt, of course, indicates that
20 this is a tort case and a -- a tort case in Nevada and
21 a separate tax case in California. There's some
22 confusion, I think, between the tort causes of action
23 and the residency issue for which he seeks declaratory
24 judgment.

25 And we know that permanent residency is what
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1 arguing that there is some inextricable intertwining of
2 the two causes of action where you can't really have
3 one without the other.

4 I frankly don't understand that. If one has
5 suffered tortious conduct and is aggrieved by it, is
6 emotionally harmed by it, is embarrassed by it because
7 that conduct somehow affected the plaintiff's circle of
8 friends or acquaintances or others, business associates
9 whom he knows where he has a residence, whether he's
10 domiciled in the residence or not, the question of
11 residence would be relevant to damages, it seems to
12 me.

13 If one is not a resident, then I suppose you
14 question whether or not there really is a circle of
15 friends and business associates and the like who
16 becoming aware of an investigation, that it's been such
17 an egregious embarrassment, mental pain and suffering,
18 if you will, that you claim some consequence of the
19 egregious conduct which you claim is tortious. And so
20 you establish residency and thereby establishing an
21 environment of friends and acquaintances whose view of
22 you has been diminished and, therefore, you sue for
23 mental anguish.

24 I suppose you could argue that theory, but

25 that's not to say that it's jurisdiction. That's not

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1 to say that you have to be a resident to sue. It's not
 2 to say that you have to be a domicile to sue. It
 3 simply means that the plaintiff can take the witness
 4 stand if the Court has not dismissed the claims of
 5 tortious conduct and testify to why he was emotionally
 6 damaged or aggrieved or embarrassed or whatever the
 7 circumstances are for which he seeks monetary damages.
 8 Doesn't require declaratory judgment at all.
 9 It's a simple question of fact going to the
 10 question of whether or not he has been damaged by the
 11 egregious conduct. So I am perplexed, to say the
 12 least, that we have it argued that we have some
 13 inextricable combination of the two that defies their
 14 separation.
 15 Hyatt's prayer in the first cause of action
 16 is indeed telling, it seems to me, because in the first
 17 claim for relief it would decree that California has no
 18 power of authority to inquire or investigate Nevada at
 19 all, which is to say that one state may not investigate
 20 in another without the other state's authority.
 21 The 13th paragraph of the Complaint raises
 22 some interesting concepts that relate to California's
 23 power to investigate as a member of a union,
 24 constitutionally, of other states, all of whom have
 25 certain sovereign powers. In paragraph 13, why, the
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1 side resident of the State of Nevada effective from
 2 September 26, 1991 to the present. This, of course, is
 3 the -- I haven't gotten to the prayer yet, which is on
 4 the board, but this is a prelude to the prayer on what
 5 Plaintiff seeks. But then Plaintiff goes on to seek a
 6 judgment declaring that the FTB's extraterritorial
 7 investigatory excursions into Nevada -- that's rather
 8 colorful language, but the sense of it is clear -- and
 9 the position of quasi subpoenas -- those are documents
 10 seeking information -- to Nevada residents without
 11 approval from a Nevada court or governmental agency as
 12 alleged above to be without authority and violative of
 13 Nevada's sovereignty and territorial integrity.
 14 And you see the prayer of the Complaint which
 15 seeks judgment accordingly.
 16 This is California's interstate inquiry. Of
 17 and by itself it is not a tort. It's necessary to the
 18 relationship among the states. It's necessary to
 19 California's exercise -- any state's exercise of its
 20 taxing authority, and that's the ability to audit and
 21 verify. States do that in other states without the
 22 need for obtaining governmental or Court permission to
 23 enter the adjoining state and make inquiry.
 24 What California has sought to do is to verify
 25 Mr. Hyatt's permanent residency in this state. That
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1 plaintiff alleges that he is informed and believes and
 2 alleges that the FTB never sought permission from a
 3 Nevada Court or any Nevada governmental agency to send
 4 such, quote, "quasi subpoenas," close quote, into
 5 Nevada where, induced by the authoritative appearance
 6 of the inquisitions, many Nevada residents and business
 7 entities did respond with answers and information
 8 concerning Plaintiff.
 9 Now, that's to say that if the State of
 10 California is going to seek information in this state
 11 in fulfillment of its taxing obligations to determine
 12 whether or not one is a resident and, if so, is subject
 13 for taxes and, if so, how much, the State of California
 14 has to seek approval from a Nevada Court or some Nevada
 15 governmental agency in order to do so. And I find that
 16 perplexing. I don't understand it, and that's really
 17 unique, it seems to me, in the relationship of
 18 sovereign states who enjoy a structure of cooperative
 19 federalism, I guess as it's called in the texts, which
 20 defines the relationship among states which indeed are
 21 separately sovereign but nevertheless are co-equal and
 22 coexistent in a federal union.
 23 But Plaintiff goes on at paragraph 32 of his
 24 Complaint to request a judgment of this Court declaring
 25 and confirming Plaintiff's status as a full-time, bona
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1 is, whether he's domiciled in Nevada and his presence
 2 in California during the subject period of time,
 3 September 26, '91 to April 3, '92 -- whether his
 4 presence in California was simply for some transitory
 5 or temporary purpose or whether he really remained
 6 domiciled in California and his presence in Nevada was
 7 for some transitory or temporary purpose and
 8 notwithstanding that he had purchased a home here.
 9 I might say that the notion that one has to
 10 get governmental approval for a sovereign's activity in
 11 another state would have rather interesting
 12 implications for the State of Nevada because, as the
 13 Court knows and just about everybody in Nevada knows,
 14 is that gaming is legalized in this state, and for a
 15 long, long period of time now, for many, many years,
 16 it's been regulated by the Nevada Gaming Control Board
 17 and its senior body, the Gaming Commission.
 18 Those two entities are governmental agencies.
 19 They exercise a sovereign power and responsibility of
 20 the State, and part of their job is to determine under
 21 the statutory mandate who is and who is not suitable to
 22 be awarded a gaming license. This involves inquiry out
 23 of state. Out-of-state investors invest in Nevada
 24 casinos. Whether one is a Nevada resident or one is a
 25 resident of another state, they have to appear for
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1 licensure. They are investigated. Their applications
2 are verified. All kinds of investigation goes on out
3 of state to determine suitability, financial
4 relationships, other relationships, the suitability of
5 the people with whom the proposed licensee does
6 business or associates with. And as the Court would
7 probably take judicial notice, sometimes gaming
8 licenses are denied and sometimes gaming licenses are
9 revoked because one is not suitable for licensure. Or
10 one is not suitable to retain a gaming license, and
11 it's revoked.
12 That inquiry and the exercise of that
13 sovereign power is based upon an inquiry. The FTB
14 calls theirs a residence audit to determine where
15 somebody really lives. The Gaming Board, I don't think
16 they call it an audit, I think they just call what it
17 is, an investigation. But I must say that's a
18 sovereign exercise of Nevada's power, and I've never
19 heard of either of those entities going to a foreign --
20 another state's courts or government agencies to make
21 application to conduct an investigation, which
22 oftentimes is done confidentially or in secret or
23 without any notoriety.
24 It's for this reason, the attempt to preempt,
25 if you will, by a declaratory judgment that the

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1 of California while he developed his computer chip
2 technology, and it was finally patented, and there's
3 nothing wrong with moving from California to a tax-free
4 state to avoid California taxes. It's a question of we
5 know he acquired a rental apartment, the auditor has
6 raised issues as to whether he's lived in it, how
7 frequently he's been there, or whether his trips to
8 California were only temporary or transitory or more
9 permanent. And the auditor conducted her audit, and
10 she reached the conclusions she reached.
11 They call those residence audits in
12 California, and their purpose is to determine, as I
13 say, where one's domicile is and whether one's presence
14 was transitory or temporary, and it's subject to review
15 by the FTB. It's also subject to review by the
16 California Board of Equalization, and it's subject to
17 appeal to the California Superior Court. As I
18 indicated, after protesting and entering the
19 administrative process, why, this Complaint was filed
20 two-and-a-half years after the protest that was filed
21 for the second year, and this Complaint was filed a
22 little over a year ago -- I say, two-and-a-half months;
23 I misspoke. The second audit was concluded, I think,
24 in October of 1997, and this action was filed in -- on
25 January the 6th of 1998.

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1 defendant raises the question of subject matter
2 jurisdiction. I know that its motion was captioned the
3 Motion for Judgment on the Pleadings, and I know there
4 was a reference to NRCP 12(c), but the motion is clear
5 under Section A on page 5, up front. And that is that
6 Plaintiff's declaratory action must be dismissed
7 because the Court lacks subject matter jurisdiction.
8 NRCP 12(b)(1), well, if you've read it, I
9 don't need to talk about it. But NRCP 12(h)(3) is very
10 clear, whatever it appears by suggestion of the parties
11 or otherwise. However informally that the Court lacks
12 jurisdiction of the subject matter, the Court shall
13 dismiss the action. That means the Court can do it sua
14 sponte without the benefit of motion or how the
15 question might otherwise be raised.
16 The FTB issue, California's issue, has to do
17 with whether there is income which should be taxable in
18 California, and as I said before, where one is
19 domiciled and where Mr. Hyatt is domiciled during the
20 period in question, and whether, as stated by the
21 plaintiff in its Complaint, if he was in California
22 only for temporary or transitory purposes while
23 domiciled in Nevada or whether it's the other way
24 around. It's a question of fact.
25 As I said, Mr. Hyatt was a long-time resident

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1 So we have an ongoing administrative process
2 requested by the taxpayer, the plaintiff, who has filed
3 protests to the audit conclusions for both years and
4 who, after filing a second protest two-and-a-half
5 months later, filed this action for declaratory
6 judgment and is seeking a judgment that California
7 can't investigate Hyatt's residency in Nevada at all
8 and can't inquire and seek information of Nevada
9 residents with respect to his residency in Nevada and
10 for the nature of a declaratory judgment with respect
11 to that residency for which Mr. Hyatt could then go to
12 California and say, "You've got to give this judgment
13 full faith and credit. It has the effect of
14 res judicata, and you can't disturb it under the
15 constitutional mandate of res judicata."
16 That administrative process is still
17 pending. As I say, it was initiated by his protests
18 when they were filed. He can pursue that process. He
19 can pursue his review to the State Board of
20 Equalization and judicial review in California, if he
21 likes.
22 I guess the question before this Court is
23 whether it has subject matter jurisdiction over the
24 administrative process of another sister sovereign
25 state which is really engaged in one of its most

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1 important sovereign responsibilities, and that is the
2 collection of revenue and to determine what, if any,
3 taxes are owing by a present or former California
4 resident of that state.
5 Mr. Hyatt in his surreply has stated that
6 recognizing that there is a matter pending in
7 California -- on page 5 in his surreply, Roman
8 Numeral IV, he states: The FTB is in Nevada answering
9 for its tortious conduct here, and Hyatt's tax
10 representative is in California dealing with the FTB's
11 tax investigation of Hyatt.
12 That's in the paper that was just filed. The
13 plaintiff apparently recognizes that his tax
14 representative is in California dealing with the FTB,
15 and that suggests, I guess, that the plaintiff intends
16 actively to pursue the administrative process in
17 California while at the same time he's seeking a
18 declaratory judgment in this state precluding that,
19 preempting that. That's a rather fundamental
20 inconsistency, and I think it reflects as a practical
21 matter what we're really talking about here, and that's
22 a judgment from this State's court which is preemptive
23 of California's activity administratively and
24 judicially as to whether or not there is a tax
25 liability.

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1 We're talking about injunction and declaratory relief
2 with respective fundamental basic sovereign rights of a
3 sister state belonging to the same union they all do
4 and in this generally defined relationship of
5 cooperative federalism.
6 As pled, Your Honor, there's been a lot of
7 hyperbole and colorful language in the Complaint with
8 respect to outrage and a lot of other things. But as
9 pled, the only conduct by the State which has been
10 pled -- and I'm separating it from its
11 characterization -- is that it has made an inquiry and
12 has talked to others in Nevada who may know or are
13 acquainted or are friends of Mr. Hyatt, about which he
14 is upset and outraged. And they have used his name and
15 his address and his Social Security number in making
16 that inquiry, I suppose, to make it accurately, to be
17 able to verify his presence and contacts in Nevada and
18 the larger question, whether the nature of his contacts
19 and residency in Nevada suggests that residency has
20 been permanent, and that it seemed to suggest a
21 domiciliary intent to live in Nevada and make it his
22 home permanently and that any transitory or temporary
23 presence in California were simply that and nothing
24 more. That really is all we're talking about here.
25 I understand there's been some comment made
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1 And I'm not prejudging whether there's a tax
2 liability. I'm not standing here before you saying
3 there is. The process hasn't run its course. There
4 has not been the review by the FTB or the Board of
5 Equalization or the California court. I'm simply
6 saying as a sovereign state California has the
7 obligation and the right to fulfill it's obligation and
8 do that.
9 Passing to the tort claims, I think there's a
10 basic question as to whether or not there's subject
11 matter jurisdiction over the tort claims as they're
12 pleaded. I know that Plaintiff has cited Nevada versus
13 Hall, and that, of course, is a case where Nevada had
14 waived its sovereign immunity with respect to actions
15 by some employees. And, in that case, the Nevada
16 employees, as you know, were driving down in California
17 and hit somebody, and the State was liable.
18 That's not to say in contrast with the
19 holding in that case that there's been a waiver of
20 sovereign immunity with respect to a State's right to
21 pursue and perform its obligations of a sovereign to
22 collect its tax revenues and, if necessary, to levy
23 them. And that's what we're talking about here. We're
24 not talking about a waiver of immunity over a traffic
25 accident by one State's employees in other state.

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1 in the pleadings with respect to demands for
2 information which are said to be outrageous. It's a
3 form that -- as discussed in the briefs, that a
4 California FTB employee will use to seek information
5 locally. Many of those were attached to letters, but
6 they were sent out of state and used to contact some
7 Nevada people to make inquiries.
8 Is that a tort? Is that contact tortious?
9 Plaintiff may indeed be outraged because his privacy
10 was compromised. He may indeed be understandably angry
11 because to ask a question about how long has he lived
12 here and, "I'm from the FTB, after all, and I'm a tax
13 collector from California, how long has Mr. Hyatt lived
14 here," that's an awkward situation for anybody to be
15 in, and I'm sure he was offended by it. But that does
16 not mean it was tortious because to ask the question, I
17 suppose, raises the question of whether it can
18 potentially be embarrassing. But how do you ask the
19 question? How do you ask the question without somebody
20 who knows Mr. Hyatt understanding by the question that
21 California is trying to determine whether or not he
22 owes California taxes and whether he's evading them?
23 I don't know how you ask the question, but
24 somehow the question has to be asked. The auditor
25 somehow has to make sufficient inquiry to be able to
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1 conclude one way or another. And, of course, if the
2 conclusion is adversary, as it has been, Mr. Hyatt is
3 free to follow the process available to him to present
4 additional evidence and to argue his case and perhaps
5 change the outcome.
6 The point of this discussion, I guess, is
7 simply to say that Hyatt's tort claims, as pled, really
8 are the subject of the California audit process. That
9 is, because they have audited, because they have
10 inquired, because they have attempted to verify,
11 because they have asked questions, the plaintiff has
12 said the conduct is tortious. It really comes down to
13 that, and they are, of course, the substance of
14 California process in Nevada.
15 It's our position that the Court does not
16 have subject matter jurisdiction over the alleged
17 tortious conduct because it's limited to those stark
18 realities, and it's really limited to how you conduct
19 an audit process. You ask a question. And these are
20 the facts which, as pled, he has pled his outrage and
21 his reaction to the fact that his privacies have been
22 invaded, that he has been embarrassed, that they've
23 used his name and address and Social Security number.
24 I suppose they do that to be sure they have the right
25 person when they talk to somebody.

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1 information to the FTB, including his residence
2 address, claimed to be an actual Nevada resident from
3 September 26, '91 on, and that the FTB thereafter set
4 out a few -- they used the circumlocution "requests"
5 rather than "demands," but a few requests to confirm
6 whether or not Mr. Hyatt was indeed a Nevada resident.
7 Thereby, I suppose, hopefully assisting him in not
8 having to pay California tax. They say surely making a
9 drive-by inquiry and sending a few letters to a few
10 people is in a sense innocuous; it's not tortious. He,
11 Mr. Wilson, suggests, in fact, that our position is
12 that California could not come to Nevada and make an
13 investigative inquiry as to Mr. Hyatt's residence.
14 And, of course, that's not the position at all.
15 Repeatedly they have said this is really a
16 tax case disguised as a tort case. They say Mr. Hyatt
17 wants to obtain a Nevada judgment on his residency that
18 will be res judicata entitled to full faith and credit
19 in California. And, yet, in their own papers, page 10
20 of their Motion for Judgment on the Pleadings, they
21 make the statement that any Nevada judgment will not be
22 given full faith and credit in California.
23 And that wouldn't be the first time. In
24 Nevada v. Hall -- and incidentally, Your Honor, Nevada
25 v. Hall is a very important case. And the FTB, in its
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1 But if these facts -- and I'm talking only
2 about the facts and not about the hyperbole that's used
3 to characterize them. If these are -- if these facts
4 amount to tortious conduct -- and we're looking at the
5 plea -- then simply having an inquiry and asking
6 questions, which is the FTB's responsibility, would be
7 tortious conduct in and of itself. I suggest that
8 can't be the law. And for that reason, I suggest that,
9 as pled, this Court does not have subject matter
10 jurisdiction over the tort causes of action in the
11 Complaint either.
12 Thank you, Your Honor. I talked a lot longer
13 than I had anticipated, and I appreciate your patience.
14 THE COURT: Plaintiff, please, in response.
15 MR. T. STEFFEN: Your Honor, my name is Tom
16 Steffen, and to my immediate right is Tom Bourke, who
17 has been admitted for purposes of this case. Next to
18 Mr. Bourke is Mr. Hyatt, plaintiff in the action. Don
19 Kula, a California attorney also admitted; and my son,
20 John, who is also representing Plaintiff.
21 THE COURT: Welcome.
22 MR. T. STEFFEN: Thank you. Your Honor, I
23 was commenting to our client yesterday that I felt I
24 could hear esteemed counsel's argument before he even
25 made it. And that was: Mr. Hyatt voluntarily supplied
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1 reply to Plaintiff's opposition, makes the statement on
2 page 17: Nevada by statute had waived its immunity
3 from suit, and, therefore, the suit was permitted to go
4 forward in California.
5 That is absolutely false. In fact, when the
6 State of Nevada was sued, the State walks in with a
7 placard saying sovereign immunity. The Superior Court
8 agreed, it went up to the California Supreme Court, and
9 the California Supreme Court said, whatever the law has
10 been in the past, hereafter there will be no sovereign
11 immunity given to the State of California on -- or
12 given to the State of Nevada on acts committed by
13 Nevada officials in the State of California. So it
14 goes back to Superior Court, and then the State of
15 Nevada walks in and says, well, we have a statute. We
16 would like you to give full faith and credit. That
17 statute limits the amount of damages to 25,000. We
18 have agreed within the State of Nevada to be sued up to
19 that limit, and that's only within the State.
20 So Nevada asked California to give full faith
21 and credit to the damage limitation. Of course, the
22 State of California said no. Said a lot more than
23 that. Said when Nevada agents cross the line, Nevada
24 sovereignty ends. It ends at the border.
25 And so that case made it very, very clear
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1 that hereafter Nevada would receive no comity from the
2 State of California, and we thereafter adopted the
3 California reasoning, the Nevada v. Hall reasoning, in
4 our Miannecki case, in effect.
5 Now, Your Honor, if this had been a simple
6 case of the FTB saying, "Look, we're going to have to
7 have some verification other than your own word and the
8 word of your tax professionals. We're going to have to
9 make some inquiry in the State of Nevada," there would
10 have been no problem. We wouldn't be here.
11 The problem is, Your Honor, we have a very
12 unique plaintiff in Mr. Hyatt. Mr. Hyatt is a
13 scientist, he's an engineer, and he's an extremely
14 successful inventor. Much of his technology exists to
15 enable us to have a personal computer at our desks.
16 And Mr. Hyatt was a closet inventor. He had worked on
17 his inventions in California for years, applied for
18 patents in approximately 1970, and they were not issued
19 until 1990, 20 years later. And at that point in time
20 it was recognized that this could be a source of great
21 wealth to Mr. Hyatt. Could be.
22 Thereafter, Mr. Hyatt started making plans to
23 move to the State of Nevada for a number of reasons.
24 And those plans reached fruition on September 26th,
25 1991, when he actually moved to Nevada. And thereafter,
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1 find out the names of residents in these areas, go back
2 to California, start with LEXIS, using cross references
3 in order to find out if they have formerly lived and
4 paid taxes in California.
5 Now, I suggest to Your Honor that this is
6 going to be a matter of great concern not only to this
7 Court but eventually possibly to other government
8 agencies in the State of Nevada. I think it's an
9 intolerable, outrageous condition. And that's what
10 prompted, by the way, the effort against Mr. Hyatt.
11 They didn't find a wealthy house to look at, but they
12 read of his success in a magazine almost two years
13 after he had already moved to Nevada and was residing
14 here and doing business here.
15 So, they contact Mr. Hyatt and ask for his
16 cooperation, and he, thinking that their intentions
17 were honorable, started voluntarily supplying them with
18 information with the hope that once having received the
19 information the matter would be ended.
20 Now, even, Your Honor, as the FTB admitted
21 that Mr. Hyatt was an extremely private person and even
22 as it admitted that he did not want to give them copies
23 of valuable documents, they promised confidentiality.
24 When Mr. Hyatt purchased his home in Las Vegas, he did
25 so through a trust, making his trusted CPA the only one
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1 the licensing negotiations continued on, and some
2 patent licensing arrangements were concluded with some
3 Japanese companies, and Mr. Hyatt became a very wealthy
4 citizen as a result. But the income was received in
5 Nevada by a Nevada resident, a Nevada citizen.
6 Now, before I get on to the investigation in
7 Nevada, Your Honor, I would like to reveal something to
8 the Court that I suggest places a great magnitude of
9 importance on this case. We have alleged, Your Honor,
10 in our Complaint -- excuse me, I'm hoarse, and I'm not
11 sure that it'll go away.
12 On page 9, paragraph 27 of our Complaint we
13 stated, and I quote, "Plaintiff is informed and
14 believes and thereafter alleges that the FTB has a
15 pattern and practice of entering into Nevada to
16 investigate Nevada residents who are formerly residents
17 of California and then assessing such residents
18 California State income taxes for time periods
19 subsequent to the date when such individuals moved to
20 and established residency in Nevada."
21 I would represent to the Court, Your Honor,
22 that we now have solid evidence that that indeed is
23 true, that the FTB is sending agents into Nevada as a
24 hunting ground. These agents will go to areas of
25 obvious wealth, gated communities, other communities,
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1 who appeared of record so that his name would nowhere
2 appear of record. He had an unlisted -- in fact, he
3 didn't even have an unlisted telephone number. He did
4 not have a telephone number. Mr. Hyatt had a post
5 office box. He had taken unusual measures to assure
6 that his actual residence would be confidential, would
7 be unknown to others, and this is where he maintains
8 his private, valuable documents.
9 So the FTB received the escrow papers on the
10 purchase of the Las Vegas residence on April 2nd,
11 1992. The address is redacted, and they're told why.
12 And they're told of the trust and why the trust was
13 formed, and the CPA would tell you that this is not an
14 unusual vehicle for maintaining confidentiality. So
15 this was done, the FTB acknowledged Mr. Hyatt's need
16 for privacy and made express commitments and promises
17 that these confidential matters would remain
18 confidential.
19 So what did they do even as they're in the
20 process of making these commitments?
21 May I approach the exhibit, Your Honor?
22 THE COURT: Certainly.
23 MR. T. STEFFEN: They send out these demands
24 to furnish information --
25 MR. WILSON: Your Honor, may I observe?
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1 THE COURT: Of course. And I will, at least
2 at this point, gentlemen, apologize for the logistics
3 of our courtroom. As you may or may not know, this is
4 a temporary courtroom, and it is so temporary we have
5 not yet been able to secure even a podium. So we do
6 apologize for the way in which you have to view these
7 items. Please feel free to jump in any place around
8 that you need to be so that you can view them.

9 MR. WILSON: Thank you, Your Honor.

10 MR. T. STEFFEN: This is fine. In fact, you
11 can come over here, Spike, if you want to.

12 These, of course, are blowups of documents
13 that are part of the record. They were attached to
14 Mr. Hyatt's affidavit in opposition to the motion to
15 quash.

16 Now, this particular demand goes to the
17 Las Vegas Valley Water District, and we know it is a
18 demand to furnish information. It's authorized by
19 California Revenue and Taxation Code, meaning the
20 obvious import is that it has extraterritorial
21 authority. It says: The People of the State of
22 California, To Las Vegas Valley Water District, in the
23 matter of Gilbert P Hyatt. They list his Social
24 Security number, and it says: "This demand
25 requires --" we highlight that because in many of
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1 California are investigating Mr. Hyatt or auditing or
2 trying to collect money from him, and the demand
3 requires you to furnish the following information.
4 They want to know if he's subscribed to the paper from
5 '91 to the present or from 1992 to the present and the
6 service at 7335 Tara, his actual home address. And
7 again they give out his Social Security number.

8 Your Honor, I have subscribed to I don't know
9 how many newspapers, and I have never yet been asked to
10 give a newspaper my Social Security number in order to
11 subscribe to a paper. Ordinarily, they'll take your
12 money and ask you where you want it delivered.

13 Mr. Hyatt never had, of course, newspapers
14 delivered to his actual residence, for obvious
15 purposes.

16 Here we have the same type of demand, this
17 going to the Association of Computing Machinery. And
18 here, Your Honor, I would like to candidly correct one
19 of our representations in our Opposition. We indicated
20 that the FTB had sent one of these demands to the
21 Licensing Executives Society, and they had, but it was
22 returned. The address was wrong. So the damage we
23 refer to in that aspect did not exist. But this one,
24 it did.

25 This went to the Association of Computing
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1 counsel's papers they refer to this as a request, but
2 it's definitely: This demand requires you to furnish
3 the Tax Board with information.

4 And then it indicates that: It will be used
5 by this department for investigation, audit, or
6 collection purposes pertaining to Mr. Hyatt.

7 They ask for copies of water bills with the
8 name of the person on whose account it was billed at
9 7335 Tara, Las Vegas, Nevada. There we have the actual
10 address that Mr. Hyatt had taken such painstaking steps
11 to prevent from becoming known. It now becomes part of
12 the database of the Las Vegas Valley Water District,
13 and it's common knowledge that private investigators
14 can gain access to this material constantly.

15 Now, notice we're also told that the period
16 of the audit is '91, the last part of '91 and up
17 through April 2nd of '92. But notice what they've
18 continued to ask for. January of '93 to December of
19 '93, January '94 to December of '94. January '95 to
20 the present. And this is dated March 24, '95. This
21 six-plus-year investigation, Your Honor, is still going
22 on, and it's still just an investigation.

23 We come now to the same demand. This time
24 it's to the newspaper, the Las Vegas Sun. They say the
25 same thing about this man: The people of the State of
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1 Machinery in New York. It was received and responded
2 to. Again, the Social Security number. This
3 association, Your Honor, is a worldwide association of
4 computer experts.

5 Now, the reason Mr. Hyatt is so concerned,
6 Your Honor, he's not someone who is just offended
7 because someone is asking a few questions. He has
8 turned over heaven and hell to provide himself with
9 absolute security. He said already in California
10 several of his intellectual properties have been leaked
11 and others have made billions of dollars of profit off
12 of it. So it's a very important matter to him.

13 Now, in the first place, the FTB promised not
14 to do this, and they did it. And Your Honor, although
15 I'm not authorized by my client to tell you exactly
16 what the result of this is, when all of a sudden he
17 finds out that his actual home address is now part of a
18 database, he has to take substantial costly efforts to
19 deal with that. In other words, his security had been
20 destroyed by the FTB, and Mr. Hyatt had to take other
21 measures in order to regain his security.

22 Now, another thing that the FTB did that it
23 promised it wouldn't do expressly, was it contacted
24 Mr. Hyatt's Japanese licensees with inquiries
25 pertaining to the tax audit and included segments of
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1 the agreement between Mr. Hyatt and the licensees. And
2 there was an obligation in each of those licenses that
3 they would be held in strict confidence, that they
4 would not be made available to third parties. Well,
5 what had become a burgeoning patent licensing business
6 for Mr. Hyatt ceased to exist. That has no longer been
7 the case.

8 And Your Honor, I'm confident, can appreciate
9 the fact that when you're talking in areas where the
10 stakes are so high, when you're talking about
11 microcomputers, and you're talking about rights to
12 microchip technology, when you're talking about digital
13 television, when you're talking about any number of
14 other things that this man has had so much to do with,
15 before someone commits to a license they look at any
16 number of things. And if they see that here's a patent
17 holder who is evidently under investigation by the
18 State of California auditing, investigating, maybe
19 wanting to collect taxes, there is a strong negative
20 implication there, Your Honor, I submit, that this man
21 is probably not what he purports to be.

22 This has been extremely embarrassing to
23 Mr. Hyatt who for 20 years suffered waiting for those
24 patents to be issued. He's been featured in any number
25 of magazines. I read a COMDEX account which referred

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1 In the first place, the FTB would have this
2 Court believe that since Mr. Hyatt filed the protest to
3 their proposed tax assessment, including fraud claims
4 now totaling up to about 21.8 million, they say that
5 since he's entered the protest, he is captive to them
6 and they have exclusive subject matter jurisdiction and
7 the administrative proceedings in California must be
8 exhausted before this Court could acquire subject
9 matter jurisdiction.

10 Well, Your Honor, in the first place, subject
11 matter jurisdiction over tort claims is -- I don't
12 think the Court needs much argument. I might cite the
13 Court to *Hanson v. Harrah's*, the seminal Nevada case on
14 retaliatory discharge for filing a Workman's
15 Compensation claim, and the employers stated you must
16 exhaust your administrative remedies. And the Court
17 said, sorry, there are no administrative remedies, and
18 this is governed by the law of torts.

19 Now, what Mr. Hyatt has alleged in his
20 Complaint is several torts which we feel under the
21 unique circumstances of this case can be demonstrated
22 to a trier of fact to be viable.

23 Now, with respect to otherwise exhausting
24 administrative remedies, even the FTB has indicated
25 that the exhaustion doctrine finds its roots in

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1 to Mr. Hyatt as indeed the founder of the personal
2 computer industry. So we have a man who has every
3 right and reason to want his absolute privacy, and the
4 FTB's own records acknowledge that. Sheila Cox, the
5 auditor, said, oh, we have even criminal -- even
6 referred to criminal statutes that would apply if they
7 revealed his confidential information.

8 So I would simply say, Your Honor, in that
9 regard, without going through the elements of each tort
10 unless the Court would want me to do so, we have seen
11 that the elements exist with respect to each tort, we
12 believe that the facts alleged cover the elements, and
13 that in this type of motion where all material
14 allegations of fact must be taken in favor of the
15 nonmoving party and all doubts also must be resolved in
16 favor of the nonmoving party, and even beyond that, if
17 there can be any hypothetical set of facts upon which a
18 proof might be adduced sufficient to enable the Court
19 to grant relief at trial, that would preclude the
20 granting of this type of motion.

21 Now, I think the main thrust of the FTB's
22 concerns, Your Honor, has to do with subject matter
23 jurisdiction. I don't share that concern. I think
24 this Court has subject matter jurisdiction for any
25 number of reasons.

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1 comity. The general rule would be as in Nevada,
2 however, that if you had a matter that was proceeding
3 before the Gaming Commission, that the courts, except
4 under the rarest of circumstances, could not intervene
5 because that's Nevada's statutory scheme. And the
6 Court could review the eventual outcome, but could not
7 intervene. At no place in Nevada law is there any
8 suggestion that Nevada courts are precluded from
9 exercising its primary function of protecting Nevada
10 citizens because an agency of another state has
11 commenced a proceeding.

12 Not only that, Your Honor, but even the FTB,
13 I think, admits there is no administrative proceeding
14 in California. There is an investigation. The FTB
15 went to the California legislature, and they said: We
16 don't want to be bothered with notions of due process
17 and a right to adjudication, so we just want our
18 investigative efforts to assess to be informal and an
19 investigative proceeding only. That's all it is.

20 There's nothing to exhaust in California.

21 Moreover, Your Honor, we have cited -- we
22 have cited cases. I think the Wisconsin case which
23 indicated that whenever the issue of exhaustion of
24 administrative remedies arises it's appropriate for a
25 Court to look into whether there is an adequate remedy,

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1 administrative remedy, and whether there is a speedy
 2 remedy. That Court went on to say if there are
 3 indications that the administrative proceeding exhibits
 4 bias or delay, then this Court will not refuse
 5 jurisdiction but will be willing to take it out of what
 6 I think it calls bureaucratic tyranny and assume
 7 jurisdiction.
 8 I cannot think, Your Honor, of a case that
 9 fits more squarely within that case. A six-plus-year
 10 investigation, Mr. Hyatt has protested the first time
 11 almost three years ago. There's never been anything
 12 done there. There's never been a hearing scheduled.
 13 Mr. Hyatt fully intends to run the course in
 14 California, convinced that at least by the time he gets
 15 to the Superior Courts there the FTB will be engaged in
 16 a number of reforms and will not prevail because this
 17 man is a Nevada resident. And we cited in our papers
 18 involving the motion to quash earlier, there's a
 19 federal case, a Barkley's case, a U.S. Supreme Court
 20 case, Your Honor, that states that it's
 21 unconstitutional for a State to impose an income-based
 22 tax on a nonresident on income earned outside of that
 23 taxing state.
 24 So that brings us to a couple of other
 25 points. Very quickly. The Nevada residency statute,
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1 seeking to require the exhaustion of administrative
 2 remedies. The Court there held that the -- whenever
 3 there are allegations of fraud, that is a ground for
 4 removing it from the administrative proceedings. In
 5 that case the assessor was accused of fraudulently
 6 undervaluing or overvaluing the property, and the Court
 7 took jurisdiction.
 8 In this case, Your Honor, I would suggest to
 9 the Court, because the question that might have
 10 immediately come to mind is: Why would declaratory
 11 relief be relevant during the period '91 and '92 when
 12 the FTB just really found out about Mr. Hyatt in '93
 13 and started doing most of their tortious activities in
 14 '95? And the reason is set forth, one of the reasons,
 15 in the fraud claim because Mr. Hyatt has alleged that
 16 the FTB's obtaining of information from him and
 17 disregarding all matters favorable to Mr. Hyatt and
 18 using such devices as nonexistent affidavits. We have
 19 evidence, Your Honor -- there are 3 affidavits. One
 20 from a disgruntled former wife who had been divorced
 21 from Mr. Hyatt for 17 years before the patents were
 22 issued and then she sought to reopen the divorce. And
 23 so they supposedly obtained an affidavit from her.
 24 They don't have an affidavit. They supposedly obtained
 25 an affidavit from a disgruntled brother that they don't
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1 10.155, Your Honor. The FTB glosses over that statute
 2 and says it's basically only a handle for divorce
 3 matters, out-of-state tuition, or voting rights, even
 4 though it doesn't say that at all. However, the FTB
 5 then goes on to declare that this statute, quote,
 6 "relates only to matters where a person's rights
 7 depend on the place of his legal residence."
 8 Well, Your Honor, it seems very obvious that
 9 Mr. Hyatt who has been here since September 26, '91, he
 10 has a very prosperous, successful business here with
 11 several patent lawyers and -- and, I mean, he's here in
 12 Nevada, it can be so clearly demonstrated. This would
 13 seem to indicate that he has a right to have his
 14 residency here determined by our Court because if he is
 15 a Nevada resident, as he claims, since September 26,
 16 1991, the FTB has to go away anyway. It has no legal
 17 right to try to tax Mr. Hyatt, and then it would appear
 18 that the most plausible course for it to take in
 19 California would be to do everything it could to make
 20 peace and do away with that proceeding. That would not
 21 affect, however, this case and this tort case.
 22 Also, Your Honor, we cite to the case of
 23 Aluowich (phonetic), if I can quickly find it. This
 24 case, Your Honor, which seems to escape my immediate
 25 observation, was a tax case where again they were
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1 have either, and the same with another family member.
 2 So I could go on and on about that, Your
 3 Honor, but the point I make with respect to fraud,
 4 because I think it is critical to the declaratory
 5 relief claim and precludes any grant of relief on that
 6 claim as well, the relevant period to the FTB is the
 7 latter quarter of '91 and the first quarter of '92, and
 8 that focused on the '91 audit, at first. Mr. Hyatt was
 9 cooperating, giving them information in return for
 10 their assurances that they were doing an objective
 11 audit and with his cooperation they could get through
 12 the matter, hopefully, without a great deal of
 13 additional effort.
 14 Well, what happened was, as soon as the
 15 information was given, they make the statement in our
 16 Complaint -- starts on page 24, Your Honor, paragraph
 17 63, where we talk about the representations were made
 18 to Plaintiff that the audit would be an objective
 19 inquiry, and then Plaintiff delivers copies of
 20 documentary evidence of the sale of his California
 21 residence on October 1, 1991 to a business colleague
 22 and confidant, and the FTB contended that sale was a
 23 sham and, therefore, evidence of Plaintiff's continued
 24 California residency and his attempt to evade
 25 California income tax by fraud.
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1 Plaintiff thereafter supplied evidence in the
2 form of his federal income tax which revealed on the
3 income tax form the sale of the home, the income
4 immediately generated, and the interest. This was
5 given to the FTB and was ignored, the FTB saying it was
6 a sham because the grant deed was not recorded until
7 June of 1993. Interestingly, then, in subparagraph D
8 on page 25, we say: After declaring Plaintiff's sale
9 of his California home on October 1, 1991 a sham, the
10 FTB later declined to compare the much less expensive
11 California home with the home Plaintiff purchased in
12 Las Vegas, Nevada, (a strong indication favoring Nevada
13 residency) stating that, quote, "From their records,
14 statistics, (size, cost, et cetera,) comparing the
15 taxpayer's La Palma home to his Las Vegas home will not
16 be weighed in the determination of residency, as the
17 taxpayer sold the La Palma house on October 1, 1991
18 before he purchased the house in Las Vegas during April
19 of 1992."
20 So on the one hand they say the sale was a
21 sham and charge him a 75 percent fraud assessment.
22 Then, on the other hand, they say, well, we're not
23 going to consider your larger home in California which
24 is -- I mean, in Nevada -- which is ordinarily an
25 indicia of a change of residence because you sold your
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1 Thank you, Your Honor.
2 THE COURT: Brief response, Mr. Wilson.
3 MR. WILSON: Briefly, Your Honor. I caught
4 the emphasis, and I will be brief. I feel a little
5 like I've been sitting through the saga of the Boston
6 tea party. I did not intend to try the facts and
7 circumstances of this case, and we have had a lot of
8 discussion this morning which hasn't had a thing to do
9 with the Complaint. And I can take up a lot of your
10 time talking about this audit, and I'm not going to do
11 that. I don't think that's part of why we're here.
12 We're not here to talk about the merits of the audit or
13 the findings, but I would like to make a couple of
14 comments in brief reply, Your Honor.
15 Counsel refers to NRS 10.155 which has to do
16 with legal residence, suggesting that demonstrating
17 legal evidence was in some way a predicate to one's
18 ability to sue for cause of action for tortious
19 conduct. And that's not what this says. I'll read
20 briefly: Unless otherwise provided by specific
21 statute, the legal residence of a person with reference
22 to his right of naturalization, right to maintain or
23 defend any suit at law or equity or any other right
24 dependent upon residence is where he's physically
25 present.

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1 smaller La Palma, California home on October 1, '91.
2 So they view it as a sham in one place, and they accept
3 the sale at another.
4 Well, Your Honor, I can only say that the
5 claim for declaratory relief, in my judgment, is
6 virtually mandated by Nevada law. This man who has
7 been here since September 26, '91 and has been
8 investigated for over six years and it's still going
9 on, who has his business here, who can bring forth all
10 kinds of evidence that he is actually a resident here
11 is the ongoing subject of harassment, intimidation.
12 And, in fact, the latest papers, they said: You could
13 have simply paid the tax and avoided the interest, and
14 then sought a refund.
15 So they're saying now: Your interest is
16 accruing at about \$5,000 a day. There's no relief in
17 sight, Your Honor.
18 We suggest to the Court that it has ample
19 subject matter jurisdiction to determine Mr. Hyatt's
20 Nevada residency and to enable him to move on and
21 demonstrate on the merits that these torts are not
22 simply contacting a person here and there, that the
23 torts are very real and the damages are enormous as
24 will be later explained to the Court in some type of in
25 camera hearing.

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1 That's not to say that you have to have an
2 element of your cause of action for tort to prove your
3 residence. If you sue for divorce, you have to prove
4 six weeks of residence, for example. That's what this
5 refers to.
6 Any other right dependent upon residence or
7 any right to maintain or defend any suit at law or
8 equity dependent upon residence.
9 An action in tort is not dependent upon
10 residence. A suit to divorce is. A suit with respect
11 to taxes may be, but we're not talking about any right
12 in Plaintiff's Complaint here, in his action here,
13 which is dependent upon residence.
14 Now, I indicated earlier that I was not going
15 to prejudge the FTB's review of this case, and I meant
16 that. We've had a lot of discussion which is trying
17 this lawsuit here today, and it's not relevant. What
18 we're here today to do is to look at what's pled in the
19 Complaint and nothing more. We've had a reference to a
20 loss of business which the plaintiff has suffered
21 because of this audit. That's not pled anywhere in the
22 Complaint, and it's prejudicial to this proceeding.
23 It's not relevant. If Plaintiff wants to amend his
24 Complaint, assert cause of action pursuant to
25 additional claims, why, it may, but that's not before
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1 us.
 2 Counsel has commented that the administrative
 3 process in California is only an investigation, and
 4 that's all it is, and there is nothing further. It
 5 involves nothing further. That also is not true. You
 6 have an audit, that audit then is reviewed by the FTB
 7 which is subject to participation by the taxpayer.
 8 It's then reviewed by the State Board of Equalization
 9 which is independent of the Tax Department or the FTB.
 10 That board, I think, has some reputation for
 11 modifying or reversing the decisions made by the FTB.
 12 It's similar by analogy, I suppose, Your Honor, to the
 13 relationship between the Nevada Tax Commission and the
 14 Tax Department, where those two are frequently
 15 adversary with respect to conclusions by the Department
 16 of Taxation.
 17 And after that, there's review by the
 18 Superior Court. So California's process is not just
 19 one of investigation and quick conclusion. This is
 20 not -- this is not a shoot-out at the corral, Your
 21 Honor. It's deliberative, and the plaintiff had been
 22 participating in this until he filed his lawsuit
 23 two-and-a-half months after the second protest.
 24 Let me make a comment about Nevada versus
 25 Hall. I wasn't commenting on what the defense was that
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1 Water District.
 2 Now, isn't it relevant, if you're going to be
 3 fair in an inquiry in an audit to say, well, the period
 4 in question is September 26 to April 3, 1992. He
 5 bought a house and moved in. Sounds like he was a
 6 resident, right? Did he live there? Was it real? You
 7 check the water bills. If there's a reasonable
 8 consumption of water during the period of time, doesn't
 9 that suggest that somebody is living there? Probably
 10 the owner, Mr. Hyatt. Was it temporary and
 11 transitory? Was he just using the water on weekends?
 12 I suppose you'd take a look at the balance of
 13 '92, after he moved in to December of '92. That's
 14 what the first entry is. How about the next year, in
 15 '93? How about the next year, in '94, or '95 to the
 16 present? That doesn't suggest that this audit is open-
 17 ended. It suggests a fair and honest attempt to find
 18 other corroborative evidence of water usage, the
 19 inference of which would be: If he's using water after
 20 April of '92 in reasonable levels and the use is
 21 consistent, it suggests permanent residence, doesn't
 22 it? And isn't that circumstantial evidence of an
 23 attempt to make a state your domiciliary? And isn't
 24 it, at least, indirectly corroborative of his residence
 25 between September the 26th to April 3 of '92.
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1 the State may have raised in that case. It's the
 2 legislature which has jurisdiction to waive immunity,
 3 and the legislature did with respect to torts by its
 4 employees. They placed a limit on it which was not
 5 recognized by California, but that's not to say that
 6 immunity was not waived. Indeed, it was. Subject to a
 7 limitation, I'll grant you, which California properly
 8 declined to recognize and found liability.
 9 But as I said before, we're not talking
 10 about -- we're not talking about a tortious action
 11 here. We're talking about a subject matter involving
 12 sovereign power of another State. Nevada hasn't
 13 waived, if you will, it's sovereign power to
 14 investigate with respect to gaming licenses. They're
 15 simply not related.
 16 Let me make a comment about these charts.
 17 And again I guess I'm indulging in talking about this
 18 case, but I must say that I don't want the Court to be
 19 misled. The only period of time we're talking about is
 20 between September 26 of 1991 and April 3 of 1992.
 21 Now, my good friend, counsel for the
 22 plaintiff, talks about all of these subsequent periods
 23 here, April of '92, December of '92. January of '93,
 24 December of '93. January of '94 to December, and
 25 January of '95 to the present. This has to do with
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1 I suggest to you that that's not for the
 2 purpose of extending the tax inquiry. I suggest to you
 3 that those questions have to do with corroborating, if
 4 you will, Plaintiff's claim of domiciliary intent
 5 because if he's living there he's using water, and if
 6 he's using water clear to the present time, he's been a
 7 resident since then. It bears upon the period of time
 8 in question. Same with these others.
 9 I don't know about whether you need your
 10 Social Security number to get a paper. Obviously, it's
 11 on the form letter, but I must say until a couple of
 12 years ago your Social Security number appeared on your
 13 driver's license. I just looked at mine. It's there.
 14 It's not any more. People have decided those numbers
 15 are a little more sensitive and they don't want them
 16 bounced around, but that's recent history, Your Honor.
 17 So I suggest to you that we don't need to
 18 find dark and sinister motive on the part of FTB with
 19 respect to its inquiry. If anything, I would submit to
 20 you that that's an attempt to be fair. If they can
 21 demonstrate that Mr. Hyatt was a full-time permanent
 22 resident and used a lot of water, it's certainly
 23 corroborative and circumstantial evidence supporting
 24 his claim. But if he had the intent to make Nevada his
 25 home at April 3 of '92, he probably had that intent
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1 back in September of '91 because he's been here.
 2 Totally different twist on that, isn't it? I
 3 apologize for arguing the case, but I'm saying there's
 4 a bit more to the context of these circumstances than
 5 that.
 6 I need to say something else, then I'm going
 7 to sit down and be quiet. My good friend and counsel
 8 for the opposition made the comment that he wanted to
 9 represent to you that, "We have solid evidence of a
 10 practice by California of viewing Nevada as a hunting
 11 ground and chasing former residents over here." Now,
 12 not only was it not pled, I don't know what that
 13 evidence is, but it's improper, doesn't belong in this
 14 courtroom in this hearing. It's prejudicial, and it
 15 has no part in this argument.
 16 I meant it when I said I'm not prejudging
 17 what the outcome of the audit would be, whether by the
 18 FTB itself or the Board of Equalization or by the
 19 Superior Court. I'm not suggesting by inference or
 20 argument what that outcome might be. I don't think
 21 that's before this Court, and I don't think it's proper
 22 to argue the tax case because that's not what we're
 23 talking about.
 24 We're talking about what's in the Complaint
 25 and how it is pled, and is the Complaint sufficiently
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1 MR. WILSON: I think we need to talk to the
 2 Court, Counsel.
 3 MR. T. STEFFEN: I agree.
 4 THE COURT: In fact, I would suggest that you
 5 have about two minutes to wrap up your argument.
 6 MR. T. STEFFEN: All right. Thank you, Your
 7 Honor. I think, unfortunately, Mr. Hyatt has been the
 8 victim of a voracious agency that has willfully set out
 9 to extort money from him in various ways which we are
 10 confident can be proved. I can give you hypotheticals
 11 now. I don't think that's necessary. But it can be
 12 proved.
 13 The FTB has attempted at the very outset by
 14 disregarding his evidence -- again, this is
 15 demonstrable -- and developing, as we've stated in our
 16 pleadings, a colorful basis for going to him and saying
 17 you owe this enormous amount of money. And there was
 18 also in our pleadings an attorney by the name of Anna
 19 Jovanovich, who represented the FTB, told Mr. Cowen,
 20 Mr. Hyatt's tax representative in California: At this
 21 point in time wealthy taxpayers usually settle because
 22 they don't want to risk having their financial affairs
 23 made public.
 24 THE COURT: The issue before us now is the
 25 Motion for Judgment on the Pleadings.
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1 fatally flawed to demonstrate that this Court does not
 2 have subject matter jurisdiction. That's why we're
 3 here today. I can spend a lot of time talking about
 4 this tax case. It's not relevant.
 5 Thank you, Your Honor.
 6 THE COURT: Rebuttal, Mr. Steffen.
 7 MR. T. STEFFEN: Thank you, Your Honor.
 8 THE COURT: Briefly.
 9 MR. T. STEFFEN: I am very pleased to hear
 10 Mr. Wilson say this is not a tax case because time and
 11 time again they have said just the opposite, this is a
 12 tax case.
 13 Counsel, with respect to my statement about
 14 the hunting ground, you find that on the bottom of
 15 page 9 on the First Amended Complaint, and that's what
 16 you said you're interested in was the allegations of
 17 the Complaint, and that's precisely, in paragraph 27,
 18 what that refers to. And all I did was say we now have
 19 solid evidence that that's true. That was alleged on
 20 information and belief. So --
 21 MR. WILSON: I'm not going to reply unless
 22 you want me to.
 23 THE COURT: You needn't.
 24 MR. T. STEFFEN: I'm just telling you it's in
 25 the Complaint. Like Prego, it's in there.
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1 MR. T. STEFFEN: That's correct. And I would
 2 suggest, Your Honor, that based on the burdens of proof
 3 that apply to both judgment on the pleadings and the
 4 12(b)(5) motion which is now incorporated in the
 5 pleadings that all facts have to be resolved in favor
 6 of the plaintiff, they have to be accepted as true.
 7 All doubts have to be resolved in favor of the
 8 plaintiff. And I suggest, Your Honor, on that basis,
 9 that Defendant's motions should be denied.
 10 THE COURT: As I just indicated, this matter
 11 that we have now spent an hour-and-a-half nearly on, is
 12 brought to the Court on a Motion for Judgment on the
 13 Pleadings. Plaintiff in their Complaint seeks certain
 14 relief, a declaration, in fact, that he was a Nevada
 15 resident since September of 1991 pursuant to California
 16 law. He also prays for compensatory and punitive
 17 damages with respect to certain tort claims. Because
 18 this is a 12(c) motion for judgment on the pleadings,
 19 as I think everyone knows, this motion can be brought
 20 at any time after the pleadings are closed. It is most
 21 appropriate, however, gentlemen, when material facts
 22 are not in dispute and judgment on the merits is
 23 warranted based upon the content of the pleadings
 24 alone.
 25 Having said that, now, I think the defendant
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1 also argues the declaratory actions seeking
2 interlocutory review of the administrative decisions in
3 this case are inappropriate, and I believe the Defense
4 cites to some Nevada law. That is PSC versus Eighth
5 Judicial Court where our Court held that Courts should
6 not adjudicate when administrative decision is still
7 pending and where a statute exists to provide an
8 administrative remedy. Thereafter, there's some -- I
9 would say some guidance provided by the case of
10 Resnick.
11 But to get back to where I think we need to
12 be, the first matter that needs to be addressed is
13 subject matter of jurisdiction. This caused me to do
14 some research even beyond that which is contained in
15 the pleadings, and I might say that my initial comments
16 regarding the voluminous nature of the pleadings in
17 this case may have, at first blush, seemed to be
18 sarcastic. I can tell both sides of this dispute that
19 I have learned a lot just by preparing for this case,
20 and I think that is always something that I should
21 thank counsel for because the pleadings in this case
22 were very well prepared on both sides, very well
23 supported by law and, in fact, exhibits giving me the
24 law that counsel were referring to. And I want to make
25 sure before I render a decision in this case that you
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1 that, in fact, his residency was of Nevada, for
2 purposes of the tax case only. Which should mean,
3 gentlemen, that I am not ruling that we don't have
4 subject matter jurisdiction -- in fact, let me state
5 that in the affirmative. I am ruling that I believe
6 that we have subject matter jurisdiction with respect
7 to the tort claims. And for that reason, this case is
8 going to stay with me for a while.
9 Without going to the merits of the case,
10 which I don't think I should in this case, the
11 administrative actions still pending in California,
12 there is case law -- adequate case law that tells me I
13 should not be addressing that. Specifically, Resnick
14 and the PSC case, both Nevada cases, tell me that
15 declaratory relief is not available during pendency of
16 an action, are not an -- I will say this incorrectly,
17 A-b-e-l-l-e-i-r-a. California cases tell us about the
18 defective failure to exhaust administrative remedies is
19 jurisdictional, and on that basis alone, I could and
20 should deny jurisdiction.
21 Now, as you can tell, I have looked at the
22 factual bases of this claim. I think there was no way
23 for me as to get to a decision without doing so. Still
24 in all, as a 12(c), taking all the facts in favor of
25 the nonmoving party, I still believe that it is
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1 all realize that I appreciate that, and it makes for
2 easier work in many instances.
3 I think the matter of the subject matter
4 jurisdiction regarding Plaintiff's residency claim
5 under California tax code is of -- mostly the thing I
6 need to deal with first because it's going to take care
7 of certain other matters. Defendant argues a lot of
8 things. Among them, they argue that these actions
9 couldn't go forth in California until the FTB matter is
10 concluded and that, therefore, they should be barred in
11 Nevada. I think that goes one step beyond where we
12 need to go.
13 The question in this case that I really have
14 is: How do I go about determining whether or not
15 there's subject matter jurisdiction without looking
16 beyond the face of the pleadings, which in a 12(c)
17 that's the only thing I'm supposed to do. Certainly I
18 could treat this as a Rule 56 motion for summary
19 judgment, in which case, I could look at any number of
20 things.
21 However, in this case, I think that I am
22 going to do what I refer to as a bifurcation. I'm
23 going to tell you I do not believe Nevada has subject
24 matter jurisdiction over this narrow part of
25 Plaintiff's claim, and that is the request to declare
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1 appropriate for me to decline subject jurisdiction with
2 respect to a declaration that Plaintiff's residency was
3 here in the State of Nevada for purposes of the tax
4 case.
5 And I want to be sure that I'm getting the
6 language correctly. The request in the Complaint was:
7 A declaration that he was a Nevada resident since
8 September of 1991 pursuant to California law.
9 That is which I am denying -- or declining to
10 entertain based upon lack of subject matter
11 jurisdiction.
12 As to the tort claims, I believe we do have
13 subject matter jurisdiction. They will remain.
14 Furthermore, I think the case of Bernard would allow me
15 to continue with that just based upon the pleadings
16 themselves. So for that, I am going to ask you to
17 prepare an order.
18 There were several other housekeeping matters
19 that we took up the last time we were here with respect
20 to scheduling of depositions. Have there been any
21 problems? And I may later kick myself for asking this
22 question because I am, in fact, not going to entertain
23 discovery arguments. That's what a discovery
24 commissioner is for. I just want to be sure, since I
25 did make an order about how that was going to go
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1 forward, I want to be sure that we're still in sync
2 with that.
3 MR. BOUKE: Yes, there are problems, Your
4 Honor. We have asked for a scheduling order. We've
5 said we'll take whatever witness you have, starting a
6 week from -- starting basically next Tuesday, and they
7 have given us no names for any witnesses. So we said,
8 well, we will take Carol Ford in Sacramento for the
9 first four days, and there's another two witnesses in
10 Los Angeles for the next two days, but they have not
11 acquiesced or agreed to that. So as of now I'd say
12 we're heading for troubled waters.

13 THE COURT: Well, you're not in them yet. I
14 think the current is still calm at this point. In
15 fact, did I hear you talk about six day's worth of
16 depositions that I scheduled -- or six day's worth of
17 the discovery that is scheduled?

18 MR. BOUKE: Eight days.

19 THE COURT: Eight days.

20 MR. BOUKE: That we've scheduled, but they
21 haven't said that the witnesses are available or
22 anything. In other words, we've been trying for weeks
23 to say, "Tell us who is available. We'll take whoever
24 is available."

25 MR. WILSON: They are not scheduled. We need
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1 There's way too much discovery to take place
2 in this matter for anyone to drag their feet. My order
3 the last time we were here had to do with reasonable
4 requests, if I recall correctly, and they should be
5 scheduled in a reasonable time after this proceeding.
6 So we're there now. I would hope with this admonition
7 that we could move forward.

8 The meet and confer is appropriate. I would
9 allow you to use the courtroom for that purpose after
10 I'm gone. I think it should be -- something should be
11 done today. We should at least put the minds together
12 today and get some direction on where we're going to go
13 and I will wait for further matters to be placed on
14 calendar as I have no doubt they will be in this case.

15 MR. BRADSHAW: Your Honor.

16 THE COURT: Yes?

17 MR. BRADSHAW: Your Honor, as part of this
18 process, you've stayed discovery in part. Outstanding
19 at that time were Plaintiff's document requests and
20 requests to admit facts. Responses to those have not
21 been forward because of the stay. We would need a
22 reasonable amount of time to do that, perhaps a week or
23 so to make our formal response to those. We especially
24 don't want to get into a problem over admissions of
25 fact because it's unclear when discovery is back on and
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1 to meet and confer and agree on what witnesses and
2 when, and we didn't want to do that until the Court
3 rendered a decision on this matter. We didn't know
4 whether that was going to be rendered today or the
5 Court would take it under advisement and render it
6 later on.

7 Let us do the meet and confer. The Court's
8 ruling today obviously eliminates a rather broad area
9 of discovery.

10 THE COURT: I would think so.

11 MR. WILSON: And that will obviously have an
12 effect on what witnesses need to be deposed. So I
13 suggest we meet and confer. If we have trouble, we can
14 come back and ask for the Court's help.

15 THE COURT: I think that's appropriate. I
16 must emphasize again, however, this is -- even with the
17 decision that was made today, this remains a weighty
18 case, and I suspect that it is of the utmost importance
19 to Mr. Hyatt, and I don't want there to be any foot
20 dragging. We really cleared an awful lot of ground
21 today. This was a huge motion. It was something that
22 took time, was, once again, tremendously presented from
23 both sides. But now we're in the meat of it, and this
24 case should not be bogged down with discovery
25 disputes.

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1 how much time we would have to pick up discovery that
2 was pending.

3 We did get some depositions done, or
4 partially done, at least, during the interim here where
5 the parties have exchanged what they plan on doing for
6 about the next two months. That needs to be collated,
7 but the Attorney General's office has been working on
8 witness availability, and we're willing to meet and
9 confer with counsel and work that out over the next few
10 weeks.

11 THE COURT: Did I hear that a response to --
12 is it a request to admit that you say have you have --

13 MR. BRADSHAW: Request to admit facts and
14 document requests are outstanding. Some of the
15 documents have gone forward in the interim, but the
16 responses to request to admit facts are at a standstill
17 because of the stay, and we wondered how much time do
18 we have to actually respond.

19 THE COURT: You have represented you can have
20 them to Plaintiff within a week?

21 MR. BRADSHAW: I think a week.

22 MR. LEATHERWOOD: Yes, Your Honor. I think
23 we'll have them within seven to ten days.

24 THE COURT: Okay. I'll put a ten-day limit
25 on it. You have it over to plaintiff's within ten
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1 days.
2 MR. BRADSHAW: Thank you.
3 THE COURT: Anything else we need to take up?
4 MR. T. STEFFEN: Your Honor, I have a
5 lingering question about the declaratory relief claim.
6 You said that you were entering your judgment for
7 purposes of the tax case.
8 THE COURT: With respect to declaring
9 Plaintiff's residency under California law from or at
10 September 1991, yes.
11 MR. T. STEFFEN: All right, under California
12 law. Now, the thing that I'm wondering is if you're,
13 in effect, still keeping the declaratory relief action
14 alive but without prejudice to the proceedings in
15 California on the same issue of residency.
16 THE COURT: It can be a denial without
17 prejudice if that's what you would like it to be. I
18 want you to be real careful, though. I'm not going to
19 revisit this issue again.
20 MR. T. STEFFEN: That's what I want to make
21 clear. So do I understand that the declaratory relief
22 claim is still alive, but it will have to be made clear
23 that any judgment resulting from a declaratory judgment
24 will not be prejudicial to the California tax
25 proceeding involving Hyatt's residency?
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1 THE COURT: It is denied in its entirety for
2 lack of subject matter jurisdiction.
3 MR. T. STEFFEN: All right. Thank you, Your
4 Honor.
5 (Thereupon, the proceeding
6 concluded at 11:50 a.m.)
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8 -oOo-
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10
11 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF
12 PROCEEDINGS
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16 Karen G. Mell, CCR No. 412
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1 THE COURT: I sense a need to respond.
2 Mr. Wilson.
3 MR. WILSON: Yes, thank you. I didn't
4 understand the Court to say that. I understood the
5 Court to say that the first cause of action was going
6 to be denied, but that had nothing to do with the
7 residency issues going forward in the administrative
8 process in California.
9 THE COURT: That is, in fact, part of the
10 basis of my decision.
11 MR. WILSON: Right. That's what I understood
12 it to be. So the first cause of action is no longer a
13 part of this case here.
14 THE COURT: That's correct.
15 MR. WILSON: Thank you.
16 MR. T. STEFFEN: So you're simply denying the
17 declaratory relief, then, cause of action altogether,
18 and not just for tax purposes.
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24 / / /
25 / / /
ALL-AMERICAN COURT REPORTERS (702)240-4394

EXHIBIT 12

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

vs.

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

Defendants.

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

PARTIAL JUDGMENT
ON THE PLEADINGS

Date of Hearing: April 7, 1999
Time of Hearing: 10:00 a.m.

The Defendant's Motion for Judgment on the Pleadings having come before the Court on the 7th day of April, 1999, the Defendant being represented by Thomas R. C. Wilson, Esq., James W. Bradshaw, Esq., Felix Leatherwood, Esq., and George Takenouchi, Esq. and the Plaintiff being present in court and represented by Thomas L. Steffen, Esq., John T. Steffen, Esq., Thomas K. Bourke, Esq., and Donald Kula, Esq., and the Court having considered the Defendant's Motion, the Plaintiff's Opposition, the Defendant's Reply, the Plaintiff's Surreply and the Defendant's Response to Surreply and the supporting authorities, as well as the oral arguments of counsel, and GOOD CAUSE APPEARING;

FILED

APR 13 3 00 PM '99

Shirley Higgins
CLERK

AA001056

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1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion
2 for Judgment on the Pleadings is granted as to the Plaintiff's First Cause of Action for
3 Declaratory Relief, the Court lacking subject matter jurisdiction. The Motion is denied as
4 to the Second through Eighth causes of action.

5 IT IS FURTHER ORDERED that the discovery stay is lifted and that the parties
6 may proceed with discovery to commence within a reasonable time following the April 7,
7 1999 hearing. The Defendant's responses to outstanding requests to admit facts and
8 document requests served by the Plaintiff on February 22, 1999, prior to the stay of
9 discovery, shall be served on or before April 19, 1999.

10 Dated this 16 day of April, 1999.

11
12
13 JAMES GRENNAN

14 _____
15 DISTRICT COURT JUDGE

16
17
18
19 Submitted by:
20 McDonald Carano Wilson McCune
21 Bergin Frankovich & Hicks, LLP

22 

23 Thomas R. C. Wilson, Esq.
24 Matthew C. Addison, Esq.
25 Bryan R. Clark, Esq.
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10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 * * * * *

13 **GILBERT P. HYATT,**
14 **Plaintiff,**

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

15 vs.

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

Date of Hearing: 4/7/99
Time of Hearing: 10:00 a.m.

19 **Defendants.**

20 **NOTICE OF ENTRY OF ORDER**

21 **TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;**

22 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that an Order was entered
23
24 ...
25 ...
26 ...
27 ...
28 ...

AA001058

1 in the above matter on the 19TH day of April, 1999, a copy of which is attached hereto.

2
3 DATED this 20th day of April, 1999.

4 McDonald Carano Wilson McCune
5 Bergin Frankovich & Hicks LLP

6
7 By: 

THOMAS R. C. WILSON, ESQ.

Nevada State Bar # 1568

MATTHEW C. ADDISON, ESQ.

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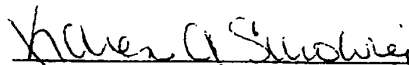
12 **CERTIFICATE OF SERVICE**

13 I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin
14 Frankovich & Hicks LLP., and that I served a true and correct copy of the foregoing **NOTICE OF**
15 **ENTRY OF ORDER** by U.S. Mail on this 20th day of April 1999, upon the following:

17 Thomas L. Steffen, Esq.
18 Mark A. Hutchison, Esq.
19 Hutchison & Steffen
20 8831 W. Sahara Ave.
21 Las Vegas, NV 89117

22 Felix Leatherwood, Esq.
23 Deputy Attorney General
24 Attorney General's Office
25 300 South Spring Street
26 Los Angeles, CA 90013

27 Thomas K. Bourke, Esq.
28 601 W. Fifth Street, 8th Floor
Los Angeles, CA 90071



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