

IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 80884

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant

v.

GILBERT P. HYATT

Respondent

On Appeal from the Eighth Judicial District Court, Clark County
Case No. A382999
THE HONORABLE TIERRA JONES, District Judge, Department X

**APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P.
HYATT - VOLUME 5 OF 17**

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3	Exhibits 14-34 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	4, 5, 6, 7, 8	RA000847- RA001732
4	Exhibits 35-66 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	8, 9, 10, 11, 12	RA001733- RA002724
5	Exhibits 67-82 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	12, 13, 14, 15, 16	RA002725- RA003697
6	Exhibits 83-94 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	16, 17	RA003698- RA004027

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 1st day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 5 OF 17** to be served by the method(s) indicated below:

_____ via U.S. mail, postage prepaid;
 X via Federal Express;
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1 reasonable. Here the FTB announced in its first contact letter with Hyatt that he could expect
2 confidential treatment of all of his personal information.⁸⁴ Subsequently, FTB auditors promised
3 Hyatt confidential treatment both orally and in writing.⁸⁵ In addition, the FTB publishes
4 statements on its web page and in booklets saying that taxpayers have a right to confidential
5 treatment.⁸⁶

6 Ironically, the FTB's own internal policies, notices, regulations, handbooks, guidelines
7 — all of which were ignored by the FTB in this case — also promise the right to privacy.⁸⁷

8 Notwithstanding Hyatt's high expectation of privacy, the FTB made mandatory
9 "Demands for Information" about him to individuals, government agencies, and businesses for
10 which no judicial permission was sought or received and for which no notice was given to
11 Hyatt.⁸⁸

12 **(a) Actions for invasion of privacy against a taxing body are**
13 **increasingly frequent.**

14 Of importance to Hyatt's action, "[d]uring the past five years about 150 lawsuits have
15 been filed against the IRS claiming wrongful disclosure of confidential information."⁸⁹ In 1997,
16 a Colorado judge awarded \$250,000 in punitive damages against the IRS for being "grossly
17 negligent" and "reckless" in placing a woman in a false light by claiming she owed \$380,000
18 more than she in fact owed.⁹⁰

19 Another recent large verdict against tax authorities for invasion of privacy rights and
20

21
22 ⁸⁴ June 17, 1993 letter from Marc Shayer, H 01213, *see* Exhibit 8 to Appendix.

23 ⁸⁵ Cowan Affid., ¶ 6-29.

24 ⁸⁶ Bourke Affid., ¶ 25.

25 ⁸⁷ Bourke Affid., ¶ 25.

26 ⁸⁸ *See, e.g.,* Hyatt Affid., ¶ 49-51, 143-147

27 ⁸⁹ Louis R. Mizell, Jr., *Invasion of Privacy*, of 127, (Berkeley Books 1998), *see* excerpts
attached as Exhibit 9 to Appendix.

28 ⁹⁰ *Id.* at 127-128.

abuse of authority is *Jones v. United States*.⁹¹ The district court awarded two taxpayers over \$5,700,000, including over \$325,000 in emotional distress damages for the destruction of their business caused by an IRS agent leaking confidential information which damaged their reputation in the oil business. There are striking parallels between this case and *Jones*. In each case, morals, character, and integrity are extremely important for the business involved.⁹²

The abusive tactics of taxing agencies are increasingly the subject of not only judicial action, but also Congressional investigation.⁹³

(b) Courts are particularly vigilant in enforcing informational privacy rights related to social security numbers, addresses, and other private information.

Courts of every level — including the U. S. Supreme Court — find disclosure of private personal information such as social security numbers and secret addresses actionable and a violation of an individual's "informational privacy" rights.

(i) U. S. Supreme Court informational privacy cases.

The U. S. Supreme Court has issued three opinions bearing on the issue. *United States Department of Defense v. Federal Labor Relations Authority (FLRA)*, held that disclosure of employees' home addresses to their union was a "clearly" unwarranted invasion of privacy."⁹⁴ That case was largely based on *United States Dept. of Justice v. Reporters Committee for Freedom of Press*,⁹⁵ which recognized that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." Finally, *United States Department of State v. Ray*,⁹⁶ held that the disclosure of names and addresses would be a clearly unwarranted invasion of privacy because *confidentiality had been*

⁹¹ 9 F. Supp. 2d 1119 (D. Neb. 1998).

⁹² *Id.* at 1134.

⁹³ U.S. Congressional Record excerpt, Exhibit 10 to Appendix.

⁹⁴ 510 U.S. 487, 489, 502, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994) (emphasis added).

⁹⁵ 489 U.S. 749, 763, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989).

⁹⁶ 502 U.S. 164, 177, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991).

1 *promised* and disclosure of the information would be “a special affront to his or her privacy.”

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

4 *State ex rel. Beacon Journal Publishing Co. v. City of Akron*,⁹⁷ found that the disclosure
5 of social security numbers “would violate the federal constitutional right of privacy” and held
6 that because the Privacy Act of 1974 regulates the use of Social Security numbers, individuals
7 “have a legitimate expectation of privacy in their Social Security numbers.” Two recent
8 Washington cases have found disclosure of social security numbers to be highly offensive.
9 *Progressive Animal Welfare Society v. University of Washington*,⁹⁸ held that “[T]he disclosure of
10 a public employee’s social security number would be highly offensive to a reasonable
11 person” Furthermore, in *Tacoma Public Library v. Woessner*,⁹⁹ the Court similarly held that
12 “[w]e agree that release of employees’ identification number would be highly offensive.”¹⁰⁰

13 Other cases concluded that certain citizens — such as Gil Hyatt — have a particular need
14 or desire to keep their address confidential. *National Association of Retired Federal Employees*
15 *v. Horner*,¹⁰¹ held that “[i]n our society, individuals generally have a large measure of control
16 over the disclosure of their own identities and whereabouts. That people expect to be able to

17 ⁹⁷ 70 Ohio St. 3d 605, 607, 640 N.E.2d 164, 166 (Ohio 1994).

18 ⁹⁸ 125 Wash. 2d 243, 884 P.2d 592 (Wash. 1994).

19 ⁹⁹ 90 Wash. App. 205, 951 P.2d 357 (Wash. App. 1998), *opinion amended on remand on*
20 *other grounds*, 972 P.2d 932 (Wash. App. 1999).

21 ¹⁰⁰ See also *Sheet Metal Workers International Association, Local Union No. 19 v. United*
22 *States Department of Veterans Affairs*, 135 F. 3d 891 (3d Cir. 1998) (holding that disclosures of
23 names, **social security numbers** and addresses of employees would constitute an unwarranted
24 invasion of personal privacy); *Greidinger v. Davis*, 988 F.2d 1344, 1352, 1354 (4th Cir. 1993)
25 (finding that the Virginia voter registrar’s public disclosure of voters’ **social security numbers**
26 brought the attendant possibility of “a serious invasion of privacy” and detailing horror stories of
27 stolen identities and concluding that “the harm that can be inflicted from the disclosure of a
28 **social security number** to an unscrupulous individual is alarming and potentially financially
ruinous.”); *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). Hyatt’s opposition to the
FTB’s motion on the judgment for pleadings at note 14 cites additional authorities.

¹⁰¹ 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

1 exercise that control is 'evidenced by . . . unlisted telephone numbers by which subscribers may
2 avoid publication of an address in public directory, and postal boxes, which permit the receipt of
3 mail without disclosing the location of one's residence.'" Moreover, the court could have had
4 Gil Hyatt in mind when it noted that it is public knowledge that when one gains wealth, "*that*
5 *individual may become a target* for those who would like to secure a share of that sum by means
6 scrupulous or otherwise."¹⁰²

7 *American Federation of Government Employees, AFL-CIO, Local 1923 v. United*
8 *States*,¹⁰³ expresses privacy concerns similar to those alleged by Hyatt in this case. The court
9 held that union members had a privacy right not to disclose their home addresses to their own
10 union because disclosure could subject the employees to an unchecked barrage of mailings and
11 perhaps personal solicitations. The court then observed that no effective constraints could be
12 placed on the range of uses to which the information, once revealed, might be employed.¹⁰⁴ The
13 dissent pointed out that only a rare person — like Hyatt — conceals his address from real
14 property records, voting lists, motor vehicle registration, licensing records and telephone
15 directories. The court majority nevertheless recognized the privacy right *even for those less*
16 *sensitive about secrecy*.¹⁰⁵

17
18 ¹⁰² *Id.* at 876 (emphasis added). See also *Painting Industry of Hawaii Market Recovery Fund*
19 *v. United States, Dept. of Air Force*, 26 F.3d 1479, 1486-1487 (9th Cir. 1994) (forbidding
20 disclosure of social security numbers, names, and **home addresses** with concurring opinion
21 stating "publishing your phone number may invite annoying phone calls, but publishing your
22 address can lead to far more intrusive breaches of privacy, and even physical danger."); *Painting*
23 *and Drywall Work Preservation Fund, Inc. v. Dept. of HUD*, 936 F.2d 1300, 1303 (D.C. Cir.
24 1991) (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**"). Additional supporting authority
is cited in note to Hyatt's opposition to the motion for judgment on the pleadings at note 15 cites
additional authorities.

25 ¹⁰³ 712 F.2d 931 (4th Cir. 1983).

26 ¹⁰⁴ *Id.* at 932.

27 ¹⁰⁵ One of the first home address cases, *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 n.
28 15 (3d Cir. 1974), forbade disclosure of individual home-wine-maker names and home addresses
since "there are few things which pertain to an individual in which his privacy has traditionally

2. Material facts are in dispute as to the FTB's invasion of Hyatt's informational privacy.

As the cases cited above demonstrate, courts recognize an individual's rights to privacy in personal information gathered by government agencies and then placed in government records.

The right of informational privacy is a significant part of Hyatt's invasion of privacy claim.

This right of privacy was violated when the FTB contacted neighbors, businesses, government officials and others within Nevada, Japan and California, either in person or by mail, gave them secret information such as Hyatt's secret Las Vegas address and social security number, and led them to believe that Hyatt was under investigation in California, thereby casting doubt upon Hyatt's honesty, integrity and moral character.¹⁰⁶ This conduct by the FTB did in fact harass, annoy, vex and embarrass Hyatt and syphon off his time, energy and money from his productive work.¹⁰⁷ Even as the FTB and its agents were continuing to provide assurances of confidentiality to Hyatt, Sheila Cox and the FTB were in the process of sending bogus "DEMAND[S] TO FURNISH INFORMATION" to Las Vegas utility companies including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water District, providing each company with Hyatt's secret personal home address, disregarding Hyatt, his privacy rights and the FTB's assurances of confidentiality.¹⁰⁸ Cox also sent them to four newspapers.¹⁰⁹

The effects of these invasions are material facts in dispute. For instance, in the patent

been more respected than his own home. Mr. Chief Justice Burger recently stated: "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." It also held "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. 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."

¹⁰⁶ See, e.g., Hyatt Affid., ¶¶ 129-138, 196, 200.

¹⁰⁷ See, e.g., Hyatt Affid., ¶ 138.

¹⁰⁸ H 01639, 01641, 01643, see Exhibit 11 to Appendix.

¹⁰⁹ H 01637, 01853, 01855, 01857, 01899, see Exhibit 12 to Appendix.

business, an accused infringer has little incentive to recognize a patent owner and acquire a license, where the patent owner is under a cloud of suspicion.¹¹⁰ This is particularly true when dealing with Japanese companies, who are extremely concerned about dealing only with people whom they believe to have the utmost honesty and integrity. They are concerned about becoming involved with tax disputes in a legal system that they do not fully understand, and they are particularly concerned about any adverse publicity that might result from such involvement.¹¹¹ Here, the undisputed facts show that the FTB contacted over one hundred sources, including four newspapers, utility companies, a dozen neighbors, the Licensing Executive Society, and Hyatt's Japanese licensees. Although the FTB disputes that these sources were alerted that Hyatt was under a cloud of suspicion,¹¹² such a dispute precludes any summary judgment.

Another very tangible loss to Hyatt was the cost he incurred as a result of the public dissemination of his address. Hyatt was required to purchase another property, under someone else's name, and move his most sensitive information and intellectual property to this new location.¹¹³ While the cost of this was small relative to the losses in his patent licensing business, such damage is a very tangible part of the emotional and economical damages caused by the FTB's massive invasion of privacy.

3. Material facts are in dispute as to Hyatt's more traditional claims of invasion of privacy.

The three more traditional forms of invasion of privacy are: (a) unreasonable intrusion upon the seclusion of another, (b) unreasonable publicity given to private facts, and (c) casting in a false light.

(a) Material facts are in dispute as to the FTB's unreasonable intrusion upon Hyatt's seclusion.

¹¹⁰ See, e.g., Hyatt Affid., ¶ 136.

¹¹¹ See, e.g., Hyatt Affid., ¶ 136.

¹¹² See, e.g., Hyatt Affid., ¶¶ 143, 200.

¹¹³ See, e.g., Hyatt Affid., ¶ 138.

For Hyatt to recover for intrusion upon his seclusion, he must “prove the following elements: (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of another; and (3) that would be highly offensive to a reasonable person.”¹¹⁴ In addition, Hyatt must show that he had “an actual expectation of seclusion or solitude and that the expectation was objectively reasonable.”¹¹⁵

Affidavits and depositions have established the following facts, which give rise to the inference that the FTB unreasonably intruded upon Hyatt’s seclusion.

1. FTB auditor Sheila Cox made at least three trips to Las Vegas to investigate Hyatt. She began planning the trips in January, 1995. In March, 1995, she commenced a “hands on” investigation of Hyatt which included unannounced visits to Las Vegas residents and questions about private details of Hyatt’s life. Persons “interviewed” included Hyatt’s current neighbors, employees of businesses and stores frequented by Hyatt, and even his Las Vegas trash collector. During these visits, Sheila Cox contacted neighbors and other fellow Nevada residents with whom Hyatt either in the past or in the future has had or might reasonably expect to have social or business interactions, and she either disclosed or implied to them that Hyatt was under investigation in California. These undisputed facts support the inference that Cox acted in such a manner as to cause doubts to arise concerning Hyatt’s integrity and moral character.¹¹⁶
2. The FTB disclosed information that Hyatt had identified as confidential and extremely sensitive, revealing such information to third parties and conducting an investigation in Nevada and Japan. These disclosures to third parties revealed personal and confidential information, which Hyatt had every right to expect would remain private.¹¹⁷
3. FTB auditor Sheila Cox made three or more trips to the neighborhood of Hyatt’s prior residence in La Palma, which trips included unannounced visits with La Palma residents of Hyatt’s prior neighborhood and questions about private details of Hyatt’s life.¹¹⁸
4. The FTB sent numerous Nevada business and professional entities and individual residents “quasi-subpoenas” entitled “Demand to Furnish Information,” which cited the FTB’s authority under California law to

¹¹⁴ *PETA*, 111 Nev. 615, 630, 895 P.2d 1269 (1995).

¹¹⁵ *Id.* at 631.

¹¹⁶ Cox depo., Vol. II, pp. 426-27, Vol. IV, p. 957, Vol. V, pp. 1329-30, Vol. VII, p. 1873.

¹¹⁷ See, e.g., Hyatt Affid., ¶¶ 10-11, 129-138; Cowan Affid., ¶¶ 6-29.

¹¹⁸ Cox depo., Vol. V, pp. 1158, 1161, 1165, 1176; C. Les depo., Vol. I, pp. 24-25, Vol. II, pp. 385-86.

issue subpoenas and demanded that the recipients thereof produce the requested information concerning Hyatt.¹¹⁹ The FTB has never claimed that it sought or received permission from a Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada. Many Nevada residents and business entities responded with answers and information concerning Hyatt. These "quasi-subpoena" Demands support the inference that they were calculated to coerce Nevada residents into responding through deception, fear and intimidation, given that more polite correspondence requesting, rather than demanding information, was sent to Nevada officials such as Governor Bob Miller, Senator Richard Bryan and others. The inference can be drawn that these individuals would have recognized the absence of any authority for a California tax agency to "Demand" information from a Nevada resident and would have taken offense at such a "Demand."¹²⁰

5. After sending these unauthorized "Demands" to Nevada residents and correspondence to Nevada government officials, which inferred that Hyatt was being investigated by the California FTB, and prior to sending a second Notice of Proposed Assessment for the 1992 tax year, a representative of the FTB stated to one of Hyatt's representatives that disputes over such assessments by the FTB always settle at this stage, since taxpayers do not want to risk having their personal financial information being made public.¹²¹ This supports the inference that the FTB was attempting to extort money not legally owed from a very private Nevada resident, through fear and intimidation induced by threatening to publish information that had been identified by Hyatt as confidential and extremely sensitive.
6. The FTB, through their investigative actions, and in particular the manner in which they were carried out in California, Nevada and Japan, intruded into the solitude and seclusion that Hyatt had specifically sought by moving to Nevada. The intrusions by the FTB support the inference that any reasonable person, including Hyatt, would find them to be highly offensive.¹²²
7. Sheila Cox sent a "DEMAND TO FURNISH INFORMATION" to the Las Vegas utility companies including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water District, connecting Hyatt's name with his secret personal home address, supporting the inference that the FTB disregarded Hyatt, his privacy rights and the FTB's assurances of confidentiality.¹²³

¹¹⁹ FTB 01882, 01888, 01890, 01892, 01894, 01896, 01897, 01908, 01910, 01912, 01914, 01938, 01940, 01964, 01992, 02043, 02054, 02069, 02081, 02083, 02085, 02087, 02098, 02100, 02294, 02296, *see* Exhibit 13 to Appendix.

¹²⁰ FTB H 01715, 01716, Exhibit 14 to Appendix.

¹²¹ Jovanovich depo., Vol. I, pp. 231-34, 242-44; Cowan Affid., ¶¶ 38-41.

¹²² *See, e.g.*, Hyatt Affid., ¶ 129-138.

¹²³ *See* Exhibit 11 to Appendix.

8. The FTB contacted over one hundred sources, including three newspapers, a dozen neighbors, the Licensing Executive Society, and Hyatt's Japanese licensees, causing the inference that Hyatt was under a cloud of suspicion.¹²⁴

(b) **Material facts are in dispute as to the FTB's unreasonable publicity of private facts about Hyatt.**

A Nevada resident has a claim for unreasonable publicity given to private facts when there is a public disclosure of private facts which would be offensive and objectionable to a reasonable person of ordinary sensibilities. *Kuhn v. Account Control Technology, Inc.*¹²⁵ The FTB's disclosure of sensitive documentation concerning Hyatt's private information to dozens of third parties falls well within the ambit of the tort of unreasonable publicity. Contrary to the FTB's assertion that its disclosures of Hyatt's personal information was not "publicity," the FTB's disclosure was widespread. The FTB communicated with businesses, governmental officials and agencies, and individuals, including disclosures of his social security number to four newspapers, two reporters and a key industry trade association — the Licensing Executive Society — with thousands of members who were highly interested in Hyatt's licensing program.¹²⁶

Twenty-two years ago when the *Restatement of Torts (Second)* was published, Comment A of section 652(d) suggested that the courts might well relax the requirement of widespread publicity, at least in those cases where there were statutes regulating disclosure of certain types of information. In this case, the Federal Privacy Act, the California Information Practices Act, the California Revenue and Taxation Code, and the California Constitution all forbid disclosures of the type made by the FTB as violations of informational privacy.¹²⁷ The California Supreme Court has made it clear that due to these statutes and the Constitution, all individuals, including

¹²⁴ Cox Narrative Report, Exhibit 1 to Appendix.

¹²⁵ 865 F. Supp. 1443, 1448 (D. Nev. 1994) (quoting *Montesano v. Donrey Media Group*, 99 Nev. 644, 668 P.2d 1081, 1084 (1983), *cert denied*, 466 U.S. 959 (1984)).

¹²⁶ See, e.g., Hyatt Affid., ¶¶ 130-138; Cox Narrative Report, Exhibit 1 to Appendix.

¹²⁷ See Hyatt's Request for Judicial Notice, at 6, submitted with Hyatt's opposition to the motion for judgment on the pleadings, as Exhibit 7 to the Appendix.

1 out-of-state residents, can have a reasonable expectation of privacy in personal information about
2 them that is maintained by government agencies, banks, hotels, and telephone companies.¹²⁸

3 The Nevada Supreme Court has indicated that information relating to a person's financial
4 condition is private, and that even in litigation, the discovery of such information should be
5 scrupulously limited.¹²⁹

6 In addition, under strict conditions of confidentiality guaranteed by the FTB, Hyatt
7 revealed to the FTB, among other things, his secret address in Nevada.¹³⁰ Thereafter, the FTB
8 flaunted its obligation of confidentiality and in many instances even made Hyatt's address known
9 to various businesses in its deceitful, unauthorized Demands to Furnish Information.¹³¹ As a
10 result, Hyatt's home-office address may now be part of the public domain, a fact that is of the
11 utmost concern and disgust to Hyatt for reasons that any reasonable person in his situation would
12 consider to be of compelling importance.¹³²

13 Contrary to the FTB's assertion, there was widespread dissemination of Hyatt's personal
14 and confidential information. At least 90 pieces of correspondence were disseminated by the
15 FTB to individuals, businesses, trade groups, licensees, etc., whose collective membership
16 totaled in the thousands.¹³³ In particular, the fact that he was under "investigation" by a taxing
17 authority was published virtually throughout the industry as the FTB "demanded" information
18 from a major industry trade association — the Licensing Executives Society — with thousands
19
20

21 ¹²⁸ *Id.* at 3.

22 ¹²⁹ *Hetter v. Eighth Judicial District*, 110 Nev. 513, 520-21, 874 P.2d 762 (1994)
23 ("[S]acrifice of [privacy] should be kept to the minimum, and this requires scrupulous limitation
24 of discovery [P]ublic policy suggests that [discovery regarding] tax returns or financial
status not be had for the mere asking.").

25 ¹³⁰ *See, e.g.*, Hyatt Affid., ¶¶ 10-11, 165, 172, 176, 196; Cowan Affid., ¶¶ 6-29; Escrow
documents on Hyatt's Las Vegas house, H01283-01284, *see* Exhibit 15 to Appendix.

26 ¹³¹ *See, e.g.*, Hyatt Affid., ¶¶ 143-147; *see* Exhibits 11-13 of the Appendix.

27 ¹³² *See, e.g.*, Hyatt Affid., ¶ 137-138.

28 ¹³³ Cox Narrative Report and recommendation, *see* Exhibit 1 to the Appendix.

of members as well as from Hyatt licensees in Japan.¹³⁴ Also, the FTB sent Demand letters to four separate newspapers with millions of readers.¹³⁵

Hyatt turned over to the FTB highly personal and confidential information with the understanding that it would remain confidential. Hyatt had every right to expect that the FTB would hold this information in confidence. However, as set forth above, the FTB violated Hyatt's privacy by revealing this information to third parties.

(c) Material facts are in dispute as to the FTB's casting Hyatt in a false light.

In a false light claim, the focus of the plaintiff's injury is on mental distress from having been disparaged by revealing false or misleading information to the public as opposed to damage to his reputation.¹³⁶ According to the *Restatement (Second) of Torts*,¹³⁷ false light consists of: (1) giving publicity to a matter concerning another; (2) that places the person in a false light; (3) that would be highly offensive to a reasonable person; and (4) that the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.¹³⁸ Courts have held, however, that to recover for false light, the subject of the publication need not necessarily be false.¹³⁹

During the FTB's contacts with Hyatt's neighbors, trade association, licensees, employees of patronized businesses, and governmental officials in Nevada, the FTB disclosed that Hyatt was under investigation in California,¹⁴⁰ and engaged in other conduct that would

¹³⁴ See, e.g., Hyatt Affid., ¶ 136; FTB 01879-80, see Exhibit 16 to Appendix.

¹³⁵ Exhibit 12 to Appendix.

¹³⁶ See *PETA*, 111 Nev. at 622, n. 4.

¹³⁷ In dealing with claims of invasion of privacy, the Supreme Court of Nevada has relied on the *Restatement* numerous times "for guidance in this area . . ." *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630, 895 P.2d 1269 (1995).

¹³⁸ See *Restatement (Second) of Torts* § 652E (1977).

¹³⁹ See, e.g., *Douglass v. Hustler Magazine*, 769 F.2d 1128 (7th Cir. 1985), cert. denied, 475 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.")

¹⁴⁰ Exhibits 11-13 to the Appendix.

1 cause these persons to have doubts as to Hyatt's moral character and his integrity.¹⁴¹ In short, the
2 FTB's actions in conducting interviews and interrogations of Hyatt's neighbors, business
3 associates, and other Nevada residents, and its conduct in issuing deceitful, unauthorized
4 "Demands to Furnish Information" gave the false, yet distinct, appearance that Hyatt was a
5 fugitive from California being investigated for illegal and immoral activities.¹⁴²

6 In sum, invasion of privacy takes many forms. Here, the FTB has committed the newer
7 form of invasion of privacy emanating from "informational" privacy as well as the traditional
8 forms of invasion of privacy.

9 **C. Material facts are in dispute as to Hyatt's tort of outrage.**

10 The tort itself has three elements: 1) extreme or outrageous conduct showing an intention
11 to inflict, or a reckless disregard for, the ensuing emotional distress; 2) a plaintiff that suffered
12 severe or extreme emotional distress; and 3) actual or proximate causation.¹⁴³

13 The conduct of the FTB meets these standards. The FTB's extreme or outrageous
14 conduct began with a "clandestine and reprehensible investigation" of Hyatt's Nevada residency.
15 The FTB interrogated his neighbors and the businesses he patronized. Nevada citizens were sent
16 authentic-looking, but unauthorized Demands for Information. Their elected leaders and
17 government officials, who might recognize and react with outrage to the overstepping of the FTB
18 authority, received gently deferential requests. These transgressions are well described above
19 and in the set of affidavits that Hyatt submits in opposition to this motion.

20 The FTB also proposed an unsavory *quid pro quo*: you pay your taxes and penalties or
21 else we will *not* hold your personal financial information with all the confidentiality that
22 California law demands. The FTB imposed unwarranted taxes and penalties in an illegal effort
23 to increase the fear and intimidation that it applied to Hyatt.

24 Even when Hyatt's representative pointed out an undeniable FTB income error in
25

26 ¹⁴¹ E.g., Chang depo, pp. 32-33.

27 ¹⁴² See, e.g., Hyatt Affid. ¶¶ 129, 143-44.

28 ¹⁴³ See *Shoen v. Amerco, Inc.*, 111 Nev. 735, 747, 896 P.2d 469, 477 (1995).

calculating the amount of taxes assessed, the FTB refused to even consider the issue and deliberately left the erroneous assessment hanging over Hyatt's head to purportedly collect interest and increase the fear and intimidation imposed upon Hyatt.¹⁴⁴ The FTB's actions served not the goals of an honest investigation into Hyatt's residency, but more base objectives of harassment, embarrassment, coercion, and intimidation. That conduct caused the effect the FTB sought: Hyatt's extreme emotional distress as manifested by his fear, grief, humiliation, embarrassment, anger and a strong sense of outrage that would be shared by any reasonable member of the community subjected to such oppressive tactics.¹⁴⁵

Past Nevada Supreme Court precedent also shows the adequacy of Hyatt's evidence.¹⁴⁶ Patrons who berate a restaurant busgirl with crude sexual propositions, engendering predictable emotional distress, commit an actionable tort of outrage.¹⁴⁷ Companies that breach employment contracts to harass an employee and engender financial hardships are similarly liable.¹⁴⁸ City officials that charge a police officer with perjury in a press release, exposing the officer to ridicule and embarrassment, face potential liabilities for the officer's resulting emotional distress.¹⁴⁹ *And when a powerful and ruthless government agency like the FTB unleashes an unlawful and reprehensible attack on a citizen in order to bring him to his knees with his checkbook in hand, that is an outrageous outrage.*

The FTB's actions are simply another example in this category of extreme and outrageous conduct. The FTB's conduct is all the more outrageous given Hyatt's life threatening battle with cancer during the period of time in which the FTB was focusing its investigation and the FTB's use of Hyatt's highly-recommended doctor and hospital facility as a California contact

¹⁴⁴ Cowan Affid., ¶¶ 35-36.

¹⁴⁵ See, e.g., Hyatt Affid., ¶ 8, 13-17, 143.

¹⁴⁶ See *Bernard v. Rockhill Development Co.*, 103 Nev. 132, 136, 734 P.2d 1238, 1241 (1987).

¹⁴⁷ See *Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223 (1981).

¹⁴⁸ See *Shoen v. Amerco, Inc.*, 111 Nev. 735, 747, 896 P.2d 469, 477 (1995).

¹⁴⁹ See *Posadas v. City of Reno*, 109 Nev. 448, 456, 851 P.2d 438, 444 (1993).

that suggests California residency.¹⁵⁰ But, Hyatt has a right guaranteed by the U.S. Constitution to travel from Nevada to California for the purpose of his surgery without having a tax imposed on him by the FTB for doing so. In any case, Hyatt's cause of action for outrage is fully supported by the facts and the FTB's motion for summary judgment must be denied.

D. Material facts are in dispute as to the FTB's abuse of process.

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

The FTB's contention that Hyatt does not state a viable claim for abuse of process because no judicial process is involved is simply wrong. Since 1932, the courts (including the 9th Circuit) have clearly recognized the tort of abuse of process when it involves administrative abuse, as opposed to judicial abuse.¹⁵¹ The Nevada Supreme Court has effectively recognized an administrative abuse of process in *Nevada Credit Rating Bureau, Inc. v. Williams*¹⁵² in holding that attaching property in excess of the value of a debt was an abuse of process. While the attachment was attendant to a lawsuit for debt, the attachment was executed as an administrative process by the Sheriff's department. In any event, this Court has already decided in response to the FTB's motion for judgment on the pleadings that the FTB's administrative process does support a cause of action for abuse of process.

¹⁵⁰ See, e.g., Hyatt Affid., ¶ 18, 190.

¹⁵¹ See e.g. *Hillside Associates v. Stravato*, 642 A.2d 664, 666 (R.I. 1994) ("Numerous jurisdictions have recognized that misuse of certain administrative proceedings may give rise to claims for malicious prosecution and abuse of process."). See also *Melvin v. Pence*, 130 F.2d 423, 426-27 (D.C. Cir. 1942) ("The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty When private as well as public rights more and more are coming to be determined by administrative proceedings, it would be anomalous to have one rule for them and another for the courts in respect to redress for abuse of their powers and processes."); *United States v. Carrozzella*, 105 F.3d 796, 799 (2d Cir. 1997) (holding "abuse of judicial process seems to us a term that . . . includes any serious misuse of judicial or administrative process proceedings intended to inflict unnecessary costs or delay on an adversary or to confer undeserved advantages on the actor."); *Clipper Express v. Rocky Mountain Motor Traffic Bureau, Inc.*, 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.")

¹⁵² 88 Nev. 601, 503 P.2d 9 (1972).

2. The FTB engaged in abuse of process.

The FTB arrogantly contends that Cal. Gov't Code § 11189 authorizes the FTB to invade the sovereignty of Nevada and its residents by sending its so called "Demands" to persons within or *without* the State of California. But, this section does no such thing. This section merely authorizes the FTB to conduct a proceeding similar to a deposition, but only after petitioning for, and obtaining an *order* from the Superior Court in the County of Sacramento. No such order was ever obtained, nor would such an order be enforceable in Nevada — unless upon request a Nevada court issued a Nevada subpoena.

The FTB also contends that Cal. Rev. and Tax Code § 19504 authorizes the FTB to "Demand" information from any person within or *without* the state. But, this section makes no reference to persons outside of California. In any event, any purported authorization to invade the sovereignty of Nevada would be unconstitutional. California law cannot authorize intrusions into Nevada using "Demands" that falsely suggest that the California FTB has power over the residents of Nevada.

Agencies commit an abuse of process when their demands for information are motivated by an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.¹⁵³ An agency that acquires information in an investigation by fraud, deceit, or trickery commits an abuse of process.¹⁵⁴ The standards for abuse of process must remain flexible to safeguard citizen liberties:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a 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.¹⁵⁵

The FTB's Demands for Information were issued for improper purposes devoid of good

¹⁵³ *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977).

¹⁵⁴ *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 317 (5th Cir. 1981).

¹⁵⁵ *Id.* at 316-17 (quoting *Olmstead v. United States*, 277 U.S. 438, 483-85, 48 S. Ct. 564, 5674, 72 L. Ed. 944 (1928)).

1 faith. They were "official" vehicles for providing Hyatt's social security number and his secret
2 address to third parties, violating the FTB's express promises of confidentiality. FTB
3 representatives then made *sotto voce* offers to protect Hyatt's confidentiality for cash.

4 For purposes of Hyatt's abuse of process claim, the FTB is estopped from asserting as a
5 defense, that no administrative process in California exists upon which the abuse of process
6 claim may be based. Each "Demand" cites to California law for its authority, and invariably
7 included Hyatt's social security number, and in many instances his actual, personal home
8 address, making this highly sensitive and confidential information a part of readily accessible
9 databases. The FTB knew that this abusive process was in direct violation of its commitments of
10 confidentiality to Hyatt. To now allow the FTB to avoid the consequences of its abuse of
11 process would be the height of injustice.¹⁵⁶

12 The FTB also assessed millions of dollars in penalties against Hyatt under circumstances
13 that did not legally support an assessment of penalties.¹⁵⁷ The penalties were assessed following
14 a lecture to FTB auditors on the use of penalties as "bargaining chips" to induce taxpayers to
15 settle tax claims rather than risk having to pay the enormous penalties that can be assessed.¹⁵⁸
16 The FTB actions violated the due process guarantees of Article 1, Section 8 of the Nevada
17 Constitution. Each of these allegations permit recovery against the FTB for abuse of process.
18 Hyatt's cause of action for abuse of process is therefore supported by the facts and the FTB's
19 motion for summary judgment must be denied.

20 **E. Material facts are in dispute as to the FTB's fraudulent conduct.**

21 Last year in its motion for judgment on the pleadings, the FTB *unsuccessfully* argued that

22
23 ¹⁵⁶ *McKeeman v. General American Life Ins. Co.*, 111 Nev. 1042, 1050, 899 P.2d 1124
24 (1995) ("[T]he party to be estopped must have been aware of the facts; it must have intended that
25 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. 4th, 4 Cal. Rptr. 2d 837 (1992)).

26 ¹⁵⁷ C. Les depo., Vol. I, p. 101, Vol. IV, p. 615; Illia depo., Vol. II, p. 436; Ford depo., Vol.
27 I, pp. 155-56.

28 ¹⁵⁸ C. Les depo., Vol. II pp. 226-28, Vol. IV, pp. 674-78, 684-87; D. Dick depo., pp. 87-91,
215-17.

Hyatt's fraud claim was not legally sufficient. The Court ruled that Hyatt did sufficiently plead the necessary elements of fraud.¹⁵⁹ As Hyatt described last year in opposing the FTB's motion for judgment on the pleadings, Hyatt contends that the FTB made two types of false promises to induce Hyatt's cooperation with the audit: (1) that the FTB would keep Hyatt's information confidential, and (2) that the FTB would conduct a fair, unbiased review. The FTB not only breached its promises, but then proceeded to try and extort a settlement from Hyatt by overtly threatening further disclosure and publicity.

1. The FTB made misrepresentations and false promises of confidentiality.

The FTB absolutely promised to maintain in the strictest of confidence the information it sought from Hyatt. FTB auditors, including Sheila Cox, gave Hyatt's representatives, Mike Kern and Eugene Cowan, promises and assurances of *confidential* treatment repeatedly during the audit. These were given both orally and in writing. The Cowan affidavit explains in great detail the lengths Hyatt and his representatives went to obtain assurances from the FTB regarding confidentiality.¹⁶⁰ On June 17, 1993, at the commencement of the audit, FTB auditor Mark Shayer sent an initial contact letter to Gil Hyatt in Las Vegas, Nevada.¹⁶¹ This document promised that Gil Hyatt could expect during an FTB audit:

- courteous treatment by FTB employees;
- clear and concise requests for information from the auditor assigned to your case;
- confidential treatment of any personal and financial information from the auditor assigned to you provided to us; and
- completion of the audit within a reasonable amount of time.

Each of the above promises to Hyatt were false and broken by the FTB without hesitation or remorse.

In the same document, the FTB sent Hyatt its standard Privacy Notice, FTB Form

¹⁵⁹ April 6, 1999 Order re Motion for Judgment on the Pleadings.

¹⁶⁰ Cowan Affid., ¶¶ 9-26.

¹⁶¹ Exhibit 18 to the Appendix.

#1131,¹⁶² that represented to Hyatt that the FTB was subject to the California privacy act¹⁶³ and was required to disclose “why we ask you for information.” The FTB then disclosed that it might share information with the IRS and other governmental agencies, *but it omitted any mention that the FTB intended to also give the information to non-governmental third parties at the discretion of its auditors.*

In his April 30, 1996 letter, Eugene Cowan referred to the fact that the FTB “has been fully informed of the taxpayer’s desire to keep this matter confidential.” Mr. Cowan further complained of the FTB’s breach of “the confidential relationship that the FTB promised to maintain in handling this matter.”¹⁶⁴

Sheila Cox represented to Hyatt’s tax attorney, Eugene Cowan, that the FTB followed the dictates of the FTB Security and Disclosure Manual. She delivered excerpts of that manual to him to induce him to allow her to copy Hyatt’s confidential documents. The Security and Disclosure Manual has many provisions designed to protect the privacy of taxpayers and the confidentiality of taxpayers and it threatens criminal action for violation by FTB employees.¹⁶⁵

Hyatt’s insistence upon confidentiality was so non-negotiable that the FTB was forced to promise strict confidentiality as a *quid pro quo* for obtaining the information and documents its auditors claimed it needed to complete the audit.¹⁶⁶ Moreover, the FTB was fully aware that Hyatt placed title to his home in a trust bearing the name of his trusted Nevada CPA in order to maintain the security and anonymity of his secret home-office address.¹⁶⁷

The FTB was keenly aware of the importance Hyatt assigned to his privacy because of danger of industrial espionage and other hazards involving the extreme need for security in

¹⁶² Exhibit 18 to the Appendix.

¹⁶³ Officially known as the California Information Practices Act of 1977 (Cal. Civ. Code §§ 1798 *et seq.*).

¹⁶⁴ Cowan Affid., ¶ 30.

¹⁶⁵ Cowan Affid., ¶ 16 and Exhibit 4 thereto.

¹⁶⁶ Cowan Affid., ¶¶ 9-26.

¹⁶⁷ Cox Narrative Report, at H 00042, Exhibit 1 to Appendix.

plaintiff's work and place of residence.¹⁶⁸ The FTB also knew that it would not be able to obtain (at least without the uncertain prospects of judicial intervention) the desired information and documents with which to develop colorable, ostensible tax assessments and penalties against Hyatt, without providing Hyatt and his representatives with solemn commitments of confidentiality.¹⁶⁹

The FTB's representations of confidentiality were false. The FTB did not treat Gil Hyatt's personal information confidentially. Instead, the FTB:

- intentionally disclosed Hyatt's social security number to over 40 individuals and entities in California and Nevada, including four newspapers;¹⁷⁰
- intentionally disclosed Hyatt's secret Las Vegas address to third parties, including utility companies and newspapers in Las Vegas;¹⁷¹
- intentionally disclosed to Fujitsu and Matsushita the fact that the FTB was investigating Hyatt on taxes;¹⁷²
- intentionally disclosed to Hyatt's Las Vegas neighbors and his former La Palma neighbors that he was under investigation;¹⁷³
- intentionally disclosed to six Dr. Shapiros selected from the phone book that Hyatt was being investigated by the FTB;¹⁷⁴
- intentionally sent the 1991 Notice of Proposed Assessment (NPA) for millions of dollars to Hyatt's former address, even though the auditor had the correct address (this misaddressed NPA was never found);¹⁷⁵
- intentionally destroyed parts of the audit file and carelessly handled, misplaced, and lost, crucial parts of the audit file, including evidence that a California judge

¹⁶⁸ See, e.g., Hyatt Affid., ¶¶ 10-133, 137.

¹⁶⁹ Cowan Affid., ¶¶ 9-26.

¹⁷⁰ FTB 01882, 01888, 01890, 01892, 01894, 01896, 01897, 01908, 01910, 01912, 01914, 01938, 01940, 01964, 01992, 02043, 02054, 02069, 02081, 02083, 02085, 02087, 02098, 02100, 02294, 02296, see Exhibit 13 to Appendix.

¹⁷¹ FTB 02056, 02058, 02059, 02064, 02102, 02292, see Exhibits 11 and 12 to Appendix.

¹⁷² FTB 01243-02142, 02144, 02147 and 02148, see Exhibit 2 to Appendix.

¹⁷³ FTB 01965-6, 01967-8, 01969, 02121, 02127-8, 02156-7, 02162-3, 02168-9, 02174-5, 02180-1, see Exhibit 19 to the Appendix.

¹⁷⁴ FTB 01925, 01926, 01927, 01928, 01929, 01930, see Exhibit 20 to the Appendix.

¹⁷⁵ Cowan Affid. ¶ 30 and Exhibit 17 thereto.

had declared Hyatt to be a Nevada resident and the Hyatt patent application and financial information regarding tens of millions dollars in patent licenses with Japanese companies.¹⁷⁶

In addition, the FTB did *not* comply with the California privacy act as it stated it did. Rather, it routinely denies all taxpayer requests for correction of records — just as it refused to correct its \$24 million income mistake in Hyatt’s 1992-tax-year proposed assessment. It routinely denies access to full audit files — just as it “sanitized” Hyatt’s files and still refuses to produce the Carol Ford review notes ordered by this Court. It routinely keeps in its files, in violation of the California privacy act, erroneous, outdated, untimely, irrelevant or incomplete information — just as it did in the Hyatt audit file.¹⁷⁷

Hyatt has established that the auditor created false evidence to extort a settlement from Hyatt, which is a criminal offense according to the California tax statute. This false evidence is still part of the Hyatt audit file to this day. Hyatt’s complaints have been totally ignored without so much as a review by the FTB.

In sum, the FTB’s representations of fairness and promises of confidentiality to Hyatt and his tax representatives were false.

2. The one-sided fraudulent audit.

The FTB holds itself out to taxpayers in its Mission Statement, its Strategic Plan, and in communications with the public to be fair and impartial in its dealings with taxpayers. It professes not to guard the revenue, but to interpret the law evenly and fairly with neither a state nor a taxpayer point of view. FTB personnel have testified to this in depositions.¹⁷⁸ The FTB’s first auditor, Mark Shayer, even testified that he promised to conduct a fair and unbiased audit.¹⁷⁹

But the FTB’s third auditor, Sheila Cox, fully acknowledged in deposition testimony that

¹⁷⁶ E.g., Shayer depo., Vol. I, pp. 186, 256, Vol. II, pp. 446-49, 511-12; Cox depo., Vol. III, pp. 568.

¹⁷⁷ See Cal. Civ. Code §§ 1798, et seq. for requirements of California privacy act. See See, e.g., Hyatt Affid., ¶¶ 7, 152, 155, 157-160, for examples of FTB’s violation of act in regard to Hyatt.

¹⁷⁸ Illia depo., Vol. II, p. 303.

¹⁷⁹ Shayer depo., Vol. I, pp. 474, 476, 482-83.

1 she focused exclusively on information obtained which could be construed as supporting the
2 FTB's position. She completely ignored documentary evidence and witness statements directly
3 contrary to the FTB's preordained conclusion.¹⁸⁰ She did not investigate the most relevant
4 information. If she had, she would have had no choice but to conclude Hyatt was a Nevada
5 resident from September 26, 1991 to the present.

6 The FTB conducted a biased investigation in which Cox acknowledged in deposition that
7 she destroyed key evidence that supported Hyatt (*e.g.*, her contemporaneous handwritten notes
8 and computer records of bank account analysis).¹⁸¹ Cox told her husband and others during the
9 Hyatt audits that she was going to get the Jew bastard."¹⁸² After the audit concluded and she had
10 assessed Hyatt millions of dollars in trumped-up taxes and penalties, she called Hyatt's ex-wife
11 and bragged about the "conviction."¹⁸³ Cox was hardly a fair and unbiased auditor.

12 The FTB disregarded, refused to investigate, ignored, and "buried" the facts favorable to
13 Hyatt which it uncovered during its invasive audit. For example, the FTB simply ignored:

- 14 • the current neighbors in Nevada who supported Hyatt's Nevada residency claim;
- 15 • the former neighbors in California who told of Hyatt's move to Nevada;
- 16 • the friends and business associates who knew of Hyatt's move to Nevada;
- 17 • the adult son who knew of Hyatt's move to Nevada;
- 18 • Nevada rent, utilities, telephones, and insurance payments of Hyatt;
- 19 • Nevada voter registration and driver's license of Hyatt;
- 20 • Nevada home purchase offers and escrow papers of Hyatt;
- 21 • Nevada religious, professional, and social affiliations of Hyatt;

22
23
24 ¹⁸⁰ Cowan Affid., Exhibit 14 thereto.

25 ¹⁸¹ Cox depo., Vol. I, pp. 17, 174-175, 190, Vol. II, pp. 341, 342, 423-24, Vol. III, pp. 569,
26 605, 661, Vol. IV, pp. 861, 971.

27 ¹⁸² Les depo., Vol., p. 10.

28 ¹⁸³ Maystead depo., Vol. I, pp. 182-84.

- changes of address from California to Nevada address.¹⁸⁴

The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages which supposedly detail the evidence in favor of its conclusion concerning Hyatt's residency as well as a basis for asserting a fraud penalty against Hyatt.¹⁸⁵ Based on the depositions conducted to date, Hyatt has learned that, in compiling such Narrative Reports, the FTB ignored substantial evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt and contrary to the FTB's preordained conclusion.¹⁸⁶

In preparing its Narrative Reports, the FTB never spoke with or interviewed Hyatt. The FTB also ignored and failed to interview the following individuals having information favorable to Hyatt: Grace Jeng, his long-time assistant; Helene Schlindwein, his long-time friend; his adult son, Dan; and Barry Lee, his long-time business associate.¹⁸⁷ Instead, the FTB audited Miss Jeng and Barry Lee¹⁸⁸ to try and intimidate them and separate them from Hyatt.

Instead of speaking with Hyatt's son, Dan, with whom Hyatt had a close ongoing relationship, who loaned Hyatt his utility trailer for Hyatt's move to Las Vegas, and who visited with Hyatt in Las Vegas during April 1992, the FTB interviewed and obtained "affidavits" from Hyatt's bitter and long-time divorced ex-wife, his estranged daughter, and his estranged brother. His ex-wife and estranged brother had forced Hyatt to defend a number of frivolous, and on their part, unsuccessful litigations. The three "affidavits" obtained by the FTB from these estranged relatives were the cornerstone of its case and were prominently featured in its Narrative Reports.¹⁸⁹ Yet, these "affidavits" were not even affidavits because they were not given under

¹⁸⁴ Cowan Affid., Exhibit 14.

¹⁸⁵ See Exhibit 1 to the Appendix.

¹⁸⁶ Cox depo., Vol. V, pp. 1181, 1187-1188; Cowan Affid., Exhibit 14.

¹⁸⁷ Cox depo., Vol. I, 29, 168-169, 181.

¹⁸⁸ Cox depo., Vol. VI, p. 1460-61, Vol VIII, p. 2021.

¹⁸⁹ See Exhibit 1 to the Appendix, at H 00061.

oath.¹⁹⁰ More importantly, the statements set forth in such “affidavits” were nothing more than vague and general attacks on Hyatt and provided no specific evidence supporting the FTB’s conclusion, despite frequent references and significant reliance on the “affidavits” in the Narrative Report and position letters. The only specific statements set forth in such “affidavits” are by Hyatt’s estranged daughter, yet she specifically wrote at the end of her statement that she could not be held to what is stated therein in a court of law.¹⁹¹ She testified in deposition that she was estranged from her father since well before and through the disputed period.¹⁹² The FTB overlooked this bias and complete lack of personal knowledge in its “key” witness. In other words, the cornerstone of the FTB’s case crumbles upon an even mild cross-examination.

3. The \$9 million fraud penalty and the FTB’s urging Hyatt to settle.

The FTB not only assessed Hyatt taxes for a period after which he had moved to Nevada based on its trumped up investigation, it assessed Hyatt penalties for alleged fraud in regard to his Nevada residency. The penalties amounted to an additional 75% of the alleged taxes. Discovery has established that the FTB teaches its auditors to use the fraud penalty as a “bargaining chip” to obtain “agreement” from the taxpayer to pay the assessed tax.¹⁹³ To make its point, the FTB’s penalties training manual has on its cover a menacing “skull and crossbones.”¹⁹⁴

Hyatt contends that the FTB instigated the audits of his tax returns to coerce a settlement from him and that Jovanovich boldly “suggested” to Hyatt’s representative that settling at the “protest stage” would avoid Hyatt’s personal and financial information being made public.¹⁹⁵ Hyatt has now confirmed through deposition testimony that Jovanovich, the FTB’s first protest

¹⁹⁰ Cox depo., Vol. III, p. 756, lns. 18-25.

¹⁹¹ H 00302-07, see Exhibit 21 to Appendix.

¹⁹² Beth Hyatt depo., Vol. I, pp. 85-86.

¹⁹³ Ford depo., Vol. I, p. 128-29.

¹⁹⁴ See FTB H 08950, see Exhibit 22 to the Appendix.

¹⁹⁵ See First Amended Complaint, ¶ 56(g).

officer, told Hyatt's tax representative that if he did not settle at the outset of the protest stage,¹⁹⁶ the privacy and confidentiality that he so valued would be lost.¹⁹⁷

Specifically, she told Hyatt's tax representative that it would be necessary for the FTB to engage in extensive additional requests for information from Hyatt as that is its practice "in high profile, large dollar" residency audits. In fact, Ms. Jovanovich testified that she told Hyatt's tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "of many unrelated facts and questions" related to Hyatt.¹⁹⁸

Jovanovich also testified that she understood Hyatt had a unique and special concern regarding his privacy.¹⁹⁹ Jovanovich testified that this was a topic of discussion among FTB auditors, such that the residency unit of the FTB fully understood Hyatt's unique need for privacy and confidentiality.²⁰⁰

4. Hyatt was damaged by the FTB's fraud.

Prior to September 26, 1991, Hyatt had been a long-standing resident and taxpayer of the State of California. He placed trust and confidence in the bona fides of the State of California when the FTB first contacted him on or about June 1993 regarding the 1991 audit of his California tax obligation. By the time of this first contact, Hyatt had become a recognized and prominent force in the computer electronics industry, and he was vitally interested in maintaining both his personal and business security, as well as the integrity of his reputation as a highly successful inventor and owner and licensor of significantly valuable patents.²⁰¹

Moreover, Hyatt had no reason to suspect that the FTB, as an organ of California

¹⁹⁶ After the audit is completed and an assessment is made against the taxpayer, the taxpayer can file a protest challenging the assessment. During the protest phase, a protest officer, in theory, reevaluates the auditor's conclusion. See Cowan Affid., ¶ 32.

¹⁹⁷ Jovanovich depo., Vol. I, pp. 50-52, 168, 185-186.

¹⁹⁸ See Exhibit 3 to Appendix.

¹⁹⁹ Jovanovich depo., Vol. I, p. 125, lns. 20-24.

²⁰⁰ Jovanovich depo., Vol. 1, p. 126, lns. 4-8.

²⁰¹ See, e.g., Hyatt Affid., ¶¶ 18, 77, 98, 106.

government, would act in a less than truthful manner. Hyatt reasonably relied on the truthfulness of the assurances and representations (both explicit and implied) by the FTB and its agents.²⁰² Having no reason to believe that an agency of the State of California would misrepresent its commitments and assurance, Hyatt agreed both personally and through his authorized professional representatives to cooperate with the FTB and provide it with his highly sensitive and confidential information and documents.²⁰³ Hyatt in fact relied upon the false representations and assurances of the FTB and its agents to his extreme detriment.

Hyatt's business losses — primarily stemming from the loss of his Japanese licensing program²⁰⁴ — are significant, with the exact amount likely to be subject to a "battle of the experts" at trial. Two simple facts demonstrate the potential magnitude of the damages.

1. In the past four years prior to the FTB's early-1995 tortious invasions of Hyatt's privacy, he closed license agreements for hundreds of millions of dollars.
2. After the FTB's early-1995 tortious invasions of Hyatt's privacy, he was not able to close a single new license agreement.²⁰⁵

Hyatt will establish at trial that the timing of the FTB's tortious conduct and the decline of his licensing program is not coincidental, but rather the former caused the latter.

In addition to his economic damages, Hyatt suffered personal injuries in the form of emotional distress. The Nevada Supreme Court has upheld a compensatory damages award for emotional distress "as a result of [a defendant's] fraudulent misrepresentations, concealment, and a bad faith course of conduct."²⁰⁶

F. Material facts are in dispute as to the FTB's negligent misrepresentations.

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

²⁰² See, e.g., Hyatt Affid., ¶¶ 10-12.

²⁰³ Cowan Affid., ¶¶ 9-26.

²⁰⁴ See, e.g., Hyatt Affid., ¶¶ 136, 162.

²⁰⁵ See, e.g., Hyatt Affid., ¶ 136.

²⁰⁶ *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949, 958 (1998).

of doing so:

We will continue to allow a cause of action against government officers and employees for negligent misrepresentation of fact because other public policy considerations are more compelling in that context. Members of the public have no other access to factual information maintained by the government except through government officers and employees. Therefore, the policy of promoting accuracy through the prospect of tort liability outweighs the possibility of inhibiting performance of duties of office or employment.²⁰⁷

The Nevada Supreme Court has adopted the Restatement (Second) of Torts §§ 552 definition of the tort of negligent misrepresentation, which extends liability beyond a pure business environment to “any other transaction in which he has a pecuniary interest,” stating,

In *Bill Stremmel Motors, Inc. v. First National Bank of Nevada*, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978), we adopted the Restatement (Second) of Torts § 552 definition of the tort of negligent misrepresentation:

(1) One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.²⁰⁸

Hyatt has fully established these precepts. The FTB made affirmative statements of fact about its confidentiality practices, its fairness, and its objectivity. The FTB representations occurred in the context of a confidential, business-like relationship involving a pecuniary interest of tens of millions of dollars. The FTB’s conduct departed from its factual representations. Furthermore, the FTB owed 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. The FTB itself is a taxpayer’s primary channel of information about its practices. Once it speaks, the FTB or any party in a confidential relationship, should not be mislead. Adherence to that duty, and the imposition of liability for negligent misrepresentation when it is breached, promotes the FTB’s

²⁰⁷ *Northernair Productions, Inc. v. Crow Wing County*, 309 Minn. 386, 244 N.W.2d 279, 282 (1976). Those public policies received further development in *M.H. v. Caritas Family Services*, 475 N.W.2d 94 (Minn. App. 1991), *aff’d in part, rev’d in part*, 488 N.W. 2d 282 (Minn. 1992). The Court ruled that holding the agency accountable for negligent misrepresentation promoted the accuracy of its communications and posed no dangers to its performance. *Id.*

²⁰⁸ *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382 (1998).

accuracy without lessening its efficiency.

VI. The Court does have subject-matter jurisdiction over the claims at issue, and there is no basis for the Court to reconsider its ruling from last year holding that it does have subject-matter jurisdiction.

Last year after extensive briefing and oral argument, this Court ruled that it has subject-matter jurisdiction over this case. The Court stated that it would not easily revisit that decision.

The FTB nonetheless now reargues the Court's ruling by again asserting five theories for the Court to dismiss this case under Rule 12(h)(3) of the Nevada Rules of Civil Procedure for lack of subject matter jurisdiction. The Court rejected four of these first arguments last year, and since then there has been no change in circumstances or the law that deprives this Court of jurisdiction and justifies reversal of the Court's decision. The fifth argument cites to inapplicable recent Supreme Court cases.

Hyatt therefore first revisits the case law — *Mianecki* and *Nevada v. Hall* — that is dispositive of this issue. *Mianecki* and *Nevada v. Hall* were cited to the Court last year, and neither has been overturned, modified, or limited in any way during the last year. The discussion and analysis on subject matter jurisdiction therefore need go no further. Hyatt, however, in an exercise of caution will fully address each argument below.

A. Contrary to the FTB's Full-Faith-and-Credit argument, but consistent with *Mianecki* and *Nevada v. Hall*, Nevada's important state interests in protecting its citizens and providing a fair, effective, speedy, and impartial forum for redress gives it subject matter jurisdiction.

1. *Nevada v. Hall* has already rejected the FTB's Full-Faith-and-Credit argument.

California's statute granting it limited sovereign immunity *within California* cited by the FTB in its moving papers has no application to this case. *Nevada v. Hall*²⁰⁹ expressly held that the Full-Faith-and-Credit Clause does not require a state court to apply another state's sovereign-immunity law. Nevada was held liable in California for torts it committed that caused injury in California, despite Nevada law granting Nevada sovereign immunity *within Nevada*. The court

²⁰⁹ 440 U.S. 410, 99 S. Ct. 1182, 59 L.Ed.2d 416, *reh'g denied*, 441 U.S. 917 (1979).

determined that “the Full-Faith-and-Credit-Clause does not require a state to apply another state’s law in violation of its own legitimate public policy.”²¹⁰

2. *Mianecki* similarly rejected the FTB’s Full-Faith-and-Credit argument.

In *Mianecki*,²¹¹ the Nevada Supreme Court held that the Full-Faith-and-Credit Clause of the Constitution did not require Nevada to give full faith and credit to Wisconsin’s immunity statute. As discussed above, in *Mianecki*, Wisconsin, totally within its own borders, had been performing arguably very important sovereign functions — criminal justice, parole, and incarceration. Acting totally in Wisconsin, a state parole officer negligently relocated a Wisconsin parolee — convicted of sex offenses — to Nevada without sufficiently warning the unsuspecting Nevada family with whom the parolee was assigned to live. The parolee injured members of the family, and the family sued the State of Wisconsin in Nevada. In its seminal decision, the Nevada Supreme Court stated that it acted with full knowledge of the “interstate implications of substantial magnitude”²¹² in allowing the suit to proceed against Wisconsin for its failure to warn and its failure to supervise and control. Even though criminal justice is arguably the most sovereign of state activities, *Mianecki* held that this state need not grant full faith and credit to Wisconsin’s reservation of such immunity.

The injured family did not attribute their injuries to the discretionary act of deciding to transfer the criminal to Nevada. Rather, the gravamen of their claim against Wisconsin was based upon the negligent performance of operational acts by Wisconsin in effectuating the transfer and placement of the parolee in Nevada. The family alleged that Wisconsin failed to investigate where he would be living and failed to warn the Nevada family of the nature of his prior child molestation — and these allegations referred to operational deficiencies for which Nevada has waived immunity.²¹³

²¹⁰ *Id.* at 422 (citing *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939)).

²¹¹ 99 Nev. 93, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983).

²¹² *Id.* 99 Nev. at 94, 658 P.2d at 423.

²¹³ Nev. Rev. Stat. § 41.032(2).

Therefore, the Court held that Nevada is not required to honor Wisconsin's claim of sovereign immunity, especially in light of the fact that Nevada has a paramount interest in protecting its citizens.²¹⁴

Here, too, the torts are not based on the discretionary decision to commence an investigation and audit of Hyatt, but rather the operational acts in carrying out the investigation and the audit. Again, this is not a tax case. No one questions the FTB's right and authority to assess and collect taxes. But when the FTB commits torts and injures a Nevada resident in the process, Nevada has a strong self interest. The Court settled this issue last year in denying the motion for judgment on the pleadings. The FTB has set forth no basis for the Court to reconsider its ruling.

Hyatt is, and has been since 1991, a resident and citizen of Nevada. The FTB commenced a paper foray and "hands on" investigation of Hyatt that included unannounced interrogation and observation of Hyatt's neighbors, associates, landlord, mail carrier, and trash collector as well as the propounding of "quasi-subpoenas" to Nevada citizens and businesses in its investigation of a Nevada resident on income earned while residing in Nevada. In a very real sense, this Court is duty-bound to exercise subject matter jurisdiction over Hyatt's tort claims against the FTB to support these important interests and rights.²¹⁵ The Court has already decided this, and there is no basis to reconsider or reverse that decision.

B. Comity does not require Nevada to defer to California, which has refused to grant comity to Nevada.

Nevada v. Hall related to a claim of sovereign immunity by Nevada in California courts and ruled that "Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an *agreement*, express or implied, between the two

²¹⁴ *Id.* 99 Nev. at 96, 658 P.2d at 424. *Mianecki* relied on three similar cases that also denied Full-Faith-and-Credit protection to a sister state. *See Peterson v. Texas*, 635 P.2d 241 (Colo. Appendix. 1981); *Daughtry v. Arlington County, Va.*, 490 F. Supp. 307 (D.D.C. 1980); and *Wendt v. County of Osceola, Iowa*, 289 N.W.2d 67 (Minn. 1979).

²¹⁵ *Compare Fegert, Inc. v. Chase Commercial Corp.*, 586 F. Supp. 933, 935 (D. Nev. 1984) (holding that states have an "especial interest in asserting jurisdiction over those who commit torts within [their] territory" and are "motivated by the objectives of deterring wrongful conduct and protecting [their] residents").

1 sovereigns, or in the *voluntary* decision of the second to respect the dignity of the first as a matter
2 of comity.”²¹⁶ *Nevada v. Hall* noted California’s position: “the California courts have told us that
3 whatever California law may have been in the past, *it no longer extends immunity to Nevada as a*
4 *matter of comity*.”²¹⁷ California cases after *Nevada v. Hall* have been even bolder in rejecting
5 comity. U.S. Supreme Court jurisprudence “renders a forum state’s prima facie right to choose
6 its own law virtually irrefutable” despite the Full-Faith-and-Credit Clause.²¹⁸

7 In regard to Nevada’s exercise of comity, *Mianecki v. Second Judicial District*
8 *Court*,²¹⁹ approved and adopted the rationale expressed by the California Supreme Court in *Hall*
9 *v. University of Nevada*.²²⁰ “We approve the reasoning of the California court and hold that
10 where the injured party is a citizen of this state, injured in this state and sues in the courts of this
11 state, there is no immunity, by law *or as a matter of comity*, covering a sister state’s activities in
12 this state.”²²¹

13 The reasoning in *Mianecki* applies to this case. The Nevada Supreme Court first
14 recognized that “Nevada has a paramount interest in protecting its citizens . . . ,”²²² and that
15 comity cannot trump the rights of the citizens of Nevada. “[I]n considering comity, there should
16 be due regard by the court to the duties, obligations, rights and convenience of its own citizens
17

18 ²¹⁶ 440 U.S. at 415-16, 99 S.Ct. at 1186 (emphasis added).

19 ²¹⁷ 440 U.S. 410, 418, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) (emphasis added).

20 ²¹⁸ *People v. Shear*, 71 Cal.App.4th 278, 287, 83 Cal. Rptr. 2d 707, 713 (1999). California
21 actually has a long history of choosing its law and refusing to give comity to other states. *See In*
22 *re Marriage of DeLotel*, 73 Cal. App. 3d 21, 140 Cal. Rptr. 553 (1977); *Bernhard v. Harrah’s*
23 *Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976);
24 *Severn v. Adidas Sportschuhfabriken*, 33 Cal. App. 3d 754, 109 Cal. Rptr. 328 (1973); *Victor v.*
Sperry, 163 Cal. App. 2d 518, 524-26, 329 P.2d 728, 732-33 (1958); *Hudson v. Von Hamm*, 85
Cal. App. 323, 329, 331, 259 P. 374, 377, 378 (1927); *In re Estate of Lathrop*, 165 Cal. 243, 247-
48, 131 P. 752, 754 (1913).

25 ²¹⁹ 99 Nev. 93, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983).

26 ²²⁰ 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972). *Mianecki* was consistent with
the United States Supreme Court’s holding in *Nevada v. Hall*, 440 U.S. 410 (1979).

27 ²²¹ *Id.* at 423-24 (emphasis supplied).

28 ²²² *Id.* at 424.

and of persons who are within the protection of its jurisdiction.”²²³ With these principles in mind, the *Mianecki* court held:

[W]e believe greater weight is to be accorded Nevada’s interest in protecting its citizens from injurious operational acts committed within its borders by 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.*²²⁴

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

A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct 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.

*Keeton v. Hustler Magazine, Inc.*²²⁵

Many states have refused to recognize sovereign immunity as a matter of comity. They have generally done so because extending immunity would violate the public policy of the forum state.²²⁶

²²³ *Id.* at 425 (quoting *State ex rel. Speer v. Haynes*, 392 So. 2d 1183, 1185 (Ala. Civ. App. 1979), *rev’d on other grounds*, 392 So. 2d 1187 (1980)).

²²⁴ *Id.* at 425 (emphasis supplied).

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

²²⁶ *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983) (refusing to grant sovereign immunity to Wisconsin); *Hernandez v. City of Salt Lake*, 100 Nev. 504, 686 P.2d 251 (1984) (refusing to grant sovereign immunity to Utah); *Hall v. University of Nevada*, 8 Cal.3d 522, 503 P.2d 1363 (1972), *cert. denied*, 414 U.S. 820 (1973) (refusing to grant sovereign immunity to Nevada); *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (refusing to grant sovereign immunity to Virginia); *Daughtry v. Arlington County, Va.*, 490 F. Supp. 307 (D.D.C.1980) (same); *Struebin v. State*, 322 N.W.2d 84 (Iowa), *cert. denied*, 459 U.S. 1087 (1982) (refusing to grant sovereign immunity to Illinois); *Radley v. Transit Authority of City of Omaha*, 486 N.W.2d 299 (Iowa 1992) (refusing to grant sovereign immunity to Nebraska); *Peterson v. Texas*, 635 P.2d 241 (Colo. App.1981) (refusing to grant sovereign immunity to Texas); *Hansford v. District of Columbia*, 329 Md. 112, 617 A.2d 1057, *cert. denied*, 509 U.S. 905 (1993) (refusing to grant sovereign immunity to the District of Columbia); *Wendt v. County of Osceola, Iowa*, 289 N.W.2d 67 (Minn. 1979) (refusing to grant sovereign immunity to Iowa); *Kent County, State of Md. v. Shepherd*, 713 A.2d 290 (Del. 1998) (refusing to grant sovereign immunity to Maryland);

Some of those cases, like *Biscoe v. Arlington County*²²⁷ declined to recognize a sister state's sovereign immunity even though the liability was partially based on misconduct by the sister state that took place *entirely in the sister state*, but caused injury in the forum state. To the same effect is the *Head* case from Kansas finding that "immunity laws have no extraterritorial force" and that Missouri should be liable for its *acts taken entirely within Missouri* that led to injury of a Kansas resident.²²⁸ *Head* recognized that all sorts of defendants, both private and governmental, are subject to liability in Kansas for *torts done out of state that cause injury in the state*. It decided to reject comity because: "Kansas courts should give primary regard to the rights of its own citizens and persons who are within the protection of this state."²²⁹

*Faulkner v. University of Tennessee*²³⁰ in Alabama dealt with fraud against a resident of Alabama relating to Tennessee's exercising its sovereign rights as to higher education. *Faulkner* declined to extend sovereign immunity to Tennessee because doing so would be appreciably different from extending immunity to an Alabama agency.²³¹

The *Faulkner* case also emphasized the forum state's interest in protecting its citizens:

"In determining whether to apply comity, we must remain sensitive to the rights of our own citizens and our duties and obligations to them. [Citation.] We cannot, absent some overriding policy, leave Alabama residents without redress within this State, relating to alleged acts of wrongdoing by an agency of another State, where those alleged acts are associated with substantial commercial activities in Alabama."²³²

Head v. Platte County, Mo., 242 Kan. 442, 749 P.2d 6 (1988) (refusing to grant sovereign immunity to Missouri); *Faulkner v. University of Tennessee*, 627 So. 2d 362 (Ala. 1992), *cert. denied*, 510 U.S. 1101 (1994) (refusing to grant sovereign immunity to Tennessee); *Haberman v. Washington Public Power Supply System*, 109 Wash. 2d 107, 159-60, 744 P.2d 1032, 1066 (1987), *mod. on other grounds*, 109 Wash. 2d 107, 750 P.2d 254 (1988) (refusing to grant sovereign immunity to Oregon or Idaho).

²²⁷ 738 F.2d 1352, 1357 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

²²⁸ 242 Kan. at 447, 749 P.2d at 10.

²²⁹ 242 Kan. at 447, 749 P.2d at 9,10.

²³⁰ 627 So. 2d 362 (Ala. 1992).

²³¹ 627 So.2d 362, 366.

²³² 627 So.2d 362, 366 (emphasis added).

Comity is a matter of voluntary choice, not compulsion. Here Nevada has substantial interests to protect. Its interest in providing a forum to injured Nevada residents, its interest in regulating conduct within Nevada and conduct intended to affect Nevada citizens, its interest in being a no-income-tax state in proximity to high-tax states, and its interest in promoting the interstate travel and migration that has made Las Vegas the fastest growing metropolitan area in the U.S. all militate toward rejecting the FTB pleas for comity.

C. The FTB cannot distinguish *Nevada v. Hall*.

Similar to its motion for judgment on the pleadings, the FTB cites to footnote 24 in *Nevada v. Hall*²³³ and argues from it that taxation is so important that this case is different and fits the *possible* exception left open by that footnote.²³⁴ Yet this case in no way interferes with California's "sovereign" right to tax and raise revenue.

1. This lawsuit in no way interferes with California's right or ability to legally tax.

This tort case does not impinge upon the FTB's tax collection efforts in California. Indeed, the FTB offers *no evidence* that this case has any effect on or in any way limits or prohibits the FTB from proceeding with tax collection from Hyatt or anyone else. Hyatt is pursuing tort claims in this action, while the FTB is pursuing assessment of taxes in the California tax protest. Neither prevents, inhibits, or in any way limits the other from proceeding.

At best, this is a disputed material issue of fact — except that the FTB offers *no evidence* to support its position. There is not even a *pro forma* affidavit from an FTB official mouthing words to that effect. The reason is that the FTB's prior statements to the Court, as well as its conduct during this litigation, belie its newly found assertion.

²³³ Footnote 24 reads: "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 Nevada, might require different analysis or a different result." *Nevada v. Hall*, 440 U.S. at 424, n.24.

²³⁴ Of course, the Supreme Court in footnote 24 never said that it would rule differently if a more important sovereign function was impinged than that in *Nevada v. Hall*, only that it was not faced with that decision.

Hyatt offers concrete admissible evidence demonstrating that the California-tax-protest is still moving forward in parallel with and unimpeded by this case:

1. Two years ago, at the outset of this suit, Terry Collins, the FTB's in-house attorney in charge of the California-tax-protest and the FTB supervisor in charge of this suit, *swore under oath* in support of a motion filed in this litigation that the California tax protest *would continue unimpeded by this suit*,²³⁵
2. Last year, the FTB relieved the second California tax protest officer Bob Dunn from his responsibilities in handling the California tax protest because it was a conflict of interest for him to also manage this litigation, so that from then on he could focus his energies to this Nevada tort case, and the new protest officer could *focus on the California tax protest*,²³⁶
3. FTB personnel continually stated to Hyatt's tax representative while this case has been pending that they are processing the Protest. In fact after the Court dismissed the declaratory relief claim, the FTB informed Hyatt's tax representative that the Protest was proceeding and the Protest officer would have a response in six months,²³⁷
4. At the beginning of this year, the FTB's third California tax protest hearing officer, Charlene Woodward, sent a 31-page demand to Hyatt, posing 186 interrogatories, and demanding 50 document categories in the California tax protest, requesting responses by March 31, 2000, and tentatively scheduling the final hearing on the California tax protest for June or July, 2000;²³⁸ and
5. Commencing *prior* to this litigation and continuing for at least the past three years, Hyatt's California tax attorney, Eugene Cowan, has been requesting, to no avail, an *early* California tax protest hearing. The first of three protest officers told Cowan almost three years ago that a decision was only weeks away. During the past three years, the FTB has nonetheless chosen to do virtually nothing on the protest, until Ms. Woodward's recent voluminous requests to Mr. Cowan and scheduling of a final hearing this Summer.²³⁹

It is also demonstrable that this case has not only *not* hurt the FTB in its tax-collecting responsibilities, but indeed that the FTB believes in its own mind that it has *benefitted* from this

²³⁵ Terry Collins March 18, 1998 Affidavit states at ¶ 7 that the "*FTB intends to continue processing and continues to process*, Mr. Hyatt's protests . . . despite his filing of this legal action in Nevada." See Exhibit 23 to Appendix. (Emphasis added.)

²³⁶ Cowan Affid., ¶¶ 45.

²³⁷ Cowan Affid., ¶¶ 47-48.

²³⁸ Cowan Affid., Exhibit 31.

²³⁹ Cowan Affid., at ¶¶ 31-32, 43-48, 52-53.

case. The FTB has directed its depositions, interrogatories, requests for admission, document requests, and informal behind-the-scenes discovery in this case towards the residency issue. The virtual sole focus of its discovery efforts have been on the residency issue, discovery it could not have compelled in the California-tax-protest.

The FTB's taxing process is not impaired by subjecting it to liability for invading privacy and breaching false promises of fairness, impartiality, and confidentiality. Holding the FTB liable for invasion of privacy and for making false promises of fairness, impartiality, and confidentiality will foster, not impede, the public confidence so essential to the California tax system. Indeed, the California legislature and the FTB's own manuals support the need for fairness and confidentiality in tax assessment and collection.²⁴⁰

2. In any event, there is no recognized exception to *Nevada v. Hall*.

Mianecki and a plethora of other cases have refused to accord sovereign immunity to a sister states engaged in what is arguably the most sovereign of state activities — law enforcement and incarceration and release of prisoners. *Biscoe v. Arlington County*²⁴¹ declined to recognize Virginia's self-granted immunity from suit by an injured innocent by-stander when Virginia police negligently engaged in a car chase of bank robbers across state lines — even though Virginia claimed it was merely exercising its sovereign right to enforce the law against fleeing bank robbers — and even though the liability was partially based on inadequate training, supervision, and control taking place *entirely in Virginia*. Likewise, *Daughtry v. Arlington County, Va.*²⁴² involved law enforcement activity, and the court rejected an attempt to distinguish *Nevada v. Hall* on such grounds.

In regard to a state's power to raise revenues, Washington's Supreme Court denied *two* sister states' claims of immunity, and rejected their Full-Faith-and-Credit claims when those

²⁴⁰ The California Taxpayers' Bill of Rights, Cal. Rev. & Taxation Code §21002; The Information Practices Act of 1977, Cal. Civil Code § 1798.1; FTB Security and Disclosure Manual, ¶ 1000 at H 06600, *see* Exhibit 24 to Appendix.

²⁴¹ 738 F.2d 1352, 1357 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

²⁴² 490 F. Supp. 307 (D.D.C. 1980).

states defrauded investors in raising revenues. *Haberman v. Washington Public Power Supply System*,²⁴³ concluded that Washington fraud law applies and that Oregon and Idaho are not immune to Washington common-law fraud claims because their interests in protecting the public fisc and governing their own actions in raising money were outweighed by Washington's interest in discouraging tortious governmental conduct, and in holding government responsible for its acts.²⁴⁴

In short, there is still no recognized exception to *Nevada v. Hall*.

D. Constitutional choice-of-law principles allow Nevada to apply its own law because Nevada's interests in this case are significant.

The FTB argues that Nevada has no real interest in this action, so therefore the Court should apply California law. The FTB's contention that it can abuse and injure a Nevada resident without arousing Nevada's interest in protecting its citizens is strongly reflective of the FTB's entrenched policy of searching out and preying on wealthy former California residents living in Nevada. Creative "taxing" ploys are then developed as the vehicle for extorting money from them.

The FTB's disdain for Nevada in the pursuit of its quarry is demonstrated by its willingness to ignore Nevada boundaries and confront its citizens with facially official, extraterritorial demands for information that impliedly impose penalties if disregarded. The only constraint on the FTB's outlaw methodology is its evaluation of whether it can get away with it. Due Process and ethical behavior are dirty words in the FTB lexicon, fittingly symbolized by the skull and crossbones adorning the front of its penalties manual.

The FTB has the audacity to charge Nevada with having no real interest in this action! One of the most compelling obligations of a sovereign state is to vouchsafe to its citizens a forum for the redress of their grievances. How dare the FTB again argue that it can abuse and injure a

²⁴³ 109 Wash. 2d 107, 159-60, 744 P.2d 1032, 1066 (1987), *mod. on other grounds*, 109 Wash. 2d 107, 750 P.2d 254 (1988).

²⁴⁴ California ignored Oregon's pleas of sovereign immunity and comity arising out of Oregon's sovereign exercise of education. *State of Oregon v. Superior Court*, 24 Cal. App.4th 1550, 1562, 29 Cal. Rptr. 2d 909 (1994), *disapproved on other grounds by*, *Vons Co. v. Seabest Foods, Inc.*, 14 Cal 4th 434, 448, 58 Cal. Rptr.2d 899, 908, 926 P.2d 1085, 1094 (1996).

Nevada resident, and Nevada has no self interest. *Nevada v. Hall* and *Mianecki* have already rejected his argument. A state has a significant interest in giving its citizens a forum to seek redress for injuries occurring within the state.²⁴⁵

The FTB fails to even address the controlling authorities, *Nevada v. Hall* and *Mianecki*. Instead the FTB cites to a series of four cases that have no application to whether a forum state may hold a sister state liable for torts committed against a resident of the forum state and causing injury to the resident in the forum state.²⁴⁶

Even ignoring the squarely-on-point holdings of *Nevada v. Hall* and *Mianecki*, application of Constitutional choice-of-law principles allows Nevada to apply its own law, as it did in *Mianecki*. Because Nevada has significant interests to protect, its election to choose its own law rather than conflicting California law meets Constitutional standards. The leading U.S. Supreme Court case, *Phillips Petroleum Co. v. Shutts*²⁴⁷ held that a forum state may choose its own law despite the Full-Faith-and-Credit Clause, provided the forum state has "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."²⁴⁸

Here the victim resides and works in Nevada, much of the tortious activity either occurred in or was directed in Nevada (although planning, lack of supervision, certain activities, and control occurred outside), and the domicile of Hyatt is in Nevada. The relationship between

²⁴⁵ *Mianecki*, at 424.

²⁴⁶ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (remanding wherein a Kansas court applied Kansas law in a nationwide class action case in which less than 1,000 class members out of 28,200 resided in Kansas); *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930) (wherein a Texas court tried to apply its law to contracts made outside Texas, and performed outside Texas, with a plaintiff who resided at all material times in Mexico, and defendants who had never appeared in Texas); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633, 66 L.Ed. 2d 521 (1981) (affirming Minnesota court's application of its own law to an insurance dispute over a Wisconsin accident involving Wisconsin residents and an insurance policy that was delivered in Wisconsin); *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 (1936) (described by Court in *Allstate* as of questionable precedential value given how it was limited in subsequent cases). See *Allstate*, at 324, n. 11.

²⁴⁷ 472 U.S. 797, 821-22, 105 S.Ct. 2965, 2979, 86 L.Ed.2d 628 (1985).

²⁴⁸ *Id.*

Hyatt and the FTB is centered in Nevada for all the FTB's actions were directed at extorting all or major portions of \$22 million from Hyatt — from the Nevada citizen to the California treasury. Nevada's rule in tort cases is to apply the law of the place where the injury took place. Thus, under *Motenko v. MGM Dist., Inc.*,²⁴⁹ Nevada should apply its law to the tort, the *lex loci*, the place where Hyatt suffered his injury.²⁵⁰ We need look no further than *Nevada v. Hall* to see an example of the Court approving a choice of a forum state's law when the relevant forum-state contacts consist of plaintiff's residence and the place of the injury. Here Hyatt is a long-time Nevada resident, the injury took place here, and a significant part of the tortious activity took place here, indeed *all* of the torts were directed at a Nevada resident.²⁵¹ In addition, the testimony of former FTB-residency-auditor Candace Les and her FTB documents demonstrate that FTB auditors regularly enter Nevada and target Nevada citizens for investigation, surveillance, and assessment.²⁵²

E. The U. S. Supreme Court's five recent sovereign-immunity cases all deal with federal regulation of states and do not overrule *Nevada v. Hall*.

The U. S. Supreme Court has issued five sovereign-immunity cases cited by the FTB. One deals with Native-American tribal sovereign immunity, a topic foreign to state-versus-state relations and always recognized as involving special concerns.²⁵³ All four of the other cases deal

²⁴⁹ 112 Nev. 1038, 921 P.2d 933 (Nev. 1996).

²⁵⁰ California courts, as usual, are in the forefront of disregarding other states' law in reliance on this principle. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502-03, 59 S.Ct. 629, 633, 83 L.Ed. 940, 945 (1939), held that California's only "significant contact" was injury in California to an out-of-state employee of an out-of-state employer, but that alone created a state interest, such that choice of California law was neither arbitrary nor fundamentally unfair. *See also People v. Shear*, 71 Cal. App. 4th 278, 83 Cal. Rptr. 2d 707 (1999) (refusing to give full faith and credit to Arizona statute because protecting California citizens is more important); *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 542, 55 S.Ct. 518, 522, 79 L.Ed. 1044 (1935) (holding that California may apply California law in suit brought by a Mexican non-resident against an Alaska corporation for an on-the-job injury occurring in Alaska because otherwise the plaintiff would be remediless).

²⁵¹ *See, e.g., Hyatt Affid.* ¶¶ 2, 16, 18.

²⁵² C. Les depo., Vol. II, pp. 329-30; CL 01428, *see* Exhibit 26 to the Appendix.

²⁵³ *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

with *federal* jurisdiction under the 11th Amendment or with *federal* regulation of states. None of the five deals with whether a state can be sued in the courts of another state. For good reason. The landmark case of *Nevada v. Hall* covered that territory.

None of these cases cited by the FTB even hints that *Nevada v. Hall* has lost its vitality. Whether cited by the majority, or by dissenters, the continued vitality and forceful reasoning of *Nevada v. Hall* is taken for granted. Leaving aside the favorable references to it by dissenting and concurring justices in the four, the majority opinion in the most recent case, *Alden*,²⁵⁴ quite forcefully states that *Nevada v. Hall* was correct and that its ruling in the state v. state context is much different from the state v. federal context:

“In [*Nevada v. Hall*] we . . . acknowledged that “[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. . . . *We sharply distinguished, however, a sovereign’s immunity from suit in the courts of another sovereign:*

‘[B]ut [this explanation] affords no support for a claim of immunity in another sovereign’s courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.’ [Citing *Nevada v. Hall* with approval].”²⁵⁵

Significantly *Alden* pointed out that “*The Constitution, after all, treats the powers of the States differently from the powers of the Federal Government.*”²⁵⁶ Here Nevada is a sovereign and this case involves California’s invasion of *Nevada*’s sovereign rights, as pointed out in the Complaint, to protect its citizens from torts and to provide a forum to its citizens. That is what distinguishes this case from the federal vs. state sovereign-immunity cases.

F. Nevada’s administrative-exhaustion and ripeness law has no application here.

1. An action against a California government agency is not subject to Nevada’s law requiring exhaustion of administrative remedies for torts committed by Nevada government agencies.

Nevada’s administrative-exhaustion and ripeness law does not bar Hyatt from suing for

²⁵⁴ *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

²⁵⁵ 119 S.Ct. at 2258 (emphasis added).

²⁵⁶ 119 S.Ct. at 2259 (emphasis added).

1 fraud, invasion of privacy, and outrage. There is no administrative body in Nevada to lodge
2 complaints with or adjudicate the torts at issue here. The Nevada law on administrative
3 exhaustion cannot therefore apply.

4 Moreover, a similar claim was rejected in an interstate context by *Faulkner v.*
5 *University of Tennessee*.²⁵⁷ There Tennessee argued that under state-law exhaustion-of-remedies
6 provisions the trial court lacked authority to hear the case. Regarding exhaustion of remedies,
7 Tennessee argued that a trial court cannot have subject-matter jurisdiction until such time as the
8 defrauded plaintiff exhausted administrative remedies available to him.

9 The Alabama Supreme Court held that “our law on the subject applies to Alabama
10 agencies. The defendant cites no authority for the proposition that Alabama’s exhaustion of
11 remedies doctrine would extend to a remedy provided by a foreign agency; nor are we persuaded
12 by [Tennessee’s] arguments that under the facts of this case we should extend our doctrine to
13 foreign agencies.”²⁵⁸ The court noted that before exhaustion of administrative remedies becomes
14 an issue in any case, there must be an administrative remedy available. Tennessee had pointed to
15 no specific authority indicating that a cognizable administrative remedy existed for persons
16 defrauded by Tennessee. Likewise there is no administrative remedy in Nevada for torts
17 committed by a sister state on Nevada residents.

18 **2. The doctrine of exhaustion of administrative remedies is also not**
19 **applicable to this case because the tax assessment and protest taking**
20 **place in California cannot grant Hyatt relief for his tort claims.**

21 The doctrine of exhaustion of administrative remedies sharply focuses on one policy:
22 Courts should not disrupt an agency’s deliberations until the agency makes a final decision. In
23 the FTB’s hands, however, the doctrine becomes oddly fuzzy. The Court, the FTB demands,
24 should “not hesitate to dismiss Hyatt’s case for lack of jurisdiction based on Hyatt’s failure to
25 exhaust his administrative remedies.”²⁵⁹ The administrative process in question is Hyatt’s

26 ²⁵⁷ 627 S. 2d 362 (Ala. 1992).

27 ²⁵⁸ *Id.*

28 ²⁵⁹ Moving Papers, at 39.

California tax-protest. But the FTB never explains how Hyatt's tort claims disrupt the FTB's protest process, violating the exhaustion doctrine's key policy. In fact, the FTB's summary-judgment motion never mentions that policy at all. The two Nevada Supreme Court decisions the FTB offers never once use the words "administrative," "exhaustion," or "exhaust."

The Nevada Supreme Court has discussed the exhaustion doctrine often, although the FTB cites none of these cases.²⁶⁰ Under Nevada Supreme Court precedent, courts are advised — as a matter of policy — to wait and see if an agency's remedies might make judicial action unnecessary.²⁶¹ But exhaustion is not required if an agency has no remedies to grant. Agencies cannot, for example, strike-down an unconstitutional statute.²⁶² They cannot give relief over matters for which acts where they lack jurisdiction.²⁶³ And no relief is possible if an agency's actions would be futile or vain.²⁶⁴

On point and dispositive on this issue is *Ambassador Ins. Co. v. Feldman*.²⁶⁵ In

²⁶⁰ See, e.g., *State of Nevada v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993) (party "must exhaust its administrative remedies"); *Dobbs v. Summa Corp.*, 108 Nev. 407, 410, 833 P.2d 1130, 1131 (1992) ("failure to exhaust administrative remedies"); *Palmer v. State of Nevada*, 106 Nev. 151, 151, 787 P.2d 803, 804 (1990) ("exhaustion of administrative remedies"); *State of Nevada v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982), *appeal dismissed*, 459 U.S. 1192 (1983) ("doctrine of exhaustion of administrative remedies"); *Engelmann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 389 (1982) ("exhaustion of administrative remedies"); *Ambassador Ins. Corp. v. Feldman*, 95 Nev. 538, 539, 598 P.2d 630, 631 (1979) ("doctrine of administrative remedies"); *First American Title Co. of Nevada v. State of Nevada*, 91 Nev. 804, 806, 543 P.2d 1344, 1345 (1975) ("administrative remedies must be exhausted"); *Corbin v. O'Keefe*, 87 Nev. 189, 190, 484 P.2d 565, 566 (1971) ("exhaustion of administrative remedies"); *Eagle Thrifty Drugs & Markets, Inc. v. Hunter Lake Parent Teachers Ass'n*, 85 Nev. 162, 451 P.2d 713 (1969) ("exhaustion of established administrative. . . procedures").

²⁶¹ *First American Title Co. of Nevada v. State of Nevada*, 91 Nev. 804, 806, 543 P.2d 1344, 1345 (1975).

²⁶² See, e.g., *State of Nevada v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993); *State of Nevada v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982), *appeal dismissed*, 459 U.S. 1192 (1983).

²⁶³ See *Engelmann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 389 (1982).

²⁶⁴ *Id.*

²⁶⁵ 95 Nev. 538, 598 P.2d 630 (1979).

Ambassador, the defendants moved the trial court to dismiss the action for lack of subject matter jurisdiction. They claimed the insurance commissioner had exclusive jurisdiction of the matter and that the plaintiffs had failed to exhaust their administrative remedies. The lower court granted the defendant's motion. The Nevada Supreme Court reversed, calling the defendants' argument "without merit."²⁶⁶ The insurance commissioner had no power to award plaintiffs damages for defamation because the agency's powers were limited to the regulation of insurance practices. The Court phrased the matter directly: "Since the commissioner is powerless to grant the relief [plaintiff's] seek in their suit, the doctrine of exhaustion of administrative remedies is not applicable."²⁶⁷

The FTB ignores the holding in *Ambassador* and instead cites three cases that have no relevance. Specifically, *Resnick v. Nevada Gaming Commission*²⁶⁸ involved a license applicant's request for a copy of an agency's investigation. The agency was not accused of torts. *Public Service Commission v. Eighth Judicial District Court*²⁶⁹ sought to prevent an agency from disclosing potential trade secrets about coal prices during proceedings for a general rate increase. Again, no tort by the agency was alleged. Finally, *Shell Petroleum N.V. v. Graves*²⁷⁰ also never addresses whether the exhaustion doctrine insulates agencies from their tortious acts.

Ambassador demonstrates, however, that Hyatt may pursue his tort claims in Nevada courts while simultaneously exhausting his administrative tax protest remedies in California. The FTB may amend his tax liabilities during the protest process, but it cannot grant Hyatt relief for the torts it committed. It is futile to expect the FTB to decide whether it invaded Hyatt's privacy. It would be vain to believe the FTB will determine whether Hyatt experienced emotional distress from its conduct. For every tort claim Hyatt has, the FTB's administrative

²⁶⁶ 95 Nev. at 539, 598 P.2d at 630.

²⁶⁷ *Id.*

²⁶⁸ 104 Nev. 60, 752 P.2d 229 (1988).

²⁶⁹ 107 Nev. 680, 818 P.2d 396 (1991).

²⁷⁰ 709 F.2d 593, 597 (9th Cir.), *cert. denied*, 464 U.S. 1012 (1983).

1 deliberations cannot provide a single remedy. If the FTB can provide no remedy, an exhaustion
2 of its administrative process cannot be required. There cannot be one without the other.

3 **VII. The FTB was not, and is not, privileged to engage in torts causing injury in Nevada.**

4 The FTB provides a three page list of reasons why it is privileged to commit torts against
5 citizens of Nevada. Like all of its arguments regarding subject matter jurisdiction, this one too
6 fails given the holdings in *Nevada v. Hall* and *Mianecki* and their progeny.²⁷¹ Moreover, the
7 FTB's assertion of privilege is based on illogical nonsequiturs that must fail.

8 The FTB first asserts that it was privileged to make a decision whether or not to
9 investigate Hyatt's residency, and since Hyatt's entire case — the FTB asserts — is premised
10 on the assumption that the FTB must accept as true Hyatt's September 26, 1991 change of
11 residency, all of the FTB tortious activities are privileged. But Hyatt has never challenged the
12 right of the FTB to investigate his residency. Hyatt's causes of action are based upon the tortious
13 conduct during the investigation, i.e. operational acts, engaged in while "investigating" Hyatt —
14 not the discretionary decision as to whether to investigate his residency.

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. In other words, there is
17 no limit regarding its investigative authority. The logical extension of this assertion is that the
18 FTB could use excessive force or other tortious conduct to obtain information from Hyatt or any
19 third-party witness; and the FTB could, can, and does issue false and deceptive subpoenas in
20 furtherance of the collection of California taxes. The FTB cannot engage in such conduct under
21 Nevada law.²⁷²

22 Whatever the FTB is empowered to do in California, it does not have such automatic
23

24
25 ²⁷¹ The cases cited by the FTB are easily distinguished because they primarily involve the
26 IRS and its rights under *federal* law. These cases have no application to the FTB's tortious
27 conduct in another state. Additionally, as discussed above, there are cases to the contrary in
28 which the IRS is held liable for its torts. *See supra*, at 23-24.

²⁷² Whether California law authorizing the FTB to conduct investigations immunizes it for
all torts *while in California*, as the FTB seemingly argues, is doubtful but irrelevant to this
motion.

rights in Nevada. Additionally under federal law, there are just as many court decisions refusing to grant the IRS immunity for its tortious conduct during the course of an audit.²⁷³ Under the *Restatement (Second) of Torts*, a privilege may exist when a sufficiently important interest arises in the performance of a government agency's "lawful" duties. However, the privilege is lost when, as here, it is abused, as by disclosure beyond what is necessary for the lawful purpose,²⁷⁴ and when, as here, there is malice.²⁷⁵

The FTB has engaged in a series of significant tortious acts. Some of the acts were performed in Nevada, some elsewhere. All of these tortious acts resulted in damage in Nevada to a Nevada resident. The FTB's decision to pursue collection of taxes from Hyatt is not at issue. Only its tortious conduct in implementing that decision. *Nevada v. Hall* and *Mianeki* require the FTB to answer in a court of law for its tortious conduct against a long time Nevada resident.

VIII. Discovery is far from complete, and if not denied outright, the motion should be continued until the FTB has fulfilled its discovery obligations.

Rule 56(e) of the Nevada Rules of Civil Procedure provides that a summary judgment motion should be denied or continued if facts essential to opposition to the motion can not be presented by affidavit. The accompanying Affidavit of Thomas K. Bourke, Esq., sets forth in detail the discovery sought from the FTB that is still outstanding. To the extent the Court will not deny this motion outright, Hyatt requests that the motion be continued until he has completed the discovery outlined in Mr. Bourke's Affidavit. In sum, this includes depositions noticed a year ago and others more recently noticed, documents the Court has already ordered produced, additional documents that will likely require additional motions to compel, Vaughn indexes already ordered by the Court, and the list goes on.²⁷⁶

²⁷³ *Supra*, at 23-24.

²⁷⁴ *Sullivan v. Conway*, 157 F.3d 1092, 1098 (7th Cir. 1998); *Zinda v. Louisiana Pacific Corp.*, 149 Wis. 2d 913, 924-926 (1989).

²⁷⁵ *Bichler v. Union Bank & Trust of Grand Rapids*, 745 F.2d 1006, (6th Cir. 1984); *Dijkstra v. Westerink*, 168 N.J. Super. 128, 135, 401 A.2d 1118 (N.J. Super. A.D. 1979).

²⁷⁶ Bourke Affid., ¶¶ 174-84.

1 Spelled out quite clearly in Mr. Bourke's Affidavit is the FTB's discovery strategy
2 invoked shortly after losing the motion for judgment on the pleadings last April 6, 1999. Prior to
3 the Court's ruling on the FTB's motion for judgment on the pleadings, the FTB had produced
4 approximately 20 employees for deposition. While no deponent outright admitted the wrongs
5 that Hyatt alleges, through the depositions Hyatt was building the evidence for his claims of
6 invasion of privacy, fraud, and related torts "one-brick-at-a-time" through the admissions and
7 contradictions he would get from different deponents. The FTB then filed the motion for
8 judgment on the pleadings.

9 After losing the motion for judgment on the pleadings, the FTB developed a new strategy
10 for stopping discovery. While FTB produced a handful of its employees for depositions in late
11 April and May shortly after their motion was denied and the Court admonished the parties that
12 there be no "foot-dragging,"²⁷⁷ the FTB began cutting-off deposition questioning with bogus
13 objections such as relevancy and deliberative process.²⁷⁸ After June 1, 1999, the FTB produced
14 only one employee for one day of deposition.²⁷⁹ After July 1, 1999, *no* employee have been
15 produced.

16 The FTB's conduct resulted in the Discovery Commissioner's ruling on November 9,
17 1999, not only ordering them to produce the discovery being withheld on bogus grounds such as
18 deliberative-process privilege, but also admonishing the FTB to act as if it had nothing to hide
19 and open its records.²⁸⁰ Instead, the FTB became even more entrenched and sought a writ
20 challenging the Discovery Commissioner's ruling and the Court's subsequent order.

21 If this motion is not denied outright, the motion should be continued until the discovery
22 Hyatt has been seeking for over a year is completed.

25 ²⁷⁷ April 7, 1999 court transcript, at 58, *see* Exhibit 26 to Appendix.

26 ²⁷⁸ Bourke Affid., ¶¶ 83-88, 174-75.

27 ²⁷⁹ Bourke Affid., ¶¶ 83-84, 90.

28 ²⁸⁰ November 9, 1999 Court Transcript, at 55-56, *see* Exhibit 5 to the Appendix.

IX. Conclusion.

Hyatt is not alone in recognizing FTB abuses. A former FTB employee was an eye-witness to FTB torts at Hyatt's Las Vegas home, and she excoriates the FTB for its conduct and treatment of Hyatt. There are also Congressional investigations commencing in regard to the FTB's treatment of taxpayers such as Hyatt.²⁸¹

Instead of opening its files and acting as if it has nothing to hide — as admonished by the Discovery Commissioner — the FTB entrenched itself even more by not providing court-ordered discovery. It then refiled essentially the same motion from a year ago where it now *reargues* the scope and elements of the torts claims and arrogantly *reasserts* that it has such powerful privileges and rights to collect taxes from a Nevada resident that the State of Nevada and this Court are prevented from protecting Nevada citizens. There was no basis last year, and there is no basis this year, for the Court to grant the relief requested.

Hyatt has, and will continue if allowed, to develop significant evidence of the torts alleged. Some of the evidence to date is summarized in the supporting affidavits, deposition testimony, and documents submitted by Hyatt. The FTB vigorously disputes the contentions of Hyatt — contentions based on Hyatt's own personal knowledge, that of third party witnesses, and admissions from FTB employees during deposition, and from the FTB's own documents. The factual disputes are too numerous to list but include: the conduct of the FTB auditors and the protest officers; the FTB's true motives in assessing taxes and penalties against Hyatt and threatening public disclosures of his confidential information; the FTB's repeated promises and assurances, and then breaches of, confidentiality; Hyatt's motives for moving to Nevada and desire for privacy and seclusion; the date upon which and manner in which Hyatt moved to Nevada; the effects on Hyatt of the FTB's intrusive disclosures and threats; Hyatt's affiliation and contacts in Nevada prior to the FTB's tortious conduct; the reason Hyatt's licensing business was destroyed. These disputed facts are more than sufficient to rebut this motion and entitle Hyatt to a trial on the merits his claims.

²⁸¹ See Exhibit 10 to Appendix.

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Under *Nevada v. Hall* and *Mianecki*, the FTB has no "legal" defense for the tort claims.
It must address the merits of Hyatt's claims, something it has refused to do thus far.

Because the FTB lacks any "legal" defense and there are layers upon layers of factual
disputes in regard to the tort claims, this motion must therefore be denied.

DATED this 22nd day of March, 2000.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, and that on this 28 day of March, 2000, a true copy of the foregoing **HYATT'S OPPOSITION TO THE FTB'S MOTION FOR SUMMARY JUDGMENT, AFFIDAVIT OF THOMAS K. BOURKE IN SUPPORT THEREOF, AFFIDAVIT OF EUGENE COWAN IN SUPPORT THEREOF, AFFIDAVIT OF MIKE KERN IN SUPPORT THEREOF, AFFIDAVIT OF GILBERT P. HYATT IN SUPPORT THEREOF, AFFIDAVIT OF WALTER SHOEMAKER, and COMPENDIUM OF NON-NEVADA AUTHORITIES** was deposited for mailing in the U.S. Mail at Las Vegas, Nevada, in a sealed envelope upon which first class postage was prepaid and addressed to:

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EXHIBIT 17

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DISTRICT COURT
CLARK COUNTY, NEVADA

15 GILBERT P. HYATT,
16 Plaintiff,

17 vs.

18 FRANCHISE TAX BOARD OF THE STATE
19 OF CALIFORNIA, and DOES 1-100, inclusive,
20 Defendants.

Case No.: A382999
Dept No.: XVIII

THOMAS K. BOURKE'S AFFIDAVIT
IN SUPPORT OF GIL HYATT'S
OPPOSITION TO FTB'S MOTION FOR
SUMMARY JUDGMENT

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

Hearing Date: April 21, 2000
Hearing Time: 9:00 A.M.

FILED

MAR 22 2000

SHIRLEY B. PARRAGUIRRE
BY
~~SHERRI JO ESTES~~

Thomas K. Bourke Affidavit

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**AFFIDAVIT OF THOMAS K. BOURKE SUBMITTED IN
OPPOSITION TO THE FTB MOTION FOR SUMMARY JUDGMENT**

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Thomas K. Bourke, Esq., being duly sworn, deposes and says:

1. I am counsel of record for Plaintiff Gil Hyatt in this case. I am admitted to practice in California, in the federal courts in California, in the Ninth Circuit, and in the United States Supreme Court. I am admitted to practice in this Court *pro hac vice*.

I. This Affidavit marshals the evidence.

2. I submit this Affidavit in opposition to the FTB motion for summary judgment. In this Affidavit I am marshalling the deposition and documentary evidence for the Court. I do not profess to have personal knowledge of the matters stated herein except as to the discovery disputes noted below. Because my knowledge of these matters was gained through the deposition process, this Affidavit is one in which I compile or summarize deposition testimony or exhibits that are attached herewith or under separate cover. As to the discovery disputes, I do have personal knowledge due to my presence at the depositions and participation in numerous meet-and-confer sessions.

3. I have had the primary responsibility of conducting the depositions in this case for Mr. Hyatt. I would estimate that I have been present at 95% of the weeks of deposition testimony in the case. With rare exceptions, I have been the only Hyatt

attorney present at these depositions except for brief intervals at which an attorney or law clerk or paralegal might sit in for a short period.

II. The Crime/Fraud Appendix.

A. The June 1, 1999 Crime/Fraud Appendix marshaled the evidence of fraud up to then.

4. This Affidavit serves in part to marshal the evidence of the FTB's torts against Hyatt that has thus far been uncovered. We already marshaled the evidence as to the FTB's fraud on June 1, 1999 when we filed a Crime/Fraud Appendix re *Prima-Facie* Case of Fraud.¹ We filed that Appendix to support our motion for discovery of the documents reflecting the legal advice that the FTB used to perpetrate its fraud, but it is equally applicable here to marshal the evidence of the FTB fraud.

5. Because part of the fraud was the FTB's repeated breaches of its false promises of confidentiality, the Crime/Fraud Appendix also goes a long way toward marshalling the evidence on the FTB's invasion of privacy, and outrage.

6. Most white-collar fraud, or insurance bad faith cases are proved "brick-by-brick" through a mosaic of circumstantial evidence. "It is seldom that a fraud or conspiracy to cheat can be proved in any other way than by circumstantial evidence, as knaves have usually sufficient cunning to have no witnesses present who can testify

¹ I attach the Crime/Fraud Appendix, with its attached Exhibits, as Exhibit 1 to my Affidavit. Because of its bulk I attach it under separate cover. This Crime/Fraud Appendix was previously filed with this Court in our submissions to Commissioner Biggar in our successful motion to compel the production of documents.

directly to their fraudulent contrivances.”² Here too our evidence of the FTB’s torts, including fraud, is built up “brick-by-brick” from the testimony of many witnesses.

7. The Crime/Fraud Appendix references the testimony, for example, of 11 FTB employees Anna Jovanovich,³ Carol Ford,⁴ Penny Bauche,⁵ Jahna Alvarado,⁶ Jon Toyama,⁷ Paul Lou,⁸ Allan Shigemitsu,⁹ Sheila Cox,¹⁰ Steve Illia,¹¹ Sheila Semana,¹² Paul Gilbert,¹³ and dozens of exhibits. All the references will be made available to the Court as Exhibit 1 to my Affidavit.

8. Hyatt intends his opposition to *include* the Crime/Fraud Appendix because it marshaled the evidence up through last year. That Crime/Fraud Appendix should be considered by this Court as an integral part of the Hyatt opposition to this motion.

² *Thompson v. Bowie*, 71 U.S. 463, 473, 18 L.Ed. 423, 4 Wall. 463 (1866).

³ Crime/Fraud Appendix, fn. 1.

⁴ Crime/Fraud Appendix, fn. 2.

⁵ Crime/Fraud Appendix, fn. 8.

⁶ Crime/Fraud Appendix, fn. 8.

⁷ Crime/Fraud Appendix, fn. 8.

⁸ Crime/Fraud Appendix, fn. 32.

⁹ Crime/Fraud Appendix, fn. 38.

¹⁰ Crime/Fraud Appendix, fn. 43.

¹¹ Crime/Fraud Appendix, fn. 46.

¹² Crime/Fraud Appendix, fn. 64.

¹³ Crime/Fraud Appendix, fn. 64.

9. Nevada has adopted the crime-fraud exception, codified at Nev. Rev. Stat. § 49.115, which provides that

“There is no privilege under NRS 49.095 or 49.105: 1. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.”

To make our case that attorneys were consulted to enable and aid in the FTB fraud, we necessarily marshaled our evidence to that date of the FTB fraud. Despite serious disruption of the discovery process by the FTB, Hyatt has discovered more evidence of FTB torts since last year, primarily through the testimony of an ex-FTB employee willing to break the code of silence. I detail below, a summary of the existing evidence, of the break-through testimony of Candace Les,¹⁴ and the sad history of the Rambo-like discovery tactics of the FTB that have shut down discovery.

¹⁴ I attach the deposition testimony of Candace Les as Exhibit 2.

10. Hyatt's evidence of the fraud engaged in by the FTB involves of both a record showing a one-sided, fabricated audit that misleadingly used trumped up evidence, and solid evidence of FTB misrepresentations and false promises concerning keeping his tax return material and other personal and business information confidential. Moreover, we have uncovered evidence spelled out below that the FTB engaged in, and continues to engage in, spoliation of evidence in an apparent cover-up of its misconduct.

1. The one-sided audit.

11. The FTB's auditor, Sheila Cox, fully acknowledged in deposition testimony that she focused on information obtained which could be construed as supporting the FTB's position. She omitted documentary evidence and witness statements directly contrary to the FTB's preordained conclusion — that Hyatt was a California resident longer than he stated in his tax returns such that California could make a large tax assessment against him.¹⁵ The 3,500-page audit record shows she did not investigate the most relevant information.¹⁶ If she had, it is Hyatt's contention that she would have had no choice but to conclude Hyatt was a Nevada resident from September 26, 1991 to the present. The 3,500-page audit file compiled by the FTB on Hyatt over a three year period while they investigated his 1991-tax-year and 1992-tax-year contains a wealth of evidence of the FTB's abuses. We have used it during discovery as a roadmap of the FTB's torts. We have attempted to submit highlights from the audit file as examples of the evidence we intend to present against the FTB at trial. In so doing, we do not intend to limit the Court's consideration to only those portions of the file specifically mentioned, to the extent that the court finds such submissions to be insufficient to deny this motion for summary judgment. We therefore incorporate by reference the entire audit file and will submit it separately as a Supplemental Appendix.¹⁷

¹⁵ Hyatt Protest Letter, Exhibit 3.

¹⁶ The relevant excerpts from the audit files for the Hyatt 1991-tax-year and 1992-tax-year, as supplied to him by the FTB are collected from the entire files marked as Deposition Exhibit 101 and 103, and attached as Exhibits 4 and 5.

Part of Mr. Hyatt's claim is that his informational privacy was violated by the FTB denying him access to the records it kept on him. The 3,500 pages of audit

12. The audit record itself shows that the FTB conducted a biased investigation. But in addition, the principal auditor, Sheila Cox, acknowledged in deposition that she destroyed key evidence that supported Hyatt (*e.g.*, her contemporaneous handwritten notes and computer records of bank account analysis).¹⁸ A comparison of the entire record to the operative “audit narrative” that contains what the FTB relied upon shows that the FTB disregarded, refused to investigate, ignored, and “buried” the facts favorable to Hyatt which it uncovered during its invasive audit. For example, in writing up her narrative report, Cox simply ignored the ample evidence of the following facts buried in the full 3,500-page audit dossier that she compiled on Hyatt:

- the current neighbors in Nevada who supported Hyatt’s Nevada residency claim;
- the former neighbors in California who told of Hyatt’s move to Nevada;
- the friends and business associates who knew of Hyatt’s move to Nevada;
- Dan Hyatt, the adult son who knew of Hyatt’s move to Nevada;

records do *not* contain all the FTB’s records on Hyatt, as our discovery proved that hundreds of pages were “sanitized” or withheld altogether, including the FTB deliberate and contemptuous withholding the Ford-review notes and other documents in violation of this Court’s order.

¹⁷ We do not expect, nor intend, for the Court to review the entire 3,500-page audit file, unless the Court finds the excerpts we have submitted not to be sufficient to demonstrate that there are disputed issues of material fact that preclude the Court from granting summary judgment. The sheer bulk of the audit file, however, will make it apparent to the court, that it is quite possible to easily “bury” evidence in its mass, and thus any executive summary, or “narrative” as the FTB calls it, summarizing the 3,500 pages becomes very important, and must be balanced and objective since few persons have the time or energy to check a summary against such a huge record. This is one method Cox used to do a biased one-sided audit of Hyatt, bury the facts in the huge record and trust that only the short and one-sided Narrative will be read.

¹⁸ Cox deposition, Vol. I, pp. 17, 174-75, 190, Vol. II, pp. 341, 342, 423-24, Vol. III, pp. 569, 605, 661, Vol. IV, pp. 861, 971, Exhibit 6.

- 300 Nevada credit card charges of Hyatt;
- Nevada rent, utilities, telephones, and insurance payments of Hyatt;
- 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.¹⁹

13. The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages that *supposedly* detailed the evidence in favor of its conclusion concerning Hyatt's residency as well as a basis for asserting 75% fraud penalties against Hyatt.²⁰ Based on the depositions conducted to date, Hyatt has learned that, in compiling such Narrative Reports, the FTB ignored substantial evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt and contrary to the FTB's preordained conclusion.²¹

14. In preparing its Narrative Reports, the FTB never spoke with or interviewed Hyatt. The FTB also ignored and failed to interview the following individuals having information favorable to Hyatt: Grace Jeng, his long-time administrative assistant; Dan Hyatt, his adult son; and Barry Lee, his long-time business associate.²² Instead, the FTB *audited* Miss Jeng and Barry Lee²³ to try and

¹⁹ Hyatt Protest Letter, Exhibit 3.

²⁰ See Exhibit 7.

²¹ Hyatt Protest Letters, see Exhibit 3; Sheila Cox deposition, Vol. V, pp. 1181, 1187-88, Exhibit 6.

²² Sheila Cox deposition, Vol. I, 29, 168-69, 181, Exhibit 6.

²³ Sheila Cox deposition, Vol. VI, p. 1460-61, Vol VIII, p. 2021, Exhibit 6.

intimidate them and separate them from Hyatt. Still, they never interviewed them to ask them the truth about what they knew about Gil Hyatt. These were the persons with personal knowledge.

15. Instead of speaking with Hyatt's son, Dan, with whom Hyatt had a close ongoing relationship and who visited with Hyatt in Las Vegas during April 1992, the FTB interviewed and obtained "affidavits" from Hyatt's bitter and long-time divorced ex-wife, his estranged daughter, and his estranged brother. His ex-wife and estranged brother had filed or forced Hyatt into a number of frivolous, and on their part, unsuccessful litigations. The three "affidavits" obtained by the FTB from such estranged relatives was the cornerstone of its case and were prominently featured in its Narrative Reports.²⁴ Yet, such "affidavits" were not even affidavits and were not given under oath.²⁵ More importantly, the statements set forth in such "affidavits" were nothing more than vague and general attacks on Hyatt and provided no specific evidence supporting the FTB's conclusion, despite frequent references and significant reliance on the "affidavits" in the narrative report. The only specific statements set forth in such "affidavits" are by Hyatt's estranged daughter, Beth, yet she specifically wrote at the end of her statement that she could not be held to what is stated in such affidavit in a court of law. This is not surprising, considering that she has wildly asserted that her father bribed two judges in California.

²⁴ See Exhibit 7.

²⁵ Sheila Cox deposition, Vol. III, p. 756, lines 18-25, Exhibit 6.

16. The FTB report does not mention any bias in its "key" witnesses, even though Cox admitted that they each had an axe to grind.²⁶ Worse, the FTB auditor *knew* from talking to each of these hostile witnesses that they were estranged and hence did not have personal knowledge of Hyatt whereabouts in the disputed six month period from September 26, 1991 to April 1992.²⁷ She omitted that key fact from the audit Narratives.

16.1 Candace Les testified that the discretion given to the auditors to decide gray areas was supposed to be exercised in favor of the state.²⁸ She testified at one point in particularly blunt terms:

"Q. Did the FTB management encourage auditors to rule in the State's favor in gray areas?

"A. Absolutely.

²⁶ Sheila Cox testified she knew Beth Hyatt and Priscilla Maystead and Michael Hyatt each had an "axe to grind" against Gil Hyatt at her deposition at 78, Exhibit 6.

²⁷ For example,

- Priscilla Maystead, his ex-wife, had been divorced for 17 years from Hyatt and maintained no contact with him. Deposition Exhibit 101 at H00293, part of Exhibit 4 ("He and I don't talk. I have never seen his La Palma house.")
- Beth Hyatt, his estranged daughter, told Cox that she was estranged and had not spoken to him for two years. Deposition Exhibit 101 at H00303, part of Exhibit 4 ("I haven't talked to him for two years.")
- Michael aka Brian Hyatt, the felon-brother of Gil Hyatt, was also estranged from his brother, had not spoken to his brother Gil for years. Deposition Exhibit 101 at H00298, part of Exhibit 4 ("We are estranged. . . . I stopped contact with [Gil Hyatt] about the end of 1990.")

²⁸ Candace Les deposition at 650-51, 741, Exhibit 2.

“Q. And why do you say that?

“A. Because that was the discourse. You would take the State’s position was the way that I was trained.”²⁹

16.2. This technique of deciding all subjective decision against the taxpayer was used by Sheila Cox against Gil Hyatt. For example, *Candace Les* saw a berm at his house in Las Vegas. I have been to Hyatt’s Las Vegas home twice and I saw a berm. Sheila Cox was there and said she saw *no* berm. Perhaps she has a special definition of berm, but if she writes her special and uniquely-subjective judgment of no berm in her Narrative report, certainly a reader who has not been there (e.g. a supervisor, reviewer, or manager) cannot contradict her. Similarly, shading the facts in favor of the state on hundreds of subjective judgments adds up to a seriously-biased audit.

16.3. To corroborate Les’s testimony about the FTB residency auditors weighing facts depending on whether they favored the state or the taxpayer, I examined a recently-decided residency case also involving a claim of Nevada residency, *In the Matter of the Appeal of Joseph and Emily Gilbert*.³⁰

16.4. A comparison to that case illustrates the one-sided and biased nature of the FTB’s audit of Hyatt. The *Gilbert* appeal was a case where Mr. and Mrs. Gilbert owned a California residence during the entire disputed three-year period. The FTB (affirmed by the BOE) decided that Emily Gilbert was a California resident during the first two years of the disputed three-year period. But in Hyatt’s case the FTB ignored

²⁹ Candace Les deposition at 132, Exhibit 2.

factors that it held important in *Gilbert* where those same factors favored the state. For example:

- **Driver's license.** The FTB asserted (and the BOE affirmed) that Mrs. Gilbert's California driver's license was an *important* California residency connection, but in Hyatt's case, Cox contended that his Nevada driver's license was a *mere formality*, and also that Hyatt's old California license — that he had surrendered at the Nevada DMV in exchange for his Nevada driver's license — should actually still be counted as a California contact because it had not expired;
- **Voter's registration.** The FTB asserted (and the BOE affirmed) that Mrs. Gilbert's California voter's registration was *important* California residency connection, but in Hyatt's case, Cox contended that his Nevada voter's registration was a *mere formality*;
- **California real estate ownership.** The FTB regarded (and the BOE affirmed) Mrs. Gilbert's ownership of California real estate as *important*. But Hyatt had *sold* his only California real estate at the beginning of the disputed six-month period in his case, and the only use Cox made of that fact was to not compare the relatively larger and more opulent Las Vegas home that Hyatt bought to the more modest La Palma house that he had sold;
- **Location of the professional tax preparer.** The FTB asserted (and the BOE affirmed) that preparation of Mrs. Gilbert's 1991 and 1992 tax returns by a California tax preparer was an *important* California residency connection, but Cox totally *ignored* the documented fact that Hyatt's tax returns were prepared and filed by his Nevada tax preparer, CPA Michael Kern, for both the 1991- and 1992-tax-years, and all years since;
- **Nevada apartment.** The FTB asserted (and the BOE decided) that Mr. Gilbert was a Nevada resident and that his move into a Nevada apartment was an *important* consideration in establishing his Nevada residency, but in Hyatt's case Cox held that Hyatt's Nevada apartment was *not* a Nevada residency connection because, among other absurd things, the apartment did not have security gates; and

³⁰ State Board of Equalization, Appeal No. 96R-0827 (October 9, 1997).

- **Planning and preparation to have Nevada home.** The BOE decided over the FTB's objections that Mrs. Gilbert was a Nevada resident in 1993, particularly because she had *engaged* an architect and was actively involved in building a home in Las Vegas, even though she still had a California apartment and a full-time job in California following a long-time California residency. But in Hyatt's case, Cox held he was not a Nevada resident, even though his *only* apartment was in Las Vegas, even though he did *not* have a business in California, and even though he had *engaged* and was actively working with a Las Vegas real-estate broker to buy a Las Vegas home, he had made over a dozen offers to buy homes in Las Vegas, and he shortly purchased a home in Las Vegas, which he still owns to the present day.

16.5. The pattern of one-sided FTB audits is clear to me.

2. The FTB used the \$9 million fraud penalty as a "bargaining chip" to encourage Hyatt to settle, suggesting that was the only way to avoid further disclosures and further intrusive investigation.

17. The FTB not only assessed Hyatt taxes for a period after which he had moved to Nevada, it assessed Hyatt *penalties* for alleged fraud in regard to his Nevada residency. The penalties amounted to an additional 75% of the millions of taxes allegedly owed. Discovery has established that the FTB teaches its auditors to use the threat of penalties as a "bargaining chip" to obtain "agreement" from the taxpayer to pay the proposed assessment.³¹

18. Hyatt contends the FTB audited his tax returns to coerce a settlement from him. The deposition evidence supports this: An FTB employee who regarded Hyatt as paranoid about privacy, Anna Jovanovich "suggested" to Eugene Cowan, Hyatt's tax representative, that settling at the "protest stage" would avoid Hyatt's personal and

³¹ Carol Ford deposition, Vol. I, p. 128-29, Exhibit 6; Candace Les deposition at 228, Exhibit 2 (FTB manager Doug Dick at the Residency Conference taught the

financial information being made public.³² Her deposition testimony confirms that in her capacity as the FTB's protest officer she told Cowan that if he did not settle at the outset of the protest stage,³³ it would be necessary for the FTB to engage in extensive additional requests for information from Hyatt as that is its practice "in high profile, large dollar" residency audits. In fact, Jovanovich testified that she told Hyatt's tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "of many unrelated facts and questions."³⁴ In short, Hyatt was told to settle this tax case or else the privacy and confidentiality which he so valued would be lost.

19. Jovanovich also testified that she understood Hyatt had a unique and special concern regarding his privacy.³⁵ Jovanovich testified that this was a topic of discussion among FTB auditors, such that the residency unit of the FTB fully understood Hyatt's unique desire for privacy and confidentiality.³⁶

residency auditors about "the penalty chip was used as a persuasive tool to I think get the taxpayer to agree or succumb to the adjustment.")

³² See First Amended Complaint, ¶ 56(g).

³³ After the audit is completed and an assessment is made against the taxpayer, the taxpayer can file a protest challenging the assessment. During the protest phase, a protest officer, in theory, reevaluates the auditor's conclusion.

³⁴ See Exhibit 8 (Jovanovich's June 1996 note re Cowan telephone conversation).

³⁵ Jovanovich deposition, Vol. I, p. 125, lines 20-24, Exhibit 9.

³⁶ Jovanovich deposition, Vol. 1, p. 126, lines 4-8., Exhibit 9.

3. The FTB invaded Hyatt's privacy while falsely promising strict confidentiality.

20. The audit record, deposition testimony, and Cowan's Affidavit shows that at the outset of its investigation the FTB made statements and freely gave assurances to Hyatt and his representatives that material turned over to the FTB would be kept strictly confidential. In particular, the FTB made the misrepresentations and false promises regarding confidentiality set forth in the following paragraphs.

21. On June 17, 1993, at the commencement of the audit, FTB auditor Mark Shayer sent an initial contact letter to Gil Hyatt in Las Vegas, Nevada.³⁷ This official letter promised that Gil Hyatt could expect during an FTB audit:

- courteous treatment by FTB employees;
- clear and concise requests for information from the auditor assigned to your case;
- confidential treatment of any personal and financial information from the auditor assigned to you provided to us; and
- completion of the audit within a reasonable amount of time.

These promises to Hyatt were false. The FTB broke them almost immediately as shown by the audit record and deposition testimony.

22. Under cover of this initial contact letter, the FTB sent Hyatt its standard Privacy Notice, FTB Form #1131,³⁸ that represented to Hyatt that the FTB complied with the California Information Practices Act of 1977 and was required to disclose "why we ask you for information." The FTB then disclosed that it might share

³⁷ See Exhibit 10 attached to the Appendix of Exhibits.

³⁸ *Id.*

information with the IRS and other governmental agencies, *but it omitted any mention that the FTB intended to also give the information to non-governmental third parties at the discretion of its auditors.*³⁹

23. FTB auditors, including Sheila Cox, gave Hyatt's representatives, Mike Kern and Eugene Cowan, promises and assurances of *confidential* treatment repeatedly during the audit. These were given both orally and in writing. For example, in his April 30, 1996 letter, Eugene Cowan referred to the fact that the FTB "has been fully informed of the taxpayer's desire to keep this matter confidential." Mr. Cowan further complained of the FTB's breach of "the confidential relationship that the FTB promised to maintain in handling this matter."⁴⁰

24. Sheila Cox represented to Hyatt's tax attorney, Eugene Cowan, that the FTB followed the dictates of the FTB Security and Disclosure Manual. She delivered excerpts of that manual to him to induce him to allow her to copy Hyatt's confidential documents in the possession of Hyatt. The Security and Disclosure Manual has many provisions designed to protect the privacy of taxpayers and the confidentiality of taxpayers and threatens criminal action for violation by FTB employees.⁴¹

25. The FTB holds itself out to taxpayers in its Mission Statement, its Strategic Plan, its website, in booklets, and in communications with the public to be fair and

³⁹ It also failed to disclose that the FTB does *not* provide the privacy protections guaranteed by the Information Practices Act of 1977. Below I discuss how state attorneys general have successfully sued banks for fraud in publishing false privacy policies.

⁴⁰ See Exhibit 11 attached to the Appendix of Exhibits.

impartial in its dealings with taxpayers, and to guard their confidentiality. It professes not to guard the revenue, but to interpret the law evenly and fairly with neither a state nor a taxpayer point of view. FTB personnel have testified to this in depositions.⁴²

26. The record shows that the FTB did not treat Gil Hyatt's personal information confidentially and did not treat him fairly. Instead, the FTB audit file, Deposition Exhibit 101, Exhibit 4, reveals that it:

- disclosed Hyatt's Social Security Number to over 40 individuals and entities in California and Nevada, including four newspapers;
- disclosed Hyatt's secret Las Vegas address to third parties, including utility companies and newspapers in Las Vegas;
- disclosed portions of his confidential patent licensing agreements to Fujitsu and Matsushita, and the fact that the FTB was investigating Hyatt on taxes;
- disclosed to Hyatt's Las Vegas neighbors and his former La Palma neighbors that he was under investigation;
- disclosed to six Dr. Shapiros selected from the phone book that Hyatt was being investigated by the FTB;
- disclosed sensitive tax information to unknown recipients by sending the 1991 Notice of Proposed Assessment (NPA) for over \$4.5 million to Hyatt's former address, even though the auditor had the correct address (this misaddressed NPA was never found); and
- carelessly handled the audit file and misplaced, lost, and destroyed crucial parts of the audit file, including evidence that a California judge had declared Hyatt to be a Nevada resident and the Hyatt patent application and financial information regarding million dollar patent licenses with Japanese companies.

⁴¹ See Exhibit 12 attached to the Appendix of Exhibits.

⁴² Steve Illia deposition, Vol. II, p. 303, lines 14-22, Exhibit 13.

27. In sum, the FTB's representations of fairness and promises of confidentiality to Hyatt and his representatives were false.

4. The FTB destroyed evidence — one of the badges of fraud.

28. One of the "badges of fraud" is the destruction of evidence. Jovanovich testified that prior to her retirement from the FTB in June of 1998, she was a member of the FTB litigation team defending this action.⁴³ Subsequent to her retirement, she was retained by the FTB as a consultant to assist and handle the litigation.⁴⁴

29. Jovanovich testified that after her retirement from the FTB, she maintained handwritten notes regarding her work on and her role in the Hyatt audits. These notes represent her year's worth of work done on the protest to the date of her retirement. A few of these notes were produced at her deposition. She testified, however, that she destroyed most of her notes in October of 1998 — approximately eight months *after* litigation started and many months after she began working as a lawyer on the litigation team defending the FTB.⁴⁵ In other words, she destroyed evidence relevant to this case.

30. Moreover, Jovanovich's testimony is not the only testimony that relates to spoliation of evidence. Carol Ford, the FTB reviewer on the Hyatt audits, testified that she printed out a hard copy of her notes from her computer, but then deleted such notes from her computer hard drive. She did this in approximately March of 1999 — over a

⁴³ Anna Jovanovich deposition, Vol. II, pp. 65-66, Exhibit 9.

⁴⁴ Anna Jovanovich deposition, Vol. II, pp. 8-10, Exhibit 9.

⁴⁵ Anna Jovanovich deposition, Vol. I, pp. 71-79, Exhibit 9.

year after the litigation had commenced and after the FTB had been served with a notice of her deposition and request for her documents. Incredibly, *Ford testified that she destroyed her computer records at the instruction of an FTB in-house attorney, Bob Dunn.*⁴⁶ During the same deposition, after a lunch break and discussion with FTB counsel, Ford changed her testimony to indicate that Dunn had not instructed her to destroy such notes. Nevertheless, Miss Ford's initial testimony was clear and unambiguous on this point.

31. FTB counsel has also represented to this Court that prior to the commencement of this litigation, at the time Hyatt had requested a copy of his audit file under California's Information Practices Act, an FTB clerk had "sanitized" portions of the file.⁴⁷ FTB counsel represented to the Court at the next hearing that erasure marks and blanks in the file were made by the auditors themselves at the time the audit was being conducted.⁴⁸ The condition of the file is such that Hyatt retained a document examiner as a consultant to determine whether the deleted and erased information can be retrieved from the audit files and to determine if there are any other improprieties in regard to the audit files. The affidavit of Hyatt's consultant, David S. Moore, detailed the voluminous and "missing" information from the audit files thus far amounting to more than 100 pages for the one-half of the file initially reviewed by Mr. Moore.⁴⁹

⁴⁶ Carol Ford deposition, Vol. II, pp. 262-64, Exhibit 14.

⁴⁷ 4/20/99 Court Transcript at 10-11, see Exhibit 15.

⁴⁸ 5/5/99 Court Transcript at 38-39, Exhibit 1.

⁴⁹ See paragraphs 5 to 7 of the David Moore Affidavit filed with the Court on May 4, 1999.

32. I therefore incorporate the June 1, 1999 Crime/Fraud Appendix, Exhibit 1, by reference and Hyatt relies on it as part of his opposition to this summary judgment motion.

5. The other badges of fraud.

33. As any good trial lawyer knows, fraud is often proved by inference from circumstantial evidence. This was the teaching of the United States Supreme Court over 16 years ago in *Herman & MacLean v. Huddleston*.⁵⁰ The IRS uses circumstantial evidence to prove its tax fraud cases, often uncovering numerous "badges of fraud."⁵¹ Nevada fraud cases also use circumstantial evidence.⁵² And ironically, in the FTB's fraud-penalty assessment against Hyatt, the FTB relied on circumstantial evidence:

"Since intent is difficult to establish directly, courts have inferred fraudulent intent from various kinds of circumstantial evidence."⁵³

34. In this case, the depositions, the audit file, and the Jovanovich telephone notes demonstrate that the FTB had both the motive and the opportunity to defraud and extort Hyatt. The facts set forth in the Crime/Fraud Appendix constitute strong circumstantial evidence of conscious misbehavior and recklessness on the part of FTB

⁵⁰ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 391, n. 30, 103 S.Ct. 683, 692, n. 30, 74 L.Ed.2d 548 (1983).

⁵¹ *Alexander Shokai, Inc., v. Commissioner of IRS*, 34 F.3d 1480, 1487 (9th Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995).

⁵² *Dark v. United States*, 43 A.F.T.R. 2d 79-1352, 79-1 USTC ¶ 16,314, 1979 WL 1383, 1979 U.S. Dist. LEXIS 13989 (D. Nev. March 6, 1979) (stating in a tax fraud civil action that "A finding of fraud can be based upon circumstantial evidence and, in making such a finding, this Court must look at the entire record.") (emphasis added).

auditors. This evidence includes not only the FTB destroying documents, as discussed below, but also that the FTB using quotas in violation of law just as the IRS has done, as exposed by recent scandals.⁵⁴

35. Ironically, in the Hyatt fraud-penalty narrative, the FTB cited the use of inconsistent or implausible explanations as a badge of fraud. But here the FTB's own fraud is proved by the same "badges of fraud" that it uses to prosecute taxpayers for fraud:

- **false statements** (*e.g.* the FTB's statements that it had three secret "affidavits," false because these were not *real* affidavits);
- **attempts to hinder examination** (*e.g.* the FTB's refusal during the audit to let Hyatt examine the three "non-affidavit" affidavits, its constant obstructions and hindering of deposition examinations, and its hiding of Anna Jovanovich and Candace Les from deposition examination);
- **failure to answer questions** (*e.g.* Carol Ford's refusal to testify about her work and her communications with Sheila Cox, the FTB's withholding of Carol Ford's review notes, and the hundreds of times FTB witnesses have refused to answer deposition questions — *e.g.* the deliberative-process video cataloging hundreds of refusals);
- **failure to keep normal records** (*e.g.* Sheila Cox did not record her November 1995 (Candace Les-assisted) surveillance of Hyatt's Las Vegas house in the progress reports, she did not attach her photos to the audit file, she did not enclose all her newspaper demands for information about Hyatt in the Hyatt work papers, and Anna Jovanovich did not

⁵³ FTB narrative report re Hyatt's 1991-tax-year audit, Deposition Exhibit 101, H 00078, Exhibit 7.

⁵⁴ As set forth below, the later deposition of Candace Les, Exhibit 2, also confirmed the FTB use of quotas, and we obtained from the State Personnel Board an example of one such quota — the \$5 million goal Candace Les set for herself to achieve in 1997, a goal approved by her supervisor, Barbara Hince, and by Ms. Hince's supervisor, FTB manager, Joe Meyers, who was the boss of the Residency Program head, Steve Illia. Exhibit 18.

record *any* of her activity in the Hyatt progress report, and Jovanovich destroyed her notes *during* the litigation);

- **irregular business practices** (*e.g.* the FTB's Hyatt audit files contain unexplained gaps omitting Hyatt financial and court records, Cox contacted Hyatt's and Grace Jeng's U.S. Postal Service mail carriers without the carriers' supervisors' permission in violation of Residency Program policy; Cox sent out requests for information to all the Dr. Shapiro's in the phone book, and she treated Hyatt's mutual fund as a bank in contravention of FTB policy); and
- **destruction of books and records** (*e.g.* Cox destroyed her own and witnesses' contemporaneous-Hyatt-audit notes and computer files, Carol Ford erased her computer files on Hyatt, Anna Jovanovich destroyed her two years of Hyatt notes, and the FTB withheld or destroyed all e-mail about Hyatt).

6. The FTB torts against Hyatt mirror the documented abuse of taxpayers by the IRS.

36. The FTB's abuses of Hyatt mirror similar taxpayer abuses at the national level. The U.S. Senate recently investigated the IRS and found widespread abuses of taxpayers and subsequent cover-ups, which the head of the Senate investigation, Senator William V. Roth, exposed in his best-selling book, *The Power to Destroy*.⁵⁵ The first Senate witness, an IRS revenue officer with over two decades of experience swore that the incidents of abuse are at an epidemic level:

"If the true number of incidents of taxpayer abuse were ever known, the public would be appalled. If the public also ever knew the number of abuses 'covered up' by the IRS, there could be a tax payer revolt."⁵⁶

37. This Hyatt tort suit seeks to expose FTB's outrageous abuse of one such taxpayer and the FTB's cover-up of its abusive tactics. The FTB abuse included its

⁵⁵ William V. Roth and William H. Nixon, *The Power to Destroy* (Atlantic Monthly Press 1999), Exhibit 19.

⁵⁶ *Id.* at viii, Exhibit 19.

Hyatt-audit narrative that “buried facts.” It includes the fact that the FTB auditors did not even speak to Hyatt’s friends and relatives who knew him best. It includes the fact that its three secret so-called “affidavits” are not affidavits at all, and that it assessed an improper fraud penalty;⁵⁷ lost significant parts of the Hyatt audit file;⁵⁸ disclosed Hyatt’s confidential, private information in California as well as Nevada;⁵⁹ assessed the fraud penalty for not turning over mutual-fund records even though mutual-fund records were not requested, assessed the fraud penalty, ignoring the opinion of its own “elite” attorney, R. Douglas Bramhall;⁶⁰ and used a full page Skull-and-Crossbones cover to its penalty training manual.⁶¹

38. Ever since the enactment of the 1989 Taxpayer Bill of Rights, the FTB has held itself out to the public (and to Hyatt) as providing fair audits, considerate treatment of taxpayers, and confidential treatment of personal information. Imposing a fraud penalty for failure to provide mutual-fund records when only bank records were requested is hardly fair. Furthermore, disclosing confidential tax information to third parties is hardly confidential, fair, or considerate treatment.

⁵⁷ *Id.* at 17-18, Exhibit 19.

⁵⁸ *Id.* at 18, lines 20-21, Exhibit 19.

⁵⁹ *Id.* at 18, line 19, Exhibit 19.

⁶⁰ Mr. Bramhall’s written legal opinion that a mutual fund is *not* a bank, meant that the Sheila Cox premise supporting her fraud determination against Hyatt [that a mutual fund was the *same* as a bank] was legally unsound

⁶¹ Penalty Class materials dated August 31, 1993 authored by Larry Moy of FTB LA District Office with Skull and Crossbones visual aid, Deposition Exhibit 202

**(a) The FTB has attempted to falsely demonize Hyatt, as
the IRS has done to other taxpayers.**

39. Significantly, the deposition testimony (and even the FTB briefs in this case) prove that it uses the same “demonize-the-taxpayer” techniques as does the IRS. According to a revenue agent testifying before the U.S. Senate, “Management automatically assumes that everyone is a criminal.”⁶²

40. Indeed, an IRS historian has stated that “‘anyone who offers even legitimate criticism of the tax collector’ is labeled a ‘tax protester.’”⁶³ One auditor described how management actually encourages auditors to incite anger in taxpayers in an effort to get them branded as protesters: “‘When a taxpayer comes into the [agency] to negotiate a tax payment issue in good faith, they are subjected to provocative behavior on the part of the [agency] in order to “set them off”. . . Management will then use the taxpayer’s response as proof that they are, in fact, a reactionary, saying “See this person’s a troublemaker, a real hothead.”’⁶⁴

41. The FTB auditors in speaking of Hyatt dehumanized Hyatt as a “Jew bastard,”⁶⁵ dehumanized his business associate Grace Jeng as a “gook,”⁶⁶ portrayed Hyatt as surrounded by one-armed men and ghouls,⁶⁷ and Hyatt himself as being

⁶² *The Power to Destroy* at 47, Exhibit 19.

⁶³ *Id* at 47, Exhibit 19, quoting Shelley Davis, author of *Unbridled Power*.

⁶⁴ *The Power to Destroy* at 47, Exhibit 19.

⁶⁵ Candace Les deposition at 10, Exhibit 2.

⁶⁶ Candace Les deposition at 10, Exhibit 2.

⁶⁷ Candace Les deposition at 25, 172, 176 Exhibit 2.

“vile.”⁶⁸ The FTB in this case submit briefs seeking to dehumanize Hyatt by painting Hyatt as a dangerous hothead. In this summary judgment motion, supposedly about the FTB torts, the FTB focused most of its factual development on trying to prove Hyatt was a tax evader. Presumably the FTB contends that it can violate a tax evader’s privacy, lie to him, extort payment from him, and commit outrageous acts, all because its acts were designed to “get” the bad guy. A noble end does not justify tortious means.

42. In its briefs filed in this Court or before Commissioner Biggar, the FTB has heaped over two dozen expressions of contempt for Hyatt, some bordering on the hysterical. Hyatt has detailed them in his Affidavit.⁶⁹

43. Of course this type of character assassination is not a new tactic for the FTB. In past losing efforts, the FTB branded Hyatt with other epithets.⁷⁰

⁶⁸ Candace Les deposition at 172, 176 Exhibit 2.

⁶⁹ With appropriate citations to the record, Hyatt recounts how the FTB describes him as “ruthless [and] misleading,” calls him guilty of “amateurish tax fraud,” labels his *successful* discovery motions as “increasingly shrill” and “improper,” terms his brief his “biggest stretch to date” and overly long [and] misguided,” dismisses his exhibits as a “mass of irrelevant documents,” cattily calls him “long-winded,” characterizes his tort claims as “thinly described protests,” denigrates his argument as “spin,” berates his discovery as “scorched earth,” mocks his allegations as “ridiculous,” belittles his evidence as “senseless volume,” bemoans his factual showing as being merely “foot thick attachments and exhibits,” accuses him of “utter contempt” for California’s tax authority, charges him with having “stone-walled” discovery while engaging in “an improper and over-funded effort by a wealthy party to punish” the poor-little-innocent FTB.

⁷⁰ Again, with appropriate citations to the record, Hyatt in his Affidavit recounts where the FTB accused him of attempting to “intimidate state employees” and “assault . . . the legitimate revenue collection practices” of California and as mounting a “savage tax avoidance lawsuit,” while terming his conduct “obscene.” Hyatt also

44. The point of this is that the FTB, like its big brother the IRS, tends to demonize those taxpayers who dare to challenge it. It will perhaps help this Court to understand why state officials who are supposed to enforce the law, can break it. Imitating "Dirty Harry," these tax enforcers who feel they are chasing a bad guy may feel they have a license to bend the rules, break the rules, ignore the Constitution, and even fudge the evidence to get a conviction.

(b) The FTB's own 3,500-page audit file contains evidence of its invasion of privacy and other torts.

45. The over 3,500-page FTB dossier on Hyatt contains the Hyatt bank records and other intrusive documents revealing where he lived; evidence of the FTB invading his privacy; and evidence of the FTB defrauding him.

46. As shown in the Hyatt-audit dossier — and known to the FTB and its lawyers — Hyatt had taken many steps to preserve his privacy, including putting record title to his Las Vegas home in the name of a trust, the Kern Trust, in which his accountant, Michael Kern, was the named trustee.⁷¹ Hyatt's phone number was unlisted and even the utility companies did not connect his name with his address.⁷² If Hyatt's social security number, name, finances, secret home address, and the fact that he is being investigated as a tax cheat by the FTB are now public knowledge, then that is because of the FTB's tortious invasion of his privacy.

relates where the FTB called this case a "vicious and abusive lawsuit," and where at deposition, Deputy Attorney General Felix Leatherwood termed Hyatt — with no factual showing — unbalanced and unstable. The FTB continues Cox's assault on the taxpayer as ghoul.

⁷¹ See Hyatt Affidavit.

(c) The FTB's one-sided audit narrative misleadingly omitted reference to the fact that the only Hyatt patent-license agreements to reference his *residence* address list Las Vegas.

47. The FTB audit makes the misrepresentation that Hyatt got income from agreements signed by Hyatt who is stated in the agreements to reside in California. But the FTB and its attorneys know full well that the *only* Hyatt patent agreements in the record referring to his "residence" are the multi-million dollar NEC and Sony agreements that clearly state that Hyatt's 1991 residence is Las Vegas, Nevada.⁷³ It is not surprising that the FTB ignored the two license agreements that establish Nevada as Hyatt's residence.

48. The FTB audit makes no reference to these two favorable patent license agreements, but instead refers to two other patent agreements, with Matsushita and Fujitsu, that contain a U.S.-*post-office address* for Hyatt — and as every auditor called to testify about it has acknowledged, a reference in a patent license agreement to a *residence* address is more probative than one to a business mail drop like a post-office box.⁷⁴

(d) Contrary to the FTB's one-sided audit narrative, a mutual fund is not a bank.

49. Sheila Cox based her fraud penalty against Hyatt on her treating his Franklin Fund mutual fund as a California bank account. Hyatt is not here simply complaining about the fact that Cox considered his mutual-fund account as a California

⁷² *Id.*

⁷³ Deposition Exhibit 170 — Exhibit 22.

⁷⁴ Steve Illia deposition, vol. II, pages 441-62. See Exhibit 13.

contact. Rather, what Hyatt primarily complains about is the FTB assessing over \$9 million in fraud penalties and interest based upon his producing all his bank accounts when Cox only *asked* for his bank accounts. She later asked for — and received — his Franklin mutual-fund records; however she then insisted that Hyatt's "delay" in producing them was fraudulent.⁷⁵ By this Kafkaesque logic — logic that is inconsistent with written FTB legal policy — Hyatt's failure to produce his mutual-fund statements when Cox had only asked for his *bank* statements was an indicia of his fraud even though he *did* produce all of his bank statements when requested.

50. One of the FTB's top attorneys opined that mutual funds are *not* banks.⁷⁶ This attorney, R. Douglas Bramhall, Esq., was described by a respected-Tax-Board program specialist as one of the FTB's *elite*.⁷⁷

(e) The FTB's one-sided audit narrative relied heavily on the three *secret* false "affidavits" without revealing the bias and complete lack of *any* personal knowledge of the three persons interviewed.

51. The FTB takes the arrogant attitude that the Court need only read its auditor's version of the facts. This mirrors the attitude of propagandists world wide throughout the ages. Known as the "Big Lie" technique, the propagandist puts forth a one-sided version of the facts.⁷⁸ For example, the FTB's position letter to Hyatt and its

⁷⁵ Deposition Exhibit 115 in the narrative at H 06363. See Exhibit 23.

⁷⁶ See Exhibit 20.

⁷⁷ Deposition testimony of Becky Medina, at 185, Exhibit 24.

⁷⁸ *Tabas v. Tabas*, 1995 WL 695106, 1995 U.S. Dist. LEXIS 17425 (E.D. Pa. Nov. 22, 1995) (sanctioning lawyer for seeking "to bring the Big Lie technique to federal litigation advocacy."); *Washington ex rel. Public Disclosure Commission v. 119*

later Audit Narratives were based upon three secret and supposedly devastatingly critical affidavits even though Cox admits that there are no affidavits and the FTB now calls them merely interview notes by a lay person, Cox. The FTB's power allows it to be judge, jury, and executioner in its own audits. But it cannot fill all these roles in this Court where the FTB's *torts* are on trial. Unlike the FTB, this Court will look at *all* of the facts, including those facts favorable to Hyatt and not just rely upon the FTB's narrative.

(f) The FTB's own audit files show the FTB's repeated promises of confidentiality were instantly breached, in a way reminiscent of IRS deception to obtain records.

52. The gravamen of fraud is falsity.⁷⁹ The elements of fraud include a false representation or false promise, knowledge of its falsity, intent to deceive, and the right to rely.⁸⁰ Hyatt's proof of fraud came naturally as part of his invasion-of-privacy claim. One of the reasons the FTB invaded his privacy and violated his Constitutional rights under the Fourth Amendment was that they induced his cooperation with their intrusion into his life by making false promises and representations. In *United States v.*

Vote No! Committee, 135 Wash. 2d 618, 957 P.2d 691, 709 (Wash. 1998) ("If the victim is without significant campaign resources, the "Big Lie" technique can, unfortunately prevail over the truth.") (concurring opinion); *Wansley v. Miller*, 353 F.Supp. 42, 49 (E.D. Va. 1973) (quoting an article referring to the big lie propaganda technique, stating "This concept was originated by the Communist theorists, brought to fruition by the National Socialists and the Fascists and used to repeated advantage all over the world by the Russian brand of Communists.").

⁷⁹ *Black's Law Dictionary* 660 (6th ed. 1990).

⁸⁰ *BP Alaska Exploration, Inc. v. Superior Court (Nahama & Weagant)*, 199 Cal. App. 3d 1240, 245 Cal. Rptr. 682 (1988).

Tweel,⁸¹ a leading case on the Fourth Amendment, the Fifth Circuit ruled that tax agents violated a taxpayer's rights by obtaining his consent to a search of his papers through deception. *Tweel* stated the general rule, supported even then by a decade of precedent, that tax officials may not obtain documents through fraud:

“It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue agent.”⁸²

53. The court held that the fraud-by-omission by the tax agent was “shocking conduct” since the nation's taxing system is based on the good faith of the taxpayers, and thus the taxpayers should be able to expect the same from the government in its enforcement activities.⁸³ Faced with a government lawyer's argument that such conduct was “routine” the court responded that tax-agent fraud “will not be tolerated and if this is ‘routine’ it should be corrected immediately.”⁸⁴

(g) The audit files reveal what the IRS jargon calls a “blue sky” or “box car” assessment, done to raise the tax auditor's individual statistics.

54. Hyatt's Affidavit states he agreed to cooperate based on FTB assurances of considerate treatment, a fair audit, and confidential treatment of his private, personal information. But the deposition testimony of Candace Les indicates that the FTB had no intention of treating Hyatt fairly. Indeed, according to Candace Les, Sheila Cox,

⁸¹ *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977).

⁸² *Id.* at 299.

⁸³ *Id.* at 300.

⁸⁴ *Id.*

the auditor-in-charge, engaged in an unfair practice so common with tax auditors that the IRS employees even give it a special name:

“What happened to [these taxpayers] is what ‘employees of the Internal Revenue Service call a blue sky or box car assessment, an assessment that has no basis in fact or in tax law, but which is levied in an effort to intentionally hurt the taxpayer or simply to raise the individual statistics of an IRS employee.’”⁸⁵

55. Cox assessed Hyatt such a huge amount that her cost-benefit-ratio (CBR) went through the roof. Ford defined CBR as a calculation of how much tax was being generated based upon how many hours were involved in the case.⁸⁶ Ford remembered \$350 and \$500 being the CBR’s discussed.⁸⁷

56. Despite spending over 500 hours on the 1991-tax-year audit, Cox’s \$4.54 million assessment meant a \$9,000/hour CBR, which more than justifies all of her work in leaving no stone unturned in cataloging and cross-referencing Hyatt’s every move for two years.⁸⁸ Of course, her later \$14 million assessment for Hyatt’s 1992-tax-year more than justified the 100 or less hours spent on that tax year since that computes to an astronomical \$141,159 per hour CBR, being 140 times more than what is expected in a typical audit. This easily beat the \$500 to \$1,000/hour CBR expected of FTB auditors and also beats the IRS goal, which “was for revenue agents to bring in \$1,000

⁸⁵ *The Power to Destroy* at 51 (“Our investigation and subsequent hearings taught us a great deal about statistics and quotas . . .”), Exhibit 19.

⁸⁶ Carol Ford deposition at 152, Exhibit 14.

⁸⁷ Carol Ford deposition at 153, Exhibit 14.

⁸⁸ This calculation is based on the FTB’s assessment for Hyatt’s 1991-tax-year, \$4,540,404.77, divided by 500 for the hours she worked on the case.

per hour and for tax auditors to raise \$1,012 per hour."⁸⁹ Such quotas are illegal under California law⁹⁰ and federal law. Another way of looking at it was yearly goals. The average residency auditor brought in about \$100,000 per year.⁹¹ Candace Les, a top residency auditor set herself a revenue target of \$5 million in 1997, which her supervisor, Barbara Hince approved.⁹²

(h) Illia, Cox, Bauche, and McKenney were all rewarded for the huge \$22 million Hyatt assessment, just as the IRS rewards its high-achievers who made their quotas.

57. Further evidence that the FTB rewarded high assessments is that Sheila Cox received important promotions after working on the Hyatt audit, first to associate tax auditor and then a second promotion fulfilling her long-held desire to be a special investigator in the FTB's criminal division. She later returned to the audit division and was rewarded with speaking engagements and a cushy job advising other auditors. Her superiors were also rewarded because, after the \$20 million in Hyatt assessments, FTB-Residency-Program-Manager Steve Illia and Sacramento-Residency-Program-Supervisor Penny Bauche both received superior achievement awards. Again, this mirrors the abuses the U.S. Senate found at the national level:

⁸⁹ *The Power to Destroy*, at 59, Exhibit 19.

⁹⁰ The 1989 Taxpayers' Bill of Rights outlawed the practice. Deposition Exhibit 127, is the California Revenue & Taxation Code §§ 21001-21027, the Katz-Harris Taxpayers' Bill of Rights, as amended, that forbids the FTB from evaluating auditors using quotas or monetary achievement statistics. The FTB professes to the world that it complies Deposition Exhibits 122-126 are FTB booklets professing to comply. Exhibit 25.

⁹¹ Candace Les deposition, at 165, Exhibit 2.

⁹² Candace Les deposition at 166, Exhibit 2.

Whether it manifests itself in the bonuses and promotions we discovered that IRS employees were receiving for meeting statistical demands or as the commissions earned by early assessors and collectors, *the quota system inevitably leads to abuse of taxpayers and corruption within the agency. . . .*⁹³

58. The motives that drove the FTB here to assess inflated taxes against Hyatt are the same that drive tax collectors everywhere. According to a CPA with three decades of service as a revenue agent, manager, and audit branch chief, auditors knowingly inflate taxpayers' proposed additional taxes when they perform an audit because "all revenue agents know they get a better evaluation if they have amassed a high dollar per hour of audit time based on their cases."⁹⁴ Obviously bringing in \$8 million a year for two years (as Cox did on the Hyatt audits for the 1991-tax-year in 1995-1996 and the 1992-tax-year in 1996-1997) was "commendable " and obviously way above average.⁹⁵

59. The reason for this type of abuse at the FTB and IRS is simple self-interest:

[E]very hour a revenue agent spends on a taxpayer audit, the more additional tax dollars that tax agent must propose as a result of that audit. It does not matter if the court or the Office of Appeals determines later that the taxpayer owes no additional tax (which is most often the case); *what counts is how much tax was proposed when the case leaves the Examination Division.*⁹⁶

60. Thus Sheila Cox, Steve Illia, and Penny Bauche need not worry if the \$22 million sought from Gil Hyatt is never actually realized by the FTB. If he settles, the

⁹³ *The Power to Destroy*, at 59, Exhibit 19 (emphasis added).

⁹⁴ *Id.* at 63, Exhibit 19.

⁹⁵ Candace Les at 168, Exhibit 2.

⁹⁶ *The Power to Destroy*, at 63. Exhibit 19 (emphasis added).

FTB will get millions. If he resists, then any reversal to the income already booked will only come years later. In the meantime, they have collected their accolades, promotions, and cash awards for assessing tens of millions of dollars effectively and efficiently — at a cost-benefit-ratio far in excess of the target \$1,000 per hour quota.

(i) The audit narrative omits the mention of exculpatory evidence that is required by Due Process.

61. To get the desired result, the FTB wrote a one-sided “hatchet job” instead of the objective audit report promised to Hyatt and mandated by the FTB’s own rules and regulations. The FTB accomplished this by, among other things, omitting any reference to the extensive exculpatory evidence uncovered — but not reported — by Sheila Cox.

62. In a criminal law context, the Supreme Court in *Brady v. Maryland* long ago held that for a government prosecutor to withhold exculpatory evidence from a defendant violates due process.⁹⁷ The rationale is that the government is so powerful that it is fundamentally unfair for it to gather only incriminating evidence and ignore or withhold the evidence pointing to innocence.

63. Here, for example, the depositions show that Sheila Cox went to Las Vegas at least twice to prove that Gil Hyatt was not living there. But she could not do so. The evidence established that Hyatt lived in Las Vegas. She went to his former La Palma residence three times to try to find him there, but he was not there. Who was? Grace Jeng, the woman to whom he had sold the house. Cox saw Jeng’s car in the

⁹⁷ *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 102 L.Ed 2d 215 (1963) (“[O]ur system of the administration of justice suffers when any accused is treated unfairly.”)

driveway all three times that she went to La Palma but buried that fact in the audit files, without noting it in the Narrative. Cox even photographed the car showing it bore Jeng's license plate, and placed the photograph into the audit file, again without mentioning that fact in the Narrative. But the Cox Narrative report never mentions these key facts because these facts were all exculpatory.

64. Similarly, buried in the long audit file is Cox's notation that Hyatt's ex-neighbors in La Palma provided exculpatory accounts about how Hyatt had sold that house to Grace Jeng:

We went back to [the neighbor's house at 7853 Jennifer Circle and] an older woman answered the door. When I asked her if she knew who owned the house at 7841 Jennifer Circle, she replied 'Do you mean Gil's old house? *She said that he sold the house six months after he got the patent and that he was living in Nevada. She said that a woman had bought the house and she thought that it was Gil's girlfriend or someone who had worked for him. She said that she sees this woman on a daily basis.*'⁹⁸

65. Nevertheless, this neighbor's exculpatory account never made it into the Hyatt-audit Narrative Report.

66. The FTB's audit was fundamentally unfair yet it enlisted Hyatt's cooperation in the audit by promising considerate and fair treatments. This was a fraud. Cox wrote a "poison-pen" narrative purportedly summarizing the audit but discussing only the unverified innuendo and speculation against Hyatt from the over 3,500-page dossier and omitting any and all *facts* supporting him.

⁹⁸ Sheila Cox field-visit narrative re her 4/17/95 surveillance of Grace Jeng's La Palma house, Deposition Exhibit 101, Volume 1, at H 00371, Exhibit 4.

67. Sheila Cox's work was cross-referenced and well-indexed, but by the 1992-tax-year audit the FTB management knew she had made over \$6.5 million worth of errors. Nonetheless, Jeffrey McKenney, the fraud-penalty auditor brought in after Cox, still relied on Cox's work-up of the case in making a decision, without even reading the responses by Hyatt's attorney.⁹⁹ The audit files show that in order to get cooperation, the FTB held itself out to Hyatt as providing considerate treatment and audits living up to an audit standard of objective impartiality, but then it created biased-in-favor-of-the-state Audit Narratives to perpetuate a fraud on Hyatt. Similarly, the audit files show that the FTB committed a fraud by gaining Hyatt's cooperation as to documents by promising strict confidentiality while simultaneously disclosing his social security number and secret home/office address to newspapers and other non-governmental agencies.

68. The FTB fraud worked by playing on the common fear of all citizens about tax audits. *People* magazine ran a survey finding that the most frightening words people could imagine hearing when they answered the phone were: "This is the IRS calling."¹⁰⁰ Indeed, "More tax is collected by fear and intimidation than by the law. People are afraid of the IRS."¹⁰¹ Imagine how much more frightening it is to get a post-audit position-letter from the FTB proposing millions of dollars in new taxes based

⁹⁹ McKenney Deposition, pp. 74, 92, Exhibit 26.

¹⁰⁰ "Annual Readers' Poll," *People*, 8, January 1990, quoted in *The Power to Destroy* at 108, Exhibit 19.

¹⁰¹ David Patnoe, enrolled agent and former IRS revenue officer, quoted in *The Power to Destroy*, at 1, Exhibit 19.

on three *secret* "affidavits" that will *not* be released to you to protect the taxing agency's secret informants.

7. The FTB extorted Hyatt.

69. Nevada law defines *extortion* in a way that aptly describes the FTB's actions against Hyatt. An extortionist is:

"A person who, with intent . . . to . . . gain any money . . . threatens directly or indirectly : 1. To accuse any person of a crime; 2. To injure . . . property; . . . 4. [T]o expose or impute to any person . . . disgrace; or 5. To expose any secret." ¹⁰²

70. The Hyatt claim is that with the intent to gain Hyatt's \$22 million, the FTB prepared a one-sided negative report concocting an alleged sham claim by Hyatt as to his Las Vegas residence, threatened to expose him as a tax evader (a felony in California), and threatened to expose publicly his private finances if he challenged their assessments. That the FTB sometimes carries through on threats against innocent taxpayers who have moved to Nevada is illustrated by the FTB's harassment of PGA Seniors Great, George Archer. The FTB was slapped had by the BOE, whose chair, Johan Klehs, "admonished the FTB staff to stop *hounding* the beleaguered golfer." ¹⁰³ The statement the six foot six senior golfer echoes Hyatt's outrage at the extortion and unfairness of the FTB. His voice shaking, he said:

¹⁰² Nev. Rev. Stat. § 205.320.

¹⁰³ *Caltaxletter* dated September 6, 1999. The FTB staff, lead by the same attorney whom the FTB has assigned to be Hyatt's third protest officer, went after Archer and his wife Donna after he became successful on the senior tour, winning \$6.8 million. He moved to Incline Village, near Lake Tahoe and the FTB accused him of cheating, complaining that because he came back to California so often to see his son and grandchildren that he and his wife must be evading taxes. Exhibit 52.

"I've made my living all [my] life, played by the rules. I don't cheat. I have never been accused of cheating in my whole life. The reason I can't speak very well about all this is because they're calling me a liar and a cheater and that really rubs me the wrong way.

"Thirty-five years I've played golf, I've never been accused of cheating once. Yet the FTB can make up a case and they never once went to Gilroy, never talked to any of my friends, never did any investigation about this, they just decided I'm a liar and a cheat. I did all of these things because it was bogus.

"This outrages me. I live in America. I do a lot of things to raise money for kids. I believe in America. I don't believe[] what's happened with us. I just don't believe it.

". . . I'd like to know why six years they've made my life a living hell by calling me a liar and a cheat." ¹⁰⁴

After enduring six years of intrusive harassment, and after incurring expensive legal fees, Nevada residents George and Donna Archer beat back the FTB. Their finances, down to the penny, are now a matter of public record.

71. The evidence to support this claim is the audit file, including the FTB position letters, FTB narratives, the FTB document demands made on Hyatt, and the Jovanovich notes coupled with the deposition testimony of Anna Jovanovich and the Cowan and Hyatt affidavits. Through its protest-officer-attorney, Anna Jovanovich, the FTB expressly gave Hyatt a way out, linking settlement with the alternative of Hyatt's finances being made public.¹⁰⁵ Half of Jovanovich's settlement "sales pitch" to Hyatt was the threat to his privacy. The other half was her making it known to Hyatt that he

¹⁰⁴ Transcript of BOE September 1, 1999 hearing, pp. 9-13. Exhibit 53.

¹⁰⁵ The account of Anna Jovanovich and her notes jibes totally with the allegations in Hyatt's complaint as does the account of Eugene Cowan in his Affidavit.

faced more lengthy documents requests and years more of harassment, even after the three-year, 3,500-page audit. Jovanovich testified that in the typical protest she handled, she would sent a 40-60 page letter requesting still more information, even after the audit was complete. She never completed a protest in her entire career, because her demands for more data and more documents were never ending.¹⁰⁶ These threats to expose Hyatt's private secrets is the gravamen of the crime of blackmail, officially called extortion.

72. Ironically, even after being prepared 30 hours for her deposition and after being put on the FTB's payroll as a "consultant" for an undisclosed sum, Anna Jovanovich recited in detail the threats she conveyed to Hyatt if he did not settle. She was going to add to the 3,500-page record by sending a 40-to-60-page request for even more documents, AND unless he capitulated at this stage, as she said most high-income taxpayers do, the FTB would make his finances part of the public record. Not only did she openly admit in her deposition her threats to Hyatt, she even seemed proud about her actions.

8. Part of the outrage was the FTB's including phony affidavits and false documents in Hyatt's audit file, and violating criminal laws governing confidentiality and destruction of records.

73. California law makes it a felony for a person to make or subscribe (or to procure, assist, counsel, or advise someone else to make or subscribe) a false affidavit or other sworn document in connection with the California Personal Income Tax

¹⁰⁶ Anna Jovanovich deposition at 63, Exhibit 9.

Law.¹⁰⁷ Here, the FTB through Cox submitted three false "affidavits" (*i.e.*, the three secret non-affidavit-affidavits and a materially false narrative report) and attempted to extort a settlement of a proposed tax assessment from Hyatt based on the false documents. Subscribing a willfully false affidavit would be criminal conduct by any of Hyatt's family members and extortion is a crime whoever commits it.

74. The record indicates that the FTB has actually violated state criminal laws re tax records, confidentiality, and destruction of tax records and violated federal criminal laws on Social Security Number confidentiality. I explain the record demonstrating this below.

75. **State criminal law.** In briefs that the FTB filed with this Court when it was trying to block further discovery of its activities, it stressed the myriad *criminal* statutes that forbid its unauthorized disclosure of tax information. As recently as February 10, 1999, Deputy Attorney General Leatherwood wrote that "in the case of California Revenue & Taxation Code, the proscription against illegal disclosures under these statutes attaches criminal penalties (Cal. Rev. & Tax. Code §§ 19542, 19552, 19557, and 19558)."¹⁰⁸ He admitted that "by state law it is a misdemeanor for the [FTB] or its employees or its agents 'to disclose or make known, in any manner,

¹⁰⁷ California Rev. and Tax Code § 19705.

¹⁰⁸ The FTB's Post-Hearing Opposition to Hyatt's Motion to compel Sheila Cox to provide further answers at deposition, filed February 12, 1999, at 5, Exhibit 27.

information as to the amount of income or any particulars set forth or disclosed' by the taxpayer." ¹⁰⁹

76. In addition, California law also makes it a crime to falsify or destroy FTB documents. ¹¹⁰

77. **Federal criminal laws.** The FTB teaches its auditors that "The Internal Revenue Code, Sections 6103(d), 7213(a)(2), and 7431, [p]rovides that states administering an income tax can have access to IRS data [and] specifies penalties for unauthorized disclosure." ¹¹¹ Internal Revenue Code § 6103 makes all federal tax returns and tax return information "confidential" and only authorizes disclosure to state taxing agencies if the state adopts provisions of law that protect the confidentiality of the federal income tax return information. ¹¹² Internal Revenue Code § 7431 gives a taxpayer a civil remedy against state employees for the greater of actual damages or \$1,000 per disclosure. ¹¹³ Internal Revenue Code § 7213(a)(2) makes it a felony for a state employee to willfully disclose federal-tax-return information, punishable by five years in prison.

¹⁰⁹ *Id.* at 7, 8 Exhibit 27.

¹¹⁰ California Gov't Code § 6200 ("Every officer having the custody of any record . . . is punishable by imprisonment in state prison [if as to any part of the record] the officer willfully does . . . any of the following: (a) Steal, remove, or secret, (b) Destroy, mutilate, or deface, (c) Alter or falsify.")

¹¹¹ FTB Educational Materials on Confidentiality with Sherlock Holmes visual aid, Deposition Exhibit 200, at 7. Exhibit 28.

¹¹² Internal Revenue Code § 6103(p)(8).

¹¹³ Internal Revenue Code § 7431(a)(2) and (c).

78. The criminality of the FTB's disclosing of Hyatt's secret address and social security number was outlined in the Crime/Fraud Appendix. In sum, three key FTB workers — Cox, Ford, and Jovanovich — have testified to destroying documents or computer data. That is one of the strongest badges of fraud.

9. Part of the invasion of privacy was the creation of a “virtual current biography” of Hyatt based solely on the discretion of an auditor, with no disinterested magistrate, and relying on a consent from Hyatt vitiated by fraud.

79. Hyatt's invasion of privacy claim rests partly on the intrusions on his home and seclusion and on the disclosure of personal secret facts. But it also rests partly on the massive 3,500-page investigation of him that was never supervised by any disinterested magistrate. His cooperation with that endless search was premised on fraudulent promises and his consent is vitiated by that fraud.

80. The Constitution forbids intrusion into personal records in such detail as to obtain a “virtual current biography” of individuals which is exactly what Hyatt contends the FTB did — with no warrant, no disinterested judge or magistrate — conduct a limitless “fishing expedition,” involving “unbridled discretion” and the sort of “general search” that the Constitutions of Nevada, California, and the United States forbid.¹¹⁴

¹¹⁴ I refer the Court to these four cases: copies of which were provided to the Court in connection with the Motion for Judgment on the Pleadings:

- *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), *modified*, 13 Cal. 3d 732a (1975) (The reason the Constitution requires legal process is distrust of “unbridled discretion” exercised by government law enforcers.) (emphasis added);

81. Hyatt contends that the FTB engaged in an unreasonable search of records intended to create a “virtual current biography” of Hyatt. The 3,500 pages of the audit record¹¹⁵ contain documentation showing that the FTB auditor considered relevant and asked from Gil Hyatt and others the papers evidencing his every:

- move for three years,
- purchase,
- haircut,
- check
- credit card charge
- subscription
- motel rental
- car rental
- apartment rental
- video rental
- home purchase
- home sale
- dues payment
- gift to his adult children
- gift to his grandchildren
- gift to foreign relatives
- gift to his alma mater
- contribution to politician
- gift to charity

-
- *People v. Tarantino*, 45 Cal. 2d 590, 594, 290 P.2d 505 (1955) (“The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.”);
 - *People v. Chapman*, 36 Cal. 3d 98, 109, 111, 201 Cal. Rptr. 628, 679 P.2d 62 (1984) (a holder of an unlisted telephone number had a constitutional privacy interest in maintaining her anonymity); and
 - *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).

¹¹⁵ Deposition Exhibits 101 (the 1991-tax-year) and 103 (the 1992-tax-year), Exhibits 4 and 5.

- deposit
- withdrawal
- doctor visit
- lawyer visit
- accountant visit
- rabbi visit
- application for drivers' license
- application to vote
- tax return
- cash receipt
- cash payment
- telephone call

82. A more far reaching search for three entire years could not be imagined.

The FTB lead auditor could not think of any area of Hyatt's life that was "out of bounds." ¹¹⁶

B. Since June 1999 the FTB has blocked discovery of its employees and refused to produce documents despite this Court's order.

83. In the Spring of 1999, prior to our filing the Crime/Fraud Appendix, the FTB had already been obstructing discovery. They had attempted to hide the location of Anna Jovanovich and hide her continuing contacts with the FTB. Commissioner Biggar later termed her a key witness. Sheila Cox hid the involvement of Candace Les for eight days, and then minimized the intrusiveness of the trespass at the Hyatt Las Vegas home. Starting in the Spring, they also began refusing to answer questions, based on the now-rejected deliberative-process privilege.

¹¹⁶ Sheila Cox deposition, Volume 2, at 347, Exhibit 6.

84. By the Summer of 1999 the FTB had actually shut down the discovery process with its constant and indiscriminate objections and instructions to witnesses not to answer based upon its now epidemic assertion of the “deliberative-process” privilege by which it unilaterally limited the scope of discovery. By the summer in response to any deposition question for which the FTB expects a damaging answer, the FTB’s attorneys object based upon the deliberative-process privilege. The height of absurdity was reached when the FTB instructed ex-auditor Jeffrey McKenney not to answer based on deliberative-process privilege when asked the following questions:

- “Did Sheila Cox tell you she had deliberately written the narrative in a one-sided way?”¹¹⁷
- “Did Sheila Cox tell you that she was deliberately exaggerating the strength of her evidence so that the Franchise Tax Board could assess large amounts of taxes and penalties against Mr. Hyatt?”¹¹⁸
- “Were you aware, in the records you saw, did you see any evidence of invasion of privacy of Mr. Hyatt?”¹¹⁹
- “Did you see any evidence of a deliberate attempt to make a demand for information to Nevada residents look like an official California subpoena?”¹²⁰
- “In the records you saw, did you see any evidence of a deliberate fraud on Mr. Hyatt?”¹²¹

¹¹⁷ Jeffrey McKenney Deposition, page 202, lines 11-13. See Exhibit 26.

¹¹⁸ *Id.* at 202, lines 4-10, Exhibit 26.

¹¹⁹ *Id.* at 261, lines 13-17, Exhibit 26.

¹²⁰ *Id.* at 261, line 23 to page 262, line 3, Exhibit 26.

¹²¹ *Id.* at 261, lines 18-22, Exhibit 26.

85. Hyatt compiled a video "highlight reel" of some of the FTB's outlandish and abusive assertions of the deliberative-process privilege.¹²² This includes excerpts from the deposition of Carol Ford regarding her "reviewer's notes" which this Court ordered produced (but have not been produced), and the deposition of Jeff McKenney who was instructed not to answer the above quoted questions.

86. By the summer the FTB had gotten so aggressive that it asserted such privilege over 125 times in three depositions.

87. The FTB's assertion of such privilege grew more brazen and almost indiscriminate as discovery proceeded. The FTB refuses to produce almost any of the responsive documents to Hyatt's most recent document request with objections under the deliberative-process privilege. The FTB asserted the deliberative-process privilege to such basic requests as Sheila Cox's field-audit manual and correspondence between the FTB and the IRS regarding Hyatt.¹²³

88. Finally, of course, this Court rejected the deliberative-process privilege late last year, but the FTB has petitioned the Nevada Supreme Court for a contrary ruling,

¹²² This videotape is referenced here as Exhibit 29 to my Affidavit. Hyatt submitted this videotape to the Court previously with an index setting forth the citations to the deposition testimony included on the tape. Copies of the transcripts from these portions of the depositions are submitted as Exhibit 30 to my Affidavit. The videotape itself is already on file with the Court because Hyatt submitted it for his successful motion to compel deliberative-process materials submitted to Commissioner Biggar and this Court as part of his post-hearing brief on July 21, 1999 and attached thereto as Exhibit 4 to that submission.

¹²³ Attached as Exhibit 31 is the FTB's Supplemental Request to Hyatt's Fourth Request for Production of Documents in which the FTB asserts deliberative process to ten categories of documents.

in the meantime refusing to comply, despite having lost its stay motion. This FTB's conduct is in direct violation of this Court's admonition against "foot-dragging."¹²⁴

89. The FTB's failure to produce the documents has prevented us from completing the depositions of the key witnesses, and asking them questions triggered by the documents being withheld. We need to question Cox, Illia, Ford, Bauche, McKenney, and Jovanovich, at a minimum, to even properly prepare an opposition to this motion, much less prepare for trial.

90. Moreover, since the date we filed the Crime/Fraud Appendix, June 1, 1999, the FTB has obstructed discovery so successfully that only *one* day of deposition of an FTB employee has been taken. That was the deposition of Monica Embry taken in June. Since July 1, the FTB has not allowed the deposition of a *single* FTB current employee. Instead of cooperating in discovery, the FTB forced us to engage in massive discovery battles with the FTB over the production of FTB attorney-client documents that were extensively briefed and carefully considered by Commissioner Biggar for *months*.

¹²⁴ Judge Saitta commented at the conclusion of the hearing on the FTB motion of judgment on the pleadings motion that "I must emphasize again, however, this is — even with the decision that was made today, *this remains a weighty case*, and I suspect that it is of the utmost importance to Mr. Hyatt, and *I don't want there to be any foot dragging*. We really cleared an awful lot of ground today. This was a huge motion. It was something that took time, was, once again, tremendously presented from both sides. But now we're in the meat of it, and *this case should not get bogged down in discovery disputes*. *There's way too much discovery to take place in this matter for anyone to drag their feet.*" 4/7/99 Transcript at 58-59, Exhibit 32 (emphasis added.)

91. Commissioner Biggar and this Court ruled that many key documents be turned over, but the FTB has refused, despite having received no stay of this Court's order.

C. Since June 1999 we have found further evidence of FTB torts by deposing ex-FTB-auditors, including Candace Les.

92. In the months since the filing of the Crime/Fraud Appendix, we did discover further evidence of FTB torts by deposing ex-FTB employees, such as Jeffrey McKenney, Doug Dick, and Candace Les. All of these witnesses were former FTB auditors or managers. Ms. Les, in particular has been willing to break the code of silence that exists at the FTB. Two other ex-FTB employees, however, confirmed some the "us vs. them" attitude at the FTB.

1. FTB manager Doug Dick lectured to residency auditors on using bargaining chips to negotiate with taxpayers as if you were in a Tijuana flea market.

93. Doug Dick, an FTB manager who supervised Mr. Illia, corroborated a key part of Ms. Les' testimony when he confirmed that he lectured a group of residency auditors, including residency chief Steve Illia in a conference in Sacramento. He confirmed his used of visual aids including :several large disks, probably five inches, six inches in diameter, and a yardstick." ¹²⁵ He said he used these chips to represent "negotiation chips." ¹²⁶

¹²⁵ Doug Dick deposition at 87-88, Exhibit 33.

¹²⁶ *Id.*, Exhibit 33.

94. He even demonstrated for the camera how big they were.¹²⁷ They were of different color, made up of heavy cardboard, with some kind of shiny paper on top.¹²⁸ He was talking about the process of negotiation and the give-and-take and used the yardstick to show the sliding scale of negotiation. He admitted his audience was "residency auditors." He likened negotiation to what you do in Tijuana in buying purses and how a good negotiator could get 40% off.¹²⁹ He suggested that good tactics would include making an initial offer lower than he was really willing to pay.

95. He used the chips as visual aids to illustrate that negotiation skills can prevent you from paying full price.¹³⁰ He taught them that the auditor with negotiation skills could be more productive, end up with better results, quicker results, more cost-effective results.¹³¹ He urged them to lead the taxpayer to believe that he or she need not fear the auditor, that the auditor is the taxpayer's best friend at the moment.¹³² He stressed how important it was to convince the taxpayer that it is his own best interest to produce documents.¹³³

¹²⁷ *Id.*, Exhibit 33.

¹²⁸ *Id.*, Exhibit 33.

¹²⁹ *Id.* at 89, Exhibit 33.

¹³⁰ Doug Dick deposition at 90, Exhibit 33.

¹³¹ Doug Dick deposition at 91, Exhibit 33.

¹³² Doug Dick deposition at 91, Exhibit 33.

¹³³ Doug Dick deposition at 92, Exhibit 33.

2. McKenney confirmed that Doug Dick lectured him using bargaining chips to illustrate the technique of having something to trade-off with taxpayers, your weak issues.

96. Jeffrey McKenney was the Sacramento residency auditor who assessed fraud penalties on Gil Hyatt for his 1992 tax year.¹³⁴ He denied being trained on negotiation and said he was “instructed we were not to negotiate.” But he did admit going to a Residency Program workshop where a manager, Doug Dick, gave a presentation on using issues as bargaining chips.¹³⁵ He said he thought what he was taught related to “trade-offs” rather than negotiation because you’re not really negotiating on, “the trade-offs in my work would come up if one of the issues wasn’t as factually substantiated or was weaker than the other.”¹³⁶ He too showed the camera how big the chips were.¹³⁷ He remembers Doug Dick passing the bargaining chips from hand to hand and identified him as a petty high up in executive or senior management at the FTB.¹³⁸

97. McKenney also confirmed his participation in a supposedly funny skit in which he made fun of taxpayers by dressing up as a half-blind, crippled, elderly taxpayer. “I played the taxpayer. . . I played the old, feeble taxpayer, who, I believe, used a cane. . . [I had] either glasses or a patch, something like that. . . [I] hobbled in with the cane and acted like I was an old, feeble man, and couldn’t see well, you know,

¹³⁴ Jeff McKenney deposition at 10, Exhibit 26.

¹³⁵ Jeff McKenney deposition at 11, Exhibit 26.

¹³⁶ Jeff McKenney deposition at 12, Exhibit 26.

¹³⁷ Jeff McKenney deposition at 12, Exhibit 26.

¹³⁸ Jeff McKenney deposition at 12-13, Exhibit 26.

kind of played that string with them. . . . I remember a good portion of it was definitely trying to hit the heart-string of sympathy. . . . [The other auditors found it funny.”¹³⁹ He and Anna Jovanovich participated in this skit.¹⁴⁰

III. Candace Les has revealed a money-driven FTB residency program that is out of control.

A. Les worked at the FTB for eight years and for four years was friendly with Cox until turned off by Cox’s racism.

98. Early this year I participated in six partial-day deposition sessions that the FTB noticed of former FTB residency auditor Candace Les. Les worked eight years for the FTB.¹⁴¹ She was a friend of Sheila Cox.¹⁴² Les testified that she had more experience than Cox and met her probably in 1993, and became a close friend after a while.¹⁴³ When they met, Les had residency experience and Cox had none, and Les helped train Cox.¹⁴⁴ Les testified that at the time of the Hyatt audit, “I was pretty much at the apex of my career. I was revered by management. I was promoted. . . . I had a reputation for being outspoken [and at that time] it was celebrated.”¹⁴⁵ Her “signature” was being good at collecting money.¹⁴⁶ Les had “made a name”¹⁴⁷ for herself, and

¹³⁹ Jeff McKenney deposition at 15-16, Exhibit 26.

¹⁴⁰ Jeff McKenney deposition at 17, Exhibit 26.

¹⁴¹ Candace Les deposition at 6, Exhibit 2.

¹⁴² Candace Les deposition at 6, Exhibit 2.

¹⁴³ Candace Les deposition at 8, Exhibit 2.

¹⁴⁴ Candace Les deposition at 8, Exhibit 2.

¹⁴⁵ Candace Les deposition at 74, Exhibit 2.

¹⁴⁶ Candace Les deposition at 74, Exhibit 2.

contributed to the residency unit going up on the revenue charts, on a steady “growth pattern.”

99. In contrast to Les, Cox could “compile a file very well,” this meant that she could gather information from Lexis/Nexis, news articles, and third-party sources and cross-reference it well.¹⁴⁸ Les had a basis for judgment that since she has reviewed her work and taken some of her cases over when she went to special investigations, including one of Cox’s major cases that involved over 100 hours of work, in which Les got to see Cox’s progress report, work papers, and draft narrative.¹⁴⁹ Ironically, Les had also seen a lot of that already on the Hyatt audit, where Les had no role.¹⁵⁰

100. Cox went as a witness for Les on some cases and Les accompanied Cox as a witness on a case.¹⁵¹ When Cox acted as a witness for Les, Cox told Les that she had done “Great.”¹⁵² And that same day in a bagel shop Cox called Les “the Queen of Residency.” Cox had complimented Les because Les had gotten the taxpayer representative to agree to the proposed adjustment.¹⁵³ Les had an above average record of reaching agreement with taxpayers, as opposed to Cox who was afraid to meet with

¹⁴⁷ Candace Les deposition at 75, Exhibit 2.

¹⁴⁸ Candace Les deposition at 76, Exhibit 2.

¹⁴⁹ Candace Les deposition at 76, Exhibit 2.

¹⁵⁰ Candace Les deposition at 76-77, Exhibit 2.

¹⁵¹ Candace Les deposition at 28, Exhibit 2.

¹⁵² Candace Les deposition at 31 Exhibit 2.

¹⁵³ Candace Les deposition at 31, Exhibit 2.

taxpayers.¹⁵⁴ Les's record was so good that very few taxpayers protested her cases, whereas most adjusted residency cases were protested.¹⁵⁵ "handled the big money cases" and came to know from talking to the tax representatives of the big-money celebrities she audited that their clients were "deathly afraid of getting a reputation that they were under audit by the FTB."¹⁵⁶

101. At the apex of their friendship at the FTB Cox and Les were going to night school together¹⁵⁷ two nights a week from 4 to 10, and Cox would stay over at Les's house on a third night of the week.¹⁵⁸ Les and Cox would see each other a lot and they'd hang out sometimes on the weekends.¹⁵⁹ They would socialize together, work out together, share personal things together, and exchange gifts together.¹⁶⁰ Cox's closest friend at the FTB was Les.¹⁶¹ Cox was a close enough friend with Les not to disguise her racism.¹⁶²

¹⁵⁴ Candace Les deposition at 31-32, Exhibit 2.

¹⁵⁵ Candace Les deposition at 33, Exhibit 2.

¹⁵⁶ Candace Les deposition at 66, Exhibit 2.

¹⁵⁷ Candace Les deposition at 70, Exhibit 2. Both were interested in joining the FTB special investigations unit, so they took Criminal Justice together at Valley College. *Id.* at 70-71, Exhibit 2.

¹⁵⁸ Candace Les deposition at 22, Exhibit 2.

¹⁵⁹ Candace Les deposition at 22 Exhibit 2.

¹⁶⁰ Candace Les deposition at 70-71, Exhibit 2.

¹⁶¹ Candace Les deposition at 22, Exhibit 2.

¹⁶² Candace Les deposition at 21, Exhibit 2.

102. In 1997 Les broke her friendship with Cox because of “philosophical and spiritual differences” including the fact that Cox was a racist.¹⁶³ Les was sensitive about this point and found it difficult to even say the racial slur that Cox used to describe Americans of Asian descent, such as Gil Hyatt’s close personal associate Grace Jeng. Les revealed that Cox “would refer to Asian people as gooks and Grace Jeng as well.”¹⁶⁴ Les, who is Jewish, was also upset that Cox would use the racial epithet “Jew bastard” to refer to Gil Hyatt.¹⁶⁵ Les was also upset that Cox called an Asian auditor who was her friend a “Gook,”¹⁶⁶ and used the “N-word” for Cox’s black supervisor Barbara Hince and a co-worker named Horace Pitts.¹⁶⁷ Lest there be any doubt, Les testified Cox said of her boss Barbara Hince, “God, what a nigger,” and also called Ms. Hince her “nigger boss.”¹⁶⁸ She called Iranian people “Arabs” and said that they stink.¹⁶⁹

103. Les informed FTB management and the FTB’s legal department about Cox’s racism, but they did not want to hear about it.¹⁷⁰

¹⁶³ Candace Les deposition at 10, Exhibit 2.

¹⁶⁴ Candace Les deposition at 10, Exhibit 2.

¹⁶⁵ Candace Les deposition at 11, Exhibit 2.

¹⁶⁶ Candace Les deposition at 13-14, Exhibit 2.

¹⁶⁷ Candace Les deposition at 14-15, Exhibit 2.

¹⁶⁸ Candace Les deposition at 17, Exhibit 2.

¹⁶⁹ Candace Les deposition at 15, Exhibit 2.

¹⁷⁰ Candace Les deposition at 19-21, Exhibit 2.

B. Cox violated FTB confidentiality rules is disclosing the FTB's investigation of the criminal activities of Hyatt auditor Felix Soriano to Les who had no "need to know."

104. After Cox was promoted to the FTB's special investigations unit, Cox told Les that one of the FTB's prior Hyatt auditors, Felix Soriano was being investigated by the FTB "for impersonating an IRS agent and carrying weapons in an airport or something."¹⁷¹ Cox had told this to Les even though FTB rules mandated that special investigations are to be kept confidential and secret.¹⁷² Les had no reason to know about that investigation.

C. Cox disclosed confidential facts about Hyatt and his audit to her friend Les who had no official role in the Hyatt audit and "no need to know."

105. Despite the fact that Les had no role in the Hyatt audit, and no need to know, Cox talked with Les about the Hyatt audit by name.¹⁷³ Les's supervisor never assigned Les to do anything on the Gil Hyatt audit.¹⁷⁴ During their friendship Cox told Les the details of the work she was doing on the Hyatt case even though Les had no official role in the audit.¹⁷⁵ Cox told Les about:

- her interviewing Gil Hyatt's relatives;¹⁷⁶

¹⁷¹ Candace Les deposition at 18, Exhibit 2.

¹⁷² Candace Les deposition at 19, Exhibit 2.

¹⁷³ Candace Les deposition at 7, 9, Exhibit 2.

¹⁷⁴ Candace Les deposition at 35, Exhibit 2.

¹⁷⁵ Candace Les deposition at 23, Exhibit 2.

¹⁷⁶ Candace Les deposition at 23, Exhibit 2.

- her getting affidavits from Gil Hyatt's ex-wife and daughter and his brother in San Diego;¹⁷⁷
- his relatives hating him;¹⁷⁸
- his being a "bad man;"¹⁷⁹
- her personally investigating his former La Palma house three times;¹⁸⁰
- the neighbors in the La Palma cul-de-sac being on the lookout;
- one guy "in particular *who had one arm and who was like the lookout guy and it was real creepy*;"¹⁸¹
- the one-armed man being a "lookout for FTB auditors;"¹⁸²
- the one-armed man being "an *old* one-armed man;"¹⁸³ and
- the neighbors being "a cast of *ghouls* looking out for — like on the lookout for State auditors."¹⁸⁴

106. Cox bragged about the Hyatt case to Les, as well as her work on other cases.¹⁸⁵ She did so not only in private with her close friend Les, but also in front of other auditors.¹⁸⁶ Cox also discussed the case in the monthly or bimonthly Residency

¹⁷⁷ Candace Les deposition at 23, Exhibit 2.

¹⁷⁸ Candace Les deposition at 23, Exhibit 2.

¹⁷⁹ Candace Les deposition at 24, Exhibit 2.

¹⁸⁰ Candace Les deposition at 24, Exhibit 2.

¹⁸¹ Candace Les deposition at 25, Exhibit 2 (emphasis added).

¹⁸² Candace Les deposition at 25, Exhibit 2.

¹⁸³ Candace Les deposition at 25, 172, 176, Exhibit 2 (emphasis added).

¹⁸⁴ Candace Les deposition at 25, Exhibit 2 (emphasis added).

¹⁸⁵ Candace Les deposition at 59-60, Exhibit 2,

¹⁸⁶ Candace Les deposition at 60, Exhibit 2.

meetings, aka RAIN meetings.¹⁸⁷ Cox talked about the Hyatt case “constantly.”¹⁸⁸ The Hyatt case was always Cox’s “case du jour,” and it seemed like she spoke about it “year after year” in the monthly or biweekly RAIN meetings.¹⁸⁹ Les got more than impression that this was a big part of Cox’s case load, “I *knew* that it was a big part of her case load.”¹⁹⁰

107. Cox also shared some of the Hyatt work papers with Les.¹⁹¹ Cox asked Les to review the Hyatt audit closing letter and later gave Les a copy of the Hyatt audit narrative.¹⁹²

1. Cox was *obsessed* with Hyatt.

108. Les testified that Cox was *obsessed* with the Hyatt case,¹⁹³ and that she witnessed Cox go through Hyatt’s mail and trash in Las Vegas.¹⁹⁴ Les has seen other auditors obsessed with cases.¹⁹⁵ Les testified that sometimes auditors would “absolutely” become fixated on a particular audit, and that “I believe the Gil Hyatt

¹⁸⁷ Candace Les deposition at 60-61, Exhibit 2.

¹⁸⁸ Candace Les deposition at 61, Exhibit 2.

¹⁸⁹ Candace Les deposition at 61-62, Exhibit 2.

¹⁹⁰ Candace Les deposition at 62-63, Exhibit 2.

¹⁹¹ Candace Les deposition at 26, Exhibit 2.

¹⁹² Candace Les deposition at 27, Exhibit 2.

¹⁹³ Candace Les deposition at 63, Exhibit 2.

¹⁹⁴ Candace Les deposition at 269, 273, Exhibit 2.

case she was obsessed with. [I.e.] talk about incessantly, inability to let go even after it was closed to the point where she created a real fiction in her head about it. . . .”¹⁹⁶

Cox told her that the Hyatt case was the largest she had handled up to that point and said , that based on her polling of other auditors, it was had the largest tax potential of any audit at the time.¹⁹⁷

109. She testified that she was so uncomfortable with Cox’s inappropriate behavior that she yelled at Cox to get out.¹⁹⁸ Les has directly contradicted Cox’s deposition testimony and portions of Cox’s summary-judgment-motion affidavit. In essence she has accused Cox of perjury.¹⁹⁹

2. Cox stalked Hyatt after the audit, traveling to Las Vegas, taking trophy photographs, and going through his trash and mail.

110. Les testified that their November 1995 post-audit trip to Hyatt’s Las Vegas home was no accident and that they were *not* merely “in the vicinity” as stated in

¹⁹⁵ Candace Les deposition at 63, 64, Exhibit 2 (e.g. “Chris Blackmore had a case that gripped him for like four years. . . . Ashraf Massound had a taxpayer who kind of went overboard with it.”

¹⁹⁶ Candace Les deposition at 63, Exhibit 2.

¹⁹⁷ Candace Les deposition at 70, Exhibit 2.

¹⁹⁸ Candace Les deposition at 269, Exhibit 2.

¹⁹⁹ Candace Les deposition at 361, Exhibit 2: “Since she lied on the witness stand I believe, you know, Sheila Cox is a liar. . . . In retrospect when I reviewed the totality of the whole situation, yes, I saw many instances where I believe she lied.” In particular Cox’s testimony the trip to Hyatt’s home was just a drive-by was a lie. *Id.* at 362, Exhibit 2.

Cox's summary-judgment-motion affidavit at ¶ 26.²⁰⁰ Les testified that they had spent over two hours investigating Gil Hyatt in November 1995,²⁰¹ in fact "two hours and 45 minutes,"²⁰² although "it seemed like the whole day,"²⁰³ and it seemed so long because Les recalls clearly and distinctly that "we couldn't find that Pecos Street." Cox did not stumble upon the Wagon Trails apartments, she "made a deliberate effort to find the apartment complex."²⁰⁴

111. Les said that Cox told her during the two hour 45 minute trip *why* she wanted to see these places: "She said she wanted to see his house because at the end of the audit the taxpayer claimed he had built a berm on his house and she wanted to see the berm and she wanted to get some photographs or see the Wagon Trails again because I think she mentioned that she had been there before and that's what it was."²⁰⁵

²⁰⁰ Candace Les deposition at 42, Exhibit 2. Les went to the Hyatt house in Las Vegas because "Sheila said she wanted to." She had maps that showed where she wanted to go. *Id.*, Exhibit 2.

²⁰¹ Candace Les deposition at 268, Exhibit 2.

²⁰² Candace Les deposition at 51, Exhibit 2.

²⁰³ Candace Les deposition at 50, Exhibit 2.

²⁰⁴ Candace Les deposition at 51, Exhibit 2.

²⁰⁵ Candace Les deposition at 51-52, Exhibit 2.

112. Cox did not tell her what a berm was — the two friends “looked up berm in the dictionary because we didn’t know what berm was.”²⁰⁶ When they visited Hyatt’s home on Tara “it appeared there was a berm.”²⁰⁷

113. At the time of the visit that Cox and Les made to Hyatt’s home “the audit was over.”²⁰⁸ The FTB rules say “once the audit is over, it’s over, you know. You can’t be a stalker.”²⁰⁹

114. Les knew, however, that Cox had a history of “inspecting” the homes of celebrities, even when they were not under audit.²¹⁰

115. Les corroborated her testimony contradicting Cox, by authenticating a map and photographs. She authenticated a Las Vegas *map* containing Cox’s handwriting identifying Hyatt’s former Wagon Trails Apartment address in Las Vegas and his secret Las Vegas home address on Tara Avenue.²¹¹ She authenticated four *photographs* that Cox took²¹² of her and of Hyatt’s former Wagon Trails Apartment

²⁰⁶ Candace Les deposition at 52, Exhibit 2. Les recalled that a berm was a hillside. *Id.* Webster’s *New World Dictionary* (3d college edition 1991), includes among its definitions of berm: “a wall or mound of earth.”

²⁰⁷ Candace Les deposition at 52, Exhibit 2.

²⁰⁸ Candace Les deposition at 54-55, Exhibit 2.

²⁰⁹ Candace Les deposition at 55, Exhibit 2.

²¹⁰ Candace Les deposition at 55, Exhibit 2.

²¹¹ Candace Les deposition at 42-44, Exhibit 2 (Hyatt’s address is written in Cox’s handwriting); Deposition Exhibit 278, attached hereto as Exhibit 34.

²¹² Candace Les deposition at 52, Exhibit 2 (“I didn’t take any photographs. Sheila took photographs.”)

address²¹³ and secret Tara Avenue address.²¹⁴ Cox did not place either her Hyatt-related Las Vegas map or the Hyatt-related photographs in the FTB Hyatt-audit file.²¹⁵ Cox would go out in the field with Les on a "gig" where the celebrities became "fair game."²¹⁶ Les knew of one celebrity home in Beverly Hills, California that Cox visited three times, even though the celebrity was never actually audited.²¹⁷ Cox was proud of it, "she regarded herself as, you know, some kind of sleuth, some kind of residency sleuth and that, you know, she was doing the job and so she was a little braggadocio

²¹³ Candace Les deposition at 53, Exhibit 2.

²¹⁴ Deposition Exhibit 286 is a photograph of Candace Les in front of Gil Hyatt home on Tara Avenue, Las Vegas taken during the November 1995 Les/Cox trip to Las Vegas, and is marked as Exhibit 35.

Deposition Exhibit 287 is a photograph of Gil Hyatt home on Tara Avenue, Las Vegas taken during the November 1995 Les/Cox trip to Las Vegas and is marked as Exhibit 36.

Deposition Exhibit 294 is a photograph of the Wagon Trails Apartment complex in Las Vegas taken during the November 1995 Les/Cox trip to Las Vegas and is marked as Exhibit 37.

Deposition Exhibit 297 is a photograph of the entrance to Wagon Trails Apartment complex in Las Vegas taken during the November 1995 Les/Cox trip to Las Vegas and is marked as Exhibit 38.

²¹⁵ Candace Les deposition at 274-75, Exhibit 2: "Did she [Sheila Cox] ever ask you to have the photographs put into the Hyatt file? A. No. . . . Q. Did you ever put the Hyatt house photographs into any audit file at the FTB? A. No. . . . Q. Did you ever put that Wagon Trails photograph in any FTB file? A. No."

²¹⁶ Candace Les deposition at 56, Exhibit 2.

²¹⁷ Candace Les deposition at 58-59, Exhibit 2.

with it.”²¹⁸ Cox even described the celebrity’s home to Les, who had no need to know.²¹⁹ But Les’s understanding was that such stalking “wasn’t permissible.”²²⁰

3. Cox was out to “get” Gil Hyatt.

116. Les testified that Cox used the map to drive Les clear across Las Vegas to visit not only Wagon Trails Apartments on the east side of town, but also the Hyatt home on the west side of town.²²¹ Cox deliberately drove to both Hyatt-related locations during the November 1995 post-audit trip so that Cox could secretly observe the object of her obsession one more time.²²² Les also testified she heard Cox say to her *husband* (another person with no need to know) that she was out to “get” Gil Hyatt.²²³ Cox told Les “I’m going to get that Jew bastard.”²²⁴

²¹⁸ Candace Les deposition at 59, Exhibit 2.

²¹⁹ Candace Les deposition at 66, Exhibit 2.

²²⁰ Candace Les deposition at 69, Exhibit 2.

²²¹ Candace Les deposition at 268, Exhibit 2: “Okay, as I recall we went to that Pecos Wagon Trails first and it took us so long, I think we talked about two hours and 45 minutes doing this whole tour of Gil Hyatt addresses on that map that was an exhibit, and we couldn’t find the Pecos because there is like a lot of Pecos or something like that and we were driving and driving and that took a long time, maybe an hour, and then as I recall, the Tara house was on the other side of town and we were driving, driving , driving.”

²²² Candace Les deposition at 275, Exhibit 2: “Was your visit to the Tara residence because you happened to be in the neighborhood and just decided to do a drive-by? A. I believe the visit was a preconceived visit from Sheila planning to visit these various locations of Gil Hyatt’s. Q. Well, Sheila Cox testified that you and she were in the neighborhood and you just did a quick little drive-by without stopping. Is that untrue? A. That’s untrue.”

²²³ Candace Les deposition at 988, Exhibit 2: “Q. Do you recall at any time observing that Sheila Cox was talking to her husband about the Gil Hyatt case? A. Yes. Q. And what was she saying to him about the Gil Hyatt case in your presence?

D. Cox committed perjury.

117. Les revealed that Sheila Cox was obsessed with Gil Hyatt and was out to get him. Cox could not "let go" of the case and blabbed about it incessantly to people who did not have a need to know.

1. Cox tried to hide the involvement of Les.

118. Most importantly for these purposes, Les has revealed that Cox committed perjury about what happened at Gil Hyatt's house in November 1995. I questioned Cox for days about who was involved in the Gil Hyatt case and she withheld the name of Les. I even prepared a chart and marked it as an exhibit of all the auditors whom Cox said were involved in the Gil Hyatt case.²²⁵ The list had the names of 38 people on it, including one we wrote in during the deposition. The name of Les was *not* on the list. Les was a close confidant of Cox.

2. Cox tried to hide her second trip to Las Vegas to stalk Hyatt.

119. For days, Cox stood by her story that she had made only one trip to Mr. Hyatt's home and apartment in Las Vegas, and she denied going through his mail. Les testified, however, to a three-day trip to Las Vegas that she and Cox made in late 1995.²²⁶ When Les got permission from her supervisor Barbara Hince she mentioned

A. She would just talk openly on the occasions that I went about, you know, getting this taxpayer. Q. And what did she say about getting the taxpayer? A. Like I want to keep working on the case until I get him. . . ."

²²⁴ Candace Les deposition at 10, Exhibit 2.

²²⁵ The chart is Deposition Exhibit 166, Exhibit 39.

²²⁶ Candace Les deposition at 36-37, Exhibit 2.

only Les-related activities in her written plan.²²⁷ Nothing was in there about Gil Hyatt.²²⁸ In fact, however, as Les testified, they went to “Gil Hyatt’s apartment and Gil Hyatt’s house.”²²⁹

120. The trip there, however was no accident. They visited because “Sheila said that she wanted to.”²³⁰ “And she was driving [because] she knew where she was going.”²³¹ Cox already had some maps showing where she wanted to go, and she had written on them where she wanted to go.²³²

3. Cox tried to minimize her intrusion on Tara, by hiding her trespass, photographs, illegal dumpster diving, and rummaging through Hyatt’s mail.

121. Through eight days of deposition in her capacity as the FTB’s Rule 36(b)(6) witness most knowledgeable on the activities of the FTB with respect to Hyatt, Cox omitted mentioning Les as having anything to do with Gil Hyatt. She also omitted any mention of a second trip to Hyatt’s Las Vegas home. Finally on day *eight* of her deposition, Cox admitted driving by Gil Hyatt’s home on Tara in November 1995 with Les in the moving car because “we were in that part of town.”²³³ In cross-examination

²²⁷ Candace Les deposition at 37, Exhibit 2.

²²⁸ Candace Les deposition at 38, Exhibit 2.

²²⁹ Candace Les deposition at 39, Exhibit 2.

²³⁰ Candace Les deposition at 42, Exhibit 2.

²³¹ Candace Les deposition at 42, Exhibit 2.

²³² Candace Les deposition at 42, Exhibit 2.

²³³ Sheila Cox deposition at 1949-50, Exhibit 6: “Q. So how many times did you visit the Gil Hyatt house in those three or four trips? A. I visited the Gil Hyatt house

she repeatedly denied getting out of the car, she denied going through his mail, she denied going through his trash, and she denied even stopping the car. She denied taking any photographs.²³⁴

122. Les, no longer burdened by the code of silence, revealed that Cox had deliberately driven them both to Mr. Hyatt's former apartment at the Wagon Trails Apartments on Pecos in Las Vegas and also to Mr. Hyatt's Tara home in Las Vegas in November 1995.²³⁵ She revealed that Cox did stop the car. Cox did go through the mail.²³⁶ Cox did go through the trash. Cox did get out, and even trespassed into Hyatt's back yard. Finally, Cox did take a photograph.²³⁷

daily on the trip to Las Vegas. I believe I drove by the house on a subsequent trip. Q. And who were you with? A. I was with an FTB auditor Candace Les. Q. Why didn't you tell us about that before? A. I don't believe that was really a field trip. We were in Las Vegas working on some of her cases and we were in that part of town so we just drove by the house."

²³⁴ Sheila Cox deposition at 1950, Exhibit 6: "Q. Did you stop? A. No, we did not. Q. Did you go up to the porch? No, we did not. Q. Did you look at his mail? A. No, we did not. Q. Did you take a picture of yourself in the front of the berm? I don't recall taking a picture in front of the house. Q. Did you get out of the car? I don't recall getting out of the car. Q. Did you go around to the back of the house? No, I did not."

²³⁵ Candace Les deposition at 275, Exhibit 2: "I believe the visit was a preconceived visit from Sheila planning to visit these various locations of Gil Hyatt's."

²³⁶ Candace Les deposition at 273-74, Exhibit 2: she felt discomfort about Cox going through the mail since "I knew she shouldn't be doing that, but I mean it was too late."

²³⁷ Candace Les deposition at 274-75, Exhibit 2: Cox *never* asked Candace Les to have the photos put in the Hyatt file, even though Candace Les had no need for any of the Hyatt photographs and no need to know anything about the Hyatt audit.

4. Cox left physical evidence — maps and photos — that supports Les and damns Cox.

123. We might be stuck with two conflicting stories, except for one thing. The physical evidence. Cox left the map she used with Les.²³⁸ The map she left behind has Cox's own handwriting on it listing their targets — and the targets of their surveillance was Gil Hyatt's former apartment at the Wagon Trail Apartments address and his Tara home. That map was marked at Les' deposition.²³⁹ Les identified that written on the map it were four Hyatt-related Las Vegas addresses:

- Gil Hyatt's secret home address at Tara,
- Gil Hyatt's former Wagon Trails Apartment address on Pecos,
- Gil Hyatt's mail-drop address on Rainbow;²⁴⁰ and
- Gil Hyatt's work address²⁴¹ at the offices of his Nevada tax rep. on Elton.²⁴²

²³⁸ Candace Les deposition at 48, Exhibit 2 ("I believe in the end of the trip, [the map] was in like, the rent-a-car/airline ticket map file and so I got the map.")

²³⁹ Deposition Exhibit 278, Exhibit 34.

²⁴⁰ Further evidence that this entry on the map was Cox's doing is that Les had no knowledge of what connection, if any, the Rainbow address had with Hyatt. Candace Les deposition at 45, Exhibit 2. But Cox had sent a form demanding information from the mail drop on Rainbow on 3/23/95. 1991-tax-year Hyatt-audit file, Deposition Exhibit 101, Vol 3, at H 01581, Exhibit 4. Cox *knew* that Hyatt received mail at the Rainbow address since the postmaster returned the address information to Cox saying so, and she received it on 3/30/95. *Id.* at H 01653, Exhibit 4. Cox and FTB auditor Sheila Semana had visited the Rainbow address six months earlier and spoken to the manager. *Id.*, Vol 1, at H 00402, Exhibit 4. Cox placed the business card of the owner of the Rainbow mail drop in the audit files at H 00409, Exhibit 4.

²⁴¹ Again there is proof that placing this address on the map was Cox's doing, not Les's. Les did not know what connection, if any, this address had to Hyatt. Candace Les deposition at 45, Exhibit 2. But Cox had corresponded with Mike Kern, Hyatt's CPA at that address, e.g. 1991-tax-year Hyatt-audit file, Exhibit 101, Vol 3, at H 01751, Exhibit 4, and six months earlier Cox and her friend, FTB auditor Sheila Semana, had *twice* made a secret, unannounced, surveillance of the CPA's parking lot and office on March 7, 1995 and March 8, 1995 at the Elton address. *Id.*, Vol 1, at H 00405, and H 00406, Exhibit 4.

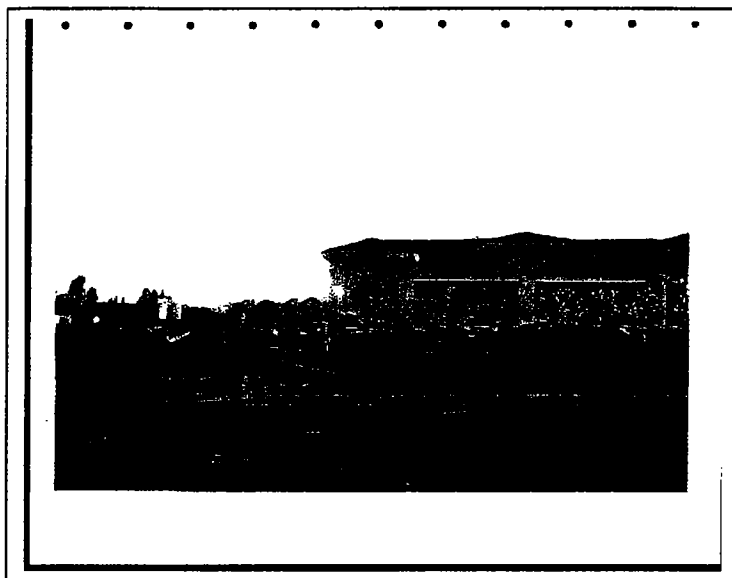
124. In addition, Cox denied taking any photographs. But Les has the photographs.

125. At the Les deposition we marked the trophy photograph that Cox took of Les in front of the Gil Hyatt home on Tara.²⁴³ That trophy photograph is significant for it demonstrates that Cox lied about making only one trip to Hyatt's home, about not going through his trash or mail, about not trespassing, and about not taking photographs.

²⁴² Candace Les deposition at 43, Exhibit 2.

²⁴³ Deposition Exhibit 286, Exhibit 35.

126. The trophy photo looks like this:



127. Les produced other trophy photographs of Hyatt's Wagon Trails Apartments, showing a nice neighborhood.²⁴⁴ This is significant because one of the witnesses the FTB wants to hide completely from questioning is Ashraf Massoud. But Cox gave him written instructions to take photographs with a twist. She was looking for photographs to prove Wagon Trails was in a bad neighborhood as was done in another residency case. I need to cross examine Mr. Massoud about those instructions and what was done in the other case, and what he tried to accomplish with his photography skills.

²⁴⁴ Deposition Exhibits 294 is Exhibit 37;

Deposition Exhibit 296 is Exhibit 40; and

Deposition Exhibit 297 is Exhibit 38.

5. Cox told Les she had gone to Las Vegas *again* with Farzaneh Eshaghian, one of the auditors the FTB is hiding from discovery.

128. Les also revealed that Cox told her that she had made a *third* trip to Las Vegas, this one with Farzaneh Eshaghian, one of the FTB auditors we wish to depose now.²⁴⁵ The Cox perjury illustrates the culture of “I don’t remember.”²⁴⁶ I need to question Eshaghian to see if she is conveniently forgetting her trip to the Hyatt Las Vegas home, or perhaps merely is classifying it as a harmless “drive-by” of a curiosity seeker rather than as official FTB business. I am entitled to question her while her memory is fresh. We have sought to depose her for over a year and the FTB should not be able to stall depositions until memories fade. What may have been a minor Las Vegas trip for Eshaghian may require jogging her memory, but the longer the FTB *delays* her deposition, the less likely it is that that we can get the benefit of her valuable memory.

6. Cox lied about Hyatt’s landscaping and the berm.

129. The Cox/Les trip to Tara was significant for one of the issues in the case — that of landscaping and a berm — for Cox had written in her audit report that Hyatt had not landscaped his home. Hyatt claimed, in contrast, to have built a berm [hill in

²⁴⁵ Candace Les deposition at 16, Exhibit 2: “I know that they went to Las Vegas. . . [Cox] said that Farzaneh drove her crazy because she kept kosher and she would have to look of kosher food or not eat and she didn’t like that.”

²⁴⁶ “The ‘I don’t recall’ evasion. This is the lie of choice for people who have to testify but don’t want to tell the truth or be prosecuted for perjury. That’s why so many lawyers advise clients and witnesses in tight spots to be mindful of what a fugitive thing memory can be. And that’s why President Nixon advised aides on March 21, 1973, on tape: ‘Perjury is an awful hard rap to prove. . . . Be damned sure you say, “I don’t remember, . . . I can’t recall.”’” Stuart Taylor, Jr., “Opening Argument,” *National Journal*, May 16, 1998, 1998 WL 2089190.

front] and that he had spent thousands of dollars filling and irrigating and landscaping. While perhaps not meeting Cox's exacting California standards for lush landscaping, Les testified that yes there was landscaping²⁴⁷ and yes there was a berm.²⁴⁸

130. The berm was so important to Cox that she kept talking about it and she and Les looked it up — twice — in dictionaries.²⁴⁹ Les testified that she saw a berm. Cox said there was no berm. The photo shows a berm.

131. The Les testimony and physical evidence show that Cox cannot be trusted to tell the truth. I need to cross-examine Cox about the visit she made to Tara, confront her with her false testimony, and find out what else of her previous testimony is false. I also need to question her about the documents that this Court ordered produced and the other matters left unfinished at her deposition. I believe it is axiomatic that a witness who has lied should be subject to cross-examination.²⁵⁰

²⁴⁷ Candace Les deposition at 270, Exhibit 2: "Q. Based on what you saw did it look to you like it had been landscaped.? A. It looked like a landscaped house"

²⁴⁸ Candace Les deposition at 268, Exhibit 2: "Q. Did you see plants in the front? A. Well, I saw the infamous berm. Q. And did the berm have some plants planted on it? A. Yes, there were plants on the berm."

²⁴⁹ Candace Les deposition at 379-80, Exhibit 2: "We looked it up twice".

²⁵⁰ My view echoes that of Justice Stevens: "Even if one does not completely agree with Wigmore's assertion that cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth,' one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate. *For that reason, a party has a motive to cross-examine any witness who, in her estimation, is giving false or inaccurate testimony about a fact that is material to the legal question at issue in the proceeding.*" *Unites States v. Salerno*, 505 U.S. 317, 328, 112 S. Ct. 2503, 120 L.Ed.2d 255 (1992) (Justice Stevens dissent) (emphasis added).

132. None of Les's critical testimony has been completed in the sense of being transcribed and reviewed by the witness. We did not complete Les' deposition. We need more time to complete her deposition and allow her to read and sign her testimony.

E. Les revealed an FTB that imposes and encourages goals and quotas driven by money.

133. Les testified that the FTB auditors considered themselves part of a revenue-producing agency. Thus if an auditor had a high propensity toward no-change audits [i.e. decisions that no new tax need be imposed] then that "was not a good thing,"²⁵¹ or at least management did not regard it as a good thing.²⁵² As Les explains it, the FTB "is not in the business of not producing revenue," after all, the FTB produced through taxation most of the State of California's budget.²⁵³ Les heard management counsel auditors about having too many no change audits.²⁵⁴ A friend of Les, FTB supervisor Jahna Alvarado (who was accompanied Cox on a Hyatt-audit interview) testified that she was worried about becoming known as the "Queen of No Change Audits" when she turned in five in a row "no change" audits.²⁵⁵

²⁵¹ Candace Les deposition at 34.

²⁵² Candace Les deposition at 34-35.

²⁵³ Candace Les deposition at 34, Exhibit 2.

²⁵⁴ Candace Les deposition at 35, Exhibit 2.

²⁵⁵ Jahna Alvarado deposition at 101, Exhibit 41.

IV. Hyatt's case mirrors the nation's cases of privacy fraud, police planting of evidence, and taxpayer abuse.

134. The FTB pooh-poohs²⁵⁶ the Hyatt fraud claim, but it is part of an emerging nationwide consensus built up over the past forty years that privacy should be protected and taxpayers should not be abused. Some of the evidence of this is in widely publicized news sources, but not in reported judicial decisions, so I provide this information to the Court.

A. The Hyatt fraud case parallels the nationwide fraud cases against banks alleging false privacy notices to customers to the effect that their personal data would be kept confidential.

135. This February I researched on Westlaw the name of California's Attorney General Bill Lockyer.²⁵⁷ I searched for his name near the words privacy and contempt. I looked into contempt because of the contemptuous conduct of the FTB here and found that even in California both Attorney General Lockyer and his predecessor had been found in *contempt* of court by our Chief Federal Judge Manual Real for discovery foot-dragging and failure to produce court-ordered documents. Those articles have relevance to the deliberate nature of the FTB's contempt of this Court's order.

137. As to the merits of the Hyatt case, another article has even more significance. I refer to the first article, a news release by the National Association of Attorneys General, announcing the successful settlement of a fraud case against a bank for posting a fraudulent privacy policy. It seemed to me hypocritical for the Attorneys

²⁵⁶ The dictionary definition of pooh-pooh, the transitive verb, is "to minimize or treat disdainfully; make light of; belittle" Webster's New World Dictionary, 1049 (3d college edition 1991).

²⁵⁷ I attach the relevant portions of my search as Exhibit 42.

General to demand that private industry adhere to their privacy policy, under penalty of multi-million dollar suits, and yet they defend the FTB's fraudulent promulgation of a knowingly false privacy policy. The press release stated that

"Bank customers in Minnesota and nationwide expect and value the privacy of their account and other information they provide to banks. Bank customers do not appreciate information they perceived as private such as credit histories, social security numbers, telephone numbers and credit card numbers to be transmitted to telemarketers.

"In June 1999, Minnesota Attorney General Mike Hatch filed a lawsuit against U.S. Bancorp accusing the bank of illegally selling customer information to a telemarketing firm, MemberWorks, Inc. The complaint, filed in federal district court, alleged that U.S. Bancorp . . . engaged in consumer fraud, deceptive trade practices, and false advertising because it had informed its customers that their data would be treated as private and confidential.

"Many banks and other financial institutions routinely transmit customer data to third party telemarketing firms. . . . U.S. Bancorp, in many instances, did not inform its customers that it was selling customer data to third parties and, in fact, made explicit promises of privacy to customers that were inconsistent with the transfer of data to telemarketers.

"In late June, U.S. Bancorp agreed to settle the lawsuit with no admission of liability, payment of a \$500,000 fine, restitution to consumers, which may be as much as \$15 million dollars in Minnesota alone, and charitable contributions in Minnesota and other states of approximately \$3 million.. . .²⁵⁸

138. I have seen the complaint and successful multi-million dollar settlement documents indicating that the bank settled quickly the AG's fraud suit based on its fraudulent disclosure of its customers' social security numbers and other personal information in violation of its written privacy notice to consumers. I have mislaid them

²⁵⁸ Exhibit 42.

and request permission from this Court to produce them for the hearing in the event I locate them.

138.1 In any event, the litigation with the bank was widely reported and a series of nationwide class actions in the Midwest and California appear to have been launched against other banks making similar privacy-fraud claims.²⁵⁹ According to the 8/1/99 *Cincinnati Post* the U.S. Bancorp's privacy statement read, "all personal information you supply to us will be considered confidential," but it sold data just the same.

138.2 On June 18, the *Minneapolis Star Tribune* reports a Los Angeles-based consumer advocacy group, Consumer Cause, filed suit against B of A, Wells Fargo and Denver-based Union Bank of California [UBSC] for allegedly selling their customers' personal information to telemarketers and other third parties. The suit alleges that the banks sold customers' addresses, Social Security numbers and other information without disclosing it for the past four years. The suit filed in San Francisco County Superior Court, seeks class action status.

138.3 The 6/18/99 *Denver Post* reported that "People are appropriately careful about protecting their Social Security number, checking and credit card information,"

²⁵⁹ I attach three such articles as Exhibit 43. The first article notes that "Federal law doesn't prohibit a bank from selling customers' data. Banks are only barred from assembling information from third parties and selling it. But in this case *U.S. Bancorp's privacy disclosure statement promises customers their data will be kept confidential*, Hatch said. As a result, Hatch said, U.S. Bancorp violated the Fair Credit Reporting Act and *engaged in deceptive advertising and fraud*. He cited three state laws that he said prohibit U.S. Bancorp's actions." (Emphasis added.)

Minnesota Attorney General Mike Hatch said in a statement. "When a bank hands out this information to the highest bidder, it has to answer to its customers and to the attorney general." The 6/1/99 Multinational Monitor published that U.S. Bank has a privacy policy printed in its U.S. Bank Customer Agreement that says, "We share your concerns about the privacy of your personal information and strive to maintain its confidentiality." Nothing in the bank's agreement reveals that personal, confidential information is being sold to companies that are not affiliated with U.S. Bank. Hatch says that none of U.S. Bank's consumer brochures disclose to customers that their names and account information could be sold to a third party. That's is eerily reminiscent of Hyatt's complaint about the FTB disclosures to third parties in violation of their promises.

138.5 The public uproar about bank privacy fraud cause over a dozen articles about the violation. I attach four representative articles as Exhibit

B. Hyatt's tort case involves evidence of public servants planting evidence and framing innocent citizens, like the growing Rampart scandal in LA.

139. Above I have compiled a record of fraud, invasion of privacy, and outrage. I was struck in reading the FTB's motion for summary judgment about the attitude it expresses the "good soldier" defense, that the auditors were only doing their patriotic duty to follow up on *suspicious* circumstances to catch a tax *evader*. The insidious idea that suspicions justify a suspension of privacy rights, a suspension of civil liberties, a suspension of the Constitutional right to be free from unreasonable searches and seizures has been repeatedly rejected by our society. In the cases cited in our brief, for example, the District of Columbia found a sister state liable for allowing its police

to cross state lines to negligently conduct and control a high-speed chase of a bank robber that caused an innocent by-stander to have his leg amputated. And Nevada found a sister state liable for sending a negligently prepared arrest warrant into Nevada causing the false arrest of a Nevada citizen. The law demands that the law enforcers follow the law. The cliché is that "Who polices the police?" In our country, the courts check governmental abuse.

140. A good example of a law enforcement agency that let its zeal for pursuing "bad guys" lead to citizen-abuse is the Los Angeles Police Department's Rampart Division. This section of the LAPD has through excess zeal plunged the entire city into a scandal that day after day covers the headlines. "The scandal centers on allegations that Rampart Division gang suppression CRASH officers routinely manufactured evidence and committed perjury to frame people — many of them gang members or their associates — for crimes they did not commit."²⁶⁰ Already "39 people have had their convictions reversed on grounds that crooked Rampart cops set them up."²⁶¹

142. The scandal surfaced in September when a former Rampart police officer, in a bid to get a lighter sentence in his own cocaine-theft case, began detailing for authorities a host of alleged misconduct by his fellow Rampart gang-suppression CRASH officers. That alleged misconduct included framing people — usually Hispanic gang members or their associates — for crimes they did not commit, dealing

²⁶⁰ Michael D. Harris, "DA's Believe Scandal Affects Trials' Results, *Los Angeles Daily Journal*, Wednesday March 15, 2000 at 1.

²⁶¹ Michael D. Harris, "DA's Believe Scandal Affects Trials' Results, *Los Angeles Daily Journal*, Wednesday March 15, 2000 at 1.

drugs, lying in sworn affidavits to obtain gang injunctions, and engaging in "dirty" shootings and beatings.²⁶² The City Attorneys office estimated the financial liability of the City to be "\$125 million, and other guesses have ranged as high as \$1 billion."²⁶³

143. The Hyatt fraud claim has many similarities to the Rampart scandal. For one thing the Rampart scandal, is thought by many thoughtful observers to have been spawned by a culture of dehumanizing the target — gang members. When you are going after scum, it is okay to plant evidence.²⁶⁴ This mentality existed at the FTB, for Candace Les testified about an "us vs. the taxpayer" mentality there.

144. The Rampart scandal has affected other police cases since, as the DA admitted, "[The Rampart scandal] now gives [jurors] ammunition to question the credibility of police officers."

145. Here, of course, the perjury of Sheila Cox, as documented by Candace Les, on the material point of her intrusive trespasses on the Gil Hyatt Las Vegas home, should likewise give reason to question the credibility of her other statements. For example Cox said in her audit that Hyatt feared kidnapping and she used that alleged

²⁶² Michael D. Harris and Chris Ford, "DA, Chief Cooperate In Showdown's Wake," *Los Angeles Daily Journal*, Friday, March 17, 2000, 1, at 5.

²⁶³ Joel Fox, "We Will Have To Pay the Piper — but How?" *Los Angeles Times*, Sunday March 12, 2000, at op-ed page, M5.

²⁶⁴ A barmaid at the Rampart cop's local bar supported them: "Let me tell you something," she . . . bursts out, lighting a Camel Red in violation of the city's no-smoking ordinance. "I don't care if they have to hit some 'Chuy' upside the head to stop crime in this city, and the public doesn't either. You think LAPD is the only department with the little secret tattoos? What's going on here is no mystery. We've always stepped one toe over the line to put assholes in jail." Shawn Hubler, "In

"fact" against Hyatt, but Hyatt's tax representatives deny ever saying anything to her about Hyatt fearing kidnapping. Cox used that untrue fact against Hyatt, and the similarity is to a cop planting evidence on a suspected gang member.

146. One law professor commented on the scandal by saying that jurors losing confidence in the testimony of police officers is "an expected reaction to [jurors] reading on a daily basis the magnitude and systemic quality of the police corruption. They're operating in a climate in which they now have less trust in police testimony and evidence produced by the police."²⁶⁵ The scandal is so widespread, that in addition to the felony convictions already overturned, there are misdemeanor trials too that may be overturned, indeed 743 misdemeanor cases that "could be dismissed because any of approximately 30 Los Angeles Police Department officers were the sole witnesses to the alleged offenses."²⁶⁶ The LAPD has already charged more than a dozen officers in the "unfolding scandal, which includes allegations that Rampart Division officers were involved in unjustified shootings, beatings, evidence planting, perjury, and an array of other crimes and misconduct."²⁶⁷

147. I have obtained a copy of the LAPD's official 362-page report analyzing the administrative and managerial failures that allowed corruption to flourish in the

Rampart, Reaping What We Sowed" *Los Angeles Times* Thursday February 17, 2000 at B1 (expletive spelled out).

²⁶⁵ Michael D. Harris, "DA's Believe Scandal Affects Trials' Results," *Los Angeles Daily Journal*, Wednesday March 15, 2000 at 9.

²⁶⁶ Chris Ford, "City Attorney Says 743 Cases May Be Tainted," *Los Angeles Daily Journal*, Wednesday, March 15, 2000 at 1.

Rampart Division, an eight-square-mile area known for gang and drug activity.²⁶⁸ The Board of Inquiry report pointed to systemic problems in the LAPD and made more than 100 recommendations aimed at improving supervision, hiring practices, and risk management programs. The report says that former officer Perez has publicly claimed that "the pressure to produce arrests made him corrupt."²⁶⁹ Candace Les has testified that the FTB auditors were pressured to be revenue producers for the State²⁷⁰ and some even carried around lists of their assessments to brag about.²⁷¹

148. Here, the depositions of Candace Les and Carol Ford admitted to the lectures by Doug Dick on the use of penalties as bargaining chips. And despite the known problems with quotas for auditors, the FTB encouraged monetary quotas (e.g. the \$5 million/year goal that Candace Les set for herself, approved by her supervisor, and the boss of the boss of the Residency Program), and each residency auditor was supposed to meet an expected return per hour of \$200/hr. or more. The deposition of

²⁶⁷ Scott Glover and Matt Lait, "LAPD to Charge 15 Officers in Scandal" *Los Angeles Times*, Thursday March 9, 2000, at B1.

²⁶⁸ The report can be viewed on the LAPD website, LAPDOnline.org.

²⁶⁹ Executive Summary of LAPD Board of Inquiry investigation.

²⁷⁰ Candace Les deposition at 83-84, Exhibit 2 (over the time she was an auditor the amount of pressure on auditors to collect money increased, most of the pressure came from Residency Program head Steve Illia).

²⁷¹ Candace Les deposition at 163-164, 192-193, Exhibit 2 (She said all the good auditors kept track of the revenue that they were producing and "one guy who it was alleged, although I never saw it, that he kept a list, a hard copy list in his wallet. . . He would show people." He, Ron Lee, would brag about it.)

Les revealed that Hince was “deficient” as a supervisor,²⁷² and the depositions of Lou and Shigemitsu, revealed two supervisors who were lax and “laid back” in their supervision.²⁷³ They even fired one Hyatt residency auditor because he was not a self-starter.²⁷⁴ The FTB was lax in its hiring practices for Cox had been fired from her accounting job and flunked probation at a funeral park. These management failings, plus the loose controls on Sheila Cox by her successive supervisors over her three years of the Hyatt audit, Lou,²⁷⁵ Alvarez,²⁷⁶ and Hince,²⁷⁷ show the potential for an auditor run amok.

149. The Final report of the Board of Inquiry concluded in part that “Had the department and the Rampart management team exercised more vigorous and

²⁷² Candace Les deposition at 443, Exhibit 2 (“She [Barbara Hince] was deficient as a supervisor. . . . I don’t think she had ever really completed or even done a residency audit. She was pretty uninvolved in the cases.”)

²⁷³ Paul Lou deposition at 91-92, Exhibit 44 (“We assign the case to the auditor and we pretty much let the auditor do their work and [try] not to interfere with their work,” he did not try to supervise her work on a day-to-day basis), Allan Shigemitsu deposition at 8-9, Exhibit 45 (As a supervisor “I was pretty laid back.”) Paul Lou’s initials appear only four times in the over 3,500 page FTB dossier on Gil Hyatt. Bob Alvarez initialed the workpapers only three times. Barbara Hince appears not to have touched the audit file.

²⁷⁴ Paul Lou deposition at 93, Exhibit 44.

²⁷⁵ Lou testified he picked Cox because she was a self-starter. He did not like supervision. Lou deposition at 91, 92, 94.

Our discovery to date places a large measure of the FTB torts on lax supervision of gung-ho underlings, the same factor impliedly implicated by the *Los Angeles Times* in its Rampart editorial: “How does the LAPD intend to improve the supervision of its officers?” Editorial, “New Level for LAPD Probe” Tuesday, March 14, 2000.

²⁷⁶ See the Bob Alvarez declaration, Exhibit 46.

coordinated oversight of area operations, and its [anti-gang] CRASH unit in particular, the crimes and misconduct that occurred may have been prevented, discouraged, or discovered much earlier.”²⁷⁸ Candace Les testified about disinterested, sleepy supervisors such as Barbara Hince and Paul Lou, Cox’s supervisors for most of the audit.²⁷⁹ They and supervisor Bob Alvarez recall almost nothing about the Gil Hyatt audit,²⁸⁰ indeed Lou testified to trying to forget about it.²⁸¹ To avoid testifying the head of the FTB also professed ignorance about the Hyatt audit,²⁸² even though we contend his two NPA’s with taxes, penalties, and daily compounded interest, add up to the largest residency assessment in history.²⁸³ No one was minding the shop.

150. One of the failures the LAPD recognized was its use of a gung-ho CRASH unit to fight gangs. Like the specialized Residency Unit at the FTB, aka the RAIN or

²⁷⁷ See the Hince declaration, Exhibit 47.

²⁷⁸ Michael D. Harris, “Parks Immolates Rampart, CRASH In Inquiry Report,” *Los Angeles Daily Journal*, Thursday March 2, 2000 at 1. Mayor Riordan said: “We have to punish the supervisors if we’re going to stop this kind of stuff from going on.” *Los Angeles Times*, Sunday March 12, 2000 at A1, A35.

²⁷⁹ Candace Les testimony at 442, Exhibit 2.

²⁸⁰ To avoid testifying Hince and Alvarez submitted declarations professing a profound ignorance about the Hyatt audit. Their testimony has been withheld for about a year now.

²⁸¹ Paul Lou deposition at 280-283, Exhibit 44.

²⁸² Goldberg declaration, Exhibit 48.

²⁸³ Ford testified that any case over \$5 million was considered a large case. She could recall only three cases with as many hours poured in by FTB auditors. Carol Ford deposition at 148, Exhibit 14. She was not aware of the Residency Program *ever* having a case as large as Hyatt’s. *Id.* at 154, Exhibit 14. She testified that out of all

RIGATONI unit, the CRASH officers bonded together and fought crime — unfortunately they did so with perjury and planting evidence. Here Cox stands accused of perjury (by her former friend and colleague Candace Les) and of planting evidence (the non-existent envelope in the Wagon Trails files).

151 In LA, police chief Parks has already disbanded all the anti-gang CRASH units,²⁸⁴ “and has ordered an overhaul of such specialized squads to bolster supervision and attract more experienced officers.”²⁸⁵ Here we have tried to conduct a Rule 30(b)(6) deposition of the FTB’s recent changes or disbanding of its renegade Residency Program, but the FTB refuses to cooperate and that refusal is now pending before Commissioner Biggar. The FTB parallel of the inexperienced-officer problem is that Sheila Cox was assigned to one of the biggest residency cases in FTB history²⁸⁶ but was very inexperienced. She was not even a “journeyman” auditor at the time and had never handled a residency case on her own.²⁸⁷ Candace Les testified about supervisors,

the cases that she reviewed in her career, “I don’t think I’ve ever seen a case with as large an assessment as his.” *Id* at 155, Exhibit 14.

²⁸⁴ Chris Ford, “Parks Announces He Is Suspending CRASH Program,” *Los Angeles Daily Journal*, Monday March 6, 2000 at 1, 10 (“The board of inquiry document that the CRASH units were not adequately supervised and provided an atmosphere where lawlessness could flourish.”).

²⁸⁵ Miles Corwin, “Commission Hears Calls for Rampart Probe,” *Los Angeles Times* Wednesday, March 15, 2000, at B1, B4.

²⁸⁶ We believe that the Hyatt residency audit was the biggest in FTB history (both in terms of hours and dollars assessed), but the FTB refuses to provide a Rule 30(b)(6) witness to set the record straight on where the Hyatt audit ranks. This too is a discovery dispute currently pending before Commissioner Biggar and another reason we need more time to adequately defend this motion.

²⁸⁷ Cox deposition at 117-118, Exhibit 9.

such as Paul Lou falling asleep on the job²⁸⁸ and managers instructing auditors to manipulate revenue so quotas could be met just before the FTB's fiscal year.²⁸⁹ In that atmosphere, Cox's lawlessness could flourish.

152. Another parallel is that the new reports say that the Rampart CRASH units kept their morale up with tattoos of a Skull and Crossbones,²⁹⁰ and the FTB's residency auditors also used the Skull and Crossbones symbol of swashbuckling piracy to cover their Penalty training materials.²⁹¹ The gung-ho police have even got a web site offering for sale T-shirts with their macho insignia: "Finally available: the hugely publicized 'Aces and Eights' logo from the Rampart CRASH Unit," reads one caption, and another "hawks clothing adorned with the menacing mascots of the 'Shootin' Newton' Division and that of the 77th Street Division, a skull and crossbones with the motto '77th Street Eat Their Dead.'"

²⁸⁸ Candace Les deposition at 443-444, Exhibit 2.

²⁸⁹ Candace Les deposition at 319-21, Exhibit 2. (Les testified that Residency Program Head Steve Illia would tell the auditors "like the budgeted projection, you know, what they wrote into the budget, like *we're going to collect \$30 million this year in residency.*" Les also testified that once she was told to postpone the recognition of a half million dollars from one fiscal year to the next, "Barbara Hince told me not to solicit full payment on the Gary Iskowitz case, to break it up because *we had already met our quota* in residency and let's put it in the next fiscal year end.") (Emphasis added.)

²⁹⁰ Matt Lait and Scott Glover, "Web Site Cashes In on Rampart Scandal" *Los Angeles Times*, Thursday March 6, 2000 at B1, B6. The website itself is at LAPDgear.com.

²⁹¹ Deposition Exhibit 202, Exhibit 21.

153. The website says these items are designed and produced by LAPD officers with the experience and edge that can only come from street combat.”²⁹² Police critics point to the fact that officers wear such insignias as evidence of the “us versus them” mentality that some police officers are accused of having, particularly when it comes to policing inner-city neighborhoods. Several current former officers in the Rampart Division’s anti-gang CRASH unit said that about a dozen officers in the unit not only wore the emblems on their jackets and sweatshirts but also had themselves tattooed with versions of the grinning skull.²⁹³

154. In the scathing self-analysis released by the LAPD this month, department officials cited the Rampart patches and tattoos as artifacts of the divisions troubling culture. Police officers told the LA Times that they have worn such logos openly, and in front of supervisors, including captains for years.²⁹⁴ The co-owner of the website, an LAPD officer, said that the logos represent the chaos that officers face in what are know as “hot shot” divisions in the LAPD.²⁹⁵ According to Candace Les, in 1995 and

²⁹² Matt Lait and Scott Glover, “Web Site Cashes In on Rampart Scandal” *Los Angeles Times*, Thursday March 6, 2000 at B1, B6.

²⁹³ Matt Lait and Scott Glover, “Web Site Cashes In on Rampart Scandal” *Los Angeles Times*, Thursday March 6, 2000 at B1, B6.

²⁹⁴ Matt Lait and Scott Glover, “Web Site Cashes In on Rampart Scandal” *Los Angeles Times*, Thursday March 6, 2000 at B1, B6.

²⁹⁵ Matt Lait and Scott Glover, “Web Site Cashes In on Rampart Scandal” *Los Angeles Times*, Thursday March 6, 2000 at B1, B6. He regarded other cops as sissies: “[San Fernando] Valley cops, if they had logos, they’d probably be a latte and a daisy.” *Id.*

1996 the FTB Residency Department considered itself as "number one" — that is the number one revenue producer for the FTB.²⁹⁶

155. The CRASH unit sports the grinning skull in a cowboy hat with playing cards splayed out behind it. "Rampart CRASH officers never know what 'hand' they will be dealt while routing out the predators of the city," the web site explains. "For that reason, the Rampart CRASH officers designed a logo called 'Aces and Eights,' the so-called dead man's hand."²⁹⁷

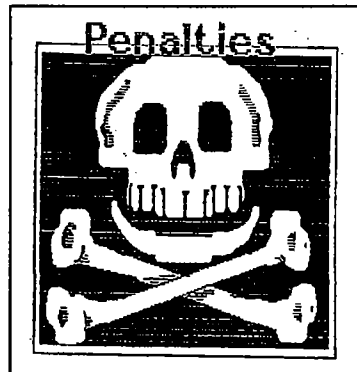
²⁹⁶ Candace Les deposition at 491-92, Exhibit 2. (Illia spoke to the residency auditors, "Yes, he said we were No. 1 and we knew we were No. 1. The word was out. . . [No. 1. meant No. 1 in] Money. Q. What do you mean? A. Revenue. Q. You were No. 1 in revenue? A. Yes.")

²⁹⁷ Matt Lait and Scott Glover, "Web Site Cashes In on Rampart Scandal" Los Angeles Times, Thursday March 6, 2000 at B1, B6.

156. I show side by side two of the LAPD macho insignias and the FTB Skull and Crossbones penalty insignia:



And the FTB's comparable insignia:



157. One of the insights that thoughtful observers of the Ramparts scandal have made is directly applicable here. The whistle-blowing ex-police officer who broke the scandal open said in this final apology to the court: "He who chases monsters must see that he not become a monster himself."²⁹⁸ But a thoughtful commentator pointed out that the problem was not in Perez becoming a monster but in his thinking it was

²⁹⁸ Gregory J. Boyle, S.J. "We Have Met the Monster, and It is Us." *Los Angeles Times* Friday March 10, 2000, op ed page B7.

monsters he was chasing.²⁹⁹ As Father Boyle pointed out, all the heightening of supervision and better hiring, screening, and training will not stamp out the problem so long as there is a spirit in the organization that “dehumanizes and demonizes ‘the other.’” The Rampart scandal will forever indicate how perilous this mind-set can become.”³⁰⁰

158. But in the FTB the mind set of Sheila Cox, according to the testimony of Candace Les, was that he was a cheap “Jew bastard”³⁰¹ who didn’t pay his “gook”³⁰² girlfriend enough,³⁰³ and who had a dungeon in his basement and surrounded himself with ghouls³⁰⁴ and one-armed men to warn him of the approach of the FTB auditors.³⁰⁵ She called him a “freak.”³⁰⁶ This mindset dehumanized Hyatt in her eyes and let her to tell her close friend Candace Les that she would “get” Hyatt,³⁰⁷ tell her *husband* that

²⁹⁹ Gregory J. Boyle, S.J. “We Have Met the Monster, and It is Us.” *Los Angeles Times* Friday March 10, 2000, op ed page B7.

³⁰⁰ Gregory J. Boyle, S.J. “We Have Met the Monster, and It is Us.” *Los Angeles Times* Friday March 10, 2000, op ed page B7.

³⁰¹ Candace Les deposition at 10, Exhibit 2.

³⁰² Candace Les deposition at 10, Exhibit 2.

³⁰³ Candace Les deposition at 253-254, Exhibit 2 (“She called him a cheap bastard. [Cox had seen] Grace Jeng’s tax returns [and] Grace Jeng received salary from Gil and . . . for a millionaire, he was a cheap bastard.”) (emphasis added).

³⁰⁴ Candace Les deposition at 25, Exhibit 2.

³⁰⁵ Candace Les deposition at 25, 172, 176, Exhibit 2.

³⁰⁶ Candace Les deposition at 254, Exhibit 2.

³⁰⁷ Candace Les deposition at 10, Exhibit 2.

she would "get" Hyatt,³⁰⁸ and then call up Hyatt's bitter ex-wife Pricilla Maystead to say we got him, "he's in serious trouble," meaning "he had been convicted or had pay some taxes."³⁰⁹ This disclosure of a private fact about Hyatt to his enemy, of course, was a serious violation of the criminal confidentiality laws, for his bitter ex-wife had no need to know about the assessment, only a loathing for Gil Hyatt that she and Cox shared. Cox had already let her know the FTB was investigating her ex-husband for tax evasion, another violation of confidentiality laws.³¹⁰

159. The racist comments by Sheila Cox recounted by Candace Les (Jew bastard, gook, Nigger boss),³¹¹ also have their parallels in the Rampart Division for there the CRASH unit reportedly compiled a list of 10,000 Latinos in California and other states who were alleged to be members or associates of the 18th Street gang. "I told my boss that was just ludicrous. They were targeting a whole race of people," said a senior INS agent, who asked not to be identified. "That's not a gang anymore, that's a culture. They [LAPD] only wanted to do one thing: sweep the street and turn the bodies over to the INS."³¹²

160. The attack this summary judgment makes on Gil Hyatt, that he is seeking to derail all tax enforcement activities is similar to the attack that police apologists

³⁰⁸ Candace Les deposition at 988-89, Exhibit 2.

³⁰⁹ Priscilla Maystead deposition at 182-83, Exhibit 49.

³¹⁰ Priscilla Maystead deposition at 184, Exhibit 49.

³¹¹ Candace Les Deposition at 10, 17, Exhibit 2.

³¹² Anne-Marie O'Connor, "Rampart Set Up Latinos to Be Deported, INS Says" *Los Angeles Times* Thursday February 24, 2000, at A1, A21.

throw at concerned lawmakers trying to fix the Rampart problem. The California Assembly's majority whip Gloria Romero introduced reform legislation, sending the message that peace officers are not above the law and need to be held accountable. But she was also forced to say:

“I'm not saying I'm anti-cop,’ she said in a telephone interview. ‘I'm saying I want to punish the bad cops and by punishing the bad cops I think I'm protecting the good cops from having their reputations tarnished by misconduct.’”³¹³

Hyatt's position is similar — he is not attacking the tax system, but rather the excesses of a few bad auditors that committed *torts* in the course of their duties.

161. One other similarity is that the organization under attack, the LAPD, has sought to restrict the documents available to the investigators.³¹⁴ The District Attorney, “sources say , believes [the LAPD chief] Parks is seeking to wrap up the corruption investigation as quickly as he can, minimizing the scope of potential wrongdoing by LAPD officers.”³¹⁵ The FTB is likewise blocking all discovery and yet insisting the trial date not be moved.

³¹³ Peter Blumberg, “LA Lawmaker Wants AG's Help With Rampart” *Los Angeles Daily Journal*, Monday February 28, 2000 at 1.

³¹⁴ The investigators include the Police Board of Inquiry, the DA, the FTB, the U.S. Attorney, the California Civil Rights Enforcement Unit, and the California's Attorney General's office, which is monitoring the other probes to collect “first hand information of individual and systemic police misconduct.” Peter Blumberg, “LA Lawmaker Wants AG's Help With Rampart” *Los Angeles Daily Journal*, Monday February 28, 2000 at 1, 8.

³¹⁵ Scott Glover & Matt Lait, “Panel Orders Parks to Work With Garcetti,” *Los Angeles Times*, Saturday March 18, 2000, A1, at A17; an earlier report had also attributed the public feud between the DA and police chief as the tension between investigator and the investigatee: “In part, the gulf between the two grew from their

V. There is no great financial impact in not recognizing sovereign-immunity defenses.

A. The availability of *insurance* to states and local government lessens the impact of not recognizing the FTB's sovereign-immunity defense

162. Part of my practice is insurance coverage and bad faith. In the course of my practice and as a result of communications with attorneys and brokers I have come to learn that almost any risk can be insured against. The typical homeowners or general liability policy insures against liability for and the cost to defend claims of invasion of privacy and wrongful detention and abuse of process.

163. My research for this motion has shown that states can purchase liability insurance to protect themselves against liability. I have confirmed this in part by reading the advance sheets for March 1, 2000, where I read that the State of California won a potentially huge insurance coverage decision against its insurers located at Lloyds of London. In this reported case the State of California sought declaratory relief worth millions with respect to its insurers' duties to defend and indemnify in related actions arising out of a toxic-waste dump.³¹⁶

164. Last year we scheduled a Rule 30(b)(6) deposition of the FTB's most knowledgeable person on its insurance coverage. The FTB refused to allow any such

conflicting interests. Parks wanted a few quick prosecutions so he could claim that the evil had been purged and was a thing of the past. But prosecutors are used to moving at the speed of glaciers when they investigate police officers, and Garcetti was said to favor a big, complicated conspiracy prosecution." Martin Berg, "A Day in L.A.: Rampart Scandal Evolves Into a Public Spectacle." *Los Angeles Daily Journal*, March 17, 2000 at 1, 5.

³¹⁶ *State of California v. Superior Court (the Underwriters at Lloyds of London)*, 93 Cal. Rptr. 2d 276, 2000 Daily Journal D.A.R. 2281 (Cal. Ct. App. March 1, 2000).

witness to be deposed. It stated through counsel that it was self-insured. Since the FTB is making an issue of this Hyatt is entitled to discover, under oath, whether the FTB is insured and whether it consciously chose not to insure itself from these risks. I had naively trusted the Attorney General's office to tell the truth about insurance coverage when it made the representation to me, but in light of this month's revelations, we need to proceed with the Rule 30(b)(6) deposition as to insurance coverage.

165. The research for this motion that I referred to above was *Biscoe v. Arlington County*³¹⁷ a case denying a defense of sovereign immunity to a sister-state. The case noted the weakness of the argument about protecting the public fisc, since liability insurance is available: "As a general matter, the immunity of Virginia's counties primarily reflects the state's concern for the financial integrity of its counties — a concern which, we have little doubt, can amply be met with the purchase of liability insurance."³¹⁸ Thus since the state's liability exposure is greatest in rare out-of-state tort cases, the fiscal concern "simply is not an especially compelling one, particularly given the availability of liability insurance."³¹⁹

166. Likewise, Delaware's Supreme Court has also recognized that the availability of liability insurance softens the impact of not recognizing sovereign immunity. Delaware's Tort Claims Act, for example, requires the state to "[p]rotect

³¹⁷ 738 F.2d 1352 (D.C. Cir. 1984).

³¹⁸ 738 F.2d 1352, at 1360 (emphasis added).

³¹⁹ 728 F.2d 1352, at 1361 (emphasis added).

the public from wrongful actions of State officials and employees” by buying insurance.³²⁰

167. Thus the availability of insurance to California is a factor to be weighed in this Court’s comity considerations.

B. California’s \$53 billion per year General Fund is so large that even a multi-million dollar judgment is a drop in the bucket to the state.

168. Even without insurance, California raises so much money each year that the judgment in this case is not material to its operations. According to the FTB’s official website,³²¹ “Each year the [FTB] collects over \$33 billion in tax revenues from individuals, banks and corporations — 62% of California’s entire General Fund.” That means that the General Fund each year has \$53 billion. A \$1 million judgment would be less than two *thousandths* of one percent of one year’s General Fund. Even a \$100 million judgment would be less than 2 *tenths* of one percent of the State’s General Fund for one year. The likelihood of a judgment in this case would be material to the Golden State is zero.

VI. Nevada’s interest in this case

169. Nevada has significant interests to protect in this case. In addition to the interest in protecting its citizens against invasion of privacy, it has an interest in protecting them against fraud and extortion.³²²

³²⁰ *Kent County, State of Maryland v. Shepard*, 713 A.2d 290, 301 (Del. 1998).

³²¹ [Http://www.ftb.ca.gov/geninfo/ftb1.htm](http://www.ftb.ca.gov/geninfo/ftb1.htm).

³²² Nev. Rev. Stat. § 205.320 Threats.

170. As a resident of Los Angeles I know that there are radio advertisements (that I have heard) that promote Nevada as a place to incorporated because it is a no-income-tax state that does not cooperate with the IRS. These policies of low taxation and respect for confidentiality undoubtedly induce substantial numbers of Californians and other out-of-state citizens to relocate to Nevada and incorporate their businesses in Nevada. Nevada has an interest in protecting its legislative choices just as Delaware has an interest in promoting itself as a state that is friendly to corporate management.

171. Nevada has an interest in protecting the Constitutional right to travel. The Supreme Court has recently affirmed the right to travel as including "the right to enter and leave another state."³²³ As I understand it, Nevada is one of the fastest growing cities in the country, with a burgeoning economy. California, once the "Golden State" has undergone some reverses recently, as the FTB recognized in its Strategic Plan until

A person who, with the intent to extort or gain any money or other property . . . whether or not the purpose is accomplished, threatens directly or indirectly:

1. To accuse any person of a crime;
2. To injure a person or property;
3. To publish or connive at publishing any libel;
4. To expose or impute to any person any deformity or disgrace; or
5. To expose any secret, is guilty of a category B felony. . . .

³²³ *Saez v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 1525, 143 L.Ed.2d 689 (1999) ("Citizens of the United States, rich or poor, have the right to choose to be citizens of the State wherein they reside." U.S. Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens."), struck down a California statute that tried to impose a durational residency test on poor people — such a test violated the Constitutional right of "those travelers who elect to become permanent residents . . . to be treated like other citizens of the state." Hyatt elected to be a permanent Nevada resident. That is his Constitutional right and Nevada has the right to protect that Constitutional right to travel.

by 1991 and 1992, it was concerned about being a less desirable place to live than its neighboring states.³²⁴

172. Nevada has an interest in protecting the U.S. Constitution's Fourth Amendment Right to be free from unreasonable searches and seizures. Not only does the Nevada Constitution have a comparable provision, the Nevada Attorney General has so opined.³²⁵

173. Nevada has an interest in providing a forum to its citizens. And the Nevada Attorney general has opined³²⁶ that the Nevada Constitution requires the government, acting civilly in investigating suspected violations of civil law, to nevertheless protect the privacy of Nevada citizens by obtaining search warrants from disinterested magistrates and serving them by the sheriff:

- "[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.

³²⁴ FTB 1992 Strategic Plan, Deposition Exhibit 199 at 10 (California was then beginning to be perceived as being "among the *least* desirable places to live and work by those with employment options.") (emphasis added).

³²⁵ The Nevada Attorney General stated in his Opinion 80 (October 18, 1963), found that "Perhaps no right of the individual in America is more fundamental than that of being secure against the invasion of privacy." He there concluded that the Nevada Constitution, Article I, Section 18 forbade any Nevada government agency from inspecting private papers without a warrant: "And the prohibition there imposed likewise applies to investigations, examinations, or any other procedure whereby the contents of a private paper may become revealed. The content of any such papers may be made available for investigative or informational purposes only by voluntary consent of the owner or pursuant to proper legal process."

³²⁶ Nevada Attorney General Opinion No. 79-2, 1979 Nev AG LEXIS 67, 1979 Op. Atty. Gen. Nev. 5 (Feb. 6, 1979).

- “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.”³²⁷

In short, Nevada protects its citizens’ privacy jealously, and Nevada citizens have legitimate expectation that their personal privacy can not lawfully be invaded, even by its giant sister State’s tax auditors coming into Nevada, flashing their “badges,” conducting their secret surveillance, and sending out dozens of *unconstitutional* search warrants termed “Demands for Information.”

VII. This Court should deny or postpone a decision on this motion because the FTB has deprived Hyatt of needed discovery.

A. The FTB has truncated depositions and made meritless objections.

174. In this case the FTB has had a practice of truncating our depositions and refusing to come back for the last day or days of testimony that we desired. A pattern emerged of the FTB asking me how much time I estimated and then the FTB attorney (generally Deputy Attorney General Felix Leatherwood) would say you don’t need that. The FTB would then allow access to its witness only for a shortened period of time, either a day or two short of the time I requested. The result is that some of the key witnesses have *not* told all they know — thus making the testimony of these other witnesses more crucial than if the FTB had followed normal discovery rules and let us adequately depose the past witnesses.

B. The FTB has made unfounded objections.

175. In addition the FTB prolonged the time of the depositions and cut off legitimate discovery by interposing unfounded objections, including the deliberative-

process objections that it raised *dozens* of times at the depositions of key FTB employees such as FTB Residency-Program-Manager Steve Illia; FTB protest-officer Anna Jovanovich; FTB residency-auditor and reviewer, Carol Ford; penalty-residency-auditor Jeff McKenney; and others.

176. One example of how the FTB used deliberative-process objections to block relevant fraud evidence is at the deposition of Jeff McKenney where this occurred:

“Mr. BOURKE: Q. Did Sheila Cox tell you that she was deliberately exaggerating the strength of her evidence so that the Franchise Tax Board could assess large amounts of taxes and penalties against Mr. Hyatt?

MR. WILSON: Same objection, same instruction.

MR. BOURKE: Q. Did Sheila Cox tell you that she had deliberately written the narrative in a one-sided way?

MR. WILSON: Same objection, same instruction.³²⁸

177. Carol Ford testified that: “My job is to evaluate a case and see if the documentation and the write up support the auditor’s decision.”³²⁹ Her review of the Cox audit of Hyatt was supposed to look for independent substantiation of the third party information.³³⁰ But the FTB refused to let Carol Ford testify about whether she found the Cox audit in the Hyatt case to be supportable by the facts or whether it was weak and just being used to extort Hyatt.³³¹

³²⁷ *Id.*

³²⁸ Jeff McKenney deposition at 202, Exhibit 26.

³²⁹ Carol Ford deposition at 90, Exhibit 14.

³³⁰ Carol Ford deposition at 64, Exhibit 14.

³³¹ Carol Ford deposition at 99, Exhibit 14.

178. Late last year this Court found those deliberative-process objections to be without merit.

179. This Court can gain some insight into the regularity of the deposition disruption caused by the FTB by viewing excerpts on the video tape filed with the Discovery Commissioner Court with the Hyatt post-hearing brief in 1999 containing the FTB's unholy mantra of deliberative-process objections.³³² In addition, the FTB is currently blocking the deposition of 14 FTB employees we have been trying to take for a year. And as a civil rights lawyer fighting a six-month delay in the Rampart case stated: "to hold us³³³ up for six months is uncalled for because memories are going to fade and evidence is going to be lost." That matter is currently before Commissioner Biggar, but we need that testimony to properly oppose this motion. I adopt my recently-filed Affidavit as to those 14 employees and incorporate it by reference as stating further reasons why summary judgment is not appropriate at this time that the FTB is blocking discovery into its torts.

C. The FTB refuses to produce court-ordered documents and a Vaughn index.

180. In addition, the FTB has refused to turn over the key documents that Hyatt has sought since the spring of last year. Those documents include the Ford review notes of the Hyatt audit, and also the "fraud memo" that auditor Sheila Cox sent to Anna Jovanovich in Sacramento, who sent suggestions back to Cox as to how to craft

³³² Video excerpts of several depositions prepared for the successful Hyatt motion to compel production of so-called deliberative-process materials as Exhibit 29.

³³³ Martin Berg, "Rampart Suits Might Be on Ice Six Months" *Los Angeles Daily Journal*, Tuesday March 7, 2000, at 1.

the deceitful and one-sided fraud penalty.³³⁴ In contempt of this Court's December 1999 order, the FTB has withheld the documents that Hyatt needs to finish the depositions of the key FTB employees, such as Residency-Program-Manager Illia, and residency auditors Cox, Ford, Bauche, and McKenney, protest officer Jovanovich, and others. The FTB has also stalled for over six months on providing a Vaughn index for the dozens of redactions they have made to FTB documents produced. We have worked with them in meet and confer sessions for months, knowing it is a big job, but the claims of privilege they made may well be as meritless as their claims of deliberative-process privilege that this Court has rejected. Until we can test those claims with a valid Vaughn index we cannot know that we have had fair discovery.

181. As I stated in my prior declaration, I know from conversations with FTB in-house attorney Natasha Page that the FTB has been working on their summary judgment motion since before Thanksgiving 1999. It has also been working on its petition for writ of mandate for the last few months as I stated in my affidavit filed on our successful opposition to the FTB motion for a stay. This is consistent with the fact that the FTB has not provided us with *any* of the witnesses we tried to schedule for depositions since last summer and we have been forced to do without depositions of any FTB employees since then.

³³⁴ See Progress Report by Sheila Cox dated June 29, 1995, stating that Jovanovich "gave suggestions for revising [fraud] memo" relating to the 1991 tax year audit, Deposition Exhibit 162, at FTB 100160, Exhibit 4. See also Progress Report by Sheila Cox dated April 7, 1997, and April 10, 1997, showing discussions with Anna Jovanovich just before sending her April 10, 1997 letter to Eugene Cowan announcing for the first time multi-million dollar fraud penalties on the 1991-tax-year audit. Deposition Exhibit 213, Exhibit 50.

D. The need for more discovery.

182. The FTB terminating key depositions before they were finished, refusing for a year to produce relevant documents, and refusing to produce the documents even after this Court's order, have caused Hyatt to need these 14 witnesses even more than before.

183. Hyatt needs the documents ordered produced and needs to complete the depositions of Cox, Illia, Ford, Jovanovich, McKenney and to take the depositions of FTB auditors Farzaneh Eshaghian (who went to Las Vegas with Cox), Chris Blackmore (who consulted with Cox), two of Cox's supervisors, Barbara Hince and Robert Alvarez, as well as the other deponents we have asked for in meet-and-confer sessions.

E. The FTB's "piling on" of motions has hindered our summary judgment preparation.

184. During the course of our summary judgment opposition the FTB has barraged us with discovery and other motions. The pendency of these motions, most of which did *not* have to be brought now, has prevented me from properly marshalling the evidence, particularly the extensive relevant evidence provided by Ms. Les. The FTB has refused to give us more time to file our opposition and I do not feel the schedule has afforded Mr. Hyatt a fair opportunity to show the strength of his case. I believe we have shown material issues of fact, but if this Court disagrees, then we should have the opportunity to finish the marshalling of the evidence that has been hindered by the FTB's obstructive discovery and "piling on" of motions.

VIII. Conclusion.

185. This Court should deny the motion. Based on the marshalling of testimony of the FTB's torts in our Crime/Fraud Appendix last June, and in this Affidavit (especially on the breaking evidence supplied by Candace Les), and in the Hyatt, Cowan, and Kern Affidavits there is ample evidence of FTB invasion of privacy, abuse of process, fraud, negligent misrepresentation, and outrage. There is ample proof of disputed issues of material fact.

186. The FTB has, however, profoundly impeded the discovery in this case — truncating the existing deposition, blocking new depositions, and withholding court-ordered documents. Mr. Hyatt has not had a fair opportunity to conduct discovery and this Court, if it does not deny the motion outright, should delay the motion until Mr. Hyatt can finish the discovery he needs.

DATED this 22nd day of March, 2000.



Thomas K. Bourke, Esq.

SUBSCRIBED and SWORN to before me
this 22nd day of March, 2000

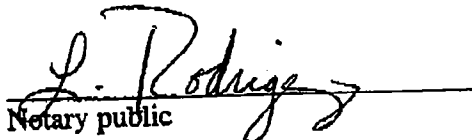
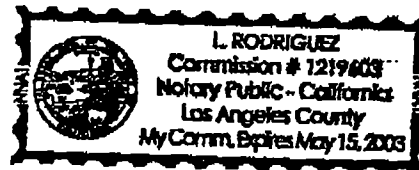

Notary public

EXHIBIT 18

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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
)
)
) **AFFIDAVIT OF EUGENE G.**
) **COWAN IN OPPOSITION TO THE**
) **FTB'S MOTION FOR SUMMARY**
) **JUDGMENT**
)
)
)
) **FILED UNDER SEAL BY**
) **STIPULATION AND ORDER DATED**
) **FEBRUARY 1, 1999**

**HUTCHISON
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MHODMA.LADOC3;349376;5

FILED
MAR 22 2000
BY SHIRLEY B. PARAGUIRRE, CL.
SHERIFF JO ESTES

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1 **AFFIDAVIT OF EUGENE G. COWAN**

2
3 STATE OF CALIFORNIA)
4 COUNTY OF LOS ANGELES) ss.

5
6 EUGENE G. COWAN, being first duly sworn, deposes and says:
7

8 **I. Background and expertise.**

9 1. I am a member of the California Bar and have been a practicing attorney for over
10 18 years. I am a Principal of the firm of Riordan & McKinzie, a professional corporation. I
11 have been affiliated with Riordan & McKinzie for over 13 years, and have been a Principal of
12 the firm since 1990. Specifically, I am a Principal in Riordan & McKinzie's Tax/Probate
13 Department, and I practice in the area of taxation including real estate and other partnership
14 syndications, income tax planning for individuals, business and tax exempt organizations and
15 state and local income, property and sales tax matters. I frequently represent clients before the
16 Internal Revenue Service and the Franchise Tax Board of California.
17

18 2. I graduated from University of California of San Diego in 1977 with a B.A. in
19 Chemistry, and I received a M.A.T. in education from Northwestern University in 1978. I
20 graduated from University of California, Berkeley School of Law (Boalt Hall) with a J.D. in
21 1981, and I received an L.L.M. in taxation from New York University in 1983.
22

23 **II. Initial representation of Gil Hyatt.**

24 3. I first began representing Gil Hyatt in late 1991. At the time he retained me,
25 Mr. Hyatt had moved to Nevada and sought my advice regarding tax planning and in regard to
26 the preparation of both his 1991-tax-year California state income tax return (given his partial
27 residency during 1991) and his 1991-tax-year federal income tax return.
28

1 4. I continued to provide Mr. Hyatt tax-planning advice on a periodic basis through
2 mid-1993 when he was first notified by the FTB that it was auditing his 1991-tax-year
3 California state income tax return. Thereafter, the scope of my representation of Mr. Hyatt
4 increased to include representing Mr. Hyatt during the 1991 tax-year-audit. I subsequently
5 represented Mr. Hyatt during the 1992-tax-year-audit. I currently represent him in regard to the
6 long pending protests submitted by Mr. Hyatt in regard to the FTB's proposed assessment of
7 taxes for each of the 1991 and 1992 tax-years. The FTB's audits, its proposed assessments and
8 the protests are discussed in greater detail below.

9
10 **III. There was full cooperation with the FTB auditors.**

11 5. The 1991-tax-year audit ran from mid-1993 until early 1996, and the 1992-tax-
12 year audit ran from late 1995 until late 1997. During the audits, I had frequent contact via
13 telephone, written correspondence, and occasional in-person meetings with the three FTB
14 auditors, Mark Shayer, Felix Soriano, and Sheila Cox, who were successively assigned to the
15 audits over the next three years. During this period, Mr. Hyatt — with my assistance and the
16 assistance of his Nevada CPA Mike Kern — produced without objection the documents
17 requested by the FTB auditors, all in a timely manner.

18
19 6. The production of documents and information to the FTB was enormous. Most
20 of the 3,500 pages in the audit filed compiled by the FTB on Mr. Hyatt were documents
21 produced by Mr. Hyatt.

22
23 7. At all times during the audits, Mr. Kern and I were cooperative and professional.
24 To the contrary, I felt I developed an extremely good working relationship with each of the FTB
25 auditors. At the outset of the audit, I had no reason to believe that the FTB would not act in a
26 fair and reasonable manner. I therefore saw no reason to object to its seemingly never-ending
27 demands for more and more information, nor to refuse to produce the information and
28 documents requested — *so long as it agreed to keep the information and documents strictly*

1 *confidential.*

2

3 **IV. FTB false promises of confidentiality.**

4 8. The productions of documents and information to the FTB were preceded by
5 countless, and quite explicit, oral and written assurances from the FTB that the information Mr.
6 Hyatt was submitting would be kept strictly confidential and not publicly disseminated. From
7 the outset of the audits, I informed the FTB of Mr. Hyatt's need and desire to keep private and
8 confidential the materials produced during the audits. The following is a chronology of the
9 written and oral contacts that I have had with the FTB concerning Mr. Hyatt's desire for
10 confidentiality and/or privacy, and the FTB's agreements to keep Mr. Hyatt's materials
11 confidential and private. It is based upon my recollection, correspondence with the FTB, and
12 the audit files.

13

14 **A. Agreements and assurances from FTB auditor Mark Shayer.**

15 9. On September 13, 1993, I spoke with Mark Shayer, FTB auditor, regarding
16 reviewing taxpayer documentation. I told him that Mr. Hyatt did not want his licensing
17 agreements readily available to all FTB personnel. Mr. Shayer explained that FTB personnel
18 was required to maintain the confidentiality of a taxpayer's records. *Mr. Shayer assured me that*
19 *Mr. Hyatt's file would be maintained in a locked cabinet and that only the FTB personnel*
20 *working on the case would have access to the file.* We set up an appointment for Mr. Shayer to
21 review the file on September 23, 1993.

22

23 10. On September 29, 1993, Mr. Shayer came to my office to review the documents
24 requested by the FTB, including the agreement between Mr. Hyatt and Philips. I told Mr.
25 Shayer that because of the documents' confidential nature, I wanted him to make copies only of
26 excerpts, as needed. I reiterated to Mr. Shayer the sensitive, confidential nature of the
27 documentation. Mr. Shayer assured me that the confidentiality of the documents would be
28 maintained.

1 **B. The FTB, through Mr. Shayer, agreed to keep Mr. Hyatt's Las Vegas**
2 **address confidential.**

3 11. My November 1, 1993 letter¹ to Mr. Shayer responded to his October 18, 1993
4 letter² requesting information from Mr. Hyatt. In Mr. Shayer's October 18, 1993 letter, he asked
5 for information regarding Mr. Hyatt's purchase of his home in Las Vegas. My November 1,
6 1993 letter noted, that in providing the escrow information, *the address of Mr. Hyatt's home had*
7 *been deleted. This deletion was made on the basis of a previous discussion I had with Mr.*
8 *Shayer regarding Mr. Hyatt's desire to keep his home address in Las Vegas private and*
9 *confidential. Mr. Shayer agreed that the FTB would keep Mr. Hyatt's home address*
10 *confidential* as all documents submitted by Mr. Hyatt to the FTB would be kept confidential.
11

12 **C. Agreements and assurances from FTB auditor Felix Soriano.**

13 12. On June 29, 1994, I spoke with Felix Soriano, the new FTB auditor, regarding
14 furnishing additional contracts for his review. I told Mr. Soriano about the sensitive and
15 confidential nature of Mr. Hyatt's contracts, and asked him to come to my office to review the
16 contracts. He said that he would. We scheduled an appointment for July 5, 1994 (which was
17 rescheduled to July 11, 1994).
18

19 13. On July 11, 1994, Mr. Soriano came to my office to review the requested
20 contracts. After his review, he identified for me the excerpts from the contracts he wanted
21 copied. I gave those excerpts to him pursuant to a cover letter dated July 11, 1994.³ That letter
22 requested that he keep confidential the excerpts from the contracts he had requested. Mr.
23 Soriano agreed that the FTB would keep the documents confidential.
24
25

26 ¹ See Exhibit 1 hereto.

27 ² See Exhibit 2 hereto.

28 ³ See Exhibit 3 hereto.

1 **D. Agreements and assurances from FTB auditor Sheila Cox.**

2 14. On February 17, 1995, Ms. Sheila Cox, a new FTB auditor, called to schedule an
3 appointment to review Mr. Hyatt's documents at my office. We scheduled the appointment for
4 February 23, 1995. I asked her to make as few copies of the documents as possible as I was
5 concerned for the privacy of Mr. Hyatt since the documents were confidential. Ms. Cox told me
6 that she would need to make the copies as these cases often take a long time to resolve.

7
8 15. On February 23, 1995, Ms. Cox came to my office to review the documents. I
9 told Ms. Cox that Mr. Hyatt was very concerned with his privacy and the confidentiality of his
10 papers and requested that the FTB only make copies of those documents that it really had to
11 have in its files. I told her that the documents were always available for review at my offices. I
12 told Ms. Cox that Mr. Hyatt is very concerned for his privacy and tries to maintain a very low
13 profile in Nevada. *Ms. Cox assured me that everyone in the FTB was subject to the security and*
14 *disclosure policy of the FTB, the violation of which would cause an FTB employee to lose his*
15 *job or worse.* Ms. Cox gave me a copy of the FTB's security and disclosure policy to assure me
16 and Mr. Hyatt that the materials and information that Mr. Hyatt was furnishing to the FTB
17 pursuant to the audit would be kept confidential.

18
19 16. The FTB's security and disclosure policy is set forth in its Security and
20 Disclosure Manual. The Manual provides that the policy is in place to encourage taxpayers to
21 make full disclosure on their income tax returns without fear that the information will be
22 revealed for some other purpose. The failure of an employee of the FTB to ensure
23 confidentiality of the data can subject the employee to criminal action, disciplinary proceedings
24 and potential loss of employment.⁴ *The information subject to confidentiality imposed by the*
25 *Manual includes any item of information that is submitted to the FTB to administer its program*
26 *responsibilities that is not specifically made public information by statute, including California*

27
28 ⁴ A copy of the excerpt from the FTB security and disclosure policy presented to me by Ms.
Cox is attached hereto as Exhibit 4.

1 tax return information.

2
3 **E. Mr. Hyatt and I relied on the FTB representations of confidentiality.**

4 17. Mr. Hyatt and I relied upon the representations of the FTB auditors and the
5 provisions contained in the Manual that the highly confidential information Mr. Hyatt was
6 providing to the FTB pursuant to the auditors' request would be maintained confidential. Ms.
7 Cox said that she needed copies of everything, which I then agreed to send. She also requested
8 authorization to get bank account information.

9
10 18. Under my cover letter dated February 28, 1995,⁵ I sent the requested copies of
11 Mr. Hyatt's bank account statements and canceled checks to Ms. Cox. *My cover letter noted*
12 *that, as I discussed with all of the previous Franchise Tax Board auditors, all of the*
13 *correspondence and materials furnished to the Franchise Tax Board by Mr. Hyatt were highly*
14 *confidential.* My cover letter also noted that it was our understanding that such materials were
15 to be retained in locked facilities with limited access. Ms. Cox did not question this statement.

16
17 19. On March 1, 1995, Ms. Cox acknowledged in a letter our meeting on February
18 23, 1995.⁶ In that letter she acknowledged that Mr. Kern expressed concern about the Mr.
19 Hyatt's privacy. She confirmed that she gave me documentation regarding the FTB security and
20 disclosure policy. She promised that all documents sent to her would be kept confidential.

21
22 **F. The FTB reconfirmed Mr. Hyatt's desire for privacy and his desire**
23 **to keep his Las Vegas address confidential.**

24 20. In my letter to Ms. Cox dated August 29, 1995,⁷ I pointed out that the audit
25 report issued by the FTB was misdirected because it mixed up Mr. Hyatt's residency with his

26 ⁵ See Exhibit 5 hereto.

27 ⁶ See Exhibit 6 hereto

28 ⁷ See Exhibit 7 hereto.

1 concern over his privacy. My August 29, 1995 letter reconfirmed that Mr. Hyatt had been
2 careful to protect his privacy as a result of past harassment and disruption of his work, but that
3 his efforts to protect his privacy did not affect his residency. My August 29, 1995 letter further
4 reminded the FTB that it had been informed since the outset of the audit that Mr. Hyatt was
5 concerned with his privacy. My letter reiterated that, like many successful individuals, Mr.
6 Hyatt put significant effort in protecting his privacy. My letter denied that Mr. Hyatt was
7 concerned about kidnapping. My letter went on to note that, as part of maintaining his low
8 profile, Mr. Hyatt asked fiends and colleagues to serve as trustees or open accounts with utility
9 companies for Mr. Hyatt's personal residence; Mr. Hyatt also used P.O. boxes for his
10 correspondence to maintain privacy. *My letter reconfirmed that Mr. Hyatt did not want his*
11 *name publicly associated with his residence as he was trying to protect himself from*
12 *undesirable contacts and had tried to insulate his name from readily accessible public records.*
13 The letter expressed concern that the promises of confidentiality by the FTB had been
14 compromised, because of the FTB audit report's failure to consider certain information provided
15 by Mr. Hyatt to the FTB during the course of the audit and because of the duplicative requests
16 made by the FTB for information during the course of the audit.

17
18 21. In the FTB's August 31, 1995 response⁸ to my letters of August 29 and 30, 1995,
19 *the FTB acknowledged that Mr. Hyatt was a private person who put a significant effort into*
20 *protecting his privacy and further acknowledged that the taxpayer did not want his name*
21 *publicly associated with his residence, as was previously acknowledged by Mr. Shayer and Mr.*
22 Soriano.

23
24 **G. Mr. Hyatt's frugal and unassuming lifestyle was explained to the**
25 **FTB.**

26 22. In my September 22, 1995 letter⁹ to the FTB in response to its August 31, 1995

27 ⁸ See Exhibit 8 hereto.

28 ⁹ See Exhibit 9 hereto.

1 letter, I stated that the FTB dwelled on Mr. Hyatt's private nature, expressing its disbelief that
2 an individual concerned about privacy would live in the modest home in which Mr. Hyatt lived.
3 My letter doubted that the FTB was aware of the methods which successfully increased one's
4 privacy. My letter noted that Mr. Hyatt's privacy had been successfully maintained because of
5 his modest life style and because of his low profile; neither his home nor his apartment attracted
6 the scrutiny of curious public or of his intrusive family (unlike high walls and gates which are
7 noticeable and invite the curious).

8
9 23. In the FTB's September 26, 1995 letter to me,¹⁰ the FTB acknowledged that Mr.
10 Hyatt's belief that his modest life style and low profile helped him to maintain his privacy. The
11 FTB letter notes that the FTB is aware of the methods which successfully increase one's
12 privacy. The FTB's letter also acknowledged the taxpayer's desire to keep a low profile and to
13 keep uninvited visitors out.

14
15 **H. Mr. Hyatt's desire for privacy and desire to keep the address of his**
16 **Las Vegas home confidential was reiterated to the FTB.**

17 24. In my cover fax dated October 13, 1995 to Ms. Sheila Cox¹¹ where I transmitted
18 our response letter to the FTB's letter of September 26, 1995, I noted that, because of the
19 taxpayer's desire for privacy, I would be delivering the original letter with the underlying
20 documentation personally to Ms. Cox.

21 25. In my October 18, 1995 letter to the FTB¹² responding to the FTB's August 2,
22 1995 penalty letter, I noted that our August 29, 1995 letter to the FTB *addressed Mr. Hyatt's*
23 *desire to keep his name and address out of the public records* so that the harassment that he
24 encountered in California would not follow him to Nevada.

25
26 ¹⁰ See Exhibit 10 hereto.

27 ¹¹ See Exhibit 11 hereto.

28 ¹² See Exhibit 12 hereto.

1 I. In sum — the FTB was continually reminded of Mr. Hyatt's desire
2 for privacy and confidentiality, and the FTB repeatedly promised to
3 keep Mr. Hyatt's materials confidential.

4 26. I repeatedly expressed to the FTB Mr. Hyatt concerns over whether the FTB
5 would maintain the taxpayer's records confidential and would conduct the audit in a
6 professional manner. I relayed these concerns to the three auditors involved on Mr. Hyatt's
7 audit, all of whom assured me that the materials furnished by Mr. Hyatt would be maintained
8 confidentially and that Mr. Hyatt's desires were being respected. In the various correspondence
9 and the various contacts noted above, I continually reminded the FTB of the need for
10 confidentially. Indeed, FTB protest officer Anna Jovanovich expressed acute awareness of Mr.
11 Hyatt's concern for confidentiality — she went so far as to call Mr. Hyatt "paranoid." On
12 another occasion she acknowledged in a letter Mr. Hyatt's concern for confidentiality.¹³

13 V. The FTB's standard for determination of residency and its application to Hyatt.

14 27. Based on the documents submitted by Mr. Hyatt and the audit file in whole, and
15 applying the FTB's standard for determining residency, I saw no basis on which the FTB could
16 conclude Mr. Hyatt was a California resident for the two periods in dispute — September 26 to
17 December 31, 1991 and January 1 to April 2, 1992. In short, the FTB's own test for
18 determining the date on which an individual is no longer a resident of California is two pronged:
19 (i) physical presence by the individual in another state, and (ii) the intent by that individual to
20 remain in that state. (California Revenue & Taxation Code § 17014; Whittell v. FTB, 231 Cal.
21 App. 2d 278, 284, 41 Cal. Rptr. 673 (1964)).

22
23 28. The documents and information submitted to the FTB auditors demonstrated
24 both: (i) Mr. Hyatt's physical presence in Nevada during most of the two disputed periods —
25 except for short business trips that were well documented, and (ii) Mr. Hyatt's intent to remain
26 in Nevada. My protest letter to the FTB dated June 20, 1996 describes the information and
27

28

¹³ See Exhibit 13 hereto.

1 documents presented to the FTB and best summarizes the strength of Mr. Hyatt's residency case
2 as it demonstrates Mr. Hyatt's physical presence in Nevada during the disputed period and his
3 intent to remain.¹⁴ Of course, the best evidence of Mr. Hyatt's intent in September of 1991 to
4 remain in Nevada, is the fact he has continued to live in Nevada since that time.

5
6 **VI. The FTB's proposed assessment for the 1991-tax-year and its public dissemination
by the FTB.**

7
8 29. I was therefore disappointed when we received the FTB's "findings" in regard to
9 the audit. A summary of these findings were sent by FTB auditor Sheila Cox in a letter dated
10 August 2, 1995.¹⁵ The FTB later issued a formal Notice of Proposed Assessment, dated April
11 23, 1996, against Mr. Hyatt for the 1991-tax-year.¹⁶ This was almost three years after Mr. Hyatt
12 received notice of the audit. The proposed assessment sought taxes totaling \$4,540,404.77. I
13 was even more disappointed when I learned that the FTB proposed to assess Mr. Hyatt not only
14 income tax on his earnings for the period after his move to Nevada — September 21, 1991
15 through the end of 1991 — but was also proposing to assert a "fraud" penalty against Mr. Hyatt
16 thereby increasing the assessment by 75% and seeking interest on both the tax and penalty from
17 1991. As a result, the proposed assessment was equal to almost double the amount of tax that
18 the FTB claimed was owed for the 1991-tax-year.

19
20 30. Despite the promises and assurances by the FTB of confidentiality, as the 1991-
21 tax-year audit concluded, there were signs that the FTB was not keeping its promises. In my
22 April 30, 1996 letter to the FTB, on which Ms. Cox was copied, I reminded the FTB of Mr.
23 Hyatt's continuing requests regarding confidentiality and then chastised the FTB for its
24 dissemination of the Notice of Proposed Assessment to an address Mr. Hyatt had not used for

25
26 ¹⁴ See Exhibit 14 hereto.

27 ¹⁵ See Exhibit 15 hereto.

28 ¹⁶ See Exhibit 16 hereto.

1 four years.¹⁷ The FTB knew Mr. Hyatt current mailing address from the voluminous
2 correspondence during the audit. Mr. Hyatt and I were therefore quite upset that the FTB
3 choose one of the most confidential and potentially embarrassing documents to send to an
4 address that it had not sent correspondence for years. The Notice asserted that Mr. Hyatt owed
5 millions of dollars in taxes and penalties, and it apparently fell into the hands of a third party. I
6 informed the FTB: "This is a breach of the confidential relationship that the FTB promised to
7 maintain in handling this matter." Only after the FTB's production of its 1991-tax-year audit
8 file did Mr. Hyatt begin to learn the full extent of the FTB's broken promises.

9
10 **VII. Protest of 1991-tax-year assessment.**

11 31. To preserve Mr. Hyatt's rights under California law (Cal. Rev.&Tax Code §
12 19044), I gave the FTB formal written notice on June 20, 1996, a lengthy and detailed protest
13 letter.¹⁸ As mentioned above, the protest letter notified the FTB of the significant evidentiary
14 support contrary to the conclusion it reached in the audit. The protest letter also set forth in
15 detail the reasons that Mr. Hyatt disputed the proposed assessment.

16
17 32. Once a protest letter is sent to the FTB, the matter then enters what is called the
18 "protest" stage, during which the FTB assigns an in-house attorney to act as the Protest Officer,
19 who in theory makes an independent review of the audit and a final determination concerning
20 the proposed assessment before submitting a final assessment. The FTB emphasizes to
21 taxpayers and their representatives that the protest officer conducts an independent review. As
22 set forth in further detail below, Mr. Hyatt's protest is still pending, almost four years after his
23 protest letter was submitted, almost seven years after he first received notice that he was being
24 audited, and almost nine years after the tax year in question.

25
26
27 ¹⁷ See Exhibit 17 hereto.

28 ¹⁸ See Exhibit 14 hereto.

1 **VIII. FTB audit and assessment for the 1992-tax-year and the FTB's multi-million dollar**
2 **error.**

3 33. Shortly after the FTB notified Mr. Hyatt of the results of the 1991-tax-year audit,
4 the FTB informed Mr. Hyatt, through a letter sent to me dated January 19, 1996¹⁹ that it was
5 commencing an audit of Mr. Hyatt for the 1992-tax-year based on the results of its audit for the
6 1991-tax-year — even though Mr. Hyatt never resided in California during 1992 and in April of
7 1992 had purchased his home in Las Vegas and moved into that home from his Las Vegas
8 apartment.

9 34. The FTB later issued a formal Notice of Proposed Assessment, dated August 14,
10 1997, against Mr. Hyatt for the 1992-tax-year.²⁰ The proposed assessment for 1992 sought taxes
11 totaling \$5,669,021.00 and as well as a "fraud" penalty thereby increasing the assessment by
12 75%, and sought interest on both the tax and penalty from 1992. The total proposed assessment
13 therefore for the 1992 tax year equaled \$14,115,941.00. I timely submitted a "Protest" letter to
14 the FTB on October 10, 1997 in regard to the FTB's proposed assessment for the 1992-tax-
15 year.²¹ The Protest for the 1992-tax-year is still pending.

16 35. The proposed assessment for 1992-tax-year contained an income error that
17 caused the proposed assessment to overstate Mr. Hyatt's income by \$24,000,000. In short, the
18 FTB concluded that Mr. Hyatt was a resident of California through April 2, 1992, when he
19 closed escrow on his Las Vegas home.²² But the proposed assessment for the 1992-tax-year
20 mistakenly assessed Mr. Hyatt for the income he earned during the month of December 1992.

21 36. I informed the FTB of this income mistake in a letter dated July 17, 1997 fully
22
23
24

25 ¹⁹ See Exhibit 18 hereto.

26 ²⁰ See Exhibit 19 hereto.

27 ²¹ See Exhibit 20 hereto.

28 ²² See Exhibit 19 hereto.

1 expecting that it would correct the mistake and issue an amended proposed assessment for the
2 1992-tax-year, but the FTB has failed to do so.²³ I made other attempts to have the FTB correct
3 this income mistake,²⁴ but to this date the FTB is continuing to assess Mr. Hyatt for the
4 December 1992 income, despite its own findings that he was not a resident of California at that
5 time.

6
7 **IX. Receipt of 3,500 page audit file and discovery therein of the FTB's audit conduct.**

8 37. The FTB audit process is as secretive as a grand jury. The FTB takes the
9 position that the individual subject to the audit has no right to review or receive a copy of the
10 audit file until after the FTB has made its proposed assessment. I did request a copy of the audit
11 file on May 1, 1996,²⁵ which was within a week after the FTB issued the proposed assessment
12 for the 1991-tax-year. The audit file was not produced until October of 1996, which was well
13 after the time I had submitted Mr. Hyatt's protest letter for the 1991-tax-year.

14
15 **X. Settlement threats from the FTB's first protest officer.**

16 38. The initial protest officer assigned to Mr. Hyatt's protest for the 1991-tax-year was
17 Anna Jovanovich. I was informed that Ms. Jovanovich was the protest officer in a letter dated
18 April 24, 1997 from Terry Collins.²⁶ From the commencement of the protest in 1996, I have
19 periodically spoken with or corresponded with each of the three successive protest officers, Ms.
20 Jovanovich, Robert Dunn, and Charlene Woodward, to determine the status of the proceedings
21 and inquire about time frame for resolution. In that regard, in June of 1997 I had lengthy
22 conversation with Ms. Jovanovich wherein I inquired as to a time frame for resolution and again
23 emphasized the strength of Mr. Hyatt's case given the documentary evidence submitted

24
25 ²³ See Exhibit 21 hereto.

26 ²⁴ See Exhibit 20 hereto.

27 ²⁵ See Exhibit 22 hereto.

28 ²⁶ See Exhibit 23 hereto.

1 supporting his Nevada residency starting in September of 1991. During the discussion, without
2 any prompting from me, she raised the issue of compromise and settlement. She first stated that
3 she understood Mr. Hyatt to be very sensitive — she used the word paranoid — about his
4 privacy and about his desire to keep the information submitted to the FTB confidential. She
5 informed me that in high profile audits, large dollar audits it was necessary for the FTB to
6 engage in fact intensive, in depth investigations and inquire into many *unrelated* facts and
7 questions. She emphasized that she would be sending me a lengthy letter asking for more
8 documents and information.

9
10 39. Ms. Jovanovich informed me during this lengthy conversation that at this stage of
11 the proceedings (*i.e.* the protest) most individuals, particularly wealthy or famous individuals,
12 compromise and settle with the FTB to avoid publicity, to avoid the individual's financial
13 information becoming public, and to avoid the very fact of the dispute with the FTB becoming
14 public. The clear import of her suggestion was that famous, wealthy individuals settle with the
15 FTB to avoid being, rightly or wrongly, branded a "tax dodger." I understood Ms. Jovanovich
16 to be suggesting that Mr. Hyatt enter into settlement discussions with the FTB concerning a
17 compromise over the assessment of taxes, penalties, and interest being assessed by the FTB. I
18 relayed Ms. Jovanovich's statements to Mr. Hyatt.

19
20 40. At the time Ms. Jovanovich made the statements to me about settlement and
21 avoiding disclosure of financial information and adverse publicity, we had already produced
22 thousands of pages of information regarding Mr. Hyatt, his licensing business, and his financial
23 position. She stated she would soon be making additional requests in a lengthy letter.

24
25 41. In August of 1997, approximately two months after my conversation with Ms.
26 Jovanovich, the FTB sent its Notice of Proposed Assessment for the 1992 tax year. As
27 explained above, it assessed not only penalties and interest, but contained mistake based upon
28 the FTB's own admitted findings by including income from after the disputed periods. The FTB

1 nonetheless assessed Mr. Hyatt taxes on his income through most of 1992, and assessed a fraud
2 penalty for income earned both before and after April 4, 1992. The FTB's refusal to correct the
3 mistake along with Ms. Jovanovich's suggestions concerning entering into a compromise with
4 the FTB, call into question whether the mistake was innocent in nature, or intended by the FTB
5 as another bargaining chip for negotiations and compromise.

6
7 **XI. Commencement of this case.**

8 42. Mr. Hyatt filed this litigation in January 1998, shortly after the 1992-tax-year-
9 assessment. My only involvement has been as a potential witness. While the case has been
10 pending, I have continued to represent Mr. Hyatt in the protests that are before the FTB for both
11 the 1991 and 1992-tax-years. At no time have any of the three successive protest officers
12 assigned by the FTB informed me that the protest was being delayed, hindered, or in any way
13 affected by this case.

14
15 **XII. The Nevada litigation does not interfere with the protests.**

16 **A. Continuation of the protest.**

17 43. I continued communicating with Ms. Jovanovich concerning the protest through
18 early 1998 shortly after this litigation started. I received no further communications from the
19 FTB concerning the protest until I received a letter dated October 27, 1998,²⁷ from Robert W.
20 Dunn, stating that because of Ms. Jovanovich's retirement, he had been assigned to resolve Mr.
21 Hyatt's protest for 1991-1992 tax-years. Mr. Dunn's letter stated that as soon as he was done
22 with the initial review of my protest letters as well as the entire audit file and the documents we
23 had submitted to Ms. Jovanovich, he would contact me. At no point in his letter did Mr. Dunn
24 inform me that the protest was being delayed, stopped, interfered with, or hindered by the
25 litigation in Nevada.

26
27
28

²⁷ See Exhibit 24 hereto.

1 44. My next written communication from the FTB was a letter dated February 24,
2 1999 stating that Mr. Hyatt's protest for 1991 and 1992-tax-years had been reassigned to
3 Charlene Woodward.²⁸ The letter stated that soon as Ms. Woodward completes her review of
4 the file, she would contact me. The letter in no way indicates that Mr. Hyatt's Protest was being
5 delayed, stopped, or in anyway interfered with or hindered by the Nevada litigation.

6

7 **B. Isolation of protest officer from the FTB litigation team.**

8 45. On or about March 2, 1999 I spoke by telephone to Ms. Woodward. Ms.
9 Woodward provided me with some background concerning her work experience and her tenure
10 with the FTB. She informed me that her instructions were to work on the matter and to analyze
11 it independent from "everything else going on", which I understood to mean the Nevada
12 litigation. She further told me that a "Chinese" law (what I understood to be an "ethical wall")
13 was being constructed around her because FTB personnel working on the Nevada litigation were
14 not to discuss the case with her. She told me that Mr. Dunn was no longer handling the protest
15 because he was assisting in the Nevada litigation.

16

17 46. At no point did Ms. Woodward indicate to me that the protest or her work on the
18 Protest was in anyway being delayed, stopped, interfered with, or hindered by the Nevada
19 litigation. To the contrary, my understanding based on with Ms. Woodward's comments was
20 that the Protest was proceeding on its own course independent of and irrespective of the Nevada
21 litigation.

22

23 **C. FTB recommencement of protest after Nevada court ruling.**

24 47. On or about July 19, 1999 I placed a call to Ms. Woodward to inquire as to the
25 status of the Protest. My call was returned by Terry Collins, whom I understood to be Ms.
26 Woodward's supervisor at the FTB. Mr. Collins wanted me to know that Ms. Woodward had
27 been assigned to the protest and would soon start working on the Protest. I told Mr. Collins that

28

²⁸ See Exhibit 25 hereto.

1 I understood that Ms. Woodward had already been assigned to the case. Mr. Collins explained
2 to me that at the outset of the Nevada litigation it appeared possible that the Nevada court would
3 consider the residency matter and make a determination. As a result, Mr. Collins explained that
4 the FTB did not devote resources to handling the Protest. In other words, I understood him to be
5 saying that if the matter was going to be decided by a Nevada court, the FTB made a decision
6 not to devote time and resources to working on Mr. Hyatt's Protest. I was surprised to hear this
7 because it was contrary to my prior conversations and correspondence with the FTB at the
8 commencement of the Protest and more recently wherein the FTB Protest Officers — Ms.
9 Jovanovich, Mr. Dunn, and Ms. Woodward — all gave me the distinct impression that the
10 Protest was proceeding and would be resolved quickly.

11

12 48. Mr. Collins further explained to me during our July 19, 1999 telephone call that
13 because it appeared that the Nevada court would not be considering the residency issue (i.e. the
14 court had dismissed the declaratory relief claim), the FTB would again commence the Protest.
15 He said I could expect a letter from Ms. Woodward that week confirming that she would begin
16 her analysis. He informed me that afterwards it would take Ms. Woodward less than six months
17 to respond. When I asked him if he thought I would hear from her within a couple of months,
18 he thought it would be even less time. He also indicated that he had been meaning to call me to
19 inform me that the FTB would start working on Mr. Hyatt's protest again. My letter of July 23,
20 1999 letter to Mr. Collins confirms the substance of our conversation on or about July 19,
21 1999.²⁹

22

23 **XIII. FTB failure to follow its own internal policy for processing the protest.**

24 49. On or about September 14, 1999, I called and spoke with Ms. Woodward to
25 discuss FTB's Notice 99-1. This is a FTB internal document that sets forth the guidelines for
26 processing the protest. It states that protests are typically to be handled within six months. Ms.

27

28

²⁹ See Exhibit 26 hereto.

1 Woodward informed me that she was not familiar with such form, but that she would check
2 with others at the FTB. I then inquired as to how her work on the protest was progressing. She
3 informed me that she had the protest for only one month and had just finished reviewing the file
4 for the first time. She informed me that she had a number of questions, six-nine (69) to be
5 precise, that she had hoped to answer by re-reviewing the audit file. She did not know how long
6 that would take, and that this was only the second protest she had ever been assigned. I
7 eventually concluded the conversation by again asking Ms. Woodward to determine if a plan
8 was in place within the FTB consistent with the FTB Notice 99-1 to resolve the protest within
9 six months. After my telephone call, I faxed her a copy of the FTB Notice 99-1.³⁰

10

11 50. On September 15, 1999, the day after my telephone conversation with Ms.
12 Woodward, her supervisor Terry Collins called me. He asked me what I was seeking with
13 respect to FTB Notice 99-1. I informed him that I was attempting to determine whether or not
14 the FTB would be following the guidelines set forth in FTB Notice 99-1 in regard to Mr. Hyatt's
15 protest. He informed me that FTB Notice 99-1 set forth guidelines, not rules. He further
16 informed me that given the nature of the case, the guidelines would not be followed in regard to
17 Mr. Hyatt's Protest because he thought the FTB's Chief Counsel would give permission to not
18 follow the guidelines in this case. He then asked me what "I really wanted from the FTB." I
19 informed him that I was trying to determine the expected time of receiving a response from Ms.
20 Woodward in regard to the Protest. He concluded by stating that there could be no date
21 proposed for anticipating completion. Again, there was no reference that Protest was being
22 delayed, stopped, interfered with, or hindered by the Nevada litigation.

23

24 51. I confirmed my September 14, 1999, conversation with Ms. Woodward in a letter
25 dated September 23, 1999.³¹ I confirmed my September 15, 1999, conversation with Mr.

26

27

³⁰ See Exhibit 27 hereto.

28

³¹ See Exhibit 28 hereto.

1 Collins in a letter also dated September 23, 1999.³²

2
3 **XIV. FTB requests further information from Hyatt in the protest and finally sets hearing**
4 **date for protest.**

5 52. Having heard nothing further from the FTB for three months, on December 14,
6 1999, I sent Ms. Woodward two separate letters, one inquiring as to the status of Mr. Hyatt's
7 Protest for the 1991 tax-year and the second one inquiring as to the status of Mr. Hyatt's Protest
8 for the 1992 tax-year.³³ The next contact I received from the FTB was a letter from Ms.
9 Woodward dated December 30, 1999, that was 31 pages in length and sought answers to over
10 187 questions.³⁴ Ms. Woodward gave me sixty days to respond to her letter, a letter that had
11 been in the works by her and prior FTB protest officers for over three years. Ms. Woodward's
12 letter stated that she hoped to have a hearing on the Protest this June or July.³⁵ I understand this
13 to be the lengthy letter Ms. Jovanovich alluded to approximately two and half years earlier.

14 53. On March 15, 2000 I again spoke with Ms. Woodward. She agreed that Mr.
15 Hyatt could have a 90 day extension to answer the 187 questions she posed in her December 30,
16 1999 letter, so long as we mutually agree on a hearing date. She then stated that a hearing in the
17 protest would be held in September or October of this year. She emphasized that the FTB
18 intended to, and would, conduct the hearing and have the protests complete by early this Fall.

19
20 **XV. The FTB auditor issued a perjured subpoena to try and acquire information about**
21 **Mr. Hyatt.**

22 54. In May of 1998 I received correspondence from Sheila Cox attached to which
23 was a subpoena she had issued on the FTB's behalf to CalFed Bank. The proof of service
24

25 ³² See Exhibit 29 hereto.

26 ³³ See Exhibit 30 hereto.

27 ³⁴ See Exhibit 31 hereto.

28 ³⁵ See Exhibit 31 hereto.

1 attached to the subpoena sworn under oath that I had been personally served with the subpoena
2 on May 28, 1998.³⁶ The proof of service was wrong because I was not served personally that
3 day or any other. The subpoena also violated the California Financial Information Privacy Act
4 that requires the consumer (here Mr. Hyatt) be served notice of the subpoena ten days prior to
5 the due date of the subpoena. The due date on the subpoena was May 28, 1998, the same day it
6 falsely states I was personally served.

7
8 55. On June 3, 1998 I spoke with Ms. Cox who confirmed that the subpoena was
9 served on the bank prior to the ten day waiting period. She said that the FTB often does this
10 because the banks take so long to respond.

11
12 56. Ms. Cox also informed me that the FTB had subpoenaed CalFed because Ms.
13 Jovanovich, the protest officer, thought that a number on a document Mr. Hyatt produced was a
14 secret bank account number. It was actually a bank branch number. In other words, Ms.
15 Jovanovich mistakenly thought it was a secret bank account that Mr. Hyatt was hiding. She
16 therefore instructed Ms. Cox to subpoena the records directly from the bank. To Mr. Hyatt's
17 great embarrassment, the subpoena was served on the bank and falsely stated that Mr. Hyatt had
18 provided incomplete information during the FTB's investigation of him.

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³⁶ See Exhibit 32 hereto.

1 57. Not only was this not true, but by not giving Mr. Hyatt the required ten day
2 notice he was unable to correct the FTB's mistake prior to its embarrassing and false
3 representation to the bank. If the FTB had called me first to request the "secret" account
4 information, the matter would have been clarified without the FTB making false statements
5 about Mr. Hyatt and without invading his privacy.

6
7 Further your affidavit sayeth naught.

8 DATED this 20th day of March, 2000.


EUGENE G. COWAN

12 SUBSCRIBED and SWORN to before me
this 20th day of March, 2000.

14 Mary E. McDermott
15 NOTARY PUBLIC



EXHIBIT 19

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Attorneys for Plaintiff

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
)
)
) **AFFIDAVIT OF MICHAEL W.**
) **KERN IN OPPOSITION TO THE**
) **FTB'S MOTION FOR SUMMARY**
) **JUDGMENT**
)
)
) **FILED UNDER SEAL BY**
) **STIPULATION AND ORDER**
) **DATED FEBRUARY 1, 1999**

**HUTCHISON
& STEFFEN**
LAKES BUSINESS PARK
8831 W. SAHARA AVENUE
LAS VEGAS, NV 89117
(702) 385-2500
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03-21-2000 Kern AFFD.wpd

FILED
MAR 22 2000
SHERIFF DEPT
CLARK COUNTY

AFFIDAVIT OF MICHAEL KERN

STATE OF NEVADA

COUNTY OF CLARK

)
) ss.
)

Michael Kern, being duly sworn, according to oath, deposes and states:

1. I am a resident of the State of Nevada, above the age of majority, and competent to testify as to the following facts of my own personal knowledge. I am a Certified Public Accountant (CPA) licensed in the State of Nevada. If called upon to do so, I would testify as to the truthfulness of the statements made in this affidavit.
2. I first met Gilbert P. Hyatt in March 1992, in Las Vegas, Nevada. He expressed his desire to remain in Las Vegas permanently and his desire to become part of the Nevada infrastructure. I volunteered to assist him in these objectives.
3. In the first half of 1992, I introduced Mr. Hyatt to and arranged for meetings with then-Governor Robert Miller, Clark County Superintendent of Schools Dr. Brian Cram, Senator Richard Bryan, and President Dennis Stein and Vice President Gerry Sandstrom of the Nevada Development Authority (NDA).
4. I attended several meetings with Mr. Hyatt and Governor Miller in mid-1992. These meetings took place in Governor Miller's office in Las Vegas. I arranged a breakfast meeting with Mr. Hyatt and Superintendent Cram in mid-1992. I attended a meeting with Mr. Hyatt and Senator Bryan in mid-1992. I arranged for Mr. Stein and Mr. Sandstrom to assist Mr. Hyatt in mid-1992.
5. Mr. Hyatt retained me to represent him with respect to preparation and filing of his federal and part-year California state income tax returns for 1991. He also retained me to prepare and file his Federal tax returns in Nevada for 1992 through 1998.
6. Attorney Eugene Cowan and I were Mr. Hyatt's professional representatives for audits conducted by the Franchise Tax Board of the State of California (FTB). These audits began in mid-1993 and have continued to the present. My role has also been to assist in the preparation and submission of materials as part of the California administrative

- 1 protest, which Mr. Hyatt is entitled to file to challenge the FTB's audit assessments.
- 2 7. The first two FTB auditors assigned to Mr. Hyatt's case requested only a few documents,
3 and long periods elapsed before they responded to our submissions. Then, late in 1994,
4 Ms. Sheila Cox took over as the third FTB auditor to be assigned to Mr. Hyatt's case.
- 5 8. During the audits, Mr. Hyatt, Mr. Cowan and I worked diligently to meet every one of
6 the requests by Ms. Cox. Ms. Cox criticized our cooperation, which I believe was unfair
7 and without basis. Mr. Hyatt, Mr. Cowan and I responded as quickly and accurately as
8 possible to all requests for information, and I was available to Ms. Cox by telephone,
9 fax, or letter to address any additional questions or concerns which she might have. To
10 the extent that I did not have information to respond to any inquiries, I diligently
11 requested information from appropriate sources and made every effort to get the FTB
12 whatever information it requested.
- 13 9. Mr. Hyatt, Mr. Cowan, and I worked diligently to meet every request by Ms. Cox. When
14 it was not possible to meet Ms. Cox's initial response schedule, we requested and
15 received some extensions of time, and we met those schedules.
- 16 10. During this process, Ms. Cox blamed Mr. Hyatt for various things which I thought were
17 inappropriate. For example, Ms. Cox requested 1991 and 1992 bank statements, and
18 Mr. Hyatt produced the requested 1991 and 1992 bank statements in a timely manner.
19 But Ms. Cox then criticized Mr. Hyatt for not supplying 1990 bank statements which she
20 had not requested. Part of Ms. Cox's ultimate finding that a fraud penalty should be
21 assessed against Mr. Hyatt was based on him not supplying the 1990 bank statements
22 which she had not requested.
- 23 11. In the course of my involvement in the audit process, I became aware of other examples
24 of the FTB's positions which slanted the FTB audit against Mr. Hyatt on various issues.
25 For example, the FTB asserted that Mr. Hyatt's Franklin mutual fund account was a
26 California bank account. Mr. Hyatt complained to Franklin, which in turn complained to
27 the FTB. The FTB attorney, Mr. Bramhall, confirmed in writing that the Franklin
28 mutual fund investment account was not a California bank account and was not a

- 1 California residency connection. The FTB has never withdrawn its reliance on the
2 Franklin account as evidence of California residency.
- 3 12. The FTB also requested a copy of the deed reflecting Mr. Hyatt's sale of his California
4 house. I sent a copy of that deed, which did not have a notary signature or stamp. I
5 understand that the FTB has now alleged that Mr. Hyatt committed fraud by back-dating
6 a deed. I believe that the FTB distorts the circumstances by assuming that an un-
7 notarized deed must have also been back-dated, and I have seen no evidence to support
8 such an assumption.
- 9 13. The FTB did not provide notice to me that it was sending "Demands for Information" to
10 various individuals and businesses in Nevada.
- 11 14. The FTB audit also contains errors relating to the timing of Mr. Hyatt's receipt of
12 approximately \$25,000,000 in income in 1992. Mr. Hyatt's records show that this
13 income was received in the second half of 1992 and we reported this as second half 1992
14 income to the Internal Revenue Service on Mr. Hyatt's 1992 U.S. Individual Income Tax
15 Return. The FTB claims that it was received in January, 1992, within the time that the
16 FTB claims that Mr. Hyatt was still a California resident. Despite letters and requests to
17 correct this error, my understanding is that the FTB still includes this \$25,000,000 as
18 income on its 1992 audit, that the FTB has assessed taxes, penalties, and interest of
19 approximately \$7,000,000, and that the FTB continues to accrue interest on this despite
20 having been given conclusive evidence of the date this income was earned.
- 21 15. I have always been aware of Mr. Hyatt's concerns about maintaining his personal and
22 financial privacy since I met him in March 1992. As a result, his advisers recommended
23 that his name not appear on various property and utility records in the State of Nevada. I
24 agreed to act as Trustee for an entity which was formed to protect this personal and
25 financial privacy for Mr. Hyatt, the Kern Trust. This Trust was formed and has
26 continued to operate for the purpose of protecting Mr. Hyatt's privacy, and not for any
27 reason related to California income taxes or the hiding of assets from taxing agencies.
28 Despite providing evidence of this to the FTB, the FTB continues to use the Kern Trust


1 as evidence of fraud and other support for the FTB's claims that Mr. Hyatt owes
2 additional California taxes.

3 Further your affidavit sayeth naught.

4 DATED this 22 day of March, 2000.

5 
6 MICHAEL KERN

7
8 SUBSCRIBED and SWORN to before me
9 this 22 day of March, 2000.

10 
11 NOTARY PUBLIC
12 clark County, Nevada

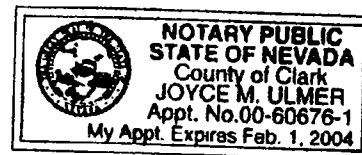


EXHIBIT 20

1 **OBJ**
2 THOMAS R. C. WILSON, ESQ.
3 Nevada State Bar # 1568
4 JAMES C. GIUDICI, ESQ.
5 Nevada State Bar # 224
6 MATTHEW C. ADDISON, ESQ.
7 Nevada State Bar # 4201
8 BRYAN R. CLARK, ESQ.
9 Nevada State Bar #4442
10 McDONALD CARANO WILSON McCUNE
11 BERGIN FRANKOVICH & HICKS LLP
12 2300 West Sahara Avenue, Suite 1000
13 Las Vegas, Nevada 89102
14 (702) 873-4100
15 Attorneys for Defendants

FILED
APR 14 3 55 PM '00
Shirley B. Thompson
CLERK

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 * * * * *

12 GILBERT P. HYATT,
13 Plaintiff,

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

14 vs.

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

**FTB'S OBJECTIONS TO AFFIDAVITS
AND ERRATA FILED IN SUPPORT OF
HYATT'S OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT**

17 Defendants.

Date of Hearing: April 21, 2000
Time of Hearing: 9:00 a.m.

18
19 The Defendant, Franchise Tax Board of the State of California ("FTB") objects as set forth
20 below to the "affidavits" of Eugene G. Cowan, Thomas K. Bourke, Gilbert P. Hyatt, and Michael
21 W. Kern filed on March 22, 2000 in support of Plaintiff Hyatt's opposition to the FTB's motion for
22 summary judgment or alternatively for dismissal. FTB also objects to the various "Errata"
23 documents that Hyatt filed on April 5, 2000.

24 **GENERAL OBJECTIONS**

25 Materials submitted in opposition to a motion for summary judgment must be admissible
26 evidence in order to be considered by the Court. *See, e.g., Adamson v. Bowker*, 85 Nev. 115, 119,
27 450 P.2d 796 (1969) ("evidence that would be inadmissible at the trial of the case is inadmissible
28 on a motion for summary judgment").

1 Rule 56(e), Nev. R. Civ. P., provides that affidavits opposing a summary judgment motion
2 “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,
3 and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

4 In addition, sworn or certified copies of all papers or parts thereof referred to in an affidavit
5 must be attached thereto or served therewith.

6 A party opposing summary judgment “may not rest upon the mere allegations or denial of
7 his pleading, but his response, by affidavits or as otherwise provided in [Rule 56], must set forth
8 specific *facts* showing that there is a genuine issue for trial.” (Emphasis added). If the opposing
9 party does not so respond, “summary judgment, if appropriate, shall be entered against him.”

10 Local Rule 2.20(b) of the Eighth Judicial District Court Rules provides in pertinent part that
11 an opposition to a motion may be supported by affidavit “stating *facts* showing why the motion
12 should be denied.” (Emphasis added). Local Rule 2.21(c) specifically provides:

13 Affidavits must contain *only factual, evidentiary matter*, conform with the
14 requirements of NRCP 56(e), and avoid mere general conclusions or arguments.
15 Affidavits substantially defective in these respects may be stricken, wholly or in part.
(Emphasis added).

16 Rule 56(e) is clear that facts stated in an affidavit must be made upon the affiant’s personal
17 knowledge, and there must be an affirmative showing of his competency to testify to them;
18 conclusory and self-serving statements are insufficient to defeat summary judgment. *Saka v.*
19 *Sahara-Nevada Corp.*, 92 Nev. 703, 705, 558 P.2d 535 (1976); *Gunlord Corp. v. Bozzano*, 95 Nev.
20 243, 245-46, 591 P.2d 1149 (1979). Rule 56(e) is mandatory, and a district court’s reliance upon
21 an affidavit that does not comply with the rule may constitute reversible error. *Havas v. Hughes*
22 *Estate, Summa Corp.*, 98 Nev. 172, 173, 643 P.2d 1220 (1982).

23 Federal Rule 56(e) contains the same requirements for affidavits opposing summary
24 judgment. Federal courts have held that affidavits have no probative value where they consist of:

- 25 1. conclusions, *see, e.g., Industrial Risk Insurers v. Creole Production Services, Inc.*,
568 F. Supp. 1323, 1325 (D.C. Alaska 1983), *aff’d* 746 F.2d 526 (9th Cir. 1984);
- 26 2. legal conclusions, *see, e.g., Oxford Life Insurance Co. v. United States*, 574 F. Supp.
27 1417, 1421-22 (D.C. Ariz. 1983), *aff’d in part and rev’d in part on other grounds*,
790 F.2d 1370 (9th Cir. 1986);

28 //

3. mere assertions unsubstantiated with admissible evidence, *see, e.g., Factofrance Heller v. I.P.M. Precision Machinery Co.*, 627 F. Supp. 1412, 1416 (N.D. Ill. 1986);
4. allegations of ultimate facts, *see, e.g., Cohen v. Ayers*, 449 F. Supp. 298, 321 (N.D. Ill. 1978), 596 F.2d 733 (7th Cir. 1979);
5. opinion or impression of the state of mind or intent of other persons, *see, e.g., Maiorana v. MacDonald*, 596 F.2d 1072, 1079-80 (1st Cir. 1979), *disapproved on other grounds, Gomez v. Toledo*, 446 U.S. 635 (1980);
6. arguments on the law or merits of the case, *see, e.g., Pfeil v. Rogers*, 757 F.2d 850, 862-63 (7th Cir. 1985);
7. generalized or unsubstantiated statements, *see, e.g., Citizens Environmental Council v. Volpe*, 484 F.2d 870, 873 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974);
8. mere denials of essential facts, *see, e.g., First National Bank of America*, 606 F.2d 760, 768 (7th Cir. 1979); or
9. mere questions about the contents of the materials submitted by the moving party. *See, e.g., id. at 768.*

ATTORNEY AFFIDAVITS

An attorney's affidavit is entitled to the same consideration as any other affidavit based upon personal knowledge *if* the affidavit is based upon *the attorney's own knowledge of the facts set forth therein*. *Wilson v. Steinbach*, 656 P.2d 1030, 1032 (Wash. 1982) (emphasis added). An attorney's affidavit not based upon personal knowledge or referable to sources of actual knowledge of the facts, leaves the record for the purposes of summary judgment as it was without any affidavit at all. *Christophides v. Porco*, 289 F. Supp. 403, 407 (S.D.N.Y. 1968) (citations omitted). In *United States v. Dibble*, the Ninth Circuit Court of Appeals stated:

Because lawyers so often present inadmissible testimony (including their own), in the form of affidavits that they would not consider presenting from a witness stand, should we assume that the belief is common that the rules of evidence vanish when a witness testifies by affidavit rather than from the stand? Testimony presented by affidavit is different from testimony orally delivered, because the affiant is not subject to cross-examination. But that fact leads to greater, not lesser, strictures imposed on the testimony presented by affidavit. FRCP 56(e).

429 F.2d 598, 602 (9th Cir. 1970) (citations omitted).

Argument of the facts and the law appropriately should appear in briefs, not affidavits. At best, legal arguments and summations in affidavits will be disregarded by the court. *E. F. Hutton & Co. v. Brown*, 305 F.Supp. 371, 383 (S.D. Tex. 1969) (citing *United States v. Coleman Capital Corp.*, 295 F.Supp. 1016 (N.D. Ill. 1969); *Christophides v. Porco*, 289 F. Supp. 403 (S.D.N.Y.

1 1968)). Furthermore, a writing is not authenticated simply by attaching it to an affidavit, the affiant
2 must have personal knowledge of the facts alleged and attest to the identity and due execution of the
3 document. *Dibble*, 429 F.2d at 602.

4 Mr. Cowan is representing Mr. Hyatt in the ongoing audit protest proceedings in California.
5 Cowan affidavit ¶ 4. Mr. Bourke is counsel of record for Mr. Hyatt in this case. Bourke affidavit
6 ¶ 1. Nevada Supreme Court Rule 178 admonishes against a lawyer acting as a witness for his client.
7 Yet, Mr. Bourke in particular uses his "affidavit" to testify as a witness on behalf of his client in this
8 very case.

9 Violations of Rule 56(e) and Local Rule 2.21(c) permeate the "affidavits" of Eugene G.
10 Cowan and Thomas K. Bourke to such an extent that they can be characterized as nothing more than
11 an attempt to simply "shovel smoke" at the Court. *Oxford Life Insurance Co.*, 574 F. Supp. at 1421-
12 22. Such affidavits fail to raise any genuine issue of material fact and should be disregarded by the
13 Court. *Hotel & Restaurant Employees' Alliance v. Allegheny Hotel Co.*, 374 F. Supp. 1259, 1263
14 (W.D. Pa. 1974). At best, the Cowan and Bourke "affidavits" are merely additional briefs in which
15 each attorney offers his own personal argument. At worst, these attorney affidavits are flagrant
16 violations of Rule 56(g) (court may hold attorneys in contempt and impose sanctions if the court is
17 satisfied that affidavits are presented in bad faith or solely for the purpose of delay).

18 Beyond the general objections made above, the FTB raises specific objections as follows.

19 OBJECTIONS TO THOMAS K. BOURKE AFFIDAVIT

20 The FTB hereby makes the following specific objections to the Bourke affidavit.

- 21 1. Lack of Personal Knowledge: Bourke admits at the beginning of his affidavit that
22 he has no personal knowledge of matters stated therein, however, that he is simply
23 "marshalling (sic) the deposition and documentary evidence." Bourke Affidavit ¶
24 2. Sections II, III, IV, V, VI, and VIII ¶ 185 may not be considered by this Court as
25 they are not based upon Bourke's own personal knowledge. Bourke merely relies
26 upon numerous hearsay documents that he has no personal knowledge of the facts
27 alleged. Not only does Bourke lack any personal knowledge of the factual
28 allegations he asserts, but his affidavit is replete with legal argument and
conclusions. Bourke's affidavit is in no way an attempt to "compile or summarize"
the evidence in the case so far but is merely argument on behalf of Hyatt. Either of
these uses of an affidavit is improper. *See Dibble*, 429 F.2d at 602; Rule 56(e).
2. Legal issues: The following paragraphs contain improper argument on the law or
merits of the case: 6, 9, 10, 11, 12, 14, 15, 16, 16.4, 17, 18, 20, 26, 33, 35, 36, 41, 45,

52, 53, 54, 62, 64, 69, 70, 71, 73, 75, 77, 80, 139, 147, 159, 165, 166, 167, 169, 171, 172 and 173.

3. Self-Serving: The following paragraphs contain improper self-serving statements instead of facts: 5, 9, 10, 12, 15, 16.2, 26, 34, 35, 37, 39, 40, 43, 44, 47, 51, 57, 59, 60, 61, 63, 65, 68, 79, 82, 83, 86, 90, 92, 102, 117, 125, 127, 129, 131, 134, 139, 145, 148, 149, 151, 158, 160, 161, 164, 168, 174, 176, 179, 180 and 184.
4. Conclusory: The following paragraphs contain improper conclusory statements: 4, 10, 11, 12, 13, 15, 16.2, 16.4, 16.5, 20, 21, 26, 27, 33, 38, 46, 49, 52, 58, 66, 71, 72, 74, 78, 84, 88, 104, 118, 123, 130, 139, 143, 158, 160, 175, 179, 180 and 186.
5. Personal Belief: The following paragraphs contain improper personal belief: 16.5 and 139.
6. Opinion or Impression of State of Mind: The following paragraphs contain improper impressions of the state of mind of other persons: 14, 16.2, 24, 63, 67, 72, 82, 101, 130, 158 and 160.
7. Irrelevant: The following paragraphs contain irrelevant statements and/or refer to irrelevant hearsay documents: 34, 36, 39, 40, 51, 52, 53, 54, 57, 58, 62, 68, 70, 108, 114, 135, 137, 138, 138.1, 138.2, 138.3, 138.5, 140, 142, 143, 144, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 159, 160, 161, 163, 165, 168, 170, 171, 172, 179 and 181.

For all the reasons stated above, the Court should disregard all improper statements contained in the Bourke affidavit. Furthermore, Bourke's affidavit relies upon exhibits that are not proper for this Court to consider in deciding FTB's motion for summary judgment. NRCP 56(c). The FTB objects to Bourke's references to Exhibit 1, attached to Bourke's affidavit, the "Appendix to Gil Hyatt's Post-Hearing Memorandum," which is an unverified pleading with attached hearsay documents about which Bourke is not competent to testify.

Bourke is not competent to testify as to the facts alleged in the following exhibits as he has no personal knowledge of the facts alleged therein and therefore the FTB objects to any reference made to them by Bourke in his affidavit:

Exhibit 2 - Candace Les Deposition Transcript;
Exhibit 3 - Hyatt's Protest Letter;
Exhibit 4 & 5 - Excerpts from Audit Files¹;
Exhibit 6 - Sheila Cox deposition transcript;
Exhibit 7 - FTB Narrative Reports;

¹FTB objects to any reference to Exhibit 5 which was not included with the March 22, 2000, filing of Hyatt's Opposition, nor was any exhibit marked as Exhibit 5 in Hyatt's Errata to Bourke's affidavit.

Exhibit 8 - Jovanovich's Telephone Call Memorandum;
 Exhibit 9 - Anna Jovanovich Deposition Transcript;
 Exhibit 10 - Letter by FTB auditor to Hyatt;
 Exhibit 11 - Cowan's Letter to FTB, April 30, 1996; and
 Exhibit 12 - Security and Disclosures Manual;
 Exhibit 13 - Steven James Illia Deposition Transcript;
 Exhibit 14 - Carol Ford Deposition Transcript;
 Exhibit 15 - Transcript of Proceeding, April 20, 1999 (Bourke was not even present);
 Exhibit 16 - Transcript of Proceeding, May 5, 1999 (Bourke was not even present);
 Exhibit 17 - David S. Moore Affidavit;
 Exhibit 18 - Les Performance Evaluation;
 Exhibit 20 - Letter of R. Douglas Bramhall, May 16, 1996;
 Exhibit 21 - Penalties Class Materials;
 Exhibit 22 - Documents relating to Hyatt's patent agreements.
 Exhibit 23 - Narrative Report (H06363);
 Exhibit 24 - Rebekah Medina Deposition Transcript;
 Exhibit 26 - Jeffrey D. McKenney Deposition Transcript;
 Exhibit 28 - FTB Disclosure Education Training;
 Exhibit 29 - Video Tape;
 Exhibit 30 - Portions of Video Tape Deposition Testimony;
 Exhibit 33 - Douglas Dick Deposition Transcript;
 Exhibit 34 - Deposition Exhibit 278 (Maps);
 Exhibit 35 - Deposition Exhibit 286 (Photograph);
 Exhibit 36 - Deposition Exhibit 287 (Photograph);
 Exhibit 37 - Deposition Exhibit 294 (Photograph);
 Exhibit 38 - Deposition Exhibit 297 (Photograph);
 Exhibit 39 - Deposition Exhibit 166 (Chart);
 Exhibit 40 - Deposition Exhibit 296 (Photograph);
 Exhibit 41 - Johna Alvarado Deposition Transcript;
 Exhibit 44 - Paul Lou Deposition Transcript;
 Exhibit 45 - Allan Hideo Shigemitsu Deposition Transcript;
 Exhibit 46 - Declaration of Robert Alvarez;
 Exhibit 47 - Declaration of Barbara Hince;
 Exhibit 48 - Declaration of Gerald H. Goldberg;
 Exhibit 49 - Priscilla Maystead Deposition Transcript; and
 Exhibit 50 - Progress Report of Sheila Cox.

FTB objects to this Court's use of and Bourke's references to the following exhibits attached to Bourke's affidavit and referenced articles as they are irrelevant and/or hearsay documents:

Exhibit 19 - The Power to Destroy; *Matter of the Appeal of Joseph and Emily Gilber*, at pp. 14-16 of Bourke's affidavit;
 Exhibit 52 - Caltax letter;
 Exhibit 53 - Transcript of BOE, September 1, 1999;
 Exhibit 42 - Westlaw Search results; Stuart Taylor, Jr. "Opening Argument," National Journal, May 16, 1998 WL 2089190;
 Exhibit 43 - Newspaper Articles;
 Michael D. Harris, "DA's Believe Scandal Affects Trials' Results," Los Angeles Daily Journal, Wednesday, March 15, 2000, at pp. 79 & 81 of Bourke's affidavit;
 Scott Glover and Matt Lait, "LAPD to Charge 15 Officers in Scandal," Los Angeles Times, Thursday, March 9, 2000, at p. 82 of Bourke's affidavit;

1 Chris Ford, "City Attorney Says 743 Cases May Be Tainted," Los Angeles Daily Journal,
Wednesday, March 15, 2000, at p. 81 of Bourke's affidavit;
2
3 Shawn Hubler, "In Rampart, Reaping What We Sowed," Los Angeles Times, Thursday, February
17, 2000, at pp. 80-81 of Bourke's affidavit;
4
5 Michael D. Harris and Chris Ford, "DA, Chief Cooperate In Showdown's Wake," Los Angeles Daily
Journal, Friday, March 17, 2000, at p. 80 of Bourke's affidavit;
6
7 Joel Fox, "We Will Have To Pay the Piper but How?" Los Angeles Times, Sunday, March 12, 2000,
at p. 80 of Bourke's affidavit;
8
9 LAPD's Official 362 Page Report, at pp. 81-82 of Bourke's affidavit;
10
11 Michael D. Harris, "Parks Immolates Rampart, CRASH In Inquiry Report," Los Angeles Daily
Journal, Thursday, March 2, 2000, at p. 84 of Bourke's affidavit;
12
13 Statement of Mayor Riordan, Los Angeles Times, Sunday, March 12, 2000, at p. 84 of Bourke's
affidavit;
14
15 Chris Ford, "Parks Announces He Is Suspending CRASH Program," Los Angeles Daily Journal,
Monday March 16, 2000, at p. 85 of Bourke's affidavit;
16
17 Miles Corwin, "Commission Hears Calls for Rampart Probe," Los Angeles Times, Wednesday,
March 15, 2000, at p. 85 of Bourke's affidavit;
18
19 Matt Lait and Scott Glover, "Web Site Crashes In On Rampart Scandal," Los Angeles Times,
Thursday, March 6, 2000, at pp. 86-88 of Bourke's affidavit;
20
21 Gregory J. Boyle, S.J., "We Have Met the Monster and It Is Us," Los Angeles Times Friday, March
10, 2000, at pp. 89-90 of Bourke's affidavit;
22
23 Anne-Marie O'Connor, "Rampart Set Up Latinos to Be Deported, INS Says" Los Angeles Times,
Thursday, February 24, 2000, at p. 91 of Bourke's affidavit;
24
25 Peter Blumberg, "LA Lawmaker Wants AG's Help With Rampart" Los Angeles Times Daily
Journal, Monday, February 28, 2000, at p. 92 of Bourke's affidavit;
26
27 Scott Glover & Matt Lait, "Panel Orders Parks to Work With Garcetti," Los Angeles Times,
Saturday, March 18, 2000, at p. 92 of Bourke's affidavit;
28
29 Martin Berg, "A Day in L.A.: Rampart Scandal Evolves Into a Public Spectacle." Los Angeles Daily
Journal, March 17, 2000, at p. 93 of Bourke's affidavit; and
30
31 Martin Berg, "Rampart Suits Might Be on Ice Six Months" Los Angeles Daily Journal, Tuesday,
March 7, 2000, at p. 100 of Bourke's affidavit.

OBJECTIONS TO EUGENE G. COWAN AFFIDAVIT

The FTB hereby makes the following specific objections to the Cowan affidavit.

1. Personal Interpretation and Argument: Most of Mr. Cowan's "affidavit" is an irrelevant and improper attempt to argue the merits of the dispute between Hyatt and FTB as to the effective date of Hyatt's move to Nevada. Whether or not Hyatt's move to Nevada was effective September 26, 1991 (as Hyatt now asserts in ¶ 2 of his

1 affidavit) so as to terminate his liability for California income tax is irrelevant to the
2 FTB's pending motion. This Court has already ruled in its April 16, 1999 Partial
3 Judgment on the Pleadings that it does not have subject matter jurisdiction to decide
4 that issue. The issues raised by the FTB's motion are whether any torts were
5 committed during the audit for which this Court can impose liability upon the FTB.
6 Moreover, what happened during the audit is in the audit file itself. The exhibits
7 attached to Cowan's affidavit speak for themselves; his interpretation of what they
8 mean is inadmissible. Almost his entire "affidavit" consists of such inadmissible
9 interpretation and argument of the audit events and attached exhibits. The FTB
10 objects to paragraphs 5, 7-11, 13, 15-57 on these grounds.

- 11 2. Misleading: FTB objects to the statement in paragraph 1: "I frequently represent
12 clients before . . . the Franchise Tax Board of California" on the grounds that it is
13 self-serving and misleading. The statement purports to clothe Mr. Cowan with
14 experience and expertise when, in fact, he admitted at his deposition that the Hyatt
15 matter was his first experience with an FTB residency audit.
- 16 3. Erroneous Legal Argument: Cowan's affidavit repeatedly attempts to impose a
17 higher degree of confidentiality for information Hyatt gave to the FTB than is
18 imposed by law. FTB specifically objects to paragraphs 15-18 wherein Mr. Cowan
19 refers to the FTB's Security and Disclosure Manual then states nothing more than
20 his personal interpretation of the Manual. Page A-2 of the excerpt from the Manual
21 Cowan himself submitted as Exhibit 4 to his affidavit clearly states:

22 Employees have no authority to use such records and
23 information for any purpose not specified by law.
24 Basically *the specified purposes are the*
25 *administration of the Personal Income Tax Law, . . .*
26 (Emphasis added).

27 For the same reason, FTB specifically objects to paragraphs 49-51 wherein Mr.
28 Cowan refers to FTB Notice 99-1 and suggests the FTB is violating its own
procedures. The copy of FTB Notice 99-1 Cowan himself submitted as Exhibit 27
to his affidavit clearly states:

It is recognized that there will be reasons why *some*
Protests are properly deferred (see infra) and that
there will be reasons why *some Protests may take*
longer to conclude. (Emphasis added).

4. Inadmissible Settlement Discussions: FTB also specifically objects to paragraphs
38-41 wherein Cowan attempts to portray a conversation he had with Anna
Jovanovich as some sort of "extortion" threat. The best evidence of what Jovanovich
said is her contemporaneous handwritten notes that she read into the record during
her deposition, not Cowan's personal "spin" on the conversation. The statement
regarding settlement merely identified the alternative procedures that were then
available to Hyatt. Because Mr. Cowan had never been through an FTB residency
audit before, Jovanovich was trying to be helpful by describing the process for him.
Moreover, evidence of such settlement negotiations is inadmissible (Nev. Rev. Stat.
§ 48.105) and cannot be considered in opposition to the FTB's motion for summary
judgment. See e.g., *Adamson*, 85 Nev. at 119.
5. Hearsay: Much of Cowan's affidavit consists of hearsay, and many of the exhibits
contain double hearsay. FTB objects to paragraphs 9-11, 13-15, 17-19, 25, 26, 28,
31, 38-41, 45-51, and 55-57 on the grounds they contain hearsay. FTB objects to the

double hearsay contained in Exhibits 1, 3, 5, 26, 28 and 29. The double hearsay is also conclusory, argumentative and self-serving.

6. Conclusory or Self-Serving: A significant portion of Cowan's affidavit contains improper conclusory or self-serving statements instead of factual statements. FTB objects to paragraphs 3, 5, 7-11, 13, 15, 17, 19, 20, 26-33, 35, 36, 38, 39, 41 and 57 to the extent they contain improper conclusory statements.
7. Legal Conclusions: Cowan also uses his affidavit as a vehicle to assert and argue what are really nothing more than improper statements of his personal legal conclusions. FTB objects to paragraphs 3, 7-11, 13, 15-17, 19, 20, 26-31, 33, 35-38, 41, 49, 54 and 57 to the extent they contain improper legal conclusions.
8. Ultimate Facts: FTB objects to the allegations of ultimate facts contained in paragraphs 3, 4, 8, 10, 11, 13, 15, 17, 19, 26-28, 30, 31, 33, 35, 36, 38 and 41 of Cowan's affidavit.
9. State of Mind: FTB objects to the statements by Cowan of opinion or impression of state of mind or intent of other persons contained in paragraphs 7, 8, 10, 11, 15, 17-19, 22, 26, 30-32, 35, 36, 38, 39, 41, 47, 50 and 56 of Cowan's affidavit.
10. Legal Argument: FTB objects to Cowan's argument on the law or merits of this case or the residency dispute in paragraphs 3, 15, 26-31, 33, 35-38, 41, 56 and 57 of Cowan's affidavit.
11. Mere Denial of Essential Facts: FTB objects to Cowan's statements that merely deny essential facts in paragraphs 27-29, 31, 33, 35, 36 and 41 of Cowan's affidavit.
12. Mere Question of Opposing Material: FTB objects to Cowan's statements that merely question the contents of materials submitted by FTB in its motion or during the course of the residency audit in paragraphs 15-17, 19, 29, 31, 33, 35, 36 and 41 of Cowan's affidavit.
13. Unsubstantiated: FTB objects to the generalized or unsubstantiated statements in paragraphs 3, 5, 7, 8, 11, 13, 17 and 26 of Cowan's affidavit.
14. Speculation: FTB objects to paragraph 57 because it constitutes speculation.

OBJECTIONS TO GILBERT P. HYATT AFFIDAVIT

The "affidavit" of Mr. Hyatt is also such a flagrant violation of Rule 56(e) and Local Rule 2.21(c) that it should be treated as nothing more than another brief consisting of his personal arguments of what he thinks the law should be. Mr. Hyatt has several private law firms and many attorneys working on his case. With such legal representation, Mr. Hyatt's "affidavit" should be held to the same standards as his attorneys' affidavits under Rules 56(e) and (g) (Court may order party employing affidavits to pay other party the amount of reasonable expenses, including

1 reasonable attorney's fees, incurred if the Court is satisfied that any affidavit is presented in bad
2 faith or solely for the purposes of delay).

3 Most of Hyatt's "affidavit" is improper argument concerning the effective date of his move
4 to Nevada, the ongoing administrative procedures that are pending in California and the merits of
5 this case. The Court ruled in its decision on the FTB's motion for judgment on the pleadings that
6 it does not have subject matter jurisdiction to decide the residency question. Yet, Hyatt uses his
7 "affidavit" to argue the merits of that dispute.

8 Even when Hyatt makes a factual statement, he improperly mixes in argument, legal
9 conclusions or other inadmissible matter. In fact, almost every single paragraph contains at least
10 one improper statement.

- 11 1. Argument on the Law or Merits of the Case or Residency Dispute: FTB objects to
12 the following paragraphs to the extent they contain inadmissible argument on the law
13 or merits of the case or residency dispute: 3-17, 18(d) (h) and (i), 19-25, 27, 37, 39-
14 42, 45-47, 49-51, 53-56, 58-65, 71-73, 75-82, 85, 87-130, 132-138, 143, 148-149,
15 151-161, 163-166, 168-174, 177, 181, 184-191, 194-197, 199-201, 203-204, 207,
16 209, 210, 212-219.
- 17 2. Conclusory or Self-serving: FTB objects to the following paragraphs to the extent
18 they contain conclusory or self-serving statements: 3-5, 7-17, 18(d), (h) and (i), 19-
19 25, 33-36, 41, 45, 48-51, 53, 55, 56, 58, 59, 61-64, 69, 71-79, 81-83, 85-87, 90-99,
20 102-105, 107-114, 116, 118-130, 132-146, 148-162, 164-166, 168-175, 180, 181,
21 183-194, 196-205, 207-209, 211, 212, 216, 218 and 219.
- 22 3. Legal Conclusions: FTB objects to the following paragraphs to the extent they
23 contain inadmissible legal conclusions: 3-13, 15, 17, 18(h) and (i), 19-25, 35, 41, 42,
24 45, 47-51, 55, 56, 58-64, 71-76, 78-80, 87, 89-100, 102, 103, 105, 108, 110, 113,
25 116, 119-124, 127-130, 132-141, 143, 145, 146, 148, 150-157, 159-162, 164, 166-
26 171, 173-175, 180, 181, 184-193, 195, 196, 198-205, 207-212, 218 and 219.
- 27 4. State of Mind: FTB objects to the following paragraphs to the extent they contain
28 inadmissible opinion or impression of state of mind or intent of other persons: 6, 9,
11, 13-17, 18(i), 22-25, 29, 31-37, 39-42, 45, 48, 50, 51, 53, 56, 59, 62, 63, 66-69,
71, 75, 78, 79, 81, 90-94, 96, 98, 99, 102, 107-110, 112, 116, 117, 119, 121, 122,
125, 126, 129, 132, 133, 141, 148, 149, 152-154, 156-158, 160, 161, 163, 164, 171,
173, 178, 180-187, 189, 191-200, 206-209, 212, 216 and 218.
5. Ultimate Facts: FTB objects to the following paragraphs to the extent they contain
allegations of ultimate facts: 2-15, 17, 18(d), (h) and (i), 19-21, 24, 25, 41, 45, 49-51,
56, 61-64, 71-74, 77, 80, 81, 87, 90-95, 98, 99, 104, 110, 117, 119, 121, 124, 127,
128, 129, 132, 133, 136, 137, 140, 141, 150-155, 157, 160-162, 166, 169, 171-174,
184, 185, 187, 190, 196, 200, 205, 212, 218 and 219.
6. Generalized or Mere Assertions: FTB objects to the following paragraphs to the
extent they contain generalized or mere assertions unsubstantiated with admissible
evidence: 4, 5, 7-15, 17, 18(h) and (i), 19, 20, 22-24, 33-36, 39, 41, 50, 52, 53, 58,

62, 63, 70, 71, 81, 83, 86, 87, 91-93, 96-99, 102-104, 110, 116, 122, 125-127, 129, 132, 133, 136, 138, 140, 151, 154, 155, 159, 160, 162, 168, 170, 173-175, 181, 187, 197, 204, 207, 211, 218 and 219.

7. Hearsay: FTB objects to the following paragraphs to the extent they contain hearsay: 6, 9, 10, 13, 16, 17, 18(h), 26, 27, 32, 37, 46-50, 59, 69, 71-73, 96, 101, 103, 104, 107, 108, 111, 116, 123, 127-129, 133, 137, 140-142, 144, 153, 158, 160, 164, 165, 175, 177, 186, 193, 198, 199, 203, 211 and 218.
8. Merely Deny Essential Facts: FTB objects to the following paragraphs to the extent they merely deny essential facts: 4, 11, 16, 17, 18(i), 20, 26, 42, 60, 63, 76, 77, 79, 80, 82, 86, 97, 103, 104, 107, 108, 109, 126, 155, 171, 173 and 184.
9. Specific Lack of Personal Knowledge: FTB objects to the following paragraphs to the extent they show a specific lack of personal knowledge: 5, 13, 17, 23, 24, 26, 27, 33-37, 46-49, 55, 58, 59, 69-71, 73, 81, 91, 103, 111, 126, 129, and 168.
10. Speculative and Self-Serving: FTB objects to the following paragraphs to the extent they contain speculative and self-serving statements: 23, 24, 48, 50, 58, 59, 62, 103, 116, 125, 126, 129, 133, 137, 138, 148, 150, 153, 158-160, 163 and 218.

FTB also objects to the purported Errata to Hyatt's affidavit filed two weeks later on April 5, 2000. An errata is properly used to correct an error made in a brief or other filing with the Court. See generally, *Black's Law Dictionary (5th Ed. 1979) at page 486*. Hyatt simply supplemented his Opposition with thousands of pages of documents without even seeking leave of Court to do so, all under the guise of "Errata." Rule 56(e) provides that exhibits to affidavits be filed with the affidavit. Hyatt's affidavit was filed March 22, 2000 without any exhibits. Knowing that FTB was faced with the task of responding to thousands of pages of argument and exhibits in Hyatt's Opposition, he nevertheless waited two more weeks before filing and serving another mass of documents. Hyatt did not even bother to mark the exhibit numbers on the copies he served on the FTB.

FTB further objects to the extent the materials filed as "Errata" are themselves irrelevant to the FTB's pending motion or contain inadmissible matter.

OBJECTIONS TO MICHAEL W. KERN AFFIDAVIT

The FTB hereby makes the following specific objections to the Kern affidavit.

1. Lack of Personal Knowledge and Legal Argument: Most of Kern's affidavit is simply his personal view of the events that occurred during the audit and his view of the evidence, all of which he purports to assert without any factual statements. The audit file is the best evidence of what happened during the audit, not Kern's interpretation. For example, the audit file itself will reflect whether Mr. Kern

1 "diligently" responded to FTB requests and whether the FTB's position in the audit
2 was "slanted." FTB objects to paragraphs 7-15 on these grounds.

- 3 2. Self-Serving: The following paragraphs contain improper self-serving statements
4 instead of facts: 7, 8, 9, 10, 11, 12, 14 and 15.
- 5 3. Conclusory: The following paragraphs contain improper conclusory statements: 11,
6 12, 14 and 15.
- 7 4. Personal Belief: The following paragraphs contain improper personal belief: 8, 10
8 and 12.
- 9 5. Legal issues: The following paragraphs contain improper legal conclusions and
10 argument: 14 and 15.
- 11 6. Irrelevant (Effective Date Of Move): Whether or not Hyatt's move to Nevada was
12 effective as of September 26, 1991 for purposes of his liability for California tax is
13 irrelevant for purposes of the FTB's motion. This Court has already ruled it does not
14 have subject matter jurisdiction over that issue, which is being litigated in California
15 through Hyatt's administrative protest procedures. To the extent Hyatt attempts to
16 argue the merits of that dispute through Kern's affidavit, such argument is irrelevant
17 to the pending motion. The following paragraphs of the Kern affidavit are irrelevant
18 for this reason: 8, 9, 10, 11 and 12.
- 19 7. Irrelevant (Attempts to Argue Merits of Hyatt's Position in the California Audit
20 Protest): Closely related to the irrelevant matter concerning the effective date of
21 Hyatt's move to Nevada, Kern also attempts to argue the merits of specific items that
22 are at issue in the audit protest process. The following paragraphs of the Kern
23 Affidavit contain irrelevant matter for this reason: 10, 11, 12, 14 and 15.

24 OBJECTIONS TO AFFIDAVIT OF WALTER SHOEMAKER

25 On April 5, 2000, Hyatt also filed a copy of the July 22, 1998 affidavit of Walter Shoemaker
26 under improper disguise as "Errata" without first seeking leave of court to supplement his
27 Opposition. FTB objects to such procedure because Rule 56(e) requires a party opposing summary
28 judgment to file all of his evidence with his opposition. Hyatt keeps dribbling in more materials in
opposition to FTB's motion long after expiration of his time to file his opposition

FTB also objects to the Shoemaker affidavit because it is irrelevant to the FTB's pending
motion. As previously shown, whether or not Hyatt's move to Nevada was effective any particular
date so as to terminate his liability for California income tax is irrelevant to the FTB's pending
motion. FTB further objects because paragraphs 3, 7, 8, 9, 11 and 12 contain hearsay; paragraphs
6 and 8 are conclusory and none of the exhibits are properly authenticated or certified.

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CONCLUSION

It is obvious that Hyatt is desperately seeking to keep his case alive by inundating the Court with thousands of pages of repetitious copies of documents and improper "affidavits" that are substantively nothing more than additional briefs. He is hoping the Court will throw up its hands in the face of the sheer volume of his papers, decide there must be a genuine issue of material fact buried somewhere, and deny the FTB's motion.

The FTB objects to Hyatt's affidavits and errata documents as set forth above and urges the Court to hold Hyatt and his counsel to the requirements of Rule 56(e) and (g).

DATED this 14th day of April, 2000.

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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 FTB'S **OBJECTION TO AFFIDAVITS AND ERRATA FILED IN SUPPORT OF HYATT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** on this 14th day of April, 2000, by depositing same in the United States Mail, postage prepaid thereon to the numbers noted below, upon the following:

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EXHIBIT 21

FILED
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12
13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 *****

16 **GILBERT P. HYATT,**
17 Plaintiff,

18 vs.

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

22 Defendants.

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

**REPLY OF FRANCHISE TAX BOARD
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT UNDER NRCP
56(B), OR ALTERNATIVELY FOR
DISMISSAL UNDER NRCP 12(H)(3)**

Date of Hearing: April 21, 2000
Time of Hearing: 9:00 a.m.

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1	<i>Simmons v. State of Montana and State of Oregon</i> , 206 Mont. 264, 670 P.2d 1372 (Mont. 1983)	4
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5	<i>Struebin v. State</i> , 322 N.W. 2d 84 (Iowa 1982), <i>cert. denied</i> , 459 U.S. 1087	25
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INTRODUCTION

Hyatt's opposition to the FTB's motion is nothing more than an attempt to substitute paper for substance, and lengthy arguments and unsupported spin for genuine issues of material fact. The Court should reject Hyatt's approach, consider what the FTB actually did involving Hyatt, consider the FTB's status as a branch of another sovereign state's government, and end this case. Hyatt's affidavit and his attorneys' affidavits contain little more than improper argument, and are insufficient to defeat the FTB's motion. Hyatt's other evidence is equally objectionable and insufficient, as described in the FTB's concurrently filed objections. Hyatt's opposition reflects what he believes the law should be, not what the law is. What it does not reflect is any actionable tortious conduct on the part of the FTB, or any need for Hyatt to conduct more discovery, where Hyatt has conducted an extraordinary amount already. The Court should grant the FTB summary judgment, or alternatively dismiss this case under Nevada Rule of Civil Procedure 12(h)(3).

ARGUMENT

1. Summary judgment argument.

a. **Hyatt cannot obtain a Nevada judgment against the FTB, a branch of another sovereign state's government, based on the FTB's non-Nevada acts.**

As the FTB predicted, Hyatt's opposition raises all variety of California internal, non-Nevada FTB acts as "evidence" that there are genuine issues of material fact in this case. Again and again, Hyatt argues that things that the California government did entirely in California, where the California government operates under California immunity laws, can subject a California government agency to Nevada tort liability in this case. FTB employees sent letters related to the Hyatt audit from their California offices to California doctors, and to a California dating service that Hyatt once used; Hyatt cries foul, and claims that the California government's correspondence with California's own citizens and businesses is punishable in Nevada as a Nevada tort. (*E.g.*, Hyatt Opp. at 9, 41.) FTB employees asked some of Hyatt's former neighbors in southern California a few questions about Hyatt; Hyatt asserts that these California internal interviews are also punishable in Nevada as Nevada torts. (*E.g.*, Hyatt Opp. at 9, 29.) The FTB gave too much weight to "'affidavits' [that] were not even affidavits" that an FTB auditor obtained in California from Hyatt's ex-wife, his daughter, and his brother, all

1 California residents; how dare the California government do this, Hyatt asserts, this is also a Nevada
2 tort. (Hyatt Opp. at 44-45.)

3 Never mind that Hyatt's complaint talks about FTB acts "in Nevada." (*E.g.*, First Am. Compl.
4 ¶¶ 26, 35, 42, 46, 51, 56, 62(c); *see* FTB Mot. at 10-11.) Never mind that Hyatt once promised the
5 Nevada federal court, to which the FTB originally removed this case, that his claims "stem strictly from
6 the FTB's tortious actions directed against him as a Nevada citizen within the State of Nevada." (Hyatt
7 Motion to Remand at 24:9-11 (Mar. 4, 1998) (emphasis added) (attached as Ex. A).) Never mind that
8 Hyatt filed another federal court pleading explaining that he "seeks relief for the FTB's past tortious
9 activities against him in Nevada," and asking that Nevada exercise jurisdiction over the FTB "so that
10 it will be required to answer for its tortious conduct committed against a Nevada resident in Nevada."
11 (Hyatt's Surreply to FTB's Reply to Plf's Opp. to Mot. to Quash at 12:10-11 & 13:10-12 (Apr. 6, 1998)
12 (emphasis added) (attached as Ex. B).) All of these assurances are out the window; according to Hyatt,
13 the FTB's liability in this case can now arise from anything and everything that the FTB did involving
14 Hyatt, whether in Nevada or not.

15 But the FTB is a branch of another sovereign state's government, and California has multiple
16 laws barring Hyatt's common law tort claims concerning the FTB's tax-related conduct. (*See* FTB
17 Mot. at 17, 31-32 (describing laws).) This Court must respect California's sovereignty and apply
18 California's laws, at a minimum, to the California government's Hyatt-related conduct that occurred
19 entirely within the confines of California. Choice of law cases require this to happen: what is more
20 arbitrary, unfair, and contrary to expectations than telling a state government that its own laws do not
21 apply to its official acts occurring entirely within its own state? *See, e.g., Phillips Petroleum Co. v.*
22 *Shutts*, 472 U.S. 797, 821-822 (1985); *see also* FTB Mot. at 36-37. *Nevada v. Hall* requires it as a
23 matter of Full Faith and Credit, by cautioning against one state interfering with another's "sovereign
24 responsibilities:" what is more sovereign than a state's tax collection efforts on its own soil? *Nevada*
25 *v. Hall*, 440 U.S. 410, 424 n.24 (1979), *reh'g denied*, 441 U.S. 917 (1979); *see also* FTB Mot. at 32-35.
26 If nothing else, comity also directs this result: California is entitled to at least the deference and respect
27 of having its own sovereignty and laws recognized for California tax administration efforts within its
28 own territory. *See, e.g., City of Philadelphia v. Cohen*, 184 N.E.2d 167, 169-70 (N.Y. 1962), *cert.*

1 *denied*, 371 U.S. 934 (1962); *see also* FTB Mot. at 37-38.

2 All of these authorities, and Hyatt's prior statements, bar Hyatt's attempt to impose liability on
3 the FTB in Nevada for its non-Nevada acts.¹ Despite Hyatt's claim that the FTB's position lacks legal
4 precedent, all of the above cases are cited in the FTB's opening brief. To be sure, they are cited as
5 proof that the Court must apply California's immunity laws and respect California's sovereignty
6 concerning all of the FTB's conduct, including its conduct in Nevada. But the FTB's non-Nevada
7 conduct is merely a subset of all of its conduct, and thus these cases and arguments apply with equal
8 or even greater force to such conduct.

9 Moreover, if Hyatt wants additional authority regarding the FTB's argument, he need look no
10 further than his own opposition. A Supreme Court case that Hyatt himself cites holds that the Full Faith
11 and Credit Clause does not "enable one state to legislate for the other or to project its laws across state
12 lines so as to preclude the other from prescribing for itself the legal consequence of acts within it."
13 *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939) (cited in Hyatt
14 Opp. at 50, 60) (refusing to apply Massachusetts law to an injury to a Massachusetts resident working
15 in California). *Nevada v. Hall* qualifies this holding regarding the extension of California's immunity
16 laws to the FTB's Nevada conduct where, as here, the FTB's conduct involved California's inherent
17 sovereign responsibilities concerning taxation. *Nevada v. Hall*, 440 U.S. at 424 n. 24. But the *Pacific*
18 *Employers* holding applies fully to Hyatt's improper attempt to project Nevada tort law into California,
19 push California's own laws aside, and hold the California government liable under Nevada law for the
20 FTB's non-Nevada conduct. The fact that Hyatt's case is a damages action does not matter, as
21 "regulation" constituting improper projection "can be as effectively exerted through an award of
22 damages as through some form of preventive relief." *San Diego Building Trades Council v. Garmon*,
23 359 U.S. 236, 247 (1959); *see also United Farm Workers of America v. Arizona Agricultural*
24 *Employment Relations Board*, 669 F.2d 1249, 1256 (9th Cir. 1982).

25
26 ¹All of the FTB's non-Nevada acts in this case occurred exclusively within California, with only
27 two exceptions of substance: (1) the FTB's letters from California to Hyatt's Japanese licensees; and
28 (2) contacts of one FTB employee working from home in Arizona into California. The FTB asserts that
it is not subject to liability in this Court for these acts as well.

1 Additional authorities, if any are needed, also support the FTB's claim that its non-Nevada
2 conduct is not subject to liability in this Court. In *Reed v. University of North Dakota*, a Minnesota
3 court held that choice of law issues required it to apply North Dakota government immunity laws to
4 the North Dakota acts of the North Dakota sovereign. *Reed v. University of North Dakota*, 543 N.W.2d
5 106, 110-111 (Minn. App. 1996). The *Reed* court also held that comity justified deference to North
6 Dakota in such an action, in large part because the plaintiff was trying to hold North Dakota liable in
7 Minnesota for the North Dakota acts of an agency of the North Dakota government:

8 What we have here is an attempt to hale the North Dakota sovereign into Minnesota court and
9 apply Minnesota law to negligence claims that arose in North Dakota. Such action not only
10 raises concerns about interstate relations in a federal system, but also presents an affront to
11 North Dakota's sovereignty since North Dakota law at the time of Reed's injury recognized the
12 sovereign immunity of UND and its agents. Accordingly, we conclude Minnesota courts should
13 not exercise jurisdiction here as a matter of comity. *Reed*, 543 N.W.2d at 111.

14 *See also Flamer v. New Jersey Transit Bus Operations, Inc.*, 414 Pa. Super. 350, 357-360 (Pa. Super.
15 1992) (applying New Jersey immunity laws to the New Jersey acts of a New Jersey government agency
16 in a Pennsylvania case); *Ramsden v. State of Illinois*, 695 S.W.2d 457, 459-460 (Mo. 1985) (where
17 performance of contract "would have been in Illinois," only Illinois law could apply to Missouri
18 resident's breach of contract action against branch of Illinois government, and comity required
19 dismissal); *Simmons v. State of Montana and State of Oregon*, 206 Mont. 264, 288-291, 670 P.2d 1372
20 (Mont. 1983) (dismissing Oregon government agency from Montana negligence action on comity
21 grounds, where Oregon's allegedly negligent acts occurred "within its boundaries" in Oregon).

22 None of Hyatt's cited cases hold to the contrary. Hyatt's reliance on various personal
23 jurisdiction cases is misplaced, as not one of them involves a state government defendant, and
24 Nevada's power to scrutinize the non-Nevada acts of another state's government is not a personal
25 jurisdiction issue. (See Hyatt Opp. at 15-18.) *Mianecki* does not hold to the contrary, as it involved
26 a Wisconsin parolee's criminal conduct *in Nevada*, and two negligence claims for failure to act *in*
27 *Nevada*: (1) Wisconsin's failure to warn Nevada citizens in Nevada of a sex offender's propensities,
28 and (2) Wisconsin failure to supervise the sex offender while he was within Nevada's borders.
Mianecki v. Second Jud. District Court, 99 Nev. 93, 95, 658 P.2d 422 (1983). Hyatt has no similar
failure to warn claims here, and nothing in *Mianecki* allows the imposition of Nevada liability on the

1 California government for letters, interviews, telephone calls, and other supposed misdeeds that did not
2 send anyone or anything into Nevada.

3 Nothing in *Biscoe v. Arlington County*, *Head v. Platte County*, or *Faulkner v. University of*
4 *Tennessee* holds to the contrary either. (See Hyatt Opp. at 54-55.) *Biscoe* was a case against a Virginia
5 county government about a District of Columbia car accident, in which the court explicitly noted that
6 “the situation in this case, in which a Virginia county acted outside Virginia territory, obviously is
7 wholly different from one in which a Virginia county has acted within its borders, or those of the state,
8 and is sued in the courts of a sister state.” *Biscoe v. Arlington County*, 738 F.2d 1352, 1358 (D.C. Cir.
9 1984). *Head* involved a Missouri arrest warrant that was forwarded and executed in Kansas, not acts
10 of another state’s government that started and ended outside the forum state, which are the type of acts
11 that Hyatt wants to litigate here. *Head v. Platte County*, 242 Kan. 442, 442-443, 749 P.2d 6 (Kan.
12 1988). *Faulkner* was a case against a Tennessee state university involving “alleged acts associated with
13 substantial commercial activities in Alabama,” not acts that were independent of Tennessee’s acts in
14 Alabama. *Faulkner v. University of Tennessee*, 627 So.2d 362, 364-366 (Ala. 1992).

15 Finally, nothing in any prior Court order concerning the proper scope of discovery is *res*
16 *judicata* on the acts that can form the basis for FTB liability. (See Hyatt Opp. at 14.) The scope of
17 discovery is not coincident with what is admissible in evidence, or with what FTB acts, if any, are
18 properly before this Court for liability purposes. The order that Hyatt cites in support of his position
19 is merely a protective order concerning confidentiality, not a decision on this issue. (See Hyatt
20 Appendix Ex. 4.)

21 If the Court has any doubt about the correctness of the FTB’s position, it should turn this case
22 around. It strains credulity to believe that Nevada would recognize the authority of California to hold
23 the Nevada government liable in tort for acts within Nevada, or between Nevada and some other state.
24 Hyatt’s attempt to litigate the FTB’s non-Nevada acts in Nevada, if allowed, is logically
25 indistinguishable from such an intrusion on Nevada’s sovereignty. Hyatt’s attempt to hold the
26 California government liable in Nevada for such non-Nevada acts cannot be allowed.

1 **b. There are no genuine issues of material fact about what the FTB actually did in**
2 **Nevada, and the FTB is entitled to judgment as a matter of law.**

3 Focusing on the FTB's Nevada acts, as the Court must, Hyatt's opposition evidence reflects no
4 genuine issue of material fact. Hyatt points to nothing disputing the FTB's evidence regarding what
5 Hyatt-related correspondence it sent into Nevada, described fully in the FTB's moving papers. (*See*
6 FTB Mot. at 12-14 and cited evidence.) Hyatt points to nothing disputing the FTB's evidence
7 regarding what FTB employees said in telephone calls between California and Nevada, also described
8 fully in the FTB's motion. (*Id.*). Hyatt points to nothing disputing the FTB's evidence of the personal
9 contacts that FTB auditors made while physically in Nevada. (*Id.* at 11-12 and cited evidence). Hyatt
10 also points to nothing suggesting that the FTB's lead auditor, Sheila Cox, actually made a third
11 undisclosed trip to Las Vegas about Hyatt, an attorney's argument without a shred of evidentiary
12 support. (*See Bourke Aff.* at 72 (citing Les depo. excerpt reflecting ignorance about whether alleged
13 third Las Vegas trip involved Hyatt); Ex. C-D (attached) (Cox and Eshaghian depo. excerpts reflecting
14 no connection between their Las Vegas trip and Hyatt).²

15 In fact, wading through all of Hyatt's paper, Hyatt's only countering evidence on what actually
16 happened in Nevada concerns what FTB auditor Sheila Cox did during her Las Vegas trip with Candace
17 Les, a former FTB auditor, in November 1995. But even accepting as true Ms. Les' dubious account
18 of that trip, this evidence does not reflect a *material* factual issue on Hyatt's tort claims. Ms. Cox
19 allegedly took pictures of Mr. Hyatt's house from a public street, and went to the site of his former
20 Nevada apartment (*see Bourke Aff.* Ex. 2 at 268-276); these are not tortious acts. Ms. Cox allegedly
21 went through Mr. Hyatt's garbage left out for collection; even if it happened, Hyatt had no reasonable
22 expectation of privacy in garbage left out at the street. *See California v. Greenwood*, 486 U.S. 35
23 (1988); *United States v. Hedrick*, 922 F.2d 396 (7th Cir. 1991). Ms. Cox allegedly walked around
24 Hyatt's claimed Las Vegas home, and approached a window with drawn blinds (*see Bourke Aff.* Ex.
25 2 at 271-272); even if these things happened, these trivial acts amount to nothing, and are well within
26

27 ² Mr. Bourke's false assertion about the FTB trying to hide Ms. Eshaghian from Hyatt is
28 irrelevant, as she now has been deposed.

1 the FTB's privilege to act. Ms. Cox allegedly looked through Mr. Hyatt's mail, an allegation that
2 ignores the fact that Hyatt's high security mailbox had a lock, and Ms. Les' previous testimony that it
3 was empty; even if it happened, it is not tortious or damaging conduct by the FTB, a government tax
4 agency with valid questions about Hyatt's change of residency claim. (See attached Ex. G (excerpt
5 from letter of Hyatt's attorney re mailbox); Ex. F (Candace Les sworn testimony regarding Hyatt's
6 empty mailbox in Ms. Les' workers' compensation proceeding).

7 Admittedly, Ms. Les makes all kinds of other salacious allegations, most notably her
8 uncorroborated and flatly denied allegations of Ms. Cox's racism. But none of Ms. Les' other
9 allegations changes what the FTB actually did in Nevada involving Hyatt, and what the FTB actually
10 did involving Hyatt gives rise to no tort claim. While there are many *immaterial* factual disputes, there
11 are no *material* factual disputes about what the FTB did concerning Hyatt in Nevada, or between
12 California and Nevada, and the undisputed material facts compel rejection of Hyatt's claims.

13 **c. Hyatt's allegations regarding the FTB's non-Nevada acts, even if they could give**
14 **rise to liability in this case, also do not reflect a genuine material factual issue.**

15 Furthermore, Hyatt's various allegations regarding the FTB's non-Nevada acts, even if they
16 could subject the FTB to liability in Nevada, do not reflect genuine issues of material fact on Hyatt's
17 claims. Hyatt calls the FTB's non-Nevada acts "extort[ion]" and similar pejoratives, (Hyatt Opp. at
18 30, 42), but no evidence about the FTB's non-Nevada acts support Hyatt's vivid descriptions. Instead,
19 the evidence shows that Hyatt's inferences and arguments about the FTB's non-Nevada conduct are
20 unsupported, and would not demonstrate a triable issue even if they could trigger potential FTB liability
21 in this case.

22 **The "extort[ion]" threat (Hyatt Opp. at 11-12, 30, 42).** The evidence of what FTB attorney
23 Anna Jovanovich actually said to Hyatt's California attorney does not support a reasonable inference
24 of attempted FTB extortion. By Hyatt's attorney's own admission, Ms. Jovanovich simply made a
25 general statement of fact that "at [the protest] stage of the [FTB administrative] proceedings . . . most
26 individuals, particularly wealthy or famous individuals, compromise and settle with the FTB to avoid
27 publicity, to avoid the individual's financial information becoming public, and to avoid the very fact
28 of the dispute with the FTB becoming public." (Cowan Aff. at 14 ¶ 39.) No reasonable jury could

1 determine that this factual statement was an extortionate threat.

2 **The Japanese licensee letters (Hyatt Opp. at 10, 28, 41).** The FTB merely sent two short
3 letters to Japanese companies, both of which had already executed licensing agreements with Hyatt.
4 The letters asked for nothing except “what dates wire transfers were made to Gilbert P. Hyatt” under
5 each company’s license agreement with him, “for the purposes of administering the California Personal
6 Income Tax Law” (Hyatt Appendix Ex. 2 at FTB02143-02144 & FTB02147 (letters).) No
7 reasonable jury could find for Hyatt that these basic and minimal inquiries were FTB torts.

8 **The six Dr. Shapiro letters (Hyatt Opp. at 41).** As part of the Hyatt residency audit, Sheila
9 Cox asked Hyatt’s accountant for a list of doctors and dentists that Hyatt saw between 1990 and 1992.
10 (Ex. E at 1-2 (request).) The list that Hyatt’s attorney provided in response did not include a Dr.
11 Shapiro. (*Id.* at 3-4 (response).) But Hyatt’s checking records reflected payments to a Dr. Shapiro, and
12 the FTB was able to find the correct Dr. Shapiro by sending letters to six doctors with that surname,
13 in the general area in California where the checking records suggested he would be. (*See id.* at 9-10
14 (audit file materials).) When the FTB found him, he reported that Hyatt had visited him twice in
15 California well after he claimed to have moved to Nevada, raising another question about Hyatt’s
16 change of residency claim. (*Id.* at 10.)

17 **The California neighbor interviews (Hyatt Opp. at 29).** Hyatt points to no evidence that
18 anything about the FTB’s interviews of Hyatt’s California neighbors was improper, because there is
19 none. His reliance on Ms. Cox’s testimony is misplaced, as the cited testimony shows the propriety
20 of her conduct. (Hyatt Opp. at 29 n. 118 (citing Cox depo. excerpts at Hyatt Appendix Ex. 29).) His
21 reliance on Ms. Les’ testimony is misplaced as well, because she relays nothing about the contacts that
22 Ms. Cox made. (*Id.* (citing Les depo. excerpts at Bourke Aff. Ex. 2).)

23 **The California third party contacts.** Hyatt makes much of the *number* of third party sources
24 that the FTB contacted, (Hyatt Opp. at 9, 31-32, 41), but points to no evidence that the *substance* of the
25 FTB’s communications with California third parties was anything rising to the level of tortious activity.
26 Some of these California communications included basic identifying information about Hyatt, such as
27 his name and social security number, but these minimal disclosures are simply not tortious in the
28 context that they occurred. (*See* FTB Mot. at 18-21.)

1 **The “income error” (Hyatt Opp. at 34-35).** Hyatt’s claim that the FTB made a supposed
2 income error on its 1992 proposed tax assessment to Hyatt is pure argument, not evidence of a tort. The
3 FTB’s calculation of Hyatt’s 1992 income for assessment purposes came directly from a letter from
4 Hyatt’s attorney. (See attached Ex. H (Cox depo. excerpt and letter).) Hyatt’s claim that the FTB
5 misinterpreted the income tables in the letter is an issue for the parties’ California tax protest
6 proceeding, not this case.

7 **The alleged promises of confidentiality and fairness (Hyatt Opp. at 40-46).** Hyatt’s
8 California attorney claims that FTB employees made various promises of confidentiality to him, and
9 Hyatt claims that these promises amounted to fraud or negligent misrepresentation. All but two of these
10 supposed promises were made well before “early-1995,” which is when Hyatt alleges that Sheila Cox’s
11 confidentiality breaches began to occur. (Cowan Aff. at 3-5 ¶¶ 8-13; see also Hyatt Opp. at 47
12 (referencing early 1995 start date).) The two alleged 1995 promises did not concern disclosure of
13 Hyatt’s name, address, or social security number, but involved general statements about confidentiality
14 of documents that Hyatt was providing. (*Id.* at 5-6 ¶¶ 14-19.) In fact, only one of the alleged promises,
15 allegedly occurring on November 1, 1993, specifically involved a matter (Hyatt’s “secret” address) that
16 Hyatt claims the FTB tortiously disclosed. (*Id.* at 4 ¶ 11.)

17 For a promise regarding future events to be triable as fraud, there must be evidence on which
18 a jury could reasonably find, by clear and convincing evidence, an intention not to perform at the time
19 that the promise was made. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588 (1992).
20 There is no such evidence as to alleged pre-1995 promises, as they were made by auditors other than
21 Sheila Cox, and occurred well before her supposed confidentiality breaches started. As to Ms. Cox’s
22 alleged confidentiality promises in 1995, these general statements did not concern the minimal
23 identifying information that the FTB disclosed, and are too vague to be actionable in any event.
24 Moreover, the FTB’s confidentiality duties and disclosure rights are dictated by law, not by
25 negotiations with individual taxpayers. (See FTB Mot. at 27.)

26 Hyatt also claims that an FTB auditor vaguely promised that the FTB’s audit would be “fair and
27 unbiased.” (Hyatt Opp. at 42.) This promise is too vague to be actionable in fraud as a matter of law.
28 See *Hanson v. New Technology, Inc.*, 594 So.2d 96, 102 (Ala. 1992) (Employee fraud claim dismissed,

1 because employer statement that "Disciplinary actions are administered in an objective, constructive
2 manner . . ." was too vague to be actionable.) Hyatt recites this promise, and similar vague promises
3 of "courteous treatment," (Hyatt Opp. at 39), in a transparent attempt to litigate the merits of the FTB's
4 determination that Hyatt was a California resident through at least April 1992. As the FTB stated in
5 its moving papers, Hyatt's attempt to litigate this FTB determination is improper. (FTB Mot. at 27-28.)

6 In addition, none of these supposed promises of future performance constitutes an actionable
7 negligent misrepresentation, for the reasons in the FTB's opening brief, (*see* FTB Mot. at 26-28), and
8 because "a negligent false promise" is insufficient to support the tort. *E.g., Tarmann v. State Farm*
9 *Mutual Automobile Insurance Co.*, 2 Cal. App. 4th 153, 159, 2 Cal. Rptr. 2d 861 (1991).

10 **d. Hyatt's disputes of various facts in his argumentative affidavit miss the point.**

11 Mr. Hyatt's numerous disputes of facts in his argumentative affidavit also do not create a
12 genuine issue of material fact. These supposed disputes concern whether and when Hyatt was actually
13 a Nevada resident, the subject of Hyatt's dismissed declaratory relief claim, not any genuine material
14 issues in this case. Hyatt disputes the precise date that he moved, (Hyatt Opp. at 12), but cannot dispute
15 that he gave three different move dates to the FTB, raising a genuine question with the FTB about his
16 change of residency claim. (FTB Mot. at 6-7.) Hyatt disputes that he knew he was about to receive
17 substantial income just before he moved, (Hyatt Opp. at 12), but cannot dispute that the income came
18 just after he claimed to have moved, raising another genuine FTB question. (FTB Mot. at 5-6.) Hyatt
19 says he really had contact with Nevada citizens, (Hyatt Opp. at 12-13), but cannot dispute that the
20 FTB's attempts to verify these contacts were largely unsuccessful, raising another genuine question
21 about his change of residency claim. (FTB Mot. at 8.)

22 Hyatt also disputes that he back-dated a deed, (Hyatt Opp. at 13), but cannot dispute that the
23 deed he provided the FTB was unrecorded, and the recorded version was both facially irregular and
24 tardily recorded, raising another genuine question. (FTB Mot. at 8-9.) Hyatt disputes whether the FTB
25 should have considered his voter registration in his residency audit, (Hyatt Opp. at 13), but cannot
26 dispute that he was registered at the wrong Nevada address for years, raising another question. (FTB
27 Mot. at 9.) Hyatt disputes the relevance of the California address for him on two licensing agreements,
28 (Hyatt Opp. at 13-14), but cannot dispute that the address is on them, raising another question. (FTB

1 Mot. at 9.)

2 Put simply, Hyatt's disputes do not negate that his responses to the FTB's raised questions about
3 his change of residency claim, and put his claim in a context where the FTB needed to take action to
4 try to answer these questions. This context explains the FTB's actions, negates Hyatt's claim that the
5 FTB's actions arose from an improper purpose, and shows that the FTB had many reasons for doing
6 what it did. Hyatt's disputes of residency facts are immaterial, and cannot defeat the FTB's summary
7 judgment motion.

8 **e. Hyatt's tort by tort analysis of his case also does not show any genuine issue of**
9 **material fact.**

10 Similarly, Hyatt's tort by tort analysis of his case, (Hyatt Opp. at 19-47), does not show what
11 Hyatt needs to show to defeat this motion: that "the evidence is such that a reasonable jury could return
12 a verdict for [Hyatt]." *Bulbman*, 108 Nev. at 110 (citations omitted). Much of Hyatt's evidence in this
13 section is addressed fully in the FTB's opening brief and the preceding sections; the few issues that
14 merit additional discussion are addressed below.

15 **i. Invasion of privacy - "informational privacy."**

16 Hyatt's lengthy analysis of his supposed "informational privacy" cause of action, (Hyatt Opp.
17 at 21-27), ignores a critical fact: there is no such tort cause of action in Nevada. Nevada recognizes
18 "four species of privacy tort," but none of them is the "informational privacy" cause of action that Hyatt
19 tries to create:

20 The four species of privacy tort are: 1) unreasonable intrusion upon the seclusion of another;
21 2) appropriation of the name or likeness of another; 3) unreasonably publicity given to private
22 facts; and 4) publicity unreasonably placing another in a false light before the public. *PETA v.*
Bobby Berosini, Ltd., 111 Nev. 615, 629, 895 P.2d 1269 (1995), *modified on other grounds*, 113
Nev. 644, 650, 940 P. 2d 134, 138 (1997).

23 Indeed, Hyatt's complaint does not even include a cause of action for "informational privacy;" instead,
24 it alleges only unreasonable intrusion upon seclusion, unreasonable publicity given to private facts,
25 and unreasonably casting Hyatt in a false light. (First Am. Compl. at 12-16.) Thus, all of Hyatt's
26 "material facts in dispute" about this cause of action amount to nothing, because no "informational
27 privacy" cause of action really exists either in Nevada or in this case.
28

1 **ii. Invasion of privacy - unreasonable intrusion upon seclusion.**

2 Hyatt points to eight items of evidence that he claims give rise to an inference that the FTB
3 unreasonably intruded upon his seclusion. (Hyatt Opp. at 29-31.) None of this evidence is sufficient
4 to create a genuine issue of material fact on his claim.

5 **(1) Las Vegas trips by FTB auditor Sheila Cox.** The FTB addressed Ms.
6 Cox's two trips to Nevada fully in its opening brief, (FTB Mot. at 11-12), and addresses Candace Les'
7 additional allegations about one of those trips above. (*See supra* at 6-7.) Even assuming that Ms. Les'
8 account of one Las Vegas trip is true, there is nothing about either of those trips that gives rise to
9 Hyatt's intrusion upon seclusion claim. Hyatt's counsel asserts in argument that there was a third
10 Hyatt-related trip to Las Vegas, but has no evidence to support this argument, because there is none.
11 (*See id.*)

12 **(2) FTB disclosures of "confidential" information.** Hyatt's claim that FTB
13 disclosures of "confidential" information are evidence of a tortious intrusion upon seclusion makes no
14 sense. The tort concerns acts of investigation or examination of private matters or a secluded place,
15 not the publication of anything to third parties. (*See* FTB Mot. at 21.) Moreover, Hyatt is deliberately
16 vague about what "confidential" information the FTB disclosed, because all that Hyatt is talking about
17 is disclosure of his name, social security number, and claimed Las Vegas address. Hyatt is also
18 deliberately vague about the FTB's "investigation" in Japan, because the FTB's "investigation" was
19 simply two short letters to Hyatt licensees, neither of which included even this minimal identifying
20 information. (*See supra* at 8.) The FTB's limited disclosures in the context of its tax audit were both
21 appropriate and allowed. (*See* FTB Mot. at 18-21, 28-31.)

22 **(3) FTB visits to California neighbors.** Hyatt's evidence regarding these
23 non-Nevada trips is not evidence supporting Hyatt's Nevada tort claims. (*See supra* at 1-7.) Even if
24 it were, Hyatt's evidence of what occurred during these visits hardly rises to the level of tortious
25 government activity, as described above. (*See supra* at 8.)

26 **(4) FTB "quasi-subpoenas."** The FTB's reasons and specific statutory
27 bases for the FTB sending its "Demand to Furnish Information" form to a few Nevada recipients are
28 described in the FTB's opening brief. (*See* FTB Mot. at 6-11, 12-13, 30.) Hyatt's characterization of

1 these forms as "quasi-subpoenas" proves nothing, as it is well-established that state administrative
2 agencies may issue even *actual* subpoenas to persons who have information relevant to a matter
3 properly under investigation. *E.g., Freeman v. Fidelity-Philadelphia Trust Company*, 248 F. Supp. 487,
4 492 (E.D. Pa. 1965); *In Re Waterfront Commission of New York*, 160 A.2d 832, 837-39 (N.J. 1960).
5 In the case of state administrative agencies like the FTB, such demands for relevant information can
6 extend beyond state borders. *See, e.g., Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300 (1937) (a
7 state administrative agency could order an out-of-state corporation to make available for examination
8 by the agency all the corporation's accounts and records relating to transactions between it and a local
9 company).

10 (5) **The FTB's "extortion" threat.** Hyatt's extortion allegations have
11 nothing to do with any intrusion upon Hyatt's seclusion. Moreover, as described above, the FTB's
12 supposed "extortion" threat was merely a statement of fact in a non-Nevada conversation between an
13 FTB attorney and Hyatt's California tax attorney, which is not actionable. (*See supra* at 7-8.)

14 (6) **Hyatt conclusions.** This item of Hyatt "evidence" does not describe any
15 additional intrusion evidence at all. Instead, it merely states Hyatt's opinion that the FTB's actions
16 constituted an intrusion tort. Hyatt's opinion on the ultimate issue is not evidence that can defeat
17 summary judgment.

18 (7) **Hyatt's second reference to FTB "quasi-subpoenas."** See discussion
19 of item (4), above.

20 (8) **FTB contact of "over one hundred sources."** The number of sources
21 that the FTB contacted concerning Hyatt is irrelevant to whether the FTB intruded upon his seclusion.
22 The character and justification for the FTB's Nevada contacts are described fully in the FTB's moving
23 papers. The remainder of the FTB's contacts did not involve Nevada, did not differ in character from
24 the FTB's Nevada contacts, and do not form a basis for liability in the case.

25 **iii. Invasion of privacy - unreasonable publicity given to private facts.**

26 The FTB's Nevada disclosures about Hyatt are described fully in the FTB's opening brief.
27 Hyatt's assertion that the Licensing Executives Society has thousands of members means nothing, as
28 there is no evidence that the FTB's minimal correspondence with the Society went to any of these

1 members. Hyatt's reference to "millions of readers" of newspapers also means nothing, as the FTB's
2 minimal correspondence with newspapers were not articles for publication, and never were published.
3 Hyatt's complaint about the total volume of correspondence also ignores that California disclosures are
4 not pertinent to this case. Even if they were pertinent, there is no evidence that the FTB disclosed
5 anything but Hyatt's name, address, and social security number, and none of these disclosures give rise
6 to this tort.

7 **iv. Invasion of privacy - casting Hyatt in a false light.**

8 As the FTB proved in its opening brief, the FTB never told anyone that Hyatt was "under
9 investigation in California," made statements to third parties impugning his moral character or integrity,
10 or told anyone that he was a fugitive. (See FTB Mot. at 20-21.) At most, the FTB's disclosures
11 reflected that the State of California was auditing Hyatt, which was entirely true. Hyatt's citation to
12 a federal case about an out-of-context photograph used by Hustler Magazine does nothing to prove that
13 the FTB's alleged disclosures of this fact were tortious. To hold otherwise would prevent any state
14 taxing agency from doing its job.

15 **v. Outrage.**

16 The facts to which Hyatt points about this cause of action would not lead an average member
17 of the community to exclaim "Outrageous!," which is what is legally required. (See FTB Mot. at 23-
18 24.) Hyatt's claim that the FTB "interrogated" Hyatt's neighbors and neighbors is unsupported (Hyatt
19 Opp. at 34); the unrebutted interview records and correspondence hardly reflect "interrogation."
20 Hyatt's claim that people were sent "unauthorized" Demands for Information is also unsupported
21 (Hyatt Opp. at 34); the FTB's authority and justification for sending them is clear. (See FTB Mot. at
22 6-8, 24-25.) Hyatt's complaint about a *quid pro quo* proposal, a non-Nevada act, are similarly
23 unsupported (Hyatt Opp. at 34); even if this were a proper basis for liability, the FTB simply made a
24 factual statement that "at [the protest] stage of the [FTB administrative] proceedings . . . most
25 individuals, particularly wealthy or famous individuals, compromise and settle with the FTB to avoid
26 publicity, to avoid the individual's financial information becoming public, and to avoid the very fact
27 of the dispute with the FTB becoming public." (Cowan Aff. at 14 ¶ 39.) The FTB's supposed income
28 error is based on a letter from Hyatt's own lawyer, and Hyatt cannot turn a question about what his

1 lawyer really meant in that letter into outrageous conduct of the FTB. (*See supra* at 9.) Even Hyatt's
2 claim of extreme emotional distress is unsupported, as Hyatt's conclusory discussion of this issue in
3 his affidavit is unsupported by any evidence manifesting such unusual distress. (Hyatt Aff. at 3 ¶ 8.)

4 None of the cases that Hyatt cites even remotely support his outrage claim. In *Branda v.*
5 *Sanford*, 97 Nev. 643, 645, 637 P.2d 1223 (1981), a nationally-recognized celebrity verbally accosted
6 a 15 year old girl in public with sexual innuendos, and then became verbally abusive when she ignored
7 his remarks. In *Posadas v. City of Reno*, 109 Nev. 448, 451, 851 P.2d 438 (1993), the Reno Police
8 Department, as part of the Department's attempt to coerce the officer to resign, issued a press release
9 stating that the officer had "admitted he lied under oath" when, in fact, he had not done so. *Shoen v.*
10 *Amerco, Inc.*, 111 Nev. 735, 747, 896 P.2d 469 (1995), allowed the founding president of a family
11 company to sue for outrage after the company breached his lifetime employment contract, and
12 discontinued his retirement compensation as part of the company's expressed strategy of harassment
13 against him. The FTB conduct in this case comes nowhere near the conduct in any of these decisions.

14 **vi. Abuse of process.**

15 Despite what Hyatt says, no authority supports Hyatt's claim for the California government's
16 supposed abuse of its own administrative process. Hyatt's citation to *Nevada Credit Rating Bureau*
17 *v. Williams*, 88 Nev. 601, 503 P.2d 9 (1972) does not help Hyatt, because the process at issue there was
18 attendant to a lawsuit, by Hyatt's own admission. *Hillside v. Stravato*, 642 A.2d 664, 666 (R.I. 1994),
19 involved a private party's misuse of an administrative process, not a government agency's misuse of
20 its own process. Moreover, the court held that the types of administrative process that could support
21 such a claim "should include at least (1) notice to the parties in interest (2) the presentation of evidence
22 and/or testimony under oath, and (3) a timely recorded decision by duly appointed or elected officials."
23 642 A.2d at 668-69. The FTB's demands to furnish information were not such administrative process.

24 *Melvin v. Pence*, 130 F.2d 423 (D.C. Cir. 1942), also does not support Hyatt's claim. In
25 *Melvin*, private citizens filed affidavits with the District of Columbia licensing agency, claiming the
26 plaintiff had impersonated a police officer when he showed them his private detective's badge. The
27 licensing agency refused to renew the plaintiff's license based upon those affidavits. The plaintiff was
28 then given a hearing before the licensing board at which the defendants testified, but the hearing

1 resulted in issuance of a renewed license. The plaintiff then brought an abuse of process of claim
2 against the private citizens who had filed the affidavits, not the agency that took adverse action against
3 him.

4 In *Clipper Express v. Rocky Mountain Motor*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459
5 U.S. 1227 (1983), private trucking companies initiated an administrative process with the Interstate
6 Commerce Commission concerning the plaintiff's published tariff rate. In response, ICC launched an
7 investigation that was terminated in plaintiff's favor. The ICC was not sued; instead, the trucking
8 companies were sued for instituting baseless protests before the ICC, in an attempt to interfere directly
9 with a competitor's business relationships. *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310 (5th
10 Cir. 1981) and *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997), were not even cases
11 involving the abuse of process tort, and did not involve claims of government agency abuse of its own
12 process in any event.

13 None of these authorities involves a claim against a government for abuse of its own
14 administrative process, which is what Hyatt is claiming here. This is tantamount to a court being sued
15 for abuse of its own court process, which is absurd. In any event, no administrative process was
16 abused, as the FTB's demands to furnish information were lawful and proper. (See FTB Mot. at 6-8,
17 24-25; *supra* at 12-13.)

18 **vii. Fraud and negligent misrepresentation.**

19 Except for the alleged fraudulent promises in the FTB's initial contact letter and privacy notice
20 to Hyatt, all of the supposed FTB promises of confidentiality and fairness were made outside Nevada,
21 and are thus an improper basis for liability in this case. (See *supra* at 1-7.) Even if this were not the
22 case, these supposed promises are not actionable as fraud or negligent misrepresentation, for the reasons
23 described above. (See *supra* at 9-10.) As to the initial contact letter and privacy notice, FTB auditor
24 Mark Shayer sent them to Hyatt on June 17, 1993, nearly two years before FTB auditor Sheila Cox
25 allegedly began making disclosures inconsistent with statements in this correspondence. The contact
26 letter and privacy notice say nothing specific about taxpayer names, social security numbers, or
27 addresses.

28 There is no evidence that the FTB violated its general privacy statements at the beginning of

1 the Hyatt audit, or that Mark Shayer and the FTB had no intention of adhering to the statements in the
2 letter and privacy notice at the time that they were sent. The contact letter and privacy notice include
3 only generalized statements about confidentiality, and the FTB's limited disclosures of Hyatt's name,
4 address, and social security number were authorized under California law. (See FTB Mot. at 27.)
5 Moreover, "[t]he mere failure to fulfill a promise or perform in the future . . . will not give rise to a
6 fraud claim absent evidence that the promisor had no intention to perform at the time the promise was
7 made. *Bulbman*, 108 Nev. at 112. The FTB's alleged misconduct beginning in 1995 is thus insufficient
8 to support Hyatt's fraud claim, and Hyatt's "negligent false promise" claim is wholly improper. (See
9 *supra* at 10.)

10
11 **f. Hyatt's argument that the FTB was not privileged to do what it did in the Hyatt
residency audit is wrong.**

12 Hyatt's claim that the FTB's affirmative defense of privilege does not really exist is simply
13 wrong. The FTB's privilege to do what it did involving Hyatt is constitutionally based. The State of
14 California, acting through its FTB, has the inherent sovereign right and authority to lay taxes, *Penn*
15 *Dairies v. Milk Control Comm. of Penn.*, 318 U.S. 261, 270-71 (1943), and is free to exercise its taxing
16 power unless such exercise results in a direct and substantial interference with a federal right. *Allied*
17 *Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959); *Union Pacific Railroad Company v.*
18 *Peniston*, 85 U.S. 5, 29 (1873). Hyatt has not here alleged any federal constitutional violation, and has
19 in fact expressly disavowed that federal constitutional law is relevant:

20 . . . At no time has plaintiff suggested or sought relief on the premise that
21 the FTB's outrageous activities in Nevada were somehow prohibited by
22 the Federal Constitution. Plaintiff has clearly pleaded causes of action
23 that are recognized under Nevada law. They are not remotely dependent
on some underlying theory attributable to the Federal Constitution. Ex.
A at 19, lines 8-12 (Hyatt Mot. to Remand).)

24 Furthermore, the facts upon which Hyatt bases his claims all occurred during the course of
25 FTB's audit and proposed findings on Hyatt's change of residency claim.

26 Hyatt's position is that FTB was not privileged to do what it did because he claims the FTB's
27 conduct was tortious. The law is clear, however, that taxing agencies are privileged to do things that
28 private persons cannot do, such as conduct audit investigations. See generally *Schaut v. First Federal*

1 *Savings and Loan Ass'n of Chicago*, 560 F. Supp. 245, 247 (N.D. Ill. 1983), *appeal dismissed without*
2 *opinion*, 735 F.2d 1366 (7th Cir. 1984) ("there is no violation of a person's right of privacy when the
3 IRS investigates and seeks documents from third parties where, as here, the investigation is specifically
4 authorized by law.") Such acts can include acts that would arguably be tortious if a private person did
5 them, and still not subject the taxing agency to liability. *E.g.*, *Capozzli v. Tracey*, 663 F.2d 654, 656-
6 658 (5th Cir. 1981) (IRS agent's alleged trespass, "prowling about" residence, and taking photographs
7 for tax purposes did not subject the IRS to liability). Thus, the FTB's privilege to act as a taxing
8 agency exists, and should be applied.

9 Hyatt argues that there are just as many cases refusing to grant taxing agencies immunity for
10 alleged torts committed during an audit, but he cites no such reported authority. (Hyatt Opp. at 66.)
11 Instead, he merely cites his own argument concerning "informational privacy," and ignores the
12 difference between causes of action against taxing agencies under specific statutes, which are allowed,³
13 and causes of action against taxing agencies for common law tort claims, which are barred. Hyatt's
14 supposed proof that such tort claims are allowed is a book describing an unreported case in which the
15 IRS was held liable, which is not proof that such non-statutory claims are allowed at all. (See Hyatt's
16 Appendix Exhibit 9.) This is especially true where the subject of those claims – disclosure of Hyatt's
17 name, address, and social security number – is allowed by statute. (See FTB Mot. at 27; *see also* 26
18 U.S.C. §§ 6103(b)(6); 6109(d); 6103(h)(4) (federal law authorizing IRS to make such disclosures).)

19 The FTB was privileged to do what it did during Hyatt's residency audit because it is a
20 government taxing agency, its acts were authorized by law, and because every act of its agents occurred
21 within the course and scope of employment. *See generally Yalkut v. Gemignani*, 873 F.2d 31, 34 (2d
22 Cir. 1989) (IRS agents absolutely immune from tort claims that filing a levy was done with knowledge
23 that taxpayer did not owe the IRS any money, without legal basis or justification, and with malice);
24 *Purk v. United States*, 747 F. Supp. 1243, 1247-49 (S.D. Ohio 1989) (government immune from claim
25 IRS agent disregarded proper procedures and collected money with a fraudulent levy). Hyatt's claim
26

27 ³ *E.g. Jones v. United States*, 9 F. Supp. 2d 1119 (D. Neb. 1998), *aff'd and rev'd in part and*
28 *remanded*, 2000 U.S. App. LEXIS 4675 (cited in Hyatt Opp. at 23-24).

1 that the FTB, a taxing agency, could only do what a private person could do in its tax administration
2 efforts should be rejected.

3 **2. Dismissal motion argument.**

4 **a. The FTB's factual challenge against subject matter jurisdiction is appropriate.**

5 Hyatt's suggestion that the FTB's alternate dismissal motion is inappropriate or somehow
6 precluded by the decision on motion for judgment on the pleadings is wrong. The motion raises the
7 Court's lack of subject matter jurisdiction, and the defense of lack of subject matter jurisdiction is never
8 waived. *Phillips v. Welch*, 11 Nev. 187, 188 (1876); *see also Wright & Miller, Federal Practice and*
9 *Procedure*: Civil 2d 1350 at pages 194-205 and § 1393 at pages 764-776. Even if the defense is
10 overruled, stricken, or excluded, it may be reasserted at any time. *Id.* at page 205.

11 As described in the FTB's motion, there are two types of challenges to any court's subject
12 matter jurisdiction: facial and factual. (FTB Mot. at 15; *see also Wright & Miller*, at pages 211-212.)
13 The FTB's motion for judgment on the pleadings was brought under NRCP Rule 12(c), and included
14 a facial challenge to the Court's subject matter jurisdiction. By its present motion, FTB now challenges
15 this Court's actual exercise of subject matter jurisdiction as to Hyatt's entire case, based on the facts,
16 not Hyatt's pleadings.

17 **b. This case falls squarely within the *Nevada v. Hall* exception.**

18 Hyatt does not dispute that California's immunity and administrative exhaustion laws, if
19 applied, would bar Hyatt's tort claims; in fact, Hyatt does not even cite those laws. Instead, Hyatt
20 claims that these laws do not apply, primarily because this case allegedly falls outside the exception
21 to *Nevada v. Hall*. But there is a substantial difference between *Nevada v. Hall*, which arose from a
22 traffic accident, and this case, in which the FTB entered Nevada to check Hyatt's claim of change of
23 residency. Negligently driving a car on the highways of a sister state is not an exercise of an inherent
24 sovereign function. Investigating a citizen's claimed change of residency, and his corresponding state
25 income tax liability, is an exercise of an inherent sovereign function.

26 Hyatt's tort claims interfere with California's capacity to fulfill its sovereign responsibilities,
27 by requiring California to engage in expensive and time-consuming litigation before even making a
28 final tax audit determination. His case also interferes with California's sovereign function of taxation,

1 for example, by asking a Nevada jury to create and impose a fiduciary obligation between Hyatt and
2 the FTB (Complaint ¶ 71) that simply does not exist. *See e.g., Schaut*, 560 F. Supp. at 246. Indeed,
3 Hyatt's entire case seeks to have a Nevada jury tell California how it can and cannot conduct an audit
4 of a long-time California resident's claim of residency change.

5 Despite Hyatt's repeated assertion that this is not a tax case, each and every one of Hyatt's
6 claims is based upon how the FTB conducted his residency audit, and the preliminary conclusions that
7 the FTB has reached. Hyatt's complaint, and indeed the entirety of his opposition, show that he wants
8 to challenge every aspect of the FTB's preliminary taxation decision, and punish the FTB for testing
9 Hyatt's residency claims. By not accepting his word for it, but conducting its own audit, the FTB is
10 alleged to have committed a whole host of supposed torts against Hyatt. These allegations put this case
11 squarely within the exception to *Nevada v. Hall*, and California's governmental immunity and
12 administrative exhaustion laws must be applied.

13 **c. Many cases recognize the *Nevada v. Hall* exception.**

14 Hyatt's argument that "there is no recognized exception to *Nevada v. Hall*" is absurd.
15 Numerous court have recognized the *Nevada v. Hall* exception that the FTB asserts, applied it, and
16 dismissed lawsuits against sister states as a result.

17 In *Guarini v. State of New York*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert.*
18 *denied*, 484 U.S. 817, New Jersey claimed that the Statue of Liberty and the island on which it is
19 located were under its jurisdiction and sovereignty. New York had exercised jurisdiction over the statue
20 and the island for at least 150 years. New Jersey sued the state of New York in a New Jersey Court,
21 but the New Jersey court dismissed the case under the exception to *Nevada v. Hall*. *Id.* at 1366-67. The
22 *Guarini* court held that the "ruling [in *Nevada v. Hall*] did not mean that a state could be sued in another
23 as a matter of course," *id.* at 1366, and dismissed the action based on its threat to the constitutional
24 system of cooperative federalism, including a potential "cascade of lawsuits" by one state's citizens
25 against neighboring states:

26 The present case clearly requires a "different analysis" and a "different
27 result." . . . Plaintiffs are challenging in a suit in New Jersey the
28 authority of New York State over land bordering the two states.
Plaintiffs, if successful, would clearly interfere with New York's
capacity to fulfill its own sovereign responsibility over those two islands

1 in accordance with and as granted by the 1833 compact. Exercise of
2 jurisdiction by this court would thereby pose a "substantial threat to our
constitutional system of cooperative federalism." *Id.*

3 *Mejia-Cabral v. Eagleton School*, No. 972715, 1999 WL 791957 (Mass. Super. Sept. 16, 1999),
4 involved another application of the *Nevada v. Hall* exception. In *Mejia-Cabral*, the plaintiff sued a
5 Massachusetts school for wrongful death caused by a juvenile delinquent attendee, and the State of
6 Connecticut was joined as a third-party defendant under allegations that it was negligent in placing the
7 juvenile at the school. The State of Connecticut moved to dismiss the claim on the ground of sovereign
8 immunity. The Massachusetts court agreed and said:

9 Unlike *Hall*, the present third-party complaint directly implicates
10 important governmental functions and controversial policy choices. The
11 sentencing and treatment of juveniles who have committed serious
12 criminal offenses is a matter left entirely to the state, and striking the
13 appropriate balance between the competing demands of rehabilitation
14 and public safety is a policy problem that each state must address. The
15 prospect of one state's court deciding whether another state was
16 negligent in selecting a particular rehabilitation program for a juvenile
17 offender is profoundly troubling, and this court's assertion of jurisdiction
over such a claim against the state of Connecticut would pose a
"substantial threat to our constitutional system of cooperative
federalism." The State of Connecticut makes a compelling argument
that this third-party complaint would, if allowed to proceed, "interfere
with [Connecticut's] capacity to fulfill its own sovereign obligations"
and that recognition of its sovereign immunity is therefore mandatory.
Id. (Internal citations omitted).

18 Similarly, in *Reed v. University of North Dakota*, discussed *supra* at 4, a plaintiff sued the State
19 of North Dakota in a Minnesota court for a negligence action. The Minnesota Court of Appeal, citing
20 footnote 24 of the *Hall* case, declined to exercise jurisdiction over the State of North Dakota as a matter
21 of comity. *Reed*, 543 N.W.2d at 109-111. In *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997), the
22 State of Montana was sued by an individual plaintiff in Blackfeet Tribal Court for negligence in the
23 design, construction and maintenance of a highway intersection at which the plaintiff was injured in a
24 car accident. The Ninth Circuit held that even if *Nevada v. Hall* were extended to include Indian tribes,
25 it could not apply to a suit which sought to hold Montana liable for governmental decisions concerning
26 highway design. "*Because the suit's theory would affect governmental processes, it falls outside the*
27 *scope of Nevada v. Hall.*" *Id.* at 1138 (emphasis added).

28 Thus, Hyatt's claim that the *Nevada v. Hall* exception has never been recognized could not be

1 further from the truth. The falsity of Hyatt's assertion is proven not only by the above cases, but even
2 by cases that Hyatt cites in his own brief. *Haberman v. Washington Public Power Supply*, 744 P.2d
3 1032, 1066 (Wash. 1987) ("Full faith and credit does not require a forum state to respect another state's
4 rule on sovereign immunity *unless the other state's ability to govern would be threatened.*") (emphasis
5 added); *Biscoe v. Arlington County*, 738 F.2d at 1358 (discussing possible application of footnote 24
6 of *Nevada v. Hall*). The *Nevada v. Hall* exception exists, has been concretely applied in other cases,
7 and should similarly be applied here.

8
9 **d. Constitutional choice of law principles require this Court to apply California's
governmental immunity and administrative exhaustion laws.**

10 Hyatt's claim that *Nevada v. Hall* and *Mianeki* conclusively prove that California laws should
11 not be applied as a choice of law matter is wrong. Hyatt's analysis ignores that there is a difference
12 between jurisdiction and choice-of-law. Just as there are constitutional limitations on this Court's
13 exercise of jurisdiction, so too there are constitutional limitations on its choice-of-law. *Phillips*
14 *Petroleum*, 472 U.S. at 821 (1985). Those limitations primarily focus on fairness and expectation of
15 the parties, not the plaintiff's state of residence or place of filing the action. *Id.* at 820, 822.
16 Notwithstanding Hyatt's argument, the existence of contacts sufficient for personal jurisdiction is also
17 not determinative of a forum state's right to apply of its own law.

18 The FTB's opening brief describes fully how fairness and the parties' expectations compel
19 application of California's immunity and administrative exhaustion laws. (See FTB Mot. at 36-37.) If
20 these laws are not applied, and this case is not dismissed, Nevada courts and juries would effectively
21 regulate California's tax collection process. At the same time, limiting Hyatt to the remedies he is
22 given under California law is not unfair, since he admittedly was a long-time resident who enjoyed the
23 benefits and privileges of living in California for many years. Hyatt also was, and still is, pursuing his
24 California remedies as to the audit and to his tax liability.

25 Furthermore, if Hyatt truly believes that the FTB violated its own procedures and confidentiality
26 requirements, there are California statutes allowing certain damages actions against the FTB in
27 California courts. *E.g.*, Cal. Rev. & Tax. Code § § 21021(a) ("If any officer or employee of the board
28 recklessly disregards board published procedures, a taxpayer aggrieved by that action may bring an

1 action for damages against the State of California in [California] superior court.”) These statutes are
2 limited exceptions to the FTB’s general immunity from tax-related damages claims, and are limited to
3 California’s own courts. *See Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 579-580
4 (1946); Cal. Code Civ. Proc. § 71. But Hyatt simply has no right under multiple California laws to
5 common law tort recovery against the FTB, a matter that Hyatt does not even dispute. Constitutional
6 choice of law analysis requires the Court to apply the California laws that bar Hyatt’s tort claims.

7
8 **e. The Supreme Court’s recent sovereign immunity cases fully support California’s dismissal motion.**

9 Hyatt is correct that none of the Supreme Court’s recent sovereign immunity decisions expressly
10 overrule *Nevada v. Hall*. But as the FTB described at pages 34-35 of its motion, these cases confirm
11 that the *Nevada v. Hall* exception should apply fully to this case. The cases reflect an ever-increasing
12 respect for sovereign dignity, an expansive view of sovereign immunity, and an unwillingness to intrude
13 on a state’s own sovereign duties. In so doing, they underscore the importance of the *Nevada v. Hall*
14 exception, counter Hyatt’s claim that the exception does not exist, and compel application of that
15 exception to this case. (*See* FTB Mot. at 34-35.)

16
17 **f. Hyatt’s request that the Court deny comity to California should be rejected.**

18 Hyatt’s interpretations of *Nevada v. Hall*, *Mianecki*, and other cases related to whether this
19 Court should grant comity to California are wrong.

20 Nothing in *Nevada v. Hall* addresses “whether a state court *should* refuse to extend immunity
21 as a matter of comity, but only whether it *could* do so.” *Lee v. Miller County, Ark.*, 800 F.2d 1372,
22 1377 (5th Cir. 1986). Instead, “the United States Supreme Court in *Hall* specifically noted, ‘It may be
23 wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or
24 to respect any established limits on liability.’” (*Id.* (citing *Hall*)). Thus, if anything, *Nevada v. Hall*
25 counsels the Nevada Court to grant the FTB comity in this case.

26 Hyatt contends that to grant immunity in this matter would violate Nevada’s public policy of
27 protecting its citizens in providing a remedy for torts committed in Nevada. (Hyatt Opp. at p. 53-55.)
28 However, the Nevada Supreme Court has recognized that not every situation will provide a remedy to

1 its citizens for tortious injuries. *Hagblom v. State Dir. of Motor Vehicles*, 93 Nev. 599, 604, 571 P.2d
2 1172 (1977) (state's qualified waiver of immunity from liability and consent to civil actions does not
3 give rise to a cause of action sounding in tort when a state official or employee makes a discretionary
4 decision injurious to some persons). In addition, other courts have recognized that the policy of giving
5 redress for tortious injuries does not override the extending of immunity. The failure to recognize
6 immunity would lead to forum shopping, would cause tension between the states, and further degrade
7 state sovereignty and raises the practical problems of enforcing a judgment in this type of case.
8 *Newberry v. Georgia Dept. of Industry & Trade*, 336 S.E.2d 464 (S.C. 1985); *see also Schoeberlein v.*
9 *Purdue University*, 544 N.E. 2d 283, 286 (Ill. 1989); *Reed v. University of North Dakota*, 543 N.W. 2d
10 at 109.

11 When analyzing whether to extend immunity as a matter of comity, courts have focused on
12 whether the immunity laws of the defendant state were in conflict with that of the forum. Courts have
13 extended immunity where the defendant state's immunity laws do not conflict with those of the forum
14 state. *See Lee*, 800 F.2d at 1378 (it is an abuse of discretion not to extend immunity as a matter of
15 comity, where defendant state would grant immunity and forum state would grant either complete or
16 partial immunity); *Clement v. State*, 524 N.E. 2d 36, 42-43 (Ind. Ct. App. 1988) (Indiana extended
17 immunity to Kentucky entities under Indiana's Tort Claims Act, as both states' immunity laws were
18 identical and Indiana police officers would have been immune under same circumstances); *Schoeberlein*
19 *v. Purdue University*, 544 N.E. 2d 283 (immunity extended as a matter of comity where defendant state
20 and forum state immunity laws were similar); *see also University of Iowa Press v. Urrea*, 440 S.E. 2d
21 203, 204 (Ga. Ct. App. 1993).

22 Moreover, the generally accepted rationale of the states, including Nevada, that have denied
23 comity to another state is that a sister state's claim of immunity will not be recognized if the forum state
24 permits recovery against the forum state under similar circumstances. *Schoeberlein*, 544 N.E. 2d at
25 288; *see Daughtry v. Arlington County, Va.*, 490 F. Supp. 307, 312-313 (D.D.C. 1980); *Head v. Platte*
26 *County, Mo.*, 749 P.2d at 9-10; *Haberman v. Washington Public Power Supply System*, 744 P.2d at
27 1066; *Biscoe v. Arlington County*, 738 F.2d at 1357 (in determining whether to extend immunity to
28 Virginia police department, the court looked to whether a District of Columbia police department would

1 have been immune under D.C. immunity laws for committing the same acts); *Morrison v. Budget Rent*
2 *A Car Systems, Inc.*, 657 N.Y.S. 2d 721 (N.Y. App. 1997); *Struebin v. State*, 322 N.W. 2d 84, 87 (Iowa
3 1982), *cert. denied*, 459 U.S. 1087 (Illinois limitations on liability not recognized in Iowa where Iowa
4 permitted full compensation); *Mianecki*, 99 Nev. at 96, 658 P.2d 422 (Nevada agency committing same
5 acts would have been liable under immunity statutes).

6 As has already been demonstrated in FTB's Motion for Summary Judgment, California's laws
7 specifically immunize the FTB from tax-related torts that Hyatt claims. The analysis below confirms
8 that these California immunity laws do not conflict with Nevada's own immunity laws, negating the
9 generally accepted rationale for denying comity. It also shows that Nevada has a special interest in
10 granting comity here.

11 **i. California's and Nevada's immunity laws do not conflict.**

12 Nevada has waived immunity from liability and consents to have its liability determined in
13 accordance with the same rules of law as are applied to civil actions against natural persons and
14 corporations. NRS 41.031. However, no action may be brought under NRS 41.031 against an officer
15 or employee of the State, or any of its agencies, which is based upon the exercise, performance, or
16 failure to exercise or perform, a discretionary function or duty on the part of the State or any of its
17 agencies, whether or not the discretion involved is abused. NRS 41.032 (emphasis added); *see also*
18 *Foster v. Washoe County*, 114 Nev. Adv. Op. 104, 964 P.2d 788, 791-792 (1998).

19 Nevada's qualified waiver of immunity from liability and consent to civil actions was to provide
20 relief for persons injured through negligence in performing or failing to perform non-discretionary or
21 operational actions. It was not intended to give rise to a cause of action sounding in tort whenever a
22 state official or employee makes a discretionary decision injurious to some person. *Hagblom*, 93 Nev.
23 at 604, 571 P.2d 1172 (manner of conducting internal agency investigations immune as discretionary
24 acts of the agency).

25 A discretionary act is that which requires the exercise of personal deliberation,
26 decision and judgment. A ministerial act is an act performed by an individual in a
27 prescribed legal manner in accordance with law, without regard to, or the exercise of,
the judgment of the individual. *Pittman v. Lower Court Counseling*, 110 Nev. 359, 364,
871 P.2d 95, 956 (1994).

28 *Foster*, 114 Nev. Adv. Op. 104 at 5, 964 P.2d at 792; *see also Burgdorf v. Funder*, 54 Cal. Rptr 805,

1 246 Cal. App. 2d 443 (1966) (discretionary act requires the exercise of judgment and choice); *Glickman*
2 *v. Glasner*, 230 Cal. App. 2d 120, 40 Cal. Rptr. 719 (1964) (ministerial act is where law prescribes and
3 defines duties to be performed with precision and certainty).

4 It is apparent that an investigation involves personal deliberation, decision, and judgment, and
5 cannot be construed to be ministerial. *Foster*, 114 Nev. Adv. Op. 104 at 5, 964 P.2d at 792. Even
6 though there may be internal departmental operating procedures, the nature of an investigation is such
7 that it is inherently discretionary. *Foster*, 114 Nev. Adv. Op. 104 at 5, 964 P.2d at 792; *see also*
8 *Travelers Hotel v. City of Reno*, 103 Nev. 343, 346, 741 P.2d 1353 (1987) (city officials actions
9 immune, even though ordinance required certain factors be considered when determining whether to
10 issue a permit, because city officials were allowed discretion in balancing the various factors in order
11 to make a decision).

12 Hyatt states that his tort claims are based on the operational acts of the FTB in carrying out the
13 investigation and audit of Hyatt. (Hyatt Opp. at 51.) But California law gave the FTB a wide range
14 of powers to investigate situations such as Hyatt's change of residency claim. Cal. Rev. & Tax. Code
15 §§ 17014, 19501, 19504 & 19545; Cal. Govt. Code § 11189. There is no language in those enabling
16 statutes that prescribes the manner in which the investigation must be conducted, or removes the ability
17 of FTB employees to exercise judgment. (*See id.*) While the statutes may provide procedures that can
18 be used by FTB auditors in conducting an investigation and audit, how FTB auditors proceed in
19 individual cases is left to their sound discretion. (*See id.*; *see also* attached Ex. I (Illia Affidavit).)
20 Under *Foster*, such discretionary actions would be immune under Nevada's sovereign immunity laws,
21 and thus there is no conflict between Nevada and California law. *See* NRS 41.032.

22 Given that the actions alleged against the FTB would be immune under both California and
23 Nevada sovereign immunity laws, it would be improper for this Court to deny comity to the FTB.

24 **ii. Nevada has a special interest in extending comity to California in this case.**

25 Whatever this Court does to the FTB in this case, it will be doing to Nevada's own agencies.
26 As previously discussed, *Miannecki* directs this Court to determine if Nevada would permit itself to be
27 sued if the FTB was a Nevada agency. 99 Nev. at 96-97, 658 P.2d at 424. Accordingly, this Court
28 cannot hold FTB liable unless it first decides that a Nevada agency doing what FTB did would also be

1 subject to Hyatt's tort claims.

2 Because Nevada has no income tax, it has no agency equivalent to the FTB. Instead of a
3 personal income tax, Nevada taxes its gaming industry. Nevada's primary tax source is the gross
4 gaming revenue license fee imposed upon casinos. Nev. Rev. Stat. §§ 463.370 et seq. The State
5 Gaming Control Board ("GCB") and the Nevada Gaming Commission ("Commission") are charged
6 with enforcing the Gaming Control Act, including protecting the state's revenues. Nev. Rev. Stat. §§
7 463.160 et seq. The GCB and Commission are the Nevada agencies most analogous to the FTB.

8 The peculiar nature of the gaming industry presents numerous concerns and problems of fact
9 determination, verification and control, the resolution of which must be readily available to cognizant
10 authorities of this State. *See generally State of Nevada v. Glusman*, 98 Nev. 412, 425-26, 651 P.2d 639,
11 648 (1982); *appeal dismissed for lack of a substantial federal question*, 459 U.S. 1192 (1983)
12 (Nevada's interest in being able to conduct selective investigations outweighed privacy right of a dress
13 shop owner operating his shop on the premises of a licensed gaming establishment). Accordingly, the
14 GCB is given the authority to "make appropriate investigations" to ensure compliance with Nevada's
15 gaming laws and regulations and as directed by the Commission. Nev. Rev. Stat. § 463.310. The
16 power to investigate is not limited to gaming licensees or applicants, and is not limited to the territorial
17 boundaries of Nevada. *See, e.g., Glusman*, 98 Nev. at 417-18, 651 P.2d at 646-47; *State v. Pashos*, 88
18 Nev. 23, 24, 492 P.2d 1309 (1972) (GCB has power to issue administrative subpoenas directing officers
19 of a union to appear before the GCB and testify concerning union activities in the gaming industry);
20 Nev. Rev. Stat. § 463.1405(1) (authorizing GCB to investigate *all* persons "having a material
21 involvement directly or indirectly with a licensed gaming operation").

22 Indeed, under Nev. Rev. Stat. § 463.140(4), the GCB may investigate *any* suspected violation
23 of the Gaming Control Act, including illegal skimming of gaming revenues. *See also* Nev. Rev. Stat.
24 § 463.160(1)(c). Such investigations can include interstate conspiracies, *see, e.g., United States v.*
25 *DeLuna*, 763 F.2d 897 (8th Cir. 1985), *cert. denied*, 474 U.S. 980, as well as in-state conspiracies. *See,*
26 *e.g., Trans-Sterling, Inc. v. Bible*, 804 F.2d 525 (1986). Accordingly, the GCB sends its agents and
27 investigators all around the country, even all around the world, to conduct the investigations necessary
28 to perform Nevada's inherent sovereign function of regulating the Nevada gaming industry and

1 protecting state revenues. Agents are dispatched whenever and wherever the gaming authorities
2 themselves determine it is appropriate to do so.

3 If Nevada's courts decline to extend comity to California in Hyatt's case, which arises out of
4 the FTB's tax investigation, then Nevada must expect similar treatment by other forums when tort suits
5 are brought against the GCB for conducting its investigations. That is a Pandora's Box that could
6 cripple the State of Nevada's ability to regulate the Nevada gaming industry effectively, and protect
7 state revenues. Therefore, even if this Court is not constitutionally required to do so, it should exercise
8 its discretion and extend comity to California in this case.

9 **3. Hyatt's request for more time to conduct discovery should be denied.**

10 Finally, Hyatt's request that this motion be continued until Hyatt has had more time to complete
11 discovery should be denied. Hyatt filed this case over two years ago, and the amount of discovery that
12 he has demanded and received from the FTB since that time is simply enormous. As of the date of this
13 motion, Hyatt's lawyers had spent approximately 315 hours in deposition, generated roughly 11,000
14 pages of transcripts from 24 deponents, propounded 329 separate document demands to the FTB, made
15 over 340 other document requests to deposed witnesses, and demanded and received over 17,000 pages
16 of FTB produced documents. (See FTB Mot. at 14.) Thirteen and a half days of Hyatt's FTB
17 depositions have been Rule 30(b)(6) depositions, and Hyatt has taken even more FTB employee
18 depositions since this motion was filed:

19
20 **HYATT DEPOSITIONS OF
PRESENT OR FORMER FTB EMPLOYEES**

21

Deponent	Days	Pages
Alvarado, Jahna	2	307
Bauche, Penny	2	564
Collier, Gerardina	0.5	180
Cox, Sheila	9	2416

22
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28

Dick, Douglas	1	254
Embry, Monica	1	239
Eshaghian, Farzaneh	1	202
Ford, Carol	2	482
Gilbert, Barry	1	217
Hobbs-Parker, Elizabeth	1	182
Illia, Steve	2	535
Jovanovich, Anna	2	520
Les, Candace	~5	1063
Lou, Paul	3.5	796
McKenney, Jeffrey	1	275
Medina, Rebekah	1	244
Meyer, Julie	2	394
Pitts, Horace	0.5	168
Semana, Sheila	2	443
Shayer, Marc	2	576
Shigemitsu, Allen	1	289
Smith, Anne	1.5	407
Toyama, Jon	1	266
TOTALS	45	11,819

1 The list of FTB employees already deposed includes the FTB's primary auditor on the case
2 (Sheila Cox), whose deposition Hyatt prolonged for nine days. It already includes a three and a half
3 day deposition of Ms. Cox's supervisor during most of her work (Paul Lou), and a two day deposition
4 of the manager of the FTB's residency audit program (Steven Illia). The list also includes two former
5 FTB employee/auditors that worked briefly on the audits (Mark Shayer and Jeff McKenney), and the
6 FTB employees that accompanied Ms. Cox on her field activities concerning the Hyatt audit (Jahna
7 Alvarado, Gerardina Collier, Barry Gilbert, and Sheila Semana). In fact, the list already includes
8 laborious depositions of every major (and many minor) figures in the FTB's audit of Hyatt.

9 From these depositions, and the FTB's voluminous document productions, Hyatt has long
10 known everything that the FTB did involving Hyatt in excruciating detail. His claimed need for even
11 more discovery, and for more deposition time with witnesses that have already been deposed for up to
12 *nine* days, is reflective of Hyatt's insatiable and unreasonable discovery appetite, not a genuine need
13 to learn more facts about this case.

14 Hyatt's claim that he needs the few internal FTB documents that are the subject of the FTB
15 pending Supreme Court writ is also unfounded. Whatever the FTB's internal deliberations about Hyatt
16 were, they do not change the FTB's outward acts about him, and all of the facts about those outward
17 acts are already known. These known facts about the FTB's external conduct simply cannot sustain
18 Hyatt's claims, and the FTB's summary judgment motion can be granted now. The FTB's alternate
19 dismissal motion is also viable now, as it is also independent of the FTB's internal deliberations.

20 Mr. Bourke's complaint about FTB *Vaughn* indices is unsupported, and unsupportable; the FTB
21 has provided detailed *Vaughn* indices for all of its redactions. His complaint about "unfounded"
22 objections to "dozens" of deposition questions on FTB internal deliberations rings hollow; these were
23 good faith objections, Hyatt has answers to tens of thousands of deposition questions, and the FTB's
24 external acts regarding Hyatt are known. Mr. Bourke's complaint about "truncated" depositions is
25 misplaced; as the above table demonstrates, Hyatt has had extraordinary time and access to FTB
26 witnesses.

27 But perhaps the most compelling evidence that Hyatt does not genuinely need more discovery
28 is his recent refusal of the FTB's offer to give him more time to take it. This week, the FTB's counsel

1 called Hyatt's counsel and proposed a stipulated continuance of the hearing on this motion, to give
2 Hyatt time to take additional deposition discovery that he claims is so badly needed. Hyatt's counsel
3 rejected the FTB's proposal, and expressed a desire to have the motion decided as is. (See attached Ex.
4 J (Bradshaw Affidavit).) Hyatt's rejection of the FTB's proposal proves that this case is ripe for
5 resolution, not even more Hyatt discovery.

6 **CONCLUSION**

7 Hyatt has no right to a trial in this action. The Court should award the FTB summary judgment,
8 or alternatively dismiss this case under Nevada Rule of Civil Procedure 12(h)(3).

9 DATED this 14th day of April, 2000.

10 McDONALD CARANO WILSON McCUNE
11 BERGIN FRANKOVICH & HICKS

12
13 By 

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Karen A. Sarawie
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EXHIBIT 22

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DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT,)
)
Plaintiff,)
)
vs.) Case No.
) A382999
FRANCHISE TAX BOARD OF THE)
STATE OF CALIFORNIA; and DOES)
1-100, inclusive,)
)
Defendants.)

CERTIFIED COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE SIATTA

Taken on Friday, April 21, 2000

At 9:10 o'clock a.m.

Las Vegas, Nevada

Reported by: Carre Lewis, CCR 497

1 APPEARANCES:

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16 And
17 THOMAS HELLER, ESQ.
18 GEORGE M. TAKENOUCHI, ESQ.
19 California Attorney General
20 300 South Spring Street, Suite 5212
21 Los Angeles, California 90013

17 Also Present: Gilbert Hyatt

20 -oOo-

1 Las Vegas, Nevada; Friday, April 21, 2000;
2 9:10 o'clock a.m.

3 THE COURT: Good morning. All records should
4 reflect that we have present the Hyatt verses California
5 State Franchise Tax Board, case number 382999 C. And this
6 is set today for hearing of defendant's motion for summary
7 judgement 56(b) and/or for dismissal under NRCP 12.

8 You may rest assured that I'm familiar with the
9 facts in this case. I have read, to be honest with you,
10 almost everything that you presented. I'm not going to
11 suggest I've read everything in every single box. But none
12 the less, we are ready to proceed at this point.

13 Is this going to be in your way, sir?

14 MR. TAKENOUCHI: Yes.

15 THE COURT: We'll just take that out of your way.

16 This is your motion, would you like to be heard?

17 MR. HELLER: Yes, Your Honor. Tom Heller, Deputy
18 Attorney General for the moving party, Franchise Tax Board.
19 Since there is so much paper, I'll do my best to be brief.

20 Broadly, we are here on a motion that covers two
21 issues: Dismissal for lack of subject matter jurisdiction
22 and summary judgment. This motion is based on the facts,
23 not just the pleadings. And as such, it's different from
24 the motion for judgement on the pleadings that the Court
25 heard last year. It comes after Hyatt has conducted an

1 enormous amount of discovery, certainly not as much as he
2 wants because he seems not to want to ever stop, but an
3 enormous amount none the less. I will focus first on the
4 dismissal part of the motion because resolving it that way
5 is the way that the Franchise Tax Board believes it must be
6 resolved to avoid a great deal of the rhetoric and paper
7 that is associated with this motion.

8 The issue in the dismissal motion really boils
9 down to whether this Court should respect California's
10 sovereignty by applying California's immunity and
11 administrative exhaustion laws to the entirety of this case.
12 There is no genuine dispute that all of the Franchise Tax
13 Board's conduct concerning Mr. Hyatt involve the application
14 of California's personal income tax laws. All of those acts
15 were related to a residency tax audit of Mr. Hyatt. A
16 residency tax audit concerns checks as to whether a taxpayer
17 has actually moved his state of residency from California to
18 another state or perhaps vis-a-versa. These residency
19 audits are part of the Franchise Tax Board's job as an arm
20 of the State of California government.

21 And all of the acts related to these residency
22 audits or this residency audit were done in the course and
23 scope of the employment of the Franchise Tax Board employees
24 involved. There is really no dispute about that. In fact,
25 Mr. Hyatt has put it in his complaint, paragraph 4. There

1 is also no genuine dispute that California has multiple laws
2 that would bar Mr. Hyatt's tort action if they were applied
3 to this case. One of them is California Government Code
4 860.2, which I have here. I will put it up on the podium,
5 the easel. This law provides that neither a public entity
6 nor public employee is liable for an injury caused by, A,
7 instituting any judicial or administrative proceeding or
8 action for or incidental to the assessment or collection of
9 a tax; or, B, an act or omission in the interpretation or
10 application of any law relating to a tax. And that would
11 include application of California's personal income tax
12 laws.

13 There are also other laws cited in the Franchise
14 Tax Board's moving papers about the administrative
15 exhaustion requirements of California. Those laws generally
16 require that Mr. Hyatt exhaust his administrative remedies
17 before proceeding with an action. And they are very
18 comparable to Nevada's own administrative exhaustion laws as
19 they would apply to Nevada government.

20 Taken altogether, these laws, I don't think there
21 is a dispute that if they were applied, they would bar
22 Mr. Hyatt's case. In fact, Mr. Hyatt's opposition does not
23 even cite those laws. Thus, the question really is whether
24 these laws apply or not to all of this case. That's the
25 subject on the dismissal motion.