

**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

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**APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P.  
HYATT - VOLUME 7 OF 17**

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2	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, filed October 15, 2019	1, 2, 3, 4	RA000002- RA000846
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

7	Correspondence re: 1991 state income tax balance, dated December 23, 2019	17	RA004028- RA004032
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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 1<sup>st</sup> day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 7 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 documents were not under “any settlement umbrella,” making the discussion about deliberative  
2 process unnecessary to its decision. (*Id.* at 435.) Hyatt has not provided any comparable Nevada  
3 authority interpreting executive privilege in such a truncated fashion, and none will be found.

4 Hyatt also misapplies *In re California Public Utilities Commission*, 892 F.2d 778 (9<sup>th</sup>  
5 Cir. 1989). The Ninth Circuit’s decision rested on the fact that the California Public Utilities  
6 Commission (“CPUC”) was not a party to the underlying private litigation between Westinghouse  
7 and Southern California Edison. CPUC attempted to quash a third party subpoena duces tecum that  
8 sought a document that directly related to the lawsuit between the two private litigants and not any  
9 action by CPUC. Unlike Westinghouse, Hyatt seeks privileged, internal documents for use in  
10 litigation against the FTB and its audit and decisional processes.

11 More fundamentally, Hyatt has not presented any published judicial opinion  
12 indicating that the Nevada district court has jurisdiction over any aspect of the California tax process.  
13 The district court has ignored California’s Constitutional and statutory mandates that require Hyatt  
14 to fully exhaust his administrative remedies before undertaking discovery and judicial intervention.  
15 (See Cal. Const., art. XIII, § 32; Cal. Rev. & Tax Code § 19381.) The discovery the district court  
16 has ordered and permitted to proceed forward is in fundamental contravention of California’s  
17 sovereignty, and in this sense, the trial court has exceeded its jurisdiction by acting outside its  
18 constitutional authority.

19 **G. The Chief of the Audit Division Properly Invoked the Deliberative Process**  
20 **Privilege.**

21 Having failed to put forth a persuasive argument on the merits, Hyatt’s litigation team  
22 resorts to a form over substance approach to defeat the deliberative process privilege as applied to  
23 the limited documents involved in this writ. Ignoring easily accessible authority, Hyatt falsely  
24 proclaims that only the Executive Officer of FTB can invoke the deliberative process privilege after  
25 personal consideration. Answer at p. 40:19-20. The authority actually affirms that a non-agency  
26 head can assert the privilege. Rejecting a similar argument, the District Court for Delaware stated:

27 Plaintiffs have challenged whether the Chairman of the FTC is the “head” of the  
28 Commission for purposes of asserting the executive privilege claims with arguments  
that the Chairman is not able to act on behalf of the Commission as a whole. *The*

1 Court finds this argument to be unpersuasive because neo-literal compliance with  
2 the requirement that an agency head act in this context is unnecessary. That  
3 requirement was designed to deter governmental units from too freely claiming the  
4 privilege that it is not to be lightly invoked, (citation omitted), by assuring that some  
one in a position of high authority could examine the materials involved from the  
vantage point involving both expertise and an overview-type perspective. (Emphasis  
added.)

5 *A.O. Smith v. Federal Trade Commission*, 403 F. Supp. 1000, 1116 n. 48 (D. Del. 1975).

6 This Court need not adopt the “neo-literal” approach that Hyatt now espouses. The  
7 declaration by Paul Usedom, Chief of the Audit Division, arrests any doubt that the privilege is too  
8 freely used or indiscriminately invoked. Paul Usedom remains, contrary to Hyatt’s  
9 misrepresentation, in a position of high authority in FTB and took an overview-type perspective in  
10 cloaking the Carol Ford review notes and the Embry/Gould memorandum with the deliberative  
11 process privilege. Usedom individualizes his rationale for protecting these documents and explains  
12 the consequences to audit practices if the referenced writings are released. Not only would audit  
13 staff fear getting professional advice on the prudence of certain tax theories, but lower level staff  
14 would be less candid in their working discourse with other employees or risk ridicule by public  
15 disclosure. Usedom’s declaration and *A.O. Smith* conclusively put to rest Hyatt’s misplaced  
16 foundational objection.

17 **H. A Balancing of the Competing Interests Weighs Against Disclosing the FTB**  
18 **Documents.**

19 Adjudicating an assertion of substantial need requires a “balancing of the competing  
20 interests, taking into account factors such as the relevance of evidence, the availability of other  
21 evidence, the seriousness of the litigation, the role of government, and the possibility of future  
22 intimidation by government employees.” (*In re Sealed Case*, 121 F.3d at 737-738 (citation and  
23 internal quotation marks omitted).) The Discovery Commissioner and the district court failed to  
24 conduct a “balancing” analysis.

25 In this case, the balance weighs strongly against granting Hyatt access to FTB’s  
26 internal deliberations. First, and most significantly, granting such disclosure violates the  
27 sovereignty of California by intruding into a vital and important governmental process in which  
28 judicial intervention has been properly proscribed by California’s constitution and its Legislature

1 until the taxpayer has fully exhausted all administrative remedies. Second, an *in camera* review will  
2 show no connection or relevance between these internal, deliberative documents and the fanciful  
3 allegations about FTB audit activities in Nevada. Third, FTB has already given Hyatt access to a  
4 tremendous amount of information, including all of the factual documentation forming the basis for  
5 the issuance of the Notice of Proposed Assessment as well as the explanation for it. Fourth, Hyatt  
6 has offered no evidence that FTB has acted to thwart his motion to compel before the District Court  
7 in an improper or untoward manner. Fifth, as discussed throughout this reply, granting Hyatt access  
8 to FTB's internal deliberations would endanger the future candor of such discussions. On balance,  
9 clearly the documents should not be disclosed.

10 **I. Hyatt Has Not Established that FTB Waived its Deliberative Process Privilege.**

11 The arguments asserted by Hyatt on the deliberative process privilege go to the  
12 tension created between the FTB, the alter ego of the State of California, and the Nevada district  
13 court, which has in fact assumed subject matter jurisdiction over California's "entire tax process,"  
14 rather than the narrower subject of an inadvertent or direct disclosure of information covered by the  
15 privilege. The district court did not rule there was a waiver because there was no waiver of the  
16 privilege. A waiver would constitute a substantive disclosure of communications within the  
17 documents. This did not occur with any of the witnesses.

18 Significantly, Hyatt asserts no statutory or case law authority supporting his waiver  
19 argument nor does he characterize, describe or disclose to this Court the confidential information  
20 he claims was disclosed by waiver.

21 The fact that FTB produced witnesses for deposition proves nothing. FTB was  
22 compelled to produce the witnesses by order of the district court, whose very authority over FTB is  
23 being challenged by this writ and by FTB's Second Writ. FTB did not "allow" but was compelled  
24 by the district court to produce witnesses for volumes of testimony regarding its audit and  
25 investigation.

26 Hyatt makes several misstatements of fact that must be clarified for this Court's  
27 benefit. Carol Ford, as well as so many other witnesses, was ordered produced for deposition by  
28 a Discovery Commissioner determined to place the entire California tax process on trial in Nevada.

Hyatt has been given almost unlimited, carte blanche, access to all aspects of California income tax enforcement process. FTB did not volunteer Carol Ford's testimony. Moreover, Hyatt's characterization of her role in the audit is profoundly inaccurate and misleading. Carol Ford did not work on the Hyatt audit. As Hyatt well knows, Felix Soriano, Marc Shayer and Shelia Cox performed the audit. Carol Ford performed a review function of the underlying audit prior to the FTB issuing its Notice of Proposed Assessment. Carol Ford was not specifically involved in the evidence gathering process of the underlying audit. In other words, her role was a deliberative and evaluative review of the actual audit performed by others. The distinction is significant and explains the need for protection of her notes along with the deliberative Gould/Embry memorandum.

### III. Attorney-Client Privilege Issues and Attorney Work-Product Issues

#### A. Hyatt's Claims to the Individual Documents are Without Merit.

It is clear from an *in camera* examination of the documents at issue that the information contained therein contains legal advice from an FTB attorney regarding the audit which is protected from discovery. This Court has all of the relevant documents and will evaluate their content to determine whether they contain a transmission of privileged information, and FTB will not again argue the content issues to this Court. However, FTB will address Hyatt's arguments regarding the attorney-client privilege and attorney work-product issues.

Hyatt's claims may be summarized as follows:

- 1) Certain documents were never privileged because they communicated "business" and not "legal" advice;
- 2) FTB waived any privilege as to those documents distributed too widely;
- 3) FTB waived the privilege as to those documents reviewed by witnesses prior to their deposition; and
- 4) Certain documents were never privileged because FTB always intended that they would be disclosed to the taxpayer (Hyatt) as part of the administrative process.

Each argument will be addressed in turn.

#### 1. Business vs. Legal Advice

Hyatt's first claim is that FTB Documents 100126, 100139, 100209, 100218, 100401,

1 and 100908-100909, 101634-101645 and 101646-101656 all contain information that related to  
2 auditing "business," not legal advice, and are not privileged. Initially, documents 100126 and  
3 100209 are not at issue in this writ petition and were not included for review by this Court. The  
4 Discovery Commissioner has already concluded that these documents are privileged and protected  
5 from Discovery. (See, Petition, Exhibit 3, p. 4-5.) Hyatt did not object to that ruling, and the ruling  
6 became a final, non-appealable order. (E.D.C.R. 2.34(f).) Therefore, the issue of whether  
7 documents 100126 and 100209 are privileged is not properly before this Court.

8 As to documents 100139, 100218, 100401, 101634-101645 and 101646-101656, FTB  
9 refers this Court to the Petition at pages 19-23 and 25-26 for its arguments regarding why those  
10 documents are privileged.

11 Hyatt's claim that the subject matter of all of these documents withheld by the FTB  
12 is that of auditing business and not legal advice and, as such, cannot be privileged, ignores  
13 established case law. The United States Supreme Court has observed that "the first step in the  
14 resolution of any legal problem is the ascertaining of the factual background and sifting through the  
15 facts with an eye to the legally relevant." (*Upjohn Co. v. United States*, 449 U.S. 383 390-  
16 391(1981).) Therefore, "the privilege exists to protect not only the giving of professional advice to  
17 those that can act on it, but also the giving of information to the lawyer to enable him to give sound  
18 and informed advice." (*Id.*) Documents 100218, 100401, 100908-909, 101634-645 and 101646-  
19 656, the information that was communicated to Ms. Jovanovich, was required for her to provide  
20 sound and informed legal advice regarding the legality of decisions made in the tax audit and was  
21 privileged.

22 Document 100908-100909, the letter from auditor Marc Shayer to Anna Jovanovich,  
23 clearly contains information requesting legal advice, and cannot be considered an "update" of the  
24 progress of the audit as Hyatt alleges. Answer at p. 50. This letter, written to "Anna Jovanovich,  
25 Lead Technical Counsel," requests legal advice from Ms. Jovanovich on a theory of taxation. The  
26 document is exactly the type which is protected by the attorney-client privilege.

27 Document 07381 memorializes a conversation between FTB attorneys Richard Gould  
28 and Anna Jovanovich regarding legal issues. Ms. Jovanovich was acting in her capacity as an

1 attorney when the document was created. But even if she was not, but instead was the "client," it  
2 is undisputed by all parties that Richard Gould, the other party to the document, was an FTB  
3 attorney. The document provides a discussion of legal issues which are protected by the work-  
4 product doctrine and the attorney-client privilege. In his Answer, Hyatt has not contested the fact  
5 that this document is protected from discovery under the attorney-client privilege, and such a failure  
6 constitutes a waiver of the issue.

## 7 2. Waiver by Distribution

8 Documents 10288 and 10289-292 are minutes of a meeting between FTB employees  
9 and FTB attorney Richard Gould regarding sourcing issues, as recorded by FTB employee Monica  
10 Embry.<sup>2</sup> Hyatt erroneously argues that these documents are not privileged because they were not  
11 drafted by an attorney and were distributed to non-attorneys.

12 First, the fact that Mr. Gould did not actually draft the minutes does not impact  
13 whether the documents are privileged; the documents contain the minutes of a meeting between FTB  
14 employees and its attorney, Richard Gould, regarding legal theories of income sourcing for purposes  
15 of taxation. The fact that the minutes of that meeting were prepared by a non-lawyer does not  
16 preclude application of the privilege. (*See Zenith Radio Corp. v. Radio Corp. of America*, 121 F.  
17 Supp. 792, 794 (D. Del. 1954) (the attorney-client privilege extends to communication with the  
18 attorney or his or her subordinate, including office clerks and staff); *Handgards, Inc. v. Johnson &*  
19 *Johnson*, 69 F.R.D. 451, 453 (1975) (following *Zenith*).)

20 As was set forth in detail in FTB's Petition, the attorney-client privilege extends to  
21 communications between an attorney for a public agency and employees of that public agency. (*See*,  
22 *Petition at pages 16-17.*) Therefore, the discussion between the agency attorney and the agency  
23 employees, as recorded by one of those employees, was privileged, and the notes regarding that  
24 discussion are also privileged.

25 Second, Hyatt asserts that the FTB has waived any otherwise applicable work-product  
26 privilege because FTB showed some of the subject documents to legal and non-legal personnel

27  
28 <sup>2</sup>FTB has also claimed a deliberative process protection over these documents.

1 simultaneously. Answer at 50. However, Hyatt's argument and the cases cited in support of that  
2 argument are misleading and do not support the proposition that the documents at issue are not  
3 privileged.

4 Hyatt cites to *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4<sup>th</sup> Cir. 1988) in  
5 support of his waiver argument. However, in that case, the Fourth Circuit held only that disclosure  
6 of confidential material *outside a privileged relationship* will waive the privilege. There has been  
7 no such disclosure here. The only documents which were transmitted to non-legal personnel are  
8 10288 and 10289-292, but even then the distribution was to FTB employees, i.e., the "client," who  
9 had a privileged relationship with the FTB attorneys. As a sizeable organization, FTB carries out  
10 its tasks in a way similar to that of a large corporation. It is an established principle that the  
11 attorney-client privilege will apply to legal matters discussed between a corporation and its in-house  
12 counsel. (*United States v. Rowe*, 96 F.3d 1294 (9<sup>th</sup> Cir. 1996).) "This principle has been followed  
13 with virtual unanimity by American courts." (*Id.* at 1296 (quoting 2 Jack B. Weinstein et. al,  
14 Weinstein's Evidence par. 503(a)(2)[01], at 503-30 (1996).) *Upjohn Co. v. United States*, 449 U.S.  
15 383 (1981), suggested a need-to-know limitation on sharing privileged documents among corporate  
16 personnel not involved in these discussions. The FTB's audit of Hyatt involved the assessment of  
17 millions of dollars of unpaid taxes. The process of performing such a large audit necessarily  
18 involved a large number of agency personnel. Each of these individuals are, in their respective roles  
19 as agency personnel, clients of FTB's in-house counsel, and communications with them are made  
20 within the scope of their employment.

21 Even if this Court were to find that some FTB personnel who saw the documents did  
22 not "need to know" the confidential information contained therein, such fact alone does not create  
23 a waiver of the attorney-client privilege. The doctrine has a practical application to both the  
24 corporate and agency setting. In *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 141-142 (D.  
25 Del. 1982), the Court held, in a post-*Upjohn* opinion, that "the fact that some unauthorized corporate  
26 personnel may purposely or inadvertently read a privileged document does not render that document  
27 nonconfidential. To hold otherwise would be to require every corporation to maintain at least two  
28 sets of files. Moreover, a screening committee would then have to be set up whereby some



1 designated official could pass on the need of each employee to know the contents of any requested  
2 document. Such a system is neither practical nor in the Court's opinion required by the case law."

3           The FTB is the alter ego of the State of California. *Ford Motor Co. v. Department*  
4 *of Treasury*, 323 U.S. 459, 464 (1945). For the FTB to function as a tax regulating agency, it must  
5 have the ability to communicate freely with FTB counsel. It takes many agency employees to carry  
6 out the FTB's work according to the legal advice given by FTB counsel. It is impractical to think  
7 that all communications between agency personnel working on active tax investigations and FTB  
8 counsel could be confined to a strict and completely "need to know" basis. Any dissemination of  
9 the privileged documents at issue in the Petition has not been so egregious as to waive the attorney-  
10 client privilege that attaches thereto.

11           Hyatt's argument that the documents at issue cannot be transmitted to employees of  
12 the FTB without breaching the privilege is nonsense. The entire purpose of the attorney-client  
13 privilege is to allow an attorney to transmit legal advice to his or her client so that the client can  
14 utilize the information. In this case, the FTB attorneys were transmitting information to their clients  
15 — FTB agency employees — so that those employees could perform their jobs. Such a transmission  
16 of legal advice is squarely within the protection of the attorney-client privilege.

### 17           3. Waiver by Review Prior to Deposition

18           Hyatt also claims that FTB waived the attorney-client privilege based upon his  
19 supposition that Sheila Cox, an FTB employee, may have reviewed certain of the contested  
20 documents prior to having her deposition taken. However, Hyatt offers neither factual nor legal  
21 support for this proposition.

22           Hyatt also neglects to note that both the district court and the Discovery  
23 Commissioner have considered and rejected this argument. The fact that Sheila Cox reviewed  
24 portions of the voluminous Hyatt audit file in preparation for her deposition does not mean she  
25 reviewed the privileged documents or that those privileged documents refreshed her recollection on  
26 any matter that she testified to. Hyatt does not assert, and Sheila Cox did not testify, that she  
27 reviewed any privileged documents in preparation for her court ordered deposition testimony.  
28 Indeed, Hyatt is purposefully vague and misses the point. Hyatt, at the district court's and Discovery

1 Commissioner's direction, exhaustively examined Sheila Cox for nine days but is still unable to  
2 specifically identify any privileged documents Sheila Cox allegedly reviewed in preparation for her  
3 deposition testimony. This is because Sheila Cox never testified to having specifically reviewed any  
4 privileged documents in preparation for her deposition testimony.

5 Moreover, even if Hyatt could have established that Ms. Cox reviewed any privileged  
6 documents, which he can not do, Ms. Cox was either the recipient or creator of all but two of the  
7 documents at issue, FTB 100908-100909 and FTB 07381. Consequently, Ms. Cox had seen all but  
8 two of the documents at issue prior to her review of the file in conjunction with her NRCP 30(b)(6)  
9 deposition, and any additional review by her of the documents did not waive the privilege.

10 Furthermore, there is no evidence that Ms. Cox reviewed the remaining two  
11 documents, 100908-100909 and 07381. The only evidence is that she reviewed the file, which  
12 consisted of some 3,000 pages. There is no evidence that the two remaining documents were in that  
13 file. Hypothetically, even if Hyatt is correct that Ms. Cox "glanced" at these documents, a glance  
14 does not constitute a "review" which waives vital and important privileges. More importantly, the  
15 fact that a deponent prepares for her deposition by reviewing, not her attorney's mental impressions,  
16 but the communiques which have been sent between client and attorney, fails to effectuate a waiver  
17 of the attorney-client privilege.

18 The *Upjohn* court recognized that "a fact is one thing and a communication  
19 concerning that fact is an entirely different thing." (*Upjohn*, 449 U.S. at 395-96.) While Ms. Cox  
20 openly testified as to the facts giving rise to the FTB's fraud investigation of Mr. Hyatt, she did not  
21 waive the attorney-client privilege as to the documents at issue here, because she did not discuss the  
22 legal advice or information contained therein. A waiver of the attorney-client privilege applies "only  
23 with respect to the facts actually disclosed." (*Unites States v. Upjohn Co.*, 600 F.2d 1223, 1227,  
24 n.12 (6<sup>th</sup> Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981).) It is the undisclosed legal advice  
25 from an attorney to a client, or legal information from a client to an attorney in confidence, that is  
26 at the heart of the attorney-client privilege. It is that type of information sought to be protected here.

27 There was no authorized disclosure of attorney-client communications by Sheila Cox  
28 or any other FTB employee. The fact that Hyatt fails to specifically identify purposeful disclosures

1 by Sheila Cox or its employees underscores that there were no disclosures, inadvertent or otherwise,  
2 by the FTB that would constitute a waiver.

3                   **4. Intent to Publicly Disclose Documents**

4                   Hyatt also argues that Anna Jovanovich acted merely as a conduit of information  
5 contained in the audit file that the FTB intended for publication and, therefore, that the information  
6 in the file, including all of the contested documents, is not privileged. First, this argument was also  
7 considered and rejected by the Discovery Commissioner. Second, the case cited and relied upon for  
8 Hyatt's legal position is misleading in the current context. In *In re 3 Com Corp. Securities*  
9 *Litigation*, 1992 WL 456813 (N.D. Cal. 1998), the Federal Magistrate judge ruled that four press  
10 releases produced by 3 Com were not protected by the attorney-client privilege because, among other  
11 things, the press releases were intended for publication. Contrarily, the documents sought to be  
12 discovered by Hyatt were never intended for publication by the FTB. There is a substantial factual  
13 difference between 3 Com's press releases being reviewed for business purposes and the interoffice  
14 memoranda produced in an ongoing agency investigation.

15                   While it is true that some documents are included in the audit file that is eventually  
16 provided to the protesting taxpayer, FTB 101634-100645 and 101646-100656 are not such  
17 documents. Moreover, all privileged documents are removed from the audit file before that file is  
18 given to the taxpayer. (Exhibit 14 — FTB's Security and Disclosure Manual (H06595, H06678)  
19 (Exhibit 19 to Appendix of Exhibits in Support of Plaintiff Gil Hyatt's Post Hearing Memorandum  
20 of Points and Authorities re May 5, 1999 Hearing on Motions to Compel; included as Exhibit 5 in  
21 Hyatt's Appendix of Exhibits [Vol. II] Filed with the Supreme Court).) Ms. Jovanovich's role in  
22 receiving these documents was much more than that of an editor or a conduit, it was of legal counsel  
23 supervising the activities of the ongoing FTB investigation.

24                   A review of the audit file indicates that Sheila Cox sought Ms. Jovanovich's legal  
25 advice at critical stages of the audit. For example, after Hyatt refused to go forward with the audit  
26 for 1992 and there was a proposed fraud penalty assessment, there was communication on May 1,  
27 1997, between Ms. Jovanovich and Ms. Cox concerning the legal significance of Hyatt's conduct.  
28 (Exhibit 13 — Sheila Cox Progress Report (FTB 100553).) In the complicated world of interstate

1 residency tax audits, it is quite reasonable for the auditor to secure legal advice on the meaning of  
2 facts and conduct at each critical stage of an audit. The fact that the monetary value of the audit was  
3 so large underscores the importance of receiving sound legal advice at each critical stage of the audit.

4 **B. Hyatt's Argument Regarding The Crime-Fraud Exception To the Attorney-**  
5 **Client Privilege May Not Be Considered By This Court.**

6 Hyatt has misled this Court regarding the application of the crime-fraud exception  
7 to the attorney-client privilege in this case. Hyatt argued to the Discovery Commissioner, in a  
8 separate appendix to the underlying Motion to Compel, that the FTB auditors and attorneys engaged  
9 in fraudulent activity such that the Discovery Commissioner should invoke the "crime-fraud"  
10 doctrine to permit inspection of documents which otherwise would be protected by the attorney-  
11 client privilege. (See, Exhibit 4 to Answer.) However, Hyatt was unsuccessful in his argument, and  
12 the Discovery Commissioner stated that he "*was not going to embrace [the crime-fraud exception]*  
13 *as a reason for the recommendation on the production*" of documents which FTB claimed were  
14 protected by the attorney client privilege. (See, Petition, Exhibit 4, p. 75.) This finding was  
15 included in the Discovery Commissioner's Report and Recommendation, which stated: "The  
16 Discovery Commissioner found that a significant showing is necessary to conclude that a crime or  
17 fraud has been committed sufficient to invoke the crime/fraud exception and find waiver of the  
18 attorney-client privilege. Hyatt's assertion of the crime/fraud exception is not frivolous in this case,  
19 but the Discovery Commissioner will not Order at this time production of materials claimed to be  
20 privileged based on the crime/fraud exception." (Petition, Exhibit 3, page 4.)

21 Pursuant to E.D.C.R. 2.34(f), an objection to the Discovery Commissioner's Report  
22 and Recommendation must be filed in the District Court and served no more than five days after  
23 receipt of the Report and Recommendation, or else it becomes a final order. FTB filed its Objection  
24 in a timely fashion, but did not include in that Objection any challenge to the crime-fraud ruling.  
25 Petition, Exhibit 5. Hyatt filed no objection to the Report and Recommendation to challenge the  
26 denial of his assertion that the crime-fraud exception applies. Therefore, the ruling regarding the  
27 crime-fraud decision has become final and non-appealable.

28 Hyatt cannot now file in his Answer what is, in essence, a Petition for Writ of

1 Mandamus challenging the Discovery Commissioner's denial of his plea to apply the crime/fraud  
2 exception, because he has not followed the proper procedures for district court review to give this  
3 Court jurisdiction to adjudicate the issue. For Hyatt to place this issue before the Court, he needed  
4 to have properly challenged the decision by filing an Objection in the district court, and then, after  
5 receiving a ruling affirming the decision, filing his own Petition for Writ of Mandamus with this  
6 Court explaining why such writ relief was necessary. Hyatt has not done so. The decision became  
7 final and non-appealable, and he is precluded from raising the issue in this Court. (See, e.g.,  
8 *Whitman v. Whitman*, 108 Nev. 949, 950, 840 P.2d 1232, 1233 (1992) (an untimely notice of appeal  
9 fails to vest jurisdiction in the Nevada Supreme Court).)

10 Because the issue of the crime-fraud exception is not properly before this Court, all  
11 of the information presented by Hyatt in support of that claim should be ignored. Hyatt was aware  
12 that he was precluded from raising the crime-fraud issue because he did not challenge the decision  
13 in the district court, yet he included the argument anyway, and attempted to support it by including  
14 his most incendiary and inflammatory allegations against the FTB. Hyatt's approach is nothing  
15 more than another transparent attempt to predispose this Court against FTB in general, in the hope  
16 that such action will result in a ruling in his favor on the specific discovery issues now before this  
17 Court. That should not be permitted by this Court.

#### 18 IV. The District Court erred in Permitting 19 the Entry of The Protective Order

##### 20 A. The District Court's Order That the Scope of the Discovery is "The Entire 21 Audit and Assessment Process Performed by the FTB That Was and Is Directed 22 at Hyatt" Was Improper.

23 Hyatt claims that the district court properly concluded that the scope of discovery in  
24 this action is "the entire audit and assessment process performed by the FTB that was and is directed  
25 at Hyatt." (Answer, p. 66.) As a result, Hyatt also claims that the protective order, which permits  
26 Hyatt to engage in discovery regarding the entire audit process and all of FTB's actions, regardless  
27 of whether they occurred in Nevada, California, or elsewhere, was proper.

28 Hyatt's argument regarding the scope of the discovery, and the validity of the  
protective order which encompasses that scope, illustrates why this Petition should be read and

1 analyzed in conjunction with FTB's Second Writ (Case No. 36390), and why the FTB has filed a  
2 Motion to Consolidate the two writ petitions. In the Second Writ, the FTB has set forth the reasons  
3 why litigation about the FTB audit process is beyond the jurisdiction of the Nevada district court.  
4 This Court's determination regarding the validity of the protective order is intimately tied to its  
5 determination of the larger jurisdictional issues raised by FTB in the Second Writ.

6 Rather than restate the arguments set forth in FTB's Second Writ, FTB refers this  
7 Court to that petition for the full explanation of its jurisdictional arguments. In summary, FTB has  
8 asserted that Hyatt's case must be dismissed because the district court exceeded its subject matter  
9 jurisdiction by concluding that the entire scope of the audit, and all of FTB's actions, whether  
10 occurring in Nevada, California, or elsewhere, are at issue in the litigation. FTB has asserted that  
11 such a ruling constitutes an improper exercise of the district court's jurisdiction because it  
12 improperly permits litigation against a California governmental agency for its fulfillment of an  
13 inherent sovereign function, taxation. Under the theories of Full Faith and Credit, Comity, and  
14 Choice of Law, the district court must apply California's law to Hyatt's lawsuit, and that California  
15 is immune from such lawsuits under its own laws.

16 This Court's ruling on the issues presented in FTB's Second Writ will likely dispose  
17 of the FTB's issues regarding the protective order. If this Court agrees with the FTB and dismisses  
18 Hyatt's lawsuit, there will be no need to address the protective order issues. At a minimum, the  
19 Court's decisions regarding the issues presented in the Second Writ will have an impact on the  
20 protective order issues raised in the Petition.

21 **B. The Protective Order Unfairly Hinders FTB's Ability to Prosecute This**  
22 **Litigation.**

23 Even if this Court concludes that the district court did not exceed its jurisdiction in  
24 permitting the discovery contemplated by the protective order, the protective order still should be  
25 stricken because of its prejudicial impact on FTB. As an initial matter, this Court should understand  
26 the broad scope of the protective order. Pursuant to the protective order, "Confidential Information"  
27 encompasses not only documents which the parties mark as "Confidential," but also answers to  
28 interrogatories, answers to requests for admission, and any testimony given by any party or its

1 officers, directors, agents, and/or employees, and the testimony of third parties, whether at trial or  
2 in a deposition. (Petition, Exhibit 6, p. 3: 3-8.)

3 Additionally, pursuant to the terms of the protective order, the dissemination of any  
4 material marked "Confidential" is limited to certain people. The protective order states as follows:

5 Hyatt Confidential Information may not be disclosed,  
6 revealed, or disseminated by the FTB and its counsel and FTB  
7 Confidential Information may not be disclosed, revealed, or  
disseminated by Hyatt and his counsel except to the following  
individuals and in the following manner:

- 8 (i) To the counsel of record for the opposing party and counsel  
9 for any witnesses and their respective stenographic, clerical,  
10 and paralegal employees. It shall be the responsibility of the  
11 attorneys to insure that their respective stenographic, clerical,  
and paralegal employees understand and comply with the  
Protective Order. Violation of the Protective Order by any  
employee will be imputed to the attorneys.
- 12 (ii) To the Opposing Party. In the case of the FTB this includes  
13 employees, officers, and board members to the extent  
necessary to assist FTB Counsel in the defense of this Action.
- 14 (iii) To court reporters and videographers covered by Paragraph 9  
15 herein, after reading this Protective Order and executing a  
copy of Exhibit A attached hereto.
- 16 (iv) To experts or consultants, whose advice and consultation are  
17 being or will be used by the opposing Party in this Action,  
provided that such experts or consultants read this Protective  
Order and execute a copy of Exhibit A attached hereto.
- 18 (v) To such other persons as hereafter may be designated by  
19 written stipulation of the Parties or by further order of the  
20 Court on motion by either party subject to the notice  
provisions of Paragraph 16 below.

21 Petition, Exhibit 6, p.3-4.

22 FTB is prohibited from showing "Confidential Information" to any "person, firm,  
23 corporation, or other entity not expressly authorized by this Protective Order." (*Id.*, p. 4:24-25.)  
24 This means that FTB cannot show, or even discuss, a huge body of evidence with non-party  
25 witnesses to this case. This cripples FTB's ability to prepare those non-party witnesses for

26 ///

27 //

28 //

1 deposition, or even to discuss the case with those witnesses to evaluate its case.<sup>3</sup> Therefore, while  
2 the FTB can use the "Confidential Information" for "discovery, in preparation of discovery, in  
3 preparation for trial, trial, and any appeals related to this action," that use is still severely and  
4 unfairly limited by the protective order.

5 Compounding this limitation is the fact that Hyatt has abused the use of the  
6 "Confidential" stamp in this case. Hyatt claims that his designation of material as "Confidential"  
7 has been "extremely limited." (Answer, p. 74 :13.) Such a statement is blatantly untrue. For  
8 example, Hyatt has marked the entire FTB audit file for the years 1991 and 1992 as confidential,  
9 even though these documents were in the possession of the FTB prior to this litigation and they  
10 contain nearly every document relevant to Hyatt's lawsuit. (See Hyatt's Table of Contents-Global  
11 to his document index, attached hereto as Exhibit 11.)

12 Hyatt asserts that he cannot rely on the general prohibition on the disclosure of tax  
13 information in California law because the FTB and other authorities willfully violate the  
14 proscriptions against unauthorized disclosures. However, in California there are in place numerous  
15 laws to ensure and protect the confidentiality of taxpayers. Indeed, the only disclosures pertaining  
16 to Hyatt occurred during the course of the audit itself and were permissible under California law.

17 Hyatt's "Table of Contents-Global," which designates many categories of documents  
18 as "Confidential," reveals more abuses on its face. For example, Hyatt marked as confidential the  
19 "news file" in Volume 2 which consists of an accumulation of news articles from various  
20 newspapers and industry publications. These documents (H01010-H01173) alone are 163 pages of  
21 published news articles on Hyatt. Copies will be provided only if the Court requests them.

22 The third entry in Vol. 1 (H00036) describes a video tape containing a nationally  
23

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24 <sup>3</sup>An example of how the protective order is improperly tying FTB's hands in defending this  
25 case arose at the recent deposition of Hyatt's Taxpayer Representative during the audit, Mr. Michael  
26 Kern. Kern testified that he allowed Hyatt to execute a false, and therefore perjurious, Clark County  
27 voter registration statement based upon the legal advice of a member of a prominent Las Vegas law  
28 firm. Normally, defense counsel would simply call the attorney identified by Kern and informally  
inquire into the matter before deciding if they need to proceed more formally. The Protective Order,  
however, precludes the FTB's counsel from doing so because Hyatt has designated Kern's entire  
deposition as "Confidential."



1 televised Hard Copy program regarding a divorce decree contest by the former Mrs. Hyatt and  
2 includes a video presentation of Hyatt's "secret" Las Vegas residence on Tara Avenue. Of course,  
3 this is public information which should not be the subject of any special handling or restrictions in  
4 discovery. The same is true of the Comdex news release which was obviously intended for  
5 publication. (Volume 12, H 04903). The copy of NRS 483.082-483.245 is obviously public  
6 information. (H07045-47). The Nevada DMV's Driver's Handbook is a public, government  
7 publication. (H 07125-190). The University of Southern California School of Engineering Alumni  
8 Directory excerpts, showing Mr. Hyatt's address and telephone number, is obviously a public  
9 document. (H 06083-87).

10 The Vol. 23 "Landscaping" materials (H 09266-831), include such public information  
11 as the publication "Operation Desert Lawn" distributed by the Las Vegas Valley Water District and  
12 the Arizona Native Plant Society's publication "Desert Flowers" (H 09266-339 and H 09340-64).

13 The Vol. 23 "Hyatt Patents," consist of a list of patents (public information) and the  
14 patents listed (only the first page of each patent is marked). (H 09428-527). A United States Patent  
15 is the absolute opposite of a "confidential" document. A patent is filed in the public Patent Office  
16 filings for all the world to see. The publication of the patent is what gives notice to the world of the  
17 patent claims and inventors. These are but a small few of the many examples of Hyatt designating  
18 public information as "Confidential." Again, actual copies will be submitted if the Court requests.

19 If any Protective Order is appropriate at all, the proposed protective order tendered  
20 by the FTB should be substituted for the one entered by the district court as it offers whatever  
21 protection Hyatt might reasonably need. This protective order is attached hereto as Exhibit 12. It  
22 imposes no special burden on either party. It allows both sides to use discovery materials in the  
23 conduct of this litigation without giving either side unfair advantage. It does not restrain either party  
24 from using discovery materials in the parallel California tax proceedings initiated by Mr. Hyatt just  
25 prior to this litigation. It should be noted that *the Court file has already been sealed* by the  
26 Discovery Commissioner and the FTB has agreed to restrict use of discovery materials to this  
27 litigation and the California tax proceedings. Hyatt made no showing whatsoever of any need for  
28 additional protection. Although Plaintiff's counsel argues by affidavit that Hyatt's protective order

1 is "standard," no evidence of this is provided.

2 Hyatt has provided no legitimate reason as to why the general presumption favoring  
3 open and public trials should not apply here. The principal question presented by the lawsuit is  
4 whether a sovereign state in performing a legitimate and constitutional public function, the collection  
5 of taxes, in some way violated the personal rights of Mr. Hyatt and the laws of a sister state. As  
6 such, the unique rules governing public entity litigation should apply rather than the rules normally  
7 used in commercial litigation. Unlike commercial litigants who are not bound by statutory  
8 restrictions regarding confidentiality of information and therefore need confidentiality agreements  
9 and protective orders, the FTB is a government entity which is bound by statutes, public policies and  
10 internal procedures which provide extensive protection.

11 The proposed protective order tendered by the Board is simple, workable and fair,  
12 and incorporates all of the statutory protections to which Hyatt is entitled. On the other hand, the  
13 protective order entered by the district court, is, in practical effect, one-sided, oppressive and  
14 burdensome for both the FTB and the Court.

15 **C. California law governing the FTB must be recognized in considering any**  
16 **protective order.**

17 The protective order also purports to restrict severely the FTB's ability to utilize in  
18 its administration process the documents, information, and testimony designated by Hyatt as  
19 "Confidential Information" in this case. (See, Protective Order, Exhibit 6 to the Petition, at Para 4.  
20 pp. 4-5.) The district court lacks this power. In effect, Hyatt wants the district court to erect a  
21 "Chinese Wall" between the FTB's staff handling the Nevada litigation and its staff handling Hyatt's  
22 obviously intertwined tax and penalty assessment protest proceedings. However, as has been set  
23 forth in full in FTB's Second Writ, Hyatt was precluded under California law from filing this lawsuit  
24 in California. Hyatt has attempted to skirt this prohibition by filing this case in Nevada, and now  
25 wants the district court to further intrude into California's sovereign power by restricting California's  
26 ability to utilize documents legitimately obtained by the FTB in litigation *initiated by Hyatt*.

27 Hyatt argues, and the district court agreed, that California law governing the FTB  
28 should be ignored in preparing the protective order. First, with respect to handling the "Confidential

Information," the district court lacks the power to alter the California laws and regulations which govern how FTB handles its administrative process. Additionally, with respect to the discovery of FTB materials allowed by the protective order, such a ruling is fundamentally unfair given that Hyatt is suing the FTB, the alter ego of the State of California, for actions taken by the FTB when it was carrying out its duties mandated by California law. During all such times, FTB was acting lawfully under the rules and laws of the State of California. To ignore those rules and laws now is prejudicial to the FTB. The FTB acted under a defined set of rules when it created all of the documents at issue in this case, and those rules provided the parameters of what would be discoverable by the taxpayer. To now cast those rules aside and make FTB conform to the discovery rules of Nevada, a separate sovereign state which has no authority over the FTB, is not only unconstitutional, but fundamentally unfair.

Hyatt is represented by five law firms in this litigation, including three California law firms with scores of attorneys. Hyatt's California tax attorneys are well aware of the California laws and procedures referenced in FTB's proposed protective order. These have been the subject of Hyatt's extensive discovery, including dozens of depositions inquiring into confidentiality policies and procedures, and production of related documents and manuals.

The FTB's proposed protective order provides for the Nevada Court's order that the following protections offered under California law and procedure be complied with in addition to the other restrictions volunteered by FTB in its proposed protective order:

3. The FTB's obligation hereunder as to treatment of confidential information regarding Hyatt shall be to treat such matters consistent with Calif. Rev. & Tax Code sections 19542 and 19547 and in accordance with the FTB's "need to know" internal policy, FTB Legal Branch confidentiality policies, the FTB's Security and Disclosure Manual and directives of the Franchise Tax Board. Hyatt's obligation hereunder shall be to use information and documents designated by the FTB as confidential only for purposes of preparation for and trial of this action and in the protest hearing proceedings before the FTB for 1991 and 1992, any subsequent appeal to the California Board of Equalization, related judicial review in the California Superior Court or related appeal (the "Hyatt residency proceedings").

The statutes cited in the FTB's proposed protective order bind the agency, impose severe penalties if violated and offer powerful protection for Mr. Hyatt. For the Court's

convenience, the text of each of the applicable statutes is as follows:

California Revenue & Taxation Code sections 19542 and 19547 provide:

§ 19542 - Disclosure of information from filed returns, reports or documents as misdemeanor. Except as otherwise provided in this article and as required to administer subdivision (b) of Section 19005, it is a misdemeanor for the Franchise Tax Board or any member thereof, or any deputy, agent, clerk, or other officer or employee of the state (including its political subdivisions), or any former officer or employee or other individual, who in the course of his or her employment or duty has or had access to returns, reports, or documents required to be filed under this part, to disclose or make known in any manner information as to the amount of income or any particulars (including the business affairs of a corporation) set forth or disclosed therein.

§ 19547 - Inspection of return or return information by legal representative of State. In a matter involving tax administration under this part, a return or return information shall be open to inspection by the Attorney General or other legal representatives of the state, if any of the following apply:

(a) The taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of the taxpayer's civil liability with respect to any tax imposed under Part 10 (commencing with Section 17001) or Part II (commencing with Section 23001).

(b) The treatment of an item reflected on the return is or may be related to the resolution of an issue in the proceeding or investigation.

(c) The return or return information relates or may relate to a transactional relationship between a person who is a party to the proceeding and the taxpayer, which affects or may affect, the resolution of an issue in the proceeding or investigation.

In addition, the Attorney General may inspect any report or return required under this part when required in the enforcement of any public or charitable trust or in compelling adherence to any charitable purposes for which any nonprofit corporation is formed.

Criminal penalties are also imposed by California Revenue & Taxation Code, section 19552:

§ 19552 - Use of information furnished or secured under article or other provisions of law; Unwarranted disclosure as misdemeanor. Except as otherwise provided by this article, the information furnished or secured pursuant to either this article or the express provisions of law, shall be used solely for the purpose of administering the tax laws or other laws administered by the person or agency obtaining it. Any unwarranted disclosure or use of the information by the person or agency, or the employees and officers thereof, is a misdemeanor.

1 The FTB's proposed protective order references its obligations under California  
2 Revenue & Taxation Code sections 19542 and 19547, as well as its "need to know" internal policy,  
3 FTB Legal Branch confidentiality policies, the FTB's Security and Disclosure Manual and directives  
4 of the Franchise Tax Board. These include the "ADMINISTRATION CONFIDENTIALITY AND  
5 SECURITY OF DATA POLICY", the "STATEMENT OF INCOMPATIBLE ACTIVITIES AND  
6 RULES OF CONDUCT FOR DEPARTMENTAL EMPLOYEES" and the "EMPLOYEE  
7 RECEIPT" attached hereto as Exhibit 13.

8 Hyatt objects to reference to these specific protections, undoubtedly so Hyatt can  
9 claim that California precedent regarding their interpretation does not apply. These statutes provide  
10 Hyatt with more protection than he would ordinarily be entitled to in Nevada litigation, and would  
11 still be applied by the FTB for Hyatt's benefit whether or not specifically referenced. Any order  
12 should then simply require that discovery materials be used by the defense for purposes of this  
13 litigation and as required in the FTB's capacity as a California government agency. Any other  
14 restriction should require a showing of good cause by Hyatt as to specific documents or information.

15 Hyatt filed a California Part Year Resident return for taxable year 1991 with FTB.  
16 That return, and other tax and penalty issues, are currently at issue in administrative proceedings now  
17 pending before the FTB in California. It is the FTB's position that all documents or information  
18 bearing on the residency issue sought in the FTB's discovery and received by FTB during this  
19 litigation, or during and as part of the administrative process, whatever its source, is subject to  
20 California disclosure laws as set forth in the California Revenue and Tax Code as outlined in FTB's  
21 proposed protective order. This litigation and the district court's protective order does not, and  
22 cannot, impact Hyatt's statutory protections with respect to the FTB. Nor can it affect how FTB  
23 conducts that administrative proceeding, including what materials its officials review and consider  
24 in the conduct of those proceedings, or what personnel are or are not permitted to participate.

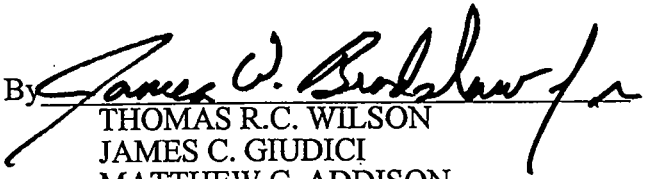
25 Hyatt's Answer raises the issue that if he appeals the FTB's final decision to the  
26 California Board of Equalization ("BOE"), the matters included in the appeal may be disclosed in  
27 these public proceedings. What Hyatt does not disclose is that he can request that the BOE seal  
28 records which are particularly sensitive, arrange for advance notice from the BOE if it intends to use

1 the sealed items in a public proceeding and petition the California Superior Court for protection.  
2 Instead, Hyatt attempts to avoid the California agency's access by requiring it to come begging to  
3 the Nevada Court for access or proceed with unnecessarily duplicate discovery in the California and  
4 Nevada proceedings which are going on at the same time. This should not be allowed by the Nevada  
5 Court.

6 All of these reasons highlight why the district court abused its discretion in entering  
7 Hyatt's protective order. This Court should remedy that abuse by either striking the protective order  
8 altogether or, in the alternative, by ruling that the FTB's proposed protective order, attached hereto  
9 as Exhibit 12, be entered instead.

10 DATED this 8<sup>th</sup> day of August, 2000.

11 McDONALD CARANO WILSON McCUNE  
12 BERGIN FRANKOVICH & HICKS

13 By   
14 THOMAS R.C. WILSON  
15 JAMES C. GIUDICI  
16 MATTHEW C. ADDISON  
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22 Reno, NV 89505-2670  
23 (775) 788-2000

24 Attorneys for Petitioner Franchise Tax Board  
25  
26  
27  
28

**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing -  
**FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA'S PROPOSED REPLY IN SUPPORT OF ITS PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION** on this 8<sup>th</sup> day of August, 2000, by depositing same in the United States Mail, postage prepaid thereon to the addresses noted below, upon the following:

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

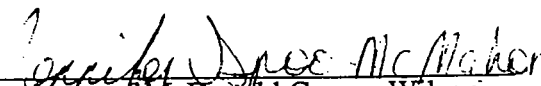
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Felix Leatherwood, Esq.  
Deputy Attorney General  
Attorney General's Office  
300 South Spring Street  
Los Angeles, CA 90013

Honorable Nancy Saitta  
Eighth Judicial District Court  
of the State of Nevada,  
in and for the County of Clark  
200 S. Third Street  
Las Vegas, NV 89155

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

# **EXHIBIT 28**



IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35549

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR  
THE COUNTY OF CLARK, AND THE  
HONORABLE NANCY M. SAITTA,  
DISTRICT JUDGE,

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest

**FILED**

SEP 13 2000

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *S. Richards*  
CHIEF DEPUTY CLERK

No. 36390

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR  
THE COUNTY OF CLARK, AND THE  
HONORABLE NANCY M. SAITTA,  
DISTRICT JUDGE,

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest.

ORDER CONSOLIDATING PETITIONS IN DOCKET NOS. 35549 AND 36390,  
DIRECTING AN ANSWER IN DOCKET NO. 36390 AND CLARIFYING ORDER  
GRANTING TEMPORARY STAY IN DOCKET NO. 35549

These original petitions for a writ of mandamus  
and/or prohibition challenge the district court's protective  
order and order compelling petitioner to release certain  
documents to the real party in interest (Docket No. 35549) and  
the district court's exercise of subject matter jurisdiction

00-16084

over the real party in interest's tort action against petitioner (Docket No. 36390).

On July 7, 2000, petitioner filed a motion to consolidate the petitions in Docket Nos. 35549 and 36390. We conclude that in the interest of judicial economy, these matters should be consolidated. See NRAF 3(b). Accordingly we hereby consolidate Docket No. 35549 and Docket No. 36390 for disposition.<sup>1</sup>

In addition, having reviewed the petition in Docket No. 36390, it appears that an answer is warranted. Therefore, the real party in interest, on behalf of respondents, shall have thirty (30) days from the date of this order within which to file an answer addressing the issues raised in Docket No. 36390.

Finally, on June 15, 2000, the real party in interest filed a motion for clarification of our June 7, 2000, stay order entered in Docket No. 35549.<sup>2</sup> Specifically, the real party in interest requests clarification as to whether we intended to temporarily stay all proceedings in the district court. In our June 7, 2000, order we temporarily stayed the

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<sup>1</sup>In light of our order consolidating the writ petitions in Docket Nos. 35549 and 36390, we deny as moot petitioner's August 8, 2000, request to file a reply in support of its motion to consolidate these two petitions. We grant petitioner's request to file a reply in support of its petition for writ of mandamus or prohibition in Docket No. 35549. The clerk of this court shall file the reply and appendix provisionally received on August 8, 2000. We deny the real party in interest's motions to strike proposed replies filed on August 21, 2000.

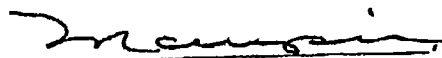
<sup>2</sup>In light of our order, we deny as moot the real party in interest's request to file a reply in support of its motion for clarification.

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district court's orders imposing a protective order and compelling petitioner to release certain documents, as well as the proceedings in District Court Case No. A382999. Our June 7, 2000, order was intended to stay all proceedings in the district court. The stay of the district court proceedings will remain in effect until further order of this court.

It is so ORDERED.

  
Rose C.J.

  
Maupin J.

  
Shearing J.

cc: Hon. Nancy M. Saitta, District Judge  
California Attorney General  
McDonald Carano Wilson McCune Bergin Frankovich & Hicks  
Thomas K. Bourke  
Riordan & McKenzie  
Hutchison & Steffen  
Bernhard & Leslie  
Clark County Clerk

# **EXHIBIT 29**

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Deputy Attorneys General  
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IN THE SUPREME COURT OF THE  
STATE OF NEVADA

\*\*\*\*\*

17 FRANCHISE TAX BOARD OF THE  
STATE OF CALIFORNIA,  
18  
19 Petitioner,  
20 vs.  
21 EIGHTH JUDICIAL DISTRICT COURT of  
the State of Nevada, in and for the County of  
Clark, Honorable Nancy Saitta, District  
22 Judge,  
23 Respondent,  
24 and  
25 GILBERT P. HYATT,  
26  
27 Real Party in Interest.

Case No.: 36390  
Consolidated with Case No. 35549

FRANCHISE TAX BOARD OF THE  
STATE OF CALIFORNIA'S REPLY IN  
SUPPORT OF ITS PETITION FOR A  
WRIT OF MANDAMUS ORDERING  
DISMISSAL, OR ALTERNATIVELY  
FOR A WRIT OF PROHIBITION AND  
MANDAMUS LIMITING THE SCOPE  
OF THIS CASE

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Case No.: 35549/36390 (Consolidated)

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## INTRODUCTION

The Franchise Tax Board of the State of California's writ petition in Docket No. 36390 ("the Jurisdictional Writ") concerns the constitutional and judicial authority of Nevada state courts to adjudicate real party in interest Gilbert P. Hyatt's tort claims involving the taxation decisions and actions of the California government. The FTB asserts in its Jurisdictional Writ that Nevada state courts do not have subject matter jurisdiction over the conduct involving California's taxing process about which Hyatt complains. In the alternative, the FTB asserts that the subject matter jurisdiction of Nevada state courts is at least limited to the Nevada acts and contacts of the FTB involving Hyatt, given that California's own immunity and administrative exhaustion laws apply, at a minimum, to the FTB's non-Nevada conduct.

Hyatt's October 13, 2000 Answer to the FTB's Jurisdictional Writ includes all varieties of negative and inflammatory allegations against the FTB, including allegations of bigotry and racial epithets, which the FTB flatly denies. Hyatt includes these allegations to try to divert this Court from the legal issues presented in this writ petition, and to prejudice and predispose this Court against the FTB. In this regard, Hyatt's Answer to the Jurisdictional Writ is similar to his Answer to the FTB's writ petition in Docket No. 35549 ("the Discovery Writ"), which has been consolidated with the FTB's Jurisdictional Writ. Both of Hyatt's Answers include misleading and improper "spin," self-serving allegations, misstatements of law and facts, and statements that directly contradict statements in prior pleadings. Taken together, Hyatt's two Answers also include a virtual mountain of documents, reflecting Hyatt's additional strategy of filing so much paper that this Court is hindered in its efforts to conduct a full analysis of the issues in these proceedings.

Sifting through all of Hyatt's paper and rhetoric, Hyatt's Answer to the Jurisdictional Writ is legally wrong and fundamentally unsound. Hyatt's request that this Court summarily dispose of the FTB's Jurisdictional Writ under *State ex rel. Dep't of Transportation v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983) should be rejected. Hyatt's argument that the California government is not entitled to application of its own immunity and administrative exhaustion laws as a matter of Full Faith and Credit is also wrong. The exception to *Nevada v. Hall* exists, has been applied, and should be applied to this case. Constitutional choice-of-law and comity principles compel the same conclusion.

1 Limiting plaintiffs with complaints about the FTB's taxation actions and decisions to the California  
2 statutory remedies that are available in California courts is both appropriate and fair. *See, e.g., Cal.*  
3 *Rev. and Tax. Code § 21021.* Nevada's own administrative exhaustion/ripeness laws are also a basis  
4 for ending this case, and nothing that Hyatt says supports a contrary conclusion. In the alternative,  
5 and at a minimum, Hyatt's case should be limited to litigation over the California government's  
6 Nevada acts and contacts involving Hyatt, as any other result would reflect a wholesale disregard for  
7 California's immunity and administrative exhaustion laws.

8 Hyatt's case should not be allowed to proceed as if California's immunity and administrative  
9 exhaustion laws do not exist. The Court should grant writ relief that acknowledges the California  
10 government's sovereignty over its tax processes.

#### 11 ARGUMENT

##### 12 1. The Court is not obligated to accept Hyatt's unsupported spin.

13 As an initial matter, Hyatt's suggestion that this Court must accept as true every "fact" that  
14 Hyatt alleges should be rejected. The FTB's motion to the district court was not a motion to dismiss  
15 for failure to state a claim. Instead, it was a motion to dismiss for lack of subject matter jurisdiction  
16 based on evidence, not the pleadings, coupled with an alternative motion for summary judgment that  
17 was based on evidence as well. (*See App. Ex. 7.*) Both types of motions allow the Court to look  
18 beyond the hyperbole in Hyatt's First Amended Complaint and Answer to the FTB's Jurisdictional  
19 Writ and to consider the actual evidence that was before the district court on the motions. This is what  
20 the Court should do.

21 At pages 5-16 of the Jurisdictional Writ, the FTB provided the Court with a concise statement  
22 of the undisputed facts with specific record citations. The FTB's evidence underlying its statement  
23 of facts shows how FTB employees took various actions to try to verify Hyatt's change of residency  
24 claim. FTB auditors requested relevant information from Hyatt's taxpayer representatives. (*See App.*  
25 *Ex. 7 at 6-9 (FTB's Motion for Summary Judgment or Dismissal) (citing App. Ex. 8, Cox Affd.).*)  
26 Some FTB information requests required multiple request letters to Hyatt's representatives; some FTB  
27 information requests were never satisfied despite repeated requests. (*See App. Ex. 7 at 6-7 (citing App.*  
28 *Ex. 8, Cox Affd.).*) Some information that Hyatt provided raised more questions with FTB auditors

1 than it answered. (See App. Ex. 7 at 6-9 (citing evidence in App. Ex. 8, Cox Aff.)) FTB provided  
2 several examples: 1) Hyatt's various claimed departure dates from California to Nevada; 2) Hyatt's  
3 failure to account for his whereabouts between late September and late October, 1991, despite  
4 repeated requests; 3) Hyatt's rental of a Las Vegas apartment well after his claimed moved date; 4)  
5 Hyatt's credit card information showing substantial California activity after his claimed move; 5)  
6 Hyatt's false Nevada voter registration, and 6) Hyatt's patent license agreements signed after Hyatt's  
7 claimed move that suggested that Hyatt was still in California. (Jurisdictional Writ at pages 7-12.)

8 The decisions to issue the Notices of Proposed Assessment were based upon many factors that  
9 FTB considered during the course of its attempt to verify Hyatt's change of residency claim.  
10 Because Hyatt did not provide any information as to where he lived during the critical time period  
11 September 26 — October 20, the statutory presumption of full year residency in Cal. Rev. & Tax  
12 Code § 17016 stood un rebutted. The issue of where he lived September 25 — October 20<sup>th</sup> was just  
13 one item of information the FTB needed, but as shown in the Petition at 9, Hyatt failed to provide such  
14 information when asked repeatedly.

15 The correspondence between the FTB and Hyatt regarding this crucial issue shows how  
16 evasive Hyatt was during the audit process, and how disingenuous he is being now. In the FTB's  
17 August 2, 1995, tentative position letter, the FTB auditor explained her understanding of the facts at  
18 that time and specifically informed Hyatt's taxpayer representative that she had no information as to  
19 where Hyatt resided from September 24, 1991 through November 1, 1991 (PBTk 05947, 05952,  
20 05954 and 05955). She concluded the letter with a request that, if her understanding of the facts was  
21 incorrect, she be provided with additional information since her position was still only tentative.  
22 (PBTk 05975).

23 A complete copy of the audit file is included in Hyatt's mass of exhibits before this Court. For  
24 the Court's convenience, another copy of the August 2, 1995 tentative position letter (PBTk 05947-  
25 05986) is submitted as Reply Appendix 1, along with the other audit correspondence cited herein.

26 Hyatt's representative responded on August 29, 1995 that while Hyatt's lease commenced on  
27 November 1, 1991, he actually moved in on a paid pro-rated rent on October 20, 1991. (PBTk05992)  
28 (Reply Appendix Exhibit 2). On August 31, 1995, the FTB responded to this letter specifically asking

1 consistently provided evasive, incomplete, and illogical responses, the FTB auditors were forced to  
2 take additional action and contact third-parties to verify Hyatt's claims. Hyatt's complaints about  
3 these FTB actions ring hollow, as they were a product of his own actions. A person being investigated  
4 cannot give only the information he chooses or otherwise control the investigation, as Hyatt attempted  
5 to do during the audit. *See, e.g., NLRB vs. United Aircraft Corp.*, 200 F. Supp. 48, 51 (D. Conn.  
6 1961), *aff'd*, 300 F.2d 442 (2d Cir. 1962). Such a person also cannot later complain about the  
7 agency's decision to take action, as Hyatt is doing in this case. *See id.* Courts have long rejected  
8 attempts to impose tort liability upon agencies because they did not accept a person's claim but instead  
9 conducted their own investigation and rejected the claim. *See, e.g., Gibson vs. Reynolds*, 77 F.Supp.  
10 629, 640 (D. Ark. 1948), *aff'd* 172 F.2d 95 (8<sup>th</sup> Cir. 1949), *cert. denied*, 337 U.S. 925.

11 Just as a person who seeks damages for alleged injuries must expect the claim will be  
12 investigated, Hyatt had to expect the FTB would check his change of residency claim. Hyatt had no  
13 right to have that audit conducted in complete secrecy, which is what all of his "spin" necessarily  
14 suggests. *Haines v. Askew*, 368 F. Supp. 369, 376 (M.D. Fla. 1973), *aff'd*, 417 U.S. 901 (1974).

15 In addition, much of Hyatt's "spin" has no basis in fact. The most egregious of Hyatt's  
16 misstatements are as follows:

17 **Hyatt spin:** FTB disclosed Hyatt's secret technology. (Hyatt Answer at 12.)

18 **Facts:** The FTB never disclosed to any person or entity the details of the technology  
19 Hyatt was working on. In fact, those details were irrelevant to the audit to  
20 determine when Hyatt severed ties to the State of California. Hyatt has not  
21 produced any evidence that the FTB disclosed his "secret" technology.

22 **Hyatt spin:** The FTB's actions resulted in the destruction of his patent licensing business.  
(Hyatt Answer at 13.)

23 **Facts:** Hyatt's patent licensing business died when his patents were successfully  
24 challenged, and in effect, became worthless. *See Hyatt v. Boone*, 146 F.3d  
25 1348 (Fed. Cir. 1998). As Hyatt's own representative during the audit, Mr.  
26 Cowan, said in his October 13, 1995 letter to Sheila Cox, "Many companies  
27 who produce products that might infringe on patents held by others . . . wait  
28 until the validity of the patent has been tested in court." (PBKT 06176 at pg.  
2, fn. 1) (emphasis added) (Reply Appendix Exhibit 6).

**Hyatt spin:** Contacting Fujitsu and Matsushita violated confidentiality and was not  
necessary. (Hyatt Answer at 13.)

**Facts:** Both the Fujitsu and Matsushita agreements contained the identical provision  
in ¶ 7.4 authorizing disclosure of their terms and conditions, including the

payment amounts, to any governmental agency or as otherwise required by law. See Exhibits 4 and 5 to FTB's reply in support of the Discovery Writ. All the FTB did was send a single page letter to each company asking only what date they wire transferred payments to Hyatt. *Id.* at Exhibits 6 and 7. Sheila Cox wrote Mr. Kern on March 1, 1995: "I need a copy of the bank statement to determine the dates that the wire transfers were made." H01531-01538 (Reply Appendix Exhibit 7). She repeated that request on March 23, 1995. H01627-01635 (Reply Appendix Exhibit 8). A formal legal demand for the information was made on April 11, 1995. PBTk 05789-05798 (Reply Appendix Exhibit 9). On April 13, 1995, Mr. Kern finally responded but provided only the following statement: "Union Bank — Account Name Pretty, Schroeder, Brueggman and Clark Client Trust Account." H01751 (Reply Appendix Exhibit 10). Faced with such an evasive response, Cox wrote directly to the Japanese companies asking merely what dates they wired their payments to Hyatt.

**Hyatt spin:** An FTB attorney, Anna Jovanovich, allegedly threatened to extort a settlement from Hyatt as an alternative to the audit becoming publicly known. (Hyatt Answer at 14.)

**Facts:** As FTB showed at pages 7-9 of its reply in support of the Discovery Writ, any settlement would have been a matter of public record requiring disclosure of Hyatt's name, total amount in dispute, amount of settlement, explanation of why such a settlement would be in the best interests of the State of California and an opinion from California Attorney General as to the overall reasonableness of the settlement. Cal. Rev. & Tax Code § 19442. Moreover, Jovanovich had no authority to even negotiate a settlement. Yet, Hyatt claims she threatened to make Hyatt's audit public if he did not settle.

**Hyatt spin:** Hyatt provided voluminous credit card receipts to the FTB in response to its request. (Hyatt Answer at 17.)

**Facts:** The fact is that none of the credit card receipts produced were for the critical period of September 25 — November 1, 1991. Instead, they were all for periods after that time (Cox Aff. at ¶ 12 & Ex. 12 thereto).

**Hyatt spin:** Hyatt claims that the lease was signed on October 8, 1991 and that he resided there until April 1992. (Hyatt Answer at 17.)

**Facts:** The date of Hyatt's signature on the lease is October 13, 1991 (PBTk 06051) (Reply Appendix Exhibit 4), and Hyatt's representative previously stated during the audit that Hyatt signed the lease on October 13, 1991 and began his tenancy on October 20, 1991. (PBTk 06037) (Reply Appendix Exhibit 4).

Thus, it is Hyatt, not the FTB, who is attempting to "fictionalize" the facts and mislead the Court, by portraying the FTB's audit activities in apocalyptic terms. The FTB simply audited Hyatt, and the basic facts about what the FTB did involving Hyatt do not comport with Hyatt's hyperbole. The Court should reject Hyatt's "spin" of these basic facts, and Hyatt's attempts to distract the Court with shrill and false accusations of FTB bigotry, racism, and institutional evil. The Jurisdictional Writ is about facts and legal issues. The FTB's petition describes the facts and legal issues accurately.

1 Hyatt's rhetoric is misplaced.

2 **2. Hyatt's claim in his Answer that his case "is a tort case,**  
3 **not a 'tax-related' case is just part of his "spin."**

4 Hyatt's claim in his Answer that his case "is a tort case, not a 'tax-related' case" (Hyatt  
5 Answer at 8) is just part of his "spin." Hyatt's own Answer to the FTB's writ petition inexorably links  
6 his claimed run-of-the-mill "tort case" to every taxation decision that the FTB made about him. Hyatt  
7 claims in his Answer that the FTB fraudulently violated a promise to be fair (Hyatt Answer at 3);  
8 litigating this necessarily requires litigation about the fairness or unfairness of the audit and its result.  
9 Hyatt claims that the FTB considered sources it should not have, and disregarded sources it should  
10 have considered (Hyatt Answer at 13-14); these issues also go to the heart of the FTB's taxation  
11 decisions. Hyatt also claims that the FTB's proposed assessments against Hyatt were attempts at  
12 extortion (Hyatt Answer at 14); litigating this requires determining whether the proposed assessments  
13 had any basis in fact, again implicating the FTB's underlying taxation decisions. In sum, everything  
14 about Hyatt's case involves the FTB's underlying determinations about Hyatt's residency, and Hyatt's  
15 claim that his tort claims are distinct from the California government's taxation decisions is false.

16 **3. Thompson does not compel or support denial of the FTB's writ petition.**

17 Hyatt's claim that granting the FTB's writ petition "would alter [the] well established  
18 precedent [of] *State ex rel. Dep't of Transportation v. Thompson*" is also wrong. (Hyatt Answer at  
19 6-7, 20-23.) *Thompson* holds that this Court will not entertain writ petitions concerning denials of  
20 dismissal or summary judgment motions as a "general rule," not as an absolute one. *Smith v. Eighth*  
21 *Judicial Dist. Court*, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997); *State ex rel. Dep't Transp.*  
22 *v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983). This Court has discretion to entertain any writ  
23 petition, and "[t]he interests of judicial economy," not some blanket ban, "remain the primary standard  
24 by which this court exercises its discretion" to entertain writ petitions concerning denials of dismissal  
25 or summary judgment motions. *Smith*, 113 Nev. at 1344-45, 950 P.2d at 281. Applying this primary  
26 standard, the Court has granted writ petitions similar to the FTB's where "considerations of sound  
27 judicial economy ha[ve] militated in favor of granting [them]," including, among other circumstances,  
28 where "an important issue of law requires clarification." *Id.*; see also *Snooks v. Ninth Judicial Dist.*



1 Court, 112 Nev. 798, 799-804, 919 P.2d 1064, 1065-1067 (1996); *Harvey Lerer, Inc. v. Eighth*  
2 *Judicial Dist. Court*, 111 Nev. 1165, 901 P.2d 643 (1995); *State v. Eighth Judicial Dist. Court*, 111  
3 Nev. 1023, 899 P.2d 1121 (1995); *Lewis v. Second Judicial Dist. Court*, 113 Nev. 106, 930 P.2d 770  
4 (1997).

5 The Court's September 13, 2000 order directing Hyatt to answer the FTB's writ petition  
6 acknowledges the judicial economy inherent in these writ proceedings. Addressing the jurisdictional  
7 issues in the FTB's Jurisdictional Writ petition now will minimize the risk that a protracted Nevada  
8 trial in this case would be nullified on jurisdictional grounds after the fact. Neither the Nevada state  
9 courts nor the FTB should be obligated to commit further resources to this heavily litigated case if this  
10 Court agrees with the FTB that the district court has exceeded its subject matter jurisdiction. Thus,  
11 the interests of judicial economy are served by entertaining this petition, not by rejecting it out of  
12 hand, as Hyatt requests.

13 In addition, Hyatt's claim that no important issue of law requires clarification in these writ  
14 proceeding is incorrect. (Hyatt Answer at 22-23.) The issues of state sovereignty and respect raised  
15 in the FTB's writ petition are of paramount importance to California, Nevada, and every other state.  
16 This Court has never ruled on the ability of Nevada state courts to hold the California government  
17 liable in tort for California's tax audit activities. This Court has also never published an opinion  
18 addressing the *Nevada v. Hall* exception concerning another state's exercise of its inherent sovereign  
19 functions. *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979). Only two reported Nevada opinions –  
20 *Mianecki* (which itself was a writ proceeding) and *Hernandez v. City of Salt Lake* – cite *Nevada v.*  
21 *Hall*, and neither opinion includes an analysis of this important exception. *Mianecki v. Second*  
22 *Judicial Dist. Court*, 99 Nev. 93, 658 P.2d 422 (1983); *Hernandez v. City of Salt Lake*, 100 Nev. 504,  
23 686 P.2d 251 (1984). These important issues are integral components of the FTB's writ petition, and  
24 the time to resolve these important issues is now.

25 The FTB's writ petition challenges the trial court's subject matter jurisdiction, which is exactly  
26 what writ proceedings are for. See Nev. Rev. Stat. 34.320 (a writ of prohibition "arrests the  
27 proceedings of any tribunal . . . exercising judicial functions, when such proceedings *are without or*  
28 *in excess of the jurisdiction of such tribunal*" (emphasis added)). The fact that the FTB's challenge

1 involves constitutional limitations only makes these writ proceedings more appropriate and important.  
2 *Watson v. Housing Authority of City of North Las Vegas*, 97 Nev. 240, 242, 627 P.2d 405, 406-07  
3 (1981) (under Nev. Rev. Stat. 34.320, “jurisdiction has a broader meaning than the concept of  
4 jurisdiction over the parties and subject matter: it includes constitutional limits.”) Hyatt’s claim that  
5 the Court should summarily reject the FTB’s writ petition, allow a lengthy trial in district court, and  
6 then consider these important jurisdictional issues only on appeal, is contrary to this Court’s  
7 established practice, judicial economy, and common sense. The Court should reject Hyatt’s argument  
8 that *Thompson* requires that this case proceed to trial without resolution of the FTB’s writ petition.

9 **4. Hyatt confuses subject matter jurisdiction with personal jurisdiction.**

10 On multiple occasions in his Answer, Hyatt has confused subject matter jurisdiction with  
11 personal jurisdiction. Hyatt Answer, pages 2 and 67-73. Hyatt’s basic argument is that because FTB  
12 agents entered Nevada during their investigation, the district court has personal jurisdiction over FTB.  
13 Since it has personal jurisdiction, Hyatt concludes the district court must be able to hear all of his  
14 “tort” claims — even those based on events that occurred outside Nevada. In a real sense, Hyatt  
15 argues without any authority that since the FTB answered Hyatt’s First Amended Complaint,  
16 California, a sovereign state in our system of cooperative federalism, inexplicably waived its  
17 sovereign immunity to suit and conferred onto Nevada subject matter jurisdiction over its internal  
18 constitutional and governmental functions. By arguing notions such as, “personal jurisdiction”,  
19 “splitting causes of action”, and “tort”, Hyatt is vaulting form over substance. This lawsuit is about  
20 the administrative finding that Hyatt was a California resident from 1991 to 1992 and that he owes  
21 California substantial personal income taxes.

22 The district court previously ruled that it did not have subject matter jurisdiction over  
23 California’s tax process. Hyatt did not object or seek review this ruling and presumably it is the law  
24 of the case. Hyatt’s response to the dismissal was to reinvent his tax-related claims and dress them  
25 up as tort actions. Because the claims constitute a collateral attack on California’s taxing process they  
26 are beyond the jurisdictional authority of Nevada’s district court.

27 Furthermore, Hyatt avoided removal to federal court by conceding that his claims were based  
28 solely upon Nevada common law tort theories. *See* pages 19-20, *supra*. Hyatt also avoided removal

1 by limiting his tort claims to only what FTB did in Nevada:

2 . . . at issue are certain events, i.e. torts, which occurred during the FTB's surreptitious  
3 investigations of plaintiff in Nevada. (April 6, 1998 Surreply to FTB's Reply to  
Plaintiff's Opposition to Motion to Quash Service of Process at page 4, lines 20-21);

4 Plaintiff now seeks relief for the FTB's past tortious activities against him in Nevada.  
5 (*Id.* at page 12, lines 10-11);

6 Plaintiff . . . requests . . . that this Court exercise jurisdiction over the FTB so that it  
7 will be required to answer for its tortious conduct committed against a Nevada resident  
in Nevada. (*Id.* at page 13, lines 10-12).

8 Hyatt is therefore judicially estopped from now attempting to litigate FTB actions that took place  
9 outside Nevada. *See e.g., Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 668-69, 918 P.2d 314  
10 (1996).

11 Simply put, the district court does not have *subject matter jurisdiction* over Hyatt's causes of  
12 action against California for engaging in its legitimate administrative function of tax assessment and  
13 collection. Regardless of whether the district court has personal jurisdiction over FTB, the lack of  
14 subject matter jurisdiction precludes the district court from adjudicating Hyatt's remaining tort causes  
15 of action. As pointed out by the United States Supreme Court in *Nevada v. Hall* 410 U.S. 421 (1978),  
16 "a judgment entered in on State must be respected in another provided that the first State had  
17 jurisdiction over the parties and the subject matter." (Emphasis added.) Thus, Hyatt's restatement  
18 of his tax case against California as a tort constitutes an impermissible and constitutionally barred  
19 collateral attack on another state's taxing authority which is beyond the subject matter jurisdiction of  
20 the Nevada district court.

21 **5. Hyatt's Full Faith and Credit analysis is flawed.**

22 Hyatt's response to the FTB's request for dismissal based on Full Faith and Credit principles  
23 is similarly unpersuasive. Hyatt's Full Faith and Credit argument contains many components, but  
24 none justifies this Court ignoring California's immunity and administrative exhaustion laws.

25 **A. *Nevada v. Hall* confirms, rather than rejects, the validity of the FTB's Full Faith  
26 and Credit argument.**

27 Hyatt's opening salvo regarding Full Faith and Credit is a claim that *Nevada v. Hall*, 440 U.S.  
28 410 (1979), rejected the FTB's Full Faith and Credit argument. (Hyatt Answer at 24.) But the FTB's

Full Faith and Credit argument is a direct product of *Nevada v. Hall* and its progeny. The Supreme Court in *Nevada v. Hall* noted that its Full Faith and Credit holding allowing a private plaintiff's California lawsuit against Nevada over a California traffic accident "poses no substantial threat to our constitutional system of cooperative federalism." *Nevada v. Hall*, 440 U.S. at 424 n.24. The Supreme Court also noted that it had no occasion to consider whether other state policies not involved in car accidents "might require different analysis or a different result." *Id.* The Supreme Court further indicated that suits interfering with a state's "capacity to fulfill its own sovereign responsibilities" were the types of cases that might require this different analysis and result. *Id.* A variety of courts have dismissed lawsuits against sister states on the basis of this language in *Nevada v. Hall*. (See Jurisdictional Writ at 27-29 (citing cases).) Thus, *Nevada v. Hall* confirms, rather than rejects, the viability of the FTB's Full Faith and Credit argument.

**B. *Mianecki* does not address the *Nevada v. Hall* exception and concerns a far different type of case.**

Hyatt next claims that *Mianecki v. Second Judicial Dist. Court* disposes of the FTB's Full Faith and Credit argument. (Hyatt Answer at 24.) But neither *Mianecki* nor any other reported Nevada case discusses the *Nevada v. Hall* exception that the Court should apply here. See *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 658 P.2d 422 (1983). Furthermore, *Mianecki* involved a Wisconsin parolee's criminal conduct in Nevada, and two negligence claims for failure to act in Nevada: (1) Wisconsin's failure to warn Nevada citizens in Nevada of a sex offender's propensities, and (2) Wisconsin's failure to supervise the sex offender while he was within Nevada's borders. *Mianecki*, 99 Nev. at 95, 658 P.2d at 423. Hyatt has no similar claims here, and what Hyatt wants to litigate implicates virtually every facet of the California government's taxation decisions and actions involving Hyatt, whether those decisions and actions involved Nevada or not. (See Jurisdictional Writ at 17-18.) Thus, Hyatt's case, unlike *Mianecki*, is not about mere "injurious operational acts committed within [Nevada's] borders by employees of sister states." *Mianecki*, 99 Nev. at 98, 658 P.2d at 425. *Mianecki* held that Nevada's interest in protecting its citizens from such acts outweighed Wisconsin's interests in immunity, *id.*, but Hyatt's case about the California government's taxation process – a core sovereignty issue – is far more expansive than a case about such limited acts. These

1 considerations require "a different analysis [and] a different result" than *Mianecki* in this case.  
2 *Nevada v. Hall*, 440 U.S. at 424 n.24.

3 In *Mianecki*, this Court also said Nevada has "a paramount interest in protecting its citizens  
4 from individuals who have been convicted of criminal offenses." *Mianecki*, 99 Nev. at 97, 658 P.2d  
5 at 424. But in this case, unlike *Mianecki*, Hyatt has failed to articulate a cognizable Nevada policy  
6 or paramount interest that requires protection. Just saying, as Hyatt has said, that Nevada has a  
7 paramount interest in protecting its citizens from governmental tort damage is not enough. Like  
8 California's immunity laws, Nevada's immunity laws shield Nevada from governmental tort liability  
9 for a broad variety of acts. In the area of gaming regulation, the Nevada government function most  
10 analogous to California's taxation function, Nevada's immunities are even broader by virtue of the  
11 broad waivers that applicants sign, as Hyatt himself notes. In addition, even in those areas where  
12 Nevada has waived its immunity to civil liability, Nevada has limited the compensatory damages  
13 recoverable from the Nevada government to \$50,000, and altogether barred the imposition of punitive  
14 damages. Nev. Rev. Stat. § 41.035; accord Cal. Gov't. Code § 818 (California government immunity  
15 from punitive damages).

16 These protections of the Nevada government evidence that there is no Nevada policy that  
17 justifies continuation of Hyatt's case against the California government. They do so by indicating that  
18 not every governmental act has a remedy, and that Nevada government acts like the FTB's acts do not  
19 give rise to Nevada government liability. Even if such acts by the Nevada government would give  
20 rise to Nevada liability, Nevada's laws would insulate Nevada government from a large compensatory  
21 damage award, and from any punitive damage award at all.

22 Given these considerations, the unfairness of Hyatt's interpretation of *Mianecki* is readily  
23 apparent. Hyatt's interpretation of *Mianecki*, if accepted, would allow Nevada state court litigation  
24 whenever Nevada residents are the subjects of a California administrative investigation, because the  
25 rights of Nevada citizens are always involved in such cases. Hyatt's interpretation of *Mianecki*, if  
26 accepted, would also allow Nevada courts to ignore California's own laws, apply only Nevada's law  
27 regardless of where the California government's conduct occurred, and hold the California  
28 government liable for an unlimited amount of compensatory and punitive damages, even though the

1 California government is immune under its own laws, and Nevada law would either bar or sharply  
2 limit recovery if the conduct involved a Nevada government agency.

3 Hyatt's interpretation of *Mianecki* is especially unfair since California offers aggrieved parties  
4 judicial and administrative forums in California in which to bring complaints against California's  
5 taxing authorities. For instance, California law includes a statutory remedy for the FTB's reckless  
6 disregard of its policies and procedures, a remedy limited to California's own courts:

7 If any officer or employee of the board recklessly disregards board  
8 published procedures, a taxpayer aggrieved by that action may bring an  
9 action for damages against the State of California in *superior court*.  
Cal. Rev. & Tax. Code § 21021(a) (Emphasis added).

10 Given such statutory remedies in California's own courts (*see* page 19, *infra*), Hyatt should not be  
11 allowed to pursue a Nevada common law tort action involving taxation, which is expressly barred  
12 under California immunity and administrative exhaustion laws. *Mianecki* does not hold to the  
13 contrary, and no Nevada policy interest justifies allowing Hyatt to proceed.

14 **C. Hyatt's intentional tort and operational act arguments miss the point.**

15 Hyatt's Full Faith and Credit argument continues with a lengthy analysis of Nevada immunity  
16 laws, concluding that the FTB should be denied immunity because Nevada would permit itself to be  
17 sued for "operational" conduct and "intentional torts." (Hyatt Answer at 23-37.) But Hyatt's claim  
18 that Nevada's immunity laws generally do not immunize such conduct is not evidence that applying  
19 California's immunity and administrative exhaustion laws to this case would violate Nevada public  
20 policy. Hyatt ignores that Nevada has no personal income tax, and therefore no reason to conduct  
21 residency tax audits of individuals. Since Nevada has no personal income tax, the Nevada Legislature  
22 has never had to consider whether it would permit the State of Nevada to be sued for "deficient  
23 operational acts" or "intentional torts" involving personal income tax administration. Furthermore,  
24 in the area of Nevada gaming regulation, which involves government investigations analogous to  
25 California tax audits, distinctions among "operational" acts, "discretionary" acts, and "intentional  
26 torts" have substantially less meaning, given the broad waivers that gaming applicants sign.  
27 Moreover, the distinctions among such acts have nothing to do with the administrative exhaustion  
28 laws cited in the FTB's petition, and Hyatt raises no genuine dispute that California's and Nevada's

1 laws regarding administrative exhaustion are substantially the same. Accordingly, the distinctions in  
2 Nevada's general immunity laws among "discretionary acts", "operational acts", and "intentional  
3 torts" are not reasons to deny Full Faith and Credit to California's specific immunity laws regarding  
4 taxation, or to the California administrative exhaustion laws with which Hyatt did not comply.

5 In any event, Hyatt's assertions that the FTB acts about which he complains were  
6 "operational" and "intentionally tortious" are unfounded. As the FTB described in its petition,  
7 California law gave the FTB a wide range of powers to conduct audits like the Hyatt audits, and left  
8 the details of those audits to the FTB's discretion. (Jurisdictional Writ at 34-35.) Where statutory  
9 provisions entrust authority and discretion to a coordinate branch of government, actions taken under  
10 those statutes are generally ruled discretionary, not operational. *See, e.g., Becerra v. County of Santa*  
11 *Cruz*, 68 Cal. App. 4<sup>th</sup> 1450, 81 Cal. Rptr. 2d 165 (1998) (county social services department held  
12 immunized for placement and supervision of foster child who was later murdered, under statutes  
13 entrusting department employees with authority and discretion to analyze dependent child's needs and  
14 interests).

15 Here, the FTB acted under authority of such statutes, which entrusted the FTB with the  
16 authority to determine how to conduct the Hyatt residency audits, and indeed to "prescribe *all* rules  
17 and regulations necessary" for the enforcement of California's personal income tax laws. Cal. Rev.  
18 and Tax Code § 19503 (emphasis added); *see also* Jurisdictional Writ at 35. Under the FTB's own  
19 rules and regulations, the details of how FTB auditors proceeded involving Hyatt were left to the  
20 auditors' discretion. (Jurisdictional Writ at 35.) Just because the FTB promulgated rules for the  
21 auditors to follow during audits does not mean that their acts were "operational." All government  
22 actors, even discretionary actors, are subject to some rules from some source, whether statutory,  
23 regulatory, or otherwise.

24 In addition, Hyatt's characterization of the FTB's conduct as "intentionally tortious" proves  
25 nothing. Neither the FTB's "intent" to perform each step of its audits, nor Hyatt's labeling of the  
26 FTB's conduct as "intentionally tortious," transmutes that conduct into an intentional tort. *See*  
27 *Conway v. Circus Circus Casinos, Inc.*, — Nev. —, 8 P.3d 837, 840 (2000) ("Simply labeling an  
28 employer's conduct as intentional . . ." does not turn that conduct into an intentional tort.) An

1 intentional tort requires facts showing a deliberate intent to bring about injury, (*id.*), but Hyatt has  
2 neither plead nor presented *facts* suggesting any such deliberate intent here. To the contrary, Hyatt's  
3 pleading simply shows that the FTB conducted a residency tax audit for tax year 1991 and, at Hyatt's  
4 request, applied the results of the 1991 audit to the 1992 tax year. The FTB subsequently issued  
5 proposed California tax assessments for tax years 1991 and 1992 against Hyatt that he vehemently  
6 opposes. The facts properly in evidence show that Hyatt's evasions and the need to check his change  
7 of residency claim, not governmental malice, were why the FTB took the actions and made the  
8 minimal information disclosures that it did. Hyatt's evasions, and the facts prompting a need to check,  
9 included: (1) unsatisfied information requests to Hyatt; (2) Hyatt's multiple claimed move dates; (3)  
10 credit card statements showing dining charges almost exclusively in California in late 1991 and early  
11 1992; (4) a Las Vegas apartment lease with a start date weeks after Hyatt's claimed move, with no  
12 explanation of where Hyatt lived in the interim; and (5) patent license agreements executed after  
13 Hyatt's claimed move listing his California mailing address. (*See* App. Ex. 7 at 6-9 (citing evidence  
14 in App. Ex. 8, Cox. Aff.).)

15 Thus, there is nothing about the FTB's conduct, or Nevada's own immunity laws, that justifies  
16 denial of Full Faith and Credit to California's immunity and administrative exhaustion laws in this  
17 case.

18 **D. Hyatt's cursory discussion of California's immunity and administrative**  
19 **exhaustion laws does not demonstrate that Hyatt's case should proceed.**

20 Hyatt next argues that even California law, specifically California Government Code section  
21 860.2, does not accord the FTB the immunity that it asserts, as it only provides immunity in regard  
22 to "instituting" a tax proceeding. (Hyatt Answer at 36.) But Hyatt is only reading the first half of the  
23 statute, which in its entirety immunizes *all* FTB acts or omissions concerning the application of  
24 California's tax laws:

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

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

28 (b) An act or omission in the interpretation or application of any law  
relating to a tax. Cal. Gov't Code § 860.2.



1 By its own terms, this statute covers far more than the FTB "instituting" a tax proceeding. *Id.*  
2 The statute immunizes the FTB from liability for all of the acts or omissions of its employees  
3 concerning their application of California's tax laws, which are the only types of acts or omissions that  
4 Hyatt alleges here. (App. Ex. 4 p.2, ¶ 4 (Hyatt First Am. Compl.) (Alleging that all claims concern  
5 acts of FTB employees "within the course and scope of their employment"). The FTB's immunity  
6 under this statute is not dependent on whether its employees' acts were operational or discretionary,  
7 even if the FTB's acts here were operational (which they were not). Cal. Gov't Code § 860.2;  
8 *Mitchell v. Franchise Tax Bd.*, 183 Cal. App. 3d 1133, 228 Cal. Rptr. 750 (1986) (finding FTB  
9 immune under this section in tort action without consideration of any discretionary/operational  
10 distinction). The FTB's immunity under this statute is also not dependent on any distinction between  
11 intentional and other torts, even if the FTB's acts here could be construed as intentional torts (which  
12 they cannot). *Id.*; see also *Gates v. Superior Court*, 32 Cal. App. 4<sup>th</sup> 481, 510, 38 Cal. Rptr. 2d 489  
13 (1995) ("[U]nless an immunity otherwise provides, the [California] governmental tort immunities  
14 apply to intentional tortious conduct."); Cal. Gov't Code § 818.8 (immunizing the California  
15 government from all intentional or negligent misrepresentation claims for damages, such as those in  
16 Hyatt's complaint.). Instead, the FTB's immunity under this statute depends on the subject matter of  
17 the acts (application of California's tax laws), and that subject matter is precisely what Hyatt  
18 complains about here.<sup>1</sup>

19 Predictably, Hyatt also cites to what his counsel (not the FTB's counsel) called "loopholes"  
20 in California's immunity laws during the dismissal/summary judgment hearing in the district court.  
21 But as the FTB noted in its writ petition, none of these "loopholes" has any application to Hyatt's  
22 common law tort case. (Jurisdictional Writ at 24-25.) Furthermore, Hyatt's Answer contains no  
23

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24 <sup>1</sup> While this subject-based approach in California Government Code section 860.2 may be  
25 different from the discretionary/operational approach of Nevada's immunity laws, this does not mean  
26 that the two states' immunity laws conflict in the context of this case. As described *supra*: (1) the  
27 Nevada legislature has never had to consider an immunity law concerning personal income tax  
28 administration activities; (2) the discretionary/operational distinction has far less meaning in the  
analogous Nevada gaming regulation context, and (3) the FTB's actions in this case were not  
"operational" in any event.

1 persuasive authority that he was excused from the claims filing requirements of California Tort Claims  
2 Act, which are a jurisdictional prerequisite to a damages action for "any . . . injury for which the  
3 State is liable." *Cal. Code Regs., tit. 2, § 630(h) (emphasis added)*; see also *Cal. Govt. Code § 905.2*;  
4 Jurisdictional Writ at 24-25. Hyatt's suggestion that this blanket rule does not apply because his  
5 California tax protest is not an "administrative proceeding," (Hyatt Answer at 66-67), is a non-  
6 sequitur; the Tort Claims Act requires claims filing no matter how Hyatt characterizes the protest.

7 Thus, there is no real question about whether application of California's immunity and  
8 administration exhaustion laws immunize the FTB from Hyatt's common law tort case. If this Court  
9 applies those laws, Hyatt's case in Nevada is over. This Court should apply those laws as a Full Faith  
10 and Credit matter.

11 Applying these California laws would be fully consistent with the general rights and  
12 immunities of taxing agencies. Federal and state courts have long recognized the concepts of absolute  
13 and/or qualified immunity for the acts of governmental agencies and their personnel. See, e.g., *Barr*  
14 *v. Matteo*, 360 U.S. 564, 571-72 and 576 (1959); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).  
15 In addition, because taxation is such a vital governmental function, a state may limit suits arising out  
16 of its exercise of the taxation power to its own courts. *Kennecott Copper Corp. v. State Tax Com.*,  
17 327 U.S. 573, 579-80 (1946) (statute authorizing "an action in any court of competent jurisdiction"  
18 for return of taxes paid under protest limited such actions to Utah's own courts); *Smith v. Reeves*, 178  
19 U.S. 436, 438-39, 441 (1900) (suit in federal court against California's Treasurer for illegal  
20 assessment of taxes by State Board of Equalization was barred because California consented to such  
21 a suit only in its own courts). There is also no basis for Hyatt's suggestion that recognizing FTB's  
22 immunity in this case will somehow result in a new legal principle that will subject Nevada citizens  
23 to sinister acts of sister states as Hyatt argues. Just because Nevada courts have no authority to  
24 adjudicate Hyatt's tort claims, does not mean that Nevadans generally are without legal remedy in  
25 California for alleged FTB wrongdoing. See, e.g., *Cal. Rev. & Tax. Code § 21021*.

26 //

27 //

28 //

**E. Hyatt's analysis of the FTB's policies, procedures, and regulations does not justify denying Full Faith and Credit to California's laws.**

Hyatt's argument that the FTB violated its own "policies, procedures, and regulations," and thus must be barred from relying on any California laws in this case, is also wrong. Even if these supposed violations proved that the conduct of FTB auditors involving Hyatt was "operational" (which they do not), it does not follow that any Nevada public policy requires denial of Full Faith and Credit to California's immunity and administrative exhaustion laws. As described *supra* at page 14, Nevada has never had to consider what immunity it would allow concerning tax activities like the FTB's in this case, because Nevada has no personal income tax. In the analogous area of Nevada gaming regulation, Nevada has particularly broad immunities, given the broad waivers that gaming applicants sign. In addition, the operational/discretionary distinction has nothing to do with Hyatt's indisputable failure to comply with California's Tort Claims Acts. The FTB's acts involved tax administration, a function essential to California's existence. Allowing this suit to proceed would interfere with this inherent sovereign function of California, for all of the reasons stated in the FTB's petition.

Moreover, California has an express statutory remedy for any possible violation of FTB policies and procedures. Cal. Rev. & Tax. Code § 21021. Subsection (a) is a limited statutory waiver of California's sovereign immunity for claims arising out of reckless disregard of FTB published procedures. The statute expressly limits actions arising from such conduct to California's own superior courts. *Id.* ("If any officer or employee of the board recklessly disregards board published procedures, a taxpayer aggrieved by that action may bring an action for damages against the State of California in *superior court*."). (Emphasis added).

Such language is not a waiver of sovereign immunity that allows Nevada courts to exercise subject matter jurisdiction over Hyatt's case. The language of Section 21021 is more specific than that found in *Kennecott Copper Corp.*, cited *supra* at page 18, and Nevada does not even have a "superior court." In addition, the process of superior courts in California is limited to the State of California, *see* Cal. Civ. Proc. Code § 71, and other California statutes specifically refer to courts of other states. *See* Cal. Rev. & Tax Code § 31; Cal. Civ. Proc. Code § 1913. Hyatt has no right to

1 proceed with his Nevada common law tort action involving California's "policies, procedures, and  
2 regulations" where he had an available statutory remedy in California

3 As previously discussed at pages 24-25 of the Jurisdictional Writ, at oral argument before the  
4 district court, Hyatt argued that three other "loopholes" in California's sovereign immunity laws  
5 allowed Nevada courts to hear his case: 1) privacy rights under the California Constitution; 2)  
6 California's Information Practices Act; and 3) a claimed exception to governmental immunity for  
7 breach of contract. App. Ex. 16 at 30-34 (Tr. of Proceedings). But, Hyatt's claims are for Nevada  
8 common law torts, not for violation of the California Constitution, any California statute or any  
9 California contract law. In fact, Hyatt avoided removal to federal court by conceding:

10 "The action is based *entirely on Nevada law*." (App. Ex. 14, FTB  
11 Reply Ex. A (Plaintiff's Motion to Remand) at p. 19, lns. 2-3.  
(Emphasis added).

12 "His causes of action are *grounded in the law of the State of Nevada*.  
13 His tort claims speak for themselves as cause of action recognized  
*under Nevada law*." (Id. at p. 22, lns. 17-18). (Emphasis added).

14 In any event, what is significant is that Hyatt now admits in his Hyatt Answer that he has  
15 remedies in California. "California's Constitution, California's privacy act, and the California  
16 Taxpayer Bill of Rights all forbid the FTB from engaging in the conduct now alleged by Hyatt . . .".  
17 (Hyatt Answer at page 36, line 20 — page 37, line 1.) "California law provides remedies,  
18 constitutional and statutory as opposed to common law, through which an individual may obtain  
19 redress for injuries stemming from conduct akin to the FTB's actions in this case." (Hyatt Answer  
20 at page 56, lines 10-12).

21 In footnote 123 at page 37 of his Answer, Hyatt even quotes the California Information  
22 Practices Act (Cal. Civ. Code § 1798 et seq.) as allowing suit against California to be brought in "any  
23 court of competent jurisdiction." That, of course, is the same phrase that the U.S. Supreme Court held  
24 in *Kennecott Copper* limits suits to a state's own courts. When Cal. Civ. Code § 1798 is considered  
25 in conjunction with Cal. Rev. & Tax Code § 21021 and *Kennecott Copper*, Hyatt's exclusive remedy  
26 was a statutory action in California's own courts, not a common law "tort" action in Nevada.

27 That California can limit suits against it concerning taxation to statutory proceedings in  
28 California's own courts can be easily understood by analogy to federal law:

- The IRS and individual IRS agents are entitled to immunity when, in the course of collecting income taxes or enforcing income tax laws, IRS personnel allegedly commit torts. As in Hyatt's case, the actions complained of often occur during the course of an investigation to determine tax liability. Where such actions are based on common law tort or involve the initiation or continuation of proceedings subject to further agency adjudication, the IRS and the federal government are protected by sovereign immunity and individual agents are entitled to official immunity. *See, e.g., Stankevitz v. IRS*, 640 F.2d 205 (9<sup>th</sup> Cir. 1981); *Zimmerman v. Spears*, 428 F. Supp. 759, 762 (W.D. Tex. 1977), aff'd 565 F.2d 310 (5<sup>th</sup> Cir. 1977); *McKenzie v. Moeller*, 1976 U.S. Dist. LEXIS 14610 (E.D. Wis. 1976).
- Even actions for wrongful publication to third parties of information regarding a person's failure to pay federal income taxes has been barred against IRS agents based upon their official immunity. *See, e.g., Downey v. Nix*, 1977 U.S. Dist. LEXIS 16276 (N.D. Ga. 1977).
- IRS agents are also immune from suits in which it is alleged that taxes were improperly assessed. *See, e.g., Johnson v. District Director of IRS*, 1976 U.S. Dist. LEXIS 12148 (N.D. Ga. 1976).
- Hyatt's argument that federal courts have not granted IRS immunity for alleged torts committed during an audit is not supported by any reported case; the cases he cites are based on statutory claims not common law torts. For example, Hyatt cites to pages 127-28 of a book entitled "Invasion of Privacy" by Louis R. Mizell as evidence that the IRS has been held liable for invasion of privacy. That case, however, is reported as *Ward v. United States*, 973 F. Supp. 996 (D. Colo. 1997) and involved statutory claims, not common law tort claims.
- Federal law is clear: the United States retained its sovereign immunity (i.e. privilege) against tort claims that arise out of the conduct of an IRS audit; Congress waived sovereign immunity and created a statutory right to sue for improper conduct in the collection of a federal tax; but retained sovereign immunity against suits seeking money damages based upon illegal determination of a federal tax obligation. Title 26 U.S.C. § 7433; *Miller v. United States*, 66 F.3d 220, 222-23 (9<sup>th</sup> Cir. 1995), cert. denied 517 U.S. 1103.

Just as Congress waived the federal government's sovereign immunity and created statutory remedies for federal taxpayers who allege improper (i.e. "tortious") conduct by IRS agents under 26 U.S.C. § 7433, so too California has created a statutory remedy which limits damage actions against the FTB concerning taxation to California's own courts under Cal. Rev. & Tax Code § 21021.

In any event, the acts of FTB's employees did not violate any policies or procedures of the FTB. California law expressly authorizes disclosure of identifying information to third parties during an audit:

A return or return information may be disclosed in an judicial or

1 administrative proceeding pertaining to tax administration, if any of the  
2 following apply:

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

6 *See also Franchise Tax Bd. v. Superior Court*, 164 Cal. App. 3d 526, 537, 210 Cal. Rptr. 605 (1985)  
7 (FTB investigations regarding tax liability matters are "administrative inquiries"); *cf. Norman E.*  
8 *Duquette Inc. v. Commissioner of Internal Revenue*, 110 F.Supp.2d 16, 20 (D.C. Cir. 2000) (audits  
9 are administrative proceedings under virtually identical federal statute.). The FTB auditor disclosures  
10 of minimal identifying information about Hyatt to third parties in the course of the FTB's audits was  
11 fully consistent with this law, and with the FTB's "policies, procedures and regulations." The  
12 information disclosed to third parties *at most* revealed Hyatt's name, address, social security number,  
13 and selection for audit.

14 **F. Hyatt's analysis of the *Nevada v. Hall* exception is designed to mislead.**

15 Hyatt's claim that the "so-called exception to *Nevada v. Hall*" has no application to this case  
16 is structured as if Hyatt's own California tax protest is the only California "sovereign responsibility"  
17 that could conceivably be threatened by Hyatt's lawsuit. *Nevada v. Hall*, 440 U.S. at 424 n.24. But  
18 allowing this action to proceed has had, and would have, effects not only on the protest process, but  
19 on many other components of California's residency audit program as well. Hyatt's case has already  
20 consumed hundreds of hours of otherwise productive auditor time in depositions by Hyatt's counsel.  
21 In addition, the district court's December 21, 1999 protective order that is the subject of the FTB's  
22 Discovery Writ purports to preclude FTB from using evidence that the FTB develops during the  
23 defense of this case in the Hyatt protest, unless the FTB goes through procedures imposed by the  
24 Nevada court. Furthermore, the detrimental effects of Hyatt's lawsuit that are described in the FTB's  
25 Jurisdictional Writ are not exclusive. Hyatt's case, if allowed to proceed, would also do the following:

- 26 • Chill the FTB's performance of its public duties, setting a precedent for  
27 protracted Nevada litigation whenever the FTB requests information  
28 from Nevada sources in a residency audit;
- Effectively preclude FTB from conducting audits in Nevada without  
some unspecified prior approval of Nevada courts or agencies (*see*  
Hyatt's First Amended Complaint ("FAC") at ¶¶ 22 and 32);

- 1 • Discourage FTB from approaching or questioning neighbors,  
2 businesses, governmental officials or others in Nevada who may have  
3 pertinent information concerning long-time California taxpayers'  
4 claims of change of residency to Nevada (FAC ¶ 34);
- 5 • Deter the FTB from using a person's name, address and social security  
6 number to identify that person during an audit due to the risk of  
7 litigation (FAC ¶¶ 35, 41, 42 and 62);
- 8 • Deter the FTB from sending its standard "Demand for Information"  
9 form and other requests for information into Nevada (FAC ¶¶ 46, 55,  
10 56, and 62);
- 11 • Set a precedent that merely telling a third party FTB is auditing a  
12 person — and therefore is seeking information — could be tortious  
13 (FAC ¶¶ 34, 46 and 47);
- 14 • Militate in favor of the FTB conducting residency audits in total  
15 secrecy, running the risk that the FTB will not uncover all relevant  
16 facts;
- 17 • Allow the person being audited to control the audit process as well as  
18 the decision-making process; and
- 19 • Impose a fiduciary obligation (FAC ¶ 71) between FTB and California  
20 taxpayers who claim to move to another state (FAC ¶ 60), even though,  
21 as a matter of law, no such fiduciary relationship exists. (*Schaut v.*  
22 *First Federal Savings & Loan Ass'n of Chicago*, 560 F. Supp. 245, 246  
23 (N.D. Ill. 1983), *appeal dismissed without opinion*, 735 F.2d 1366 (7th  
24 Cir. 1984)).

25 Hyatt argues that the FTB has not provided the requisite proof that his lawsuit interferes with  
26 the FTB's capacity to fulfill its sovereign taxation responsibilities. (Hyatt Answer at 49-51.) But all  
27 of the above effects can be divined from the record, and from ordinary common sense. Hyatt's lawsuit  
28 does interfere with the FTB's capacity to fulfill its sovereign taxation responsibilities, and would do  
so even more if allowed to proceed. This militates in favor of this Court applying California's  
immunity and administrative exhaustion laws and ending this case.

23 **G. The Supreme Court's recent sovereign immunity cases fully support the FTB's  
24 mandamus petition.**

25 Hyatt is correct that none of the Supreme Court's recent sovereign immunity decisions  
26 expressly overrule *Nevada v. Hall*. But as the FTB described at pages 29-30 of its petition, these cases  
27 confirm that the *Nevada v. Hall* exception should apply fully to this case. The Supreme Court's recent  
28 cases reflect an ever-increasing respect for sovereign dignity, an expansive view of sovereign

1 immunity, and an unwillingness to intrude on a state's own sovereign duties. In so doing, they  
2 underscore the importance of the *Nevada v. Hall* exception, counter Hyatt's claim that the exception  
3 is not viable, and compel application of that exception to this case.

4 **6. Hyatt's choice of law analysis is similarly flawed.**

5 Hyatt's claim that *Nevada v. Hall* and *Mianecki* conclusively prove that California laws should  
6 not be applied as a Constitutional Choice of Law matter is wrong. The FTB's petition describes fully  
7 how fairness and the parties' expectations compel application of California's immunity and  
8 administrative exhaustion laws. (*See* Jurisdictional Writ at 30-32.) If these laws are not applied, and  
9 this case is not dismissed, Nevada courts and juries would effectively regulate California's tax  
10 collection process. At the same time, applying California law is not unfair, since Hyatt admittedly  
11 was a long-time resident who enjoyed the benefits and privileges of living in California for many  
12 years while he developed his computer technologies. Hyatt also was, and still is, pursuing his  
13 California remedies as to the audit and to his tax liability.

14 In contrast, what *would* be patently unfair is to treat California's immunity and administrative  
15 exhaustion laws as if they do not exist in this case, merely because Hyatt allegedly crossed the  
16 California state line into Nevada. Fully 96.8% of the FTB's audit man hours involving Hyatt were  
17 expended in California, and only 3.2% in Nevada.<sup>2</sup> All decisions to propose additional assessments  
18 against Hyatt were made in California, and all administrative review occurred in California. The audit  
19 activity and administration was done by the California government, and Hyatt is pursuing his  
20 administrative remedies and review in California at the present time. California law also provides  
21 various statutory remedies in California's superior courts for certain improper FTB conduct causing  
22 injury. Given these considerations, it is patently unfair and contrary to expectations to view all of the  
23 FTB's conduct in this case solely through the lens of Nevada law.

24  
25  
26 <sup>2</sup>An analysis of the man hours related to the audit itself, exclusive of administrative review  
27 by the FTB protest office (the first stage of review), was 624 total man hours. The number of man  
28 hours allocated to any activity in Nevada (less than three business days) was approximately 20 man  
hours. (Affidavit of Sheila Cox, 0005-11 at ¶ 34). The ratio of California man hours to Nevada man  
hours was 624 to 20, or 96.8% to 3.2%.



1                                   **7. Hyatt's comity analysis is unpersuasive.**

2           At pages 56-63 of his Answer, Hyatt argues that comity does not "require" Nevada to defer  
3 to California in this case. But the issue before this Court is not whether comity "requires" Nevada  
4 to defer to California (as Hyatt states the issue). Instead, the issue is whether Nevada *should* grant  
5 comity to California.

6           As described *supra* at pages 12-14, Nevada has no policy interest that justifies allowing  
7 Hyatt's case to proceed. To the contrary, as described at pages 35-37 of the Jurisdictional Writ,  
8 Nevada has a special interest in extending comity to the FTB in this case. *Mianecki* directs the Court  
9 to determine if Nevada would permit itself to be sued if the FTB was a Nevada agency. *Mianecki*, 99  
10 Nev. at 96-97, 658 P.2d at 424. Accordingly, this Court should not deny comity without first deciding  
11 that a Nevada agency doing what FTB did would be subject to Hyatt's tort claims. That means  
12 whatever this Court allows the district court to do to the FTB in this case, it will be doing to Nevada's  
13 own agencies that conduct interstate investigations, especially the State Gaming Control Board  
14 ("GCB") and the Nevada Gaming Commission ("Commission").

15           The FTB explained in its Jurisdictional Writ how the breadth and scope of the public duties  
16 of the Nevada gaming authorities to investigate and protect the State's primary tax source is not  
17 limited to gaming licensees or applicants, but also includes the power to investigate third parties, and  
18 is not limited to Nevada's territorial boundaries. The GCB sends its agents and investigators all  
19 around the country, even all around the world, to conduct the investigations the GCB itself deems  
20 necessary to perform Nevada's inherent sovereign function of regulating the Nevada gaming industry  
21 and protecting Nevada's revenues. If Nevada declines to extend comity to California in this case,  
22 which is based upon an FTB tax audit, then other forums will be more likely to deny comity to Nevada  
23 in similar tort suits against the GCB for doing its job.

24           Hyatt argues that the potential impact of this case upon Nevada's own agencies, especially the  
25 GCB and Commission is misleading. (Hyatt Answer at pages 60-63.) But Hyatt's argument reflects  
26 a serious lack of knowledge of the GCB's public duties, and no concept at all of the potential impact  
27 of this case on Nevada's own inherent sovereign responsibility to regulate the gaming industry and  
28 protect state revenues.

1 At pages 60-63 of his Answer to the Jurisdictional Writ, Hyatt challenges the FTB's analogy  
2 to the GCB on the grounds that:

3 "the inquiry and investigative powers of Nevada's gaming agencies are based on the  
4 *express request, consent, and authorization* of the applicant." Hyatt Answer at p. 60,  
lines 11-12, emphasis in original.

5 But while applicants for gaming licenses sign application forms consenting to GCB  
6 investigations, third parties who become the subject of GCB investigation do not sign such forms  
7 (unless they decide to file an application after being called forward for a finding of suitability). Yet,  
8 the GCB has full and complete authority to investigate non-applicant third parties in order to carry out  
9 the GCB's public duty of regulating the Nevada gaming industry and protecting state revenues.  
10 Indeed, under Hyatt's limited view of the GCB's investigative powers, those organized crime figures  
11 from around the country who are currently in jail for having hidden interests in Nevada casinos and  
12 skimming gaming revenues would be surprised to hear the GCB never had the authority to investigate  
13 them because they did not file gaming applications. *See generally, United States v. De Luna*, 763 F.2d  
14 897 (8th Cir. 1985), cert. denied, 474 U.S. 980. Perhaps the GCB itself would be even more surprised  
15 to learn that its investigative powers are limited to only those who file applications for licensure and  
16 consent to GCB investigations.

17 Hyatt's argument at pages 61-62 that a Nevada gaming license is a privilege is completely  
18 nonsensical. Because Hyatt claimed a change of residency in his 1991 California state income tax  
19 return, FTB had a public duty and was privileged to conduct an audit of claim. *See, cases cited at*  
20 *pages 5-6, supra.*

21 Finally, at pages 62-63 of his Answer, Hyatt argues that the GCB does not commit torts in  
22 other states because gaming applicants consent to investigation. The GCB investigates third parties  
23 wherever and whenever the Nevada gaming authorities themselves decide it is in their public duty to  
24 do so. The GCB conducts interstate (and international) investigations just like the FTB conducted a  
25 tax audit, part of which was done in Nevada. As previously shown, FTB conducted an audit, not a  
26 tort. Nevertheless, Hyatt has been able to drag the FTB through nearly three years of litigation over  
27 his tort claims.

28 If Nevada declines to extend comity to California in this case, then other forums will be more

1 likely to entertain tort suits against the GCB by third parties who the GCB decides to investigate for  
2 whatever reason. It is those third parties who never apply for licensure who will be able to sue the  
3 GCB for the type of "tort" claims Hyatt is asserting against FTB in this case. As FTB said in its writ,  
4 the State of Nevada has a special interest in extending comity to California in this case.

5 **8. Hyatt's analysis of Nevada's administrative**  
6 **exhaustion laws displays Hyatt's hypocrisy.**

7 At pages 38-39 of its Jurisdictional Writ, the FTB argued that the district court was also  
8 obligated to dismiss this case under Nevada's own administrative exhaustion and ripeness law. The  
9 FTB showed that Nevada applies its ripeness doctrine to preclude jurisdiction over claims based upon  
10 a plaintiff's anticipation of final administrative adjudication. *See, e.g., Resnick v. Nevada Gaming*  
11 *Com'n*, 104 Nev. 60, 65-66, 752 P.2d 229 (1988). As in *Resnick*, Hyatt is attempting to sue the FTB  
12 for matters that are still being adjudicated administratively. The FTB also showed that the proper  
13 procedure for raising a claim of an illegal; i.e., "extortionate," tax agency proceeding is as a defense  
14 in the tax enforcement proceeding itself. *See Stankevitz v. IRS*, 640 F.2d 205, 206 (9th Cir. 198).

15 In his Answer at pages 63-67, Hyatt argues that *Faulkner v. University of Tennessee*, 627  
16 So.2d 362 (Ala. 1992), *cert. denied*, 510 U.S. 1101 (1994), and *Ambassador Ins. Co. v. Feldman*, 95  
17 Nev. 538, 598 P.2d 630 (1979) are dispositive on this issue against FTB. Hyatt argues that the  
18 ongoing tax proceedings in California do not allow him to sue FTB for money damages, so therefore  
19 he has no administrative remedy to exhaust in California.

20 Hyatt's argument that he cannot sue FTB for tort damages in the ongoing proceedings  
21 completely begs the question. The tax proceedings will determine Hyatt's residency and tax status  
22 for 1991 and 1992. That determination will necessarily decide if the Notices of Proposed Assessments  
23 were valid or invalid. As previously shown, his complaint here is that the entire audit itself was  
24 "extortionate" and therefore tortious. *See* pages 3-8, *supra*. Hyatt should not be allowed to sue FTB  
25 at the very least until there is a final decision on the audit.

26 Hyatt also argues that the cases cited by FTB have no relevance, but it is Hyatt who has  
27 miscited the case law. In *Faulkner*, the Alabama Supreme Court said:

28 We note that before exhaustion of administrative remedies becomes an issue

1 in any case, there must be a administrative remedy available. UT points to no specific  
2 authority indicating that a cognizable administrative remedy through UT exists for  
persons like Faulkner.

3 627 So.2d at 365 (footnote omitted). There was no administrative remedy in that case for two reasons:  
4 1) the University of Tennessee had no established procedures for Faulkner to challenge the decision  
5 to rescind his degree; and 2) the letter to him from the graduate school dean offering a hearing itself  
6 stated the University had already "judged [Faulkner's] dissertation to lack evidence of original work  
7 and to constitute essentially duplication of material in the [Frost] reports." *Id.* at 363-64. Here, in  
8 contrast, the Proposed Notices of Assessment against Hyatt are by their very nature tentative and  
9 subject to change based upon further evidence that Hyatt is presenting to the FTB.

10 The sole issue addressed by the Nevada Supreme Court in *Ambassador Ins. Corp. v. Feldman*  
11 was whether private party insurance companies who sued another private party insurance agency for  
12 defamation were precluded from pursuing such an action until the Insurance Commission made a  
13 decision concerning a dispute between those two private parties. Neither the Insurance Commissioner  
14 nor the State of Nevada were parties to the defamation suit. Such a private defamation action was  
15 outside the Insurance Commissioner's authority to consider; therefore, there was no administrative  
16 agency remedy to exhaust.

17 Contrary to Hyatt's argument, neither case has much to do with this case, and neither is  
18 dispositive on anything that is relevant to FTB's administrative exhaustion and ripeness argument.  
19 Since Hyatt is suing the FTB for matters that are still being decided in the administrative adjudication  
20 process, his case should be barred by Nevada's own administrative exhaustion and ripeness law.

21 Finally, Hyatt's argument that Nevada's own administrative exhaustion and ripeness laws have  
22 no application to this case evidences Hyatt's hypocrisy. On the one hand, Hyatt asks this Court to  
23 disregard California's immunity and administrative exhaustion laws, and make Nevada law the start  
24 and end of this Court's inquiry. But on other hand, when faced with adverse Nevada law on  
25 administrative exhaustion and ripeness, Hyatt argues that this adverse Nevada law does not apply.  
26 Hyatt's pick-and-choose strategy should be rejected, and the Court should dismiss this case under  
27 Nevada's own administrative exhaustion and ripeness law.

28 //

1                   **9. Hyatt's response to the FTB's alternative writ petition is flawed.**

2           Finally, Hyatt's response to the FTB's alternative writ petition is unpersuasive. Hyatt  
3 completely ignores that he once promised the Nevada federal court, to which the FTB originally  
4 removed this case, that his claims "stem *strictly* from the FTB's tortious actions directed against him  
5 as a Nevada citizen *within the State of Nevada*." (See Jurisdictional Writ at 15 (emphasis added).)  
6 Hyatt also completely ignores that he also told the federal court that he "seeks relief for the FTB's past  
7 tortious activities against him *in Nevada*," asking that Nevada exercise jurisdiction over the FTB "so  
8 that it will be required to answer for its tortious conduct committed against a Nevada resident *in*  
9 *Nevada*." (*Id.* at n. 4 (emphasis added).) Unlike Hyatt, this Court should not ignore these statements,  
10 which are sufficient in and of themselves to estop Hyatt from opposing the FTB's alternative writ  
11 request. See, e.g., *Breliaut v. Preferred Equities Corp.*, 112 Nev. 663, 668-69, 918 P.2d 314 (1996).

12           Even apart from these glaring omissions, Hyatt's Answer to FTB's alternative writ petition  
13 is flawed. Hyatt claims that there is no authority for the FTB's alternative request, but there are  
14 numerous supporting authorities cited in the FTB's Jurisdictional Writ. (See Jurisdictional Writ at 39-  
15 43.) As a matter of Full Faith and Credit, choice of law, comity, and basic common sense, Hyatt  
16 cannot prosecute a Nevada common law tort action that includes litigation over California internal,  
17 non-Nevada acts and contacts of the California government that are not actionable in tort in California.  
18 Just because Hyatt allegedly crossed the California state line does not change what the California  
19 government did within California, or what laws regulate the California government's non-Nevada  
20 conduct. Applying anything other than California law to such conduct makes no sense, and not a  
21 single California law allows Hyatt to recover for alleged common law torts incident to California's  
22 application of its tax laws.

23           Hyatt argues that he should be allowed to litigate in Nevada over everything that the California  
24 government did to him, because to hold otherwise would "split" his claims. But all of the cases Hyatt  
25 relies on for his "no splitting" argument involved service of process issues, personal jurisdiction, and  
26 venue. None of them even addresses subject matter jurisdiction, let alone the exercise of subject  
27 matter jurisdiction over tort claims involving a sister state's acts within its own boundaries that are  
28 not actionable in common law tort under the sister state's own laws.

1 For example, *Sweeney v. Schultes*, 19 Nev. 53, 54 (1885) was an action for recovery of real  
2 property and damages for wrongful possession. The plaintiff was not suing a nonresident for acts  
3 outside the state. Hyatt takes the statement: "After this appearance the court had jurisdiction to  
4 proceed and grant any relief to which the plaintiff was entitled, regardless of the mistake in the form  
5 of the notice inserted in the summons" (*id.* at 57), completely out of context.

6 *Gans v. M.D.R. Liquidating Corp.*, 1990 WL 2851 (Del. Ch. Jan. 10, 1990) was an action to  
7 enforce a contract to provide retirement benefits brought against the corporate directors at the time of  
8 dissolution. *Posner Laboratories, Inc. v. Pro-line Corp.*, 1978 U.S. Dist. Lexis 16334 (S.D. N.Y.  
9 1978) was an action for unfair competition, and *Geo-Physical Maps, Inc. v. Toycraft Corp.*, 162 F.  
10 Supp. 141 (S.D. N.Y. 1958) was for copyright infringement. In all of those cases, the courts had  
11 subject matter jurisdiction over all the asserted claims. That is not the situation in this case.

12 Finally, Hyatt's "no splitting" argument is completely refuted by long practice, especially in  
13 federal courts, where a court often may lack subject matter jurisdiction over some claims but not  
14 others. Such claims are "split" when the court dismisses some, but not all of the claims before the  
15 court. *See, e.g.*, 28 U.S.C. § 1367(c) (specifying situations in which a federal district court may decline  
16 to exercise supplemental jurisdiction over a claim). In fact, the district court "split" Hyatt's claims  
17 when it dismissed Hyatt's First Cause of Action for declaratory relief.

18 At a minimum, California's laws immunize the California government from common law tort  
19 liability for its California internal, non-Nevada taxation conduct involving Hyatt. A Nevada trial  
20 involving litigation over such non-actionable conduct is not proper, and justifies, at a minimum,  
21 granting the FTB's alternative writ request.

22 DATED this 26<sup>th</sup> day of December, 2000.

23 MCDONALD CARANO WILSON MCCUNE  
24 BERGIN FRANKOVICH & HICKS LLP

25  
26 By: 

27 THOMAS R.C. WILSON

28 Attorneys for Petitioner Franchise Tax Board

**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing **FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA'S REPLY IN SUPPORT OF ITS PETITION FOR A WRIT OF MANDAMUS ORDERING DISMISSAL, OR ALTERNATIVELY FOR A WRIT OF PROHIBITION AND MANDAMUS LIMITING THE SCOPE OF THIS CASE** on this 26<sup>th</sup> day of December, 2000, by depositing same in the United States Mail, postage prepaid thereon to the addresses noted below, upon the following:

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Honorable Nancy Saitta  
Eighth Judicial District Court  
of the State of Nevada,  
in and for the County of Clark  
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# **EXHIBIT 30**



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IN THE SUPREME COURT OF THE  
STATE OF NEVADA

\*\*\*\*\*

17 FRANCHISE TAX BOARD OF THE  
STATE OF CALIFORNIA,

18 Petitioner,

19 vs.

20 EIGHTH JUDICIAL DISTRICT COURT of  
21 the State of Nevada, in and for the County of  
Clark, Honorable Nancy Saitta, District  
22 Judge,

23 Respondent,

24 and

25 GILBERT P. HYATT,

26 Real Party in Interest.  
27

**FILED**

DEC 28 2000

JANETTE M. BLOOM  
CLERK OF SUPREME COURT

BY CHIEF DEPUTY CLERK

Case No.: 36390  
Consolidated with Case No. 35549

**FRANCHISE TAX BOARD OF THE  
STATE OF CALIFORNIA'S REPLY IN  
SUPPORT OF ITS PETITION FOR A  
WRIT OF MANDAMUS ORDERING  
DISMISSAL OR ALTERNATIVELY  
FOR A WRIT OF PROHIBITION AND  
MANDAMUS LIMITING THE SCOPE  
OF THIS CASE**

**CONFIDENTIAL INFORMATION  
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CLERK OF SUPREME COURT  
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13 IN THE SUPREME COURT OF THE  
14 STATE OF NEVADA

15 \* \* \* \* \*

16 FRANCHISE TAX BOARD OF THE STATE  
17 OF CALIFORNIA,

18 Petitioner,

19 vs.

20 EIGHTH JUDICIAL DISTRICT COURT of  
the State of Nevada, in and for the County of  
21 Clark, Honorable Nancy Saitta, District Judge,

22 Respondent,

23 and

24 GILBERT P. HYATT,

25 Real Party in Interest.  
26  
27  
28

Case No.: 35549/36390 (Consolidated)

**FRANCHISE TAX BOARD OF THE  
STATE OF CALIFORNIA'S REPLY IN  
SUPPORT OF ITS PETITION FOR A  
WRIT OF MANDAMUS ORDERING  
DISMISSAL, OR ALTERNATIVELY  
FOR A WRIT OF PROHIBITION AND  
MANDAMUS LIMITING THE SCOPE  
OF THIS CASE**

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## INTRODUCTION

The Franchise Tax Board of the State of California's writ petition in Docket No. 36390 ("the Jurisdictional Writ") concerns the constitutional and judicial authority of Nevada state courts to adjudicate real party in interest Gilbert P. Hyatt's tort claims involving the taxation decisions and actions of the California government. The FTB asserts in its Jurisdictional Writ that Nevada state courts do not have subject matter jurisdiction over the conduct involving California's taxing process about which Hyatt complains. In the alternative, the FTB asserts that the subject matter jurisdiction of Nevada state courts is at least limited to the Nevada acts and contacts of the FTB involving Hyatt, given that California's own immunity and administrative exhaustion laws apply, at a minimum, to the FTB's non-Nevada conduct.

Hyatt's October 13, 2000 Answer to the FTB's Jurisdictional Writ includes all varieties of negative and inflammatory allegations against the FTB, including allegations of bigotry and racial epithets, which the FTB flatly denies. Hyatt includes these allegations to try to divert this Court from the legal issues presented in this writ petition, and to prejudice and predispose this Court against the FTB. In this regard, Hyatt's Answer to the Jurisdictional Writ is similar to his Answer to the FTB's writ petition in Docket No. 35549 ("the Discovery Writ"), which has been consolidated with the FTB's Jurisdictional Writ. Both of Hyatt's Answers include misleading and improper "spin," self-serving allegations, misstatements of law and facts, and statements that directly contradict statements in prior pleadings. Taken together, Hyatt's two Answers also include a virtual mountain of documents, reflecting Hyatt's additional strategy of filing so much paper that this Court is hindered in its efforts to conduct a full analysis of the issues in these proceedings.

Sifting through all of Hyatt's paper and rhetoric, Hyatt's Answer to the Jurisdictional Writ is legally wrong and fundamentally unsound. Hyatt's request that this Court summarily dispose of the FTB's Jurisdictional Writ under *State ex rel. Dep't of Transportation v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983) should be rejected. Hyatt's argument that the California government is not entitled to application of its own immunity and administrative exhaustion laws as a matter of Full Faith and Credit is also wrong. The exception to *Nevada v. Hall* exists, has been applied, and should be applied to this case. Constitutional choice-of-law and comity principles compel the same conclusion.

1 Limiting plaintiffs with complaints about the FTB's taxation actions and decisions to the California  
2 statutory remedies that are available in California courts is both appropriate and fair. *See, e.g., Cal.*  
3 *Rev. and Tax. Code § 21021.* Nevada's own administrative exhaustion/ripeness laws are also a basis  
4 for ending this case, and nothing that Hyatt says supports a contrary conclusion. In the alternative,  
5 and at a minimum, Hyatt's case should be limited to litigation over the California government's  
6 Nevada acts and contacts involving Hyatt, as any other result would reflect a wholesale disregard for  
7 California's immunity and administrative exhaustion laws.

8 Hyatt's case should not be allowed to proceed as if California's immunity and administrative  
9 exhaustion laws do not exist. The Court should grant writ relief that acknowledges the California  
10 government's sovereignty over its tax processes.

#### 11 ARGUMENT

##### 12 1. The Court is not obligated to accept Hyatt's unsupported spin.

13 As an initial matter, Hyatt's suggestion that this Court must accept as true every "fact" that  
14 Hyatt alleges should be rejected. The FTB's motion to the district court was not a motion to dismiss  
15 for failure to state a claim. Instead, it was a motion to dismiss for lack of subject matter jurisdiction  
16 based on evidence, not the pleadings, coupled with an alternative motion for summary judgment that  
17 was based on evidence as well. (*See App. Ex. 7.*) Both types of motions allow the Court to look  
18 beyond the hyperbole in Hyatt's First Amended Complaint and Answer to the FTB's Jurisdictional  
19 Writ and to consider the actual evidence that was before the district court on the motions. This is what  
20 the Court should do.

21 At pages 5-16 of the Jurisdictional Writ, the FTB provided the Court with a concise statement  
22 of the undisputed facts with specific record citations. The FTB's evidence underlying its statement  
23 of facts shows how FTB employees took various actions to try to verify Hyatt's change of residency  
24 claim. FTB auditors requested relevant information from Hyatt's taxpayer representatives. (*See App.*  
25 *Ex. 7 at 6-9 (FTB's Motion for Summary Judgment or Dismissal) (citing App. Ex. 8, Cox Affd.).*)  
26 Some FTB information requests required multiple request letters to Hyatt's representatives; some FTB  
27 information requests were never satisfied despite repeated requests. (*See App. Ex. 7 at 6-7 (citing App.*  
28 *Ex. 8, Cox Affd.).*) Some information that Hyatt provided raised more questions with FTB auditors



1 than it answered. (See App. Ex. 7 at 6-9 (citing evidence in App. Ex. 8, Cox Aff.)) FTB provided  
2 several examples: 1) Hyatt's various claimed departure dates from California to Nevada; 2) Hyatt's  
3 failure to account for his whereabouts between late September and late October, 1991, despite  
4 repeated requests; 3) Hyatt's rental of a Las Vegas apartment well after his claimed moved date; 4)  
5 Hyatt's credit card information showing substantial California activity after his claimed move; 5)  
6 Hyatt's false Nevada voter registration, and 6) Hyatt's patent license agreements signed after Hyatt's  
7 claimed move that suggested that Hyatt was still in California. (Jurisdictional Writ at pages 7-12.)

8 The decisions to issue the Notices of Proposed Assessment were based upon many factors that  
9 FTB considered during the course of its attempt to verify Hyatt's change of residency claim.  
10 Because Hyatt did not provide any information as to where he lived during the critical time period  
11 September 26 — October 20, the statutory presumption of full year residency in Cal. Rev. & Tax  
12 Code § 17016 stood un rebutted. The issue of where he lived September 25 — October 20<sup>th</sup> was just  
13 one item of information the FTB needed, but as shown in the Petition at 9, Hyatt failed to provide such  
14 information when asked repeatedly.

15 The correspondence between the FTB and Hyatt regarding this crucial issue shows how  
16 evasive Hyatt was during the audit process, and how disingenuous he is being now. In the FTB's  
17 August 2, 1995, tentative position letter, the FTB auditor explained her understanding of the facts at  
18 that time and specifically informed Hyatt's taxpayer representative that she had no information as to  
19 where Hyatt resided from September 24, 1991 through November 1, 1991 (PBTk 05947, 05952,  
20 05954 and 05955). She concluded the letter with a request that, if her understanding of the facts was  
21 incorrect, she be provided with additional information since her position was still only tentative.  
22 (PBTk 05975).

23 A complete copy of the audit file is included in Hyatt's mass of exhibits before this Court. For  
24 the Court's convenience, another copy of the August 2, 1995 tentative position letter (PBTk 05947-  
25 05986) is submitted as Reply Appendix 1, along with the other audit correspondence cited herein.

26 Hyatt's representative responded on August 29, 1995 that while Hyatt's lease commenced on  
27 November 1, 1991, he actually moved in on a paid pro-rated rent on October 20, 1991. (PBTk05992)  
28 (Reply Appendix Exhibit 2). On August 31, 1995, the FTB responded to this letter specifically asking

1 consistently provided evasive, incomplete, and illogical responses, the FTB auditors were forced to  
2 take additional action and contact third-parties to verify Hyatt's claims. Hyatt's complaints about  
3 these FTB actions ring hollow, as they were a product of his own actions. A person being investigated  
4 cannot give only the information he chooses or otherwise control the investigation, as Hyatt attempted  
5 to do during the audit. *See, e.g., NLRB vs. United Aircraft Corp.*, 200 F. Supp. 48, 51 (D. Conn.  
6 1961), *aff'd*, 300 F.2d 442 (2d Cir. 1962). Such a person also cannot later complain about the  
7 agency's decision to take action, as Hyatt is doing in this case. *See id.* Courts have long rejected  
8 attempts to impose tort liability upon agencies because they did not accept a person's claim but instead  
9 conducted their own investigation and rejected the claim. *See, e.g., Gibson vs. Reynolds*, 77 F.Supp.  
10 629, 640 (D. Ark. 1948), *aff'd* 172 F.2d 95 (8<sup>th</sup> Cir. 1949), *cert. denied*, 337 U.S. 925.

11 Just as a person who seeks damages for alleged injuries must expect the claim will be  
12 investigated, Hyatt had to expect the FTB would check his change of residency claim. Hyatt had no  
13 right to have that audit conducted in complete secrecy, which is what all of his "spin" necessarily  
14 suggests. *Haines v. Askew*, 368 F. Supp. 369, 376 (M.D. Fla. 1973), *aff'd*, 417 U.S. 901 (1974).

15 In addition, much of Hyatt's "spin" has no basis in fact. The most egregious of Hyatt's  
16 misstatements are as follows:

17 **Hyatt spin:** FTB disclosed Hyatt's secret technology. (Hyatt Answer at 12.)

18 **Facts:** The FTB never disclosed to any person or entity the details of the technology  
19 Hyatt was working on. In fact, those details were irrelevant to the audit to  
20 determine when Hyatt severed ties to the State of California. Hyatt has not  
21 produced any evidence that the FTB disclosed his "secret" technology.

22 **Hyatt spin:** The FTB's actions resulted in the destruction of his patent licensing business.  
(Hyatt Answer at 13.)

23 **Facts:** Hyatt's patent licensing business died when his patents were successfully  
24 challenged, and in effect, became worthless. *See Hyatt v. Boone*, 146 F.3d  
25 1348 (Fed. Cir. 1998). As Hyatt's own representative during the audit, Mr.  
26 Cowan, said in his October 13, 1995 letter to Sheila Cox, "Many companies  
27 who produce products that might infringe on patents held by others . . . wait  
28 until the validity of the patent has been tested in court." (PBKT 06176 at pg.  
2, fn. 1) (emphasis added) (Reply Appendix Exhibit 6).

**Hyatt spin:** Contacting Fujitsu and Matsushita violated confidentiality and was not  
necessary. (Hyatt Answer at 13.)

**Facts:** Both the Fujitsu and Matsushita agreements contained the identical provision  
in ¶ 7.4 authorizing disclosure of their terms and conditions, including the

payment amounts, to any governmental agency or as otherwise required by law. See Exhibits 4 and 5 to FTB's reply in support of the Discovery Writ. All the FTB did was send a single page letter to each company asking only what date they wire transferred payments to Hyatt. *Id.* at Exhibits 6 and 7. Sheila Cox wrote Mr. Kern on March 1, 1995: "I need a copy of the bank statement to determine the dates that the wire transfers were made." H01531-01538 (Reply Appendix Exhibit 7). She repeated that request on March 23, 1995. H01627-01635 (Reply Appendix Exhibit 8). A formal legal demand for the information was made on April 11, 1995. PBTk 05789-05798 (Reply Appendix Exhibit 9). On April 13, 1995, Mr. Kern finally responded but provided only the following statement: "Union Bank — Account Name Pretty, Schroeder, Brueggman and Clark Client Trust Account." H01751 (Reply Appendix Exhibit 10). Faced with such an evasive response, Cox wrote directly to the Japanese companies asking merely what dates they wired their payments to Hyatt.

**Hyatt spin:** An FTB attorney, Anna Jovanovich, allegedly threatened to extort a settlement from Hyatt as an alternative to the audit becoming publicly known. (Hyatt Answer at 14.)

**Facts:** As FTB showed at pages 7-9 of its reply in support of the Discovery Writ, any settlement would have been a matter of public record requiring disclosure of Hyatt's name, total amount in dispute, amount of settlement, explanation of why such a settlement would be in the best interests of the State of California and an opinion from California Attorney General as to the overall reasonableness of the settlement. Cal. Rev. & Tax Code § 19442. Moreover, Jovanovich had no authority to even negotiate a settlement. Yet, Hyatt claims she threatened to make Hyatt's audit public if he did not settle.

**Hyatt spin:** Hyatt provided voluminous credit card receipts to the FTB in response to its request. (Hyatt Answer at 17.)

**Facts:** The fact is that none of the credit card receipts produced were for the critical period of September 25 — November 1, 1991. Instead, they were all for periods after that time (Cox Aff. at ¶ 12 & Ex. 12 thereto).

**Hyatt spin:** Hyatt claims that the lease was signed on October 8, 1991 and that he resided there until April 1992. (Hyatt Answer at 17.)

**Facts:** The date of Hyatt's signature on the lease is October 13, 1991 (PBTk 06051) (Reply Appendix Exhibit 4), and Hyatt's representative previously stated during the audit that Hyatt signed the lease on October 13, 1991 and began his tenancy on October 20, 1991. (PBTk 06037) (Reply Appendix Exhibit 4).

Thus, it is Hyatt, not the FTB, who is attempting to "fictionalize" the facts and mislead the Court, by portraying the FTB's audit activities in apocalyptic terms. The FTB simply audited Hyatt, and the basic facts about what the FTB did involving Hyatt do not comport with Hyatt's hyperbole. The Court should reject Hyatt's "spin" of these basic facts, and Hyatt's attempts to distract the Court with shrill and false accusations of FTB bigotry, racism, and institutional evil. The Jurisdictional Writ is about facts and legal issues. The FTB's petition describes the facts and legal issues accurately.

1 Hyatt's rhetoric is misplaced.

2 **2. Hyatt's claim in his Answer that his case "is a tort case,**  
3 **not a 'tax-related' case is just part of his "spin."**

4 Hyatt's claim in his Answer that his case "is a tort case, not a 'tax-related' case" (Hyatt  
5 Answer at 8) is just part of his "spin." Hyatt's own Answer to the FTB's writ petition inexorably links  
6 his claimed run-of-the-mill "tort case" to every taxation decision that the FTB made about him. Hyatt  
7 claims in his Answer that the FTB fraudulently violated a promise to be fair (Hyatt Answer at 3);  
8 litigating this necessarily requires litigation about the fairness or unfairness of the audit and its result.  
9 Hyatt claims that the FTB considered sources it should not have, and disregarded sources it should  
10 have considered (Hyatt Answer at 13-14); these issues also go to the heart of the FTB's taxation  
11 decisions. Hyatt also claims that the FTB's proposed assessments against Hyatt were attempts at  
12 extortion (Hyatt Answer at 14); litigating this requires determining whether the proposed assessments  
13 had any basis in fact, again implicating the FTB's underlying taxation decisions. In sum, everything  
14 about Hyatt's case involves the FTB's underlying determinations about Hyatt's residency, and Hyatt's  
15 claim that his tort claims are distinct from the California government's taxation decisions is false.

16 **3. Thompson does not compel or support denial of the FTB's writ petition.**

17 Hyatt's claim that granting the FTB's writ petition "would alter [the] well established  
18 precedent [of] *State ex rel. Dep't of Transportation v. Thompson*" is also wrong. (Hyatt Answer at  
19 6-7, 20-23.) *Thompson* holds that this Court will not entertain writ petitions concerning denials of  
20 dismissal or summary judgment motions as a "general rule," not as an absolute one. *Smith v. Eighth*  
21 *Judicial Dist. Court*, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997); *State ex rel. Dep't Transp.*  
22 *v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983). This Court has discretion to entertain any writ  
23 petition, and "[t]he interests of judicial economy," not some blanket ban, "remain the primary standard  
24 by which this court exercises its discretion" to entertain writ petitions concerning denials of dismissal  
25 or summary judgment motions. *Smith*, 113 Nev. at 1344-45, 950 P.2d at 281. Applying this primary  
26 standard, the Court has granted writ petitions similar to the FTB's where "considerations of sound  
27 judicial economy ha[ve] militated in favor of granting [them]," including, among other circumstances,  
28 where "an important issue of law requires clarification." *Id.*; see also *Snooks v. Ninth Judicial Dist.*

1 Court, 112 Nev. 798, 799-804, 919 P.2d 1064, 1065-1067 (1996); *Harvey Lerer, Inc. v. Eighth*  
2 *Judicial Dist. Court*, 111 Nev. 1165, 901 P.2d 643 (1995); *State v. Eighth Judicial Dist. Court*, 111  
3 Nev. 1023, 899 P.2d 1121 (1995); *Lewis v. Second Judicial Dist. Court*, 113 Nev. 106, 930 P.2d 770  
4 (1997).

5 The Court's September 13, 2000 order directing Hyatt to answer the FTB's writ petition  
6 acknowledges the judicial economy inherent in these writ proceedings. Addressing the jurisdictional  
7 issues in the FTB's Jurisdictional Writ petition now will minimize the risk that a protracted Nevada  
8 trial in this case would be nullified on jurisdictional grounds after the fact. Neither the Nevada state  
9 courts nor the FTB should be obligated to commit further resources to this heavily litigated case if this  
10 Court agrees with the FTB that the district court has exceeded its subject matter jurisdiction. Thus,  
11 the interests of judicial economy are served by entertaining this petition, not by rejecting it out of  
12 hand, as Hyatt requests.

13 In addition, Hyatt's claim that no important issue of law requires clarification in these writ  
14 proceeding is incorrect. (Hyatt Answer at 22-23.) The issues of state sovereignty and respect raised  
15 in the FTB's writ petition are of paramount importance to California, Nevada, and every other state.  
16 This Court has never ruled on the ability of Nevada state courts to hold the California government  
17 liable in tort for California's tax audit activities. This Court has also never published an opinion  
18 addressing the *Nevada v. Hall* exception concerning another state's exercise of its inherent sovereign  
19 functions. *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979). Only two reported Nevada opinions –  
20 *Mianecki* (which itself was a writ proceeding) and *Hernandez v. City of Salt Lake* – cite *Nevada v.*  
21 *Hall*, and neither opinion includes an analysis of this important exception. *Mianecki v. Second*  
22 *Judicial Dist. Court*, 99 Nev. 93, 658 P.2d 422 (1983); *Hernandez v. City of Salt Lake*, 100 Nev. 504,  
23 686 P.2d 251 (1984). These important issues are integral components of the FTB's writ petition, and  
24 the time to resolve these important issues is now.

25 The FTB's writ petition challenges the trial court's subject matter jurisdiction, which is exactly  
26 what writ proceedings are for. *See Nev. Rev. Stat. 34.320* (a writ of prohibition "arrests the  
27 proceedings of any tribunal . . . exercising judicial functions, when such proceedings *are without or*  
28 *in excess of the jurisdiction of such tribunal*" (emphasis added)). The fact that the FTB's challenge

1 involves constitutional limitations only makes these writ proceedings more appropriate and important.  
2 *Watson v. Housing Authority of City of North Las Vegas*, 97 Nev. 240, 242, 627 P.2d 405, 406-07  
3 (1981) (under Nev. Rev. Stat. 34.320, “jurisdiction has a broader meaning than the concept of  
4 jurisdiction over the parties and subject matter: it includes constitutional limits.”) Hyatt’s claim that  
5 the Court should summarily reject the FTB’s writ petition, allow a lengthy trial in district court, and  
6 then consider these important jurisdictional issues only on appeal, is contrary to this Court’s  
7 established practice, judicial economy, and common sense. The Court should reject Hyatt’s argument  
8 that *Thompson* requires that this case proceed to trial without resolution of the FTB’s writ petition.

9 **4. Hyatt confuses subject matter jurisdiction with personal jurisdiction.**

10 On multiple occasions in his Answer, Hyatt has confused subject matter jurisdiction with  
11 personal jurisdiction. Hyatt Answer, pages 2 and 67-73. Hyatt’s basic argument is that because FTB  
12 agents entered Nevada during their investigation, the district court has personal jurisdiction over FTB.  
13 Since it has personal jurisdiction, Hyatt concludes the district court must be able to hear all of his  
14 “tort” claims — even those based on events that occurred outside Nevada. In a real sense, Hyatt  
15 argues without any authority that since the FTB answered Hyatt’s First Amended Complaint,  
16 California, a sovereign state in our system of cooperative federalism, inexplicably waived its  
17 sovereign immunity to suit and conferred onto Nevada subject matter jurisdiction over its internal  
18 constitutional and governmental functions. By arguing notions such as, “personal jurisdiction”,  
19 “splitting causes of action”, and “tort”, Hyatt is vaulting form over substance. This lawsuit is about  
20 the administrative finding that Hyatt was a California resident from 1991 to 1992 and that he owes  
21 California substantial personal income taxes.

22 The district court previously ruled that it did not have subject matter jurisdiction over  
23 California’s tax process. Hyatt did not object or seek review this ruling and presumably it is the law  
24 of the case. Hyatt’s response to the dismissal was to reinvent his tax-related claims and dress them  
25 up as tort actions. Because the claims constitute a collateral attack on California’s taxing process they  
26 are beyond the jurisdictional authority of Nevada’s district court.

27 Furthermore, Hyatt avoided removal to federal court by conceding that his claims were based  
28 solely upon Nevada common law tort theories. *See* pages 19-20, *supra*. Hyatt also avoided removal

by limiting his tort claims to only what FTB did in Nevada:

... at issue are certain events, i.e. torts, which occurred during the FTB's surreptitious investigations of plaintiff in Nevada. (April 6, 1998 Surreply to FTB's Reply to Plaintiff's Opposition to Motion to Quash Service of Process at page 4, lines 20-21);

Plaintiff now seeks relief for the FTB's past tortious activities against him in Nevada. (*Id.* at page 12, lines 10-11);

Plaintiff . . . requests . . . that this Court exercise jurisdiction over the FTB so that it will be required to answer for its tortious conduct committed against a Nevada resident in Nevada. (*Id.* at page 13, lines 10-12).

Hyatt is therefore judicially estopped from now attempting to litigate FTB actions that took place outside Nevada. *See e.g., Brelant v. Preferred Equities Corp.*, 112 Nev. 663, 668-69, 918 P.2d 314 (1996).

Simply put, the district court does not have *subject matter jurisdiction* over Hyatt's causes of action against California for engaging in its legitimate administrative function of tax assessment and collection. Regardless of whether the district court has personal jurisdiction over FTB, the lack of subject matter jurisdiction precludes the district court from adjudicating Hyatt's remaining tort causes of action. As pointed out by the United States Supreme Court in *Nevada v. Hall* 410 U.S. 421 (1978), "a judgment entered in on State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." (Emphasis added.) Thus, Hyatt's restatement of his tax case against California as a tort constitutes an impermissible and constitutionally barred collateral attack on another state's taxing authority which is beyond the subject matter jurisdiction of the Nevada district court.

#### 5. Hyatt's Full Faith and Credit analysis is flawed.

Hyatt's response to the FTB's request for dismissal based on Full Faith and Credit principles is similarly unpersuasive. Hyatt's Full Faith and Credit argument contains many components, but none justifies this Court ignoring California's immunity and administrative exhaustion laws.

##### A. *Nevada v. Hall* confirms, rather than rejects, the validity of the FTB's Full Faith and Credit argument.

Hyatt's opening salvo regarding Full Faith and Credit is a claim that *Nevada v. Hall*, 440 U.S. 410 (1979), rejected the FTB's Full Faith and Credit argument. (Hyatt Answer at 24.) But the FTB's

Full Faith and Credit argument is a direct product of *Nevada v. Hall* and its progeny. The Supreme Court in *Nevada v. Hall* noted that its Full Faith and Credit holding allowing a private plaintiff's California lawsuit against Nevada over a California traffic accident "poses no substantial threat to our constitutional system of cooperative federalism." *Nevada v. Hall*, 440 U.S. at 424 n.24. The Supreme Court also noted that it had no occasion to consider whether other state policies not involved in car accidents "might require different analysis or a different result." *Id.* The Supreme Court further indicated that suits interfering with a state's "capacity to fulfill its own sovereign responsibilities" were the types of cases that might require this different analysis and result. *Id.* A variety of courts have dismissed lawsuits against sister states on the basis of this language in *Nevada v. Hall*. (See Jurisdictional Writ at 27-29 (citing cases).) Thus, *Nevada v. Hall* confirms, rather than rejects, the viability of the FTB's Full Faith and Credit argument.

**B. *Mianecki* does not address the *Nevada v. Hall* exception and concerns a far different type of case.**

Hyatt next claims that *Mianecki v. Second Judicial Dist. Court* disposes of the FTB's Full Faith and Credit argument. (Hyatt Answer at 24.) But neither *Mianecki* nor any other reported Nevada case discusses the *Nevada v. Hall* exception that the Court should apply here. See *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 658 P.2d 422 (1983). Furthermore, *Mianecki* involved a Wisconsin parolee's criminal conduct in Nevada, and two negligence claims for failure to act in Nevada: (1) Wisconsin's failure to warn Nevada citizens in Nevada of a sex offender's propensities, and (2) Wisconsin's failure to supervise the sex offender while he was within Nevada's borders. *Mianecki*, 99 Nev. at 95, 658 P.2d at 423. Hyatt has no similar claims here, and what Hyatt wants to litigate implicates virtually every facet of the California government's taxation decisions and actions involving Hyatt, whether those decisions and actions involved Nevada or not. (See Jurisdictional Writ at 17-18.) Thus, Hyatt's case, unlike *Mianecki*, is not about mere "injurious operational acts committed within [Nevada's] borders by employees of sister states." *Mianecki*, 99 Nev. at 98, 658 P.2d at 425. *Mianecki* held that Nevada's interest in protecting its citizens from such acts outweighed Wisconsin's interests in immunity, *id.*, but Hyatt's case about the California government's taxation process – a core sovereignty issue – is far more expansive than a case about such limited acts. These



1 considerations require "a different analysis [and] a different result" than *Mianecki* in this case.  
2 *Nevada v. Hall*, 440 U.S. at 424 n.24.

3 In *Mianecki*, this Court also said Nevada has "a paramount interest in protecting its citizens  
4 from individuals who have been convicted of criminal offenses." *Mianecki*, 99 Nev. at 97, 658 P.2d  
5 at 424. But in this case, unlike *Mianecki*, Hyatt has failed to articulate a cognizable Nevada policy  
6 or paramount interest that requires protection. Just saying, as Hyatt has said, that Nevada has a  
7 paramount interest in protecting its citizens from governmental tort damage is not enough. Like  
8 California's immunity laws, Nevada's immunity laws shield Nevada from governmental tort liability  
9 for a broad variety of acts. In the area of gaming regulation, the Nevada government function most  
10 analogous to California's taxation function, Nevada's immunities are even broader by virtue of the  
11 broad waivers that applicants sign, as Hyatt himself notes. In addition, even in those areas where  
12 Nevada has waived its immunity to civil liability, Nevada has limited the compensatory damages  
13 recoverable from the Nevada government to \$50,000, and altogether barred the imposition of punitive  
14 damages. Nev. Rev. Stat. § 41.035; accord Cal. Gov't. Code § 818 (California government immunity  
15 from punitive damages).

16 These protections of the Nevada government evidence that there is no Nevada policy that  
17 justifies continuation of Hyatt's case against the California government. They do so by indicating that  
18 not every governmental act has a remedy, and that Nevada government acts like the FTB's acts do not  
19 give rise to Nevada government liability. Even if such acts by the Nevada government would give  
20 rise to Nevada liability, Nevada's laws would insulate Nevada government from a large compensatory  
21 damage award, and from any punitive damage award at all.

22 Given these considerations, the unfairness of Hyatt's interpretation of *Mianecki* is readily  
23 apparent. Hyatt's interpretation of *Mianecki*, if accepted, would allow Nevada state court litigation  
24 whenever Nevada residents are the subjects of a California administrative investigation, because the  
25 rights of Nevada citizens are always involved in such cases. Hyatt's interpretation of *Mianecki*, if  
26 accepted, would also allow Nevada courts to ignore California's own laws, apply only Nevada's law  
27 regardless of where the California government's conduct occurred, and hold the California  
28 government liable for an unlimited amount of compensatory and punitive damages, even though the

1 California government is immune under its own laws, and Nevada law would either bar or sharply  
2 limit recovery if the conduct involved a Nevada government agency.

3 Hyatt's interpretation of *Mianecki* is especially unfair since California offers aggrieved parties  
4 judicial and administrative forums in California in which to bring complaints against California's  
5 taxing authorities. For instance, California law includes a statutory remedy for the FTB's reckless  
6 disregard of its policies and procedures, a remedy limited to California's own courts:

7 If any officer or employee of the board recklessly disregards board  
8 published procedures, a taxpayer aggrieved by that action may bring an  
9 action for damages against the State of California in *superior court*.  
Cal. Rev. & Tax. Code § 21021(a) (Emphasis added).

10 Given such statutory remedies in California's own courts (*see* page 19, *infra*), Hyatt should not be  
11 allowed to pursue a Nevada common law tort action involving taxation, which is expressly barred  
12 under California immunity and administrative exhaustion laws. *Mianecki* does not hold to the  
13 contrary, and no Nevada policy interest justifies allowing Hyatt to proceed.

14 **C. Hyatt's intentional tort and operational act arguments miss the point.**

15 Hyatt's Full Faith and Credit argument continues with a lengthy analysis of Nevada immunity  
16 laws, concluding that the FTB should be denied immunity because Nevada would permit itself to be  
17 sued for "operational" conduct and "intentional torts." (Hyatt Answer at 23-37.) But Hyatt's claim  
18 that Nevada's immunity laws generally do not immunize such conduct is not evidence that applying  
19 California's immunity and administrative exhaustion laws to this case would violate Nevada public  
20 policy. Hyatt ignores that Nevada has no personal income tax, and therefore no reason to conduct  
21 residency tax audits of individuals. Since Nevada has no personal income tax, the Nevada Legislature  
22 has never had to consider whether it would permit the State of Nevada to be sued for "deficient  
23 operational acts" or "intentional torts" involving personal income tax administration. Furthermore,  
24 in the area of Nevada gaming regulation, which involves government investigations analogous to  
25 California tax audits, distinctions among "operational" acts, "discretionary" acts, and "intentional  
26 torts" have substantially less meaning, given the broad waivers that gaming applicants sign.  
27 Moreover, the distinctions among such acts have nothing to do with the administrative exhaustion  
28 laws cited in the FTB's petition, and Hyatt raises no genuine dispute that California's and Nevada's

1 laws regarding administrative exhaustion are substantially the same. Accordingly, the distinctions in  
2 Nevada's general immunity laws among "discretionary acts", "operational acts", and "intentional  
3 torts" are not reasons to deny Full Faith and Credit to California's specific immunity laws regarding  
4 taxation, or to the California administrative exhaustion laws with which Hyatt did not comply.

5 In any event, Hyatt's assertions that the FTB acts about which he complains were  
6 "operational" and "intentionally tortious" are unfounded. As the FTB described in its petition,  
7 California law gave the FTB a wide range of powers to conduct audits like the Hyatt audits, and left  
8 the details of those audits to the FTB's discretion. (Jurisdictional Writ at 34-35.) Where statutory  
9 provisions entrust authority and discretion to a coordinate branch of government, actions taken under  
10 those statutes are generally ruled discretionary, not operational. *See, e.g., Becerra v. County of Santa*  
11 *Cruz*, 68 Cal. App. 4<sup>th</sup> 1450, 81 Cal. Rptr. 2d 165 (1998) (county social services department held  
12 immunized for placement and supervision of foster child who was later murdered, under statutes  
13 entrusting department employees with authority and discretion to analyze dependent child's needs and  
14 interests).

15 Here, the FTB acted under authority of such statutes, which entrusted the FTB with the  
16 authority to determine how to conduct the Hyatt residency audits, and indeed to "prescribe *all* rules  
17 and regulations necessary" for the enforcement of California's personal income tax laws. Cal. Rev.  
18 and Tax Code § 19503 (emphasis added); *see also* Jurisdictional Writ at 35. Under the FTB's own  
19 rules and regulations, the details of how FTB auditors proceeded involving Hyatt were left to the  
20 auditors' discretion. (Jurisdictional Writ at 35.) Just because the FTB promulgated rules for the  
21 auditors to follow during audits does not mean that their acts were "operational." All government  
22 actors, even discretionary actors, are subject to some rules from some source, whether statutory,  
23 regulatory, or otherwise.

24 In addition, Hyatt's characterization of the FTB's conduct as "intentionally tortious" proves  
25 nothing. Neither the FTB's "intent" to perform each step of its audits, nor Hyatt's labeling of the  
26 FTB's conduct as "intentionally tortious," transmutes that conduct into an intentional tort. *See*  
27 *Conway v. Circus Circus Casinos, Inc.*, — Nev. —, 8 P.3d 837, 840 (2000) ("Simply labeling an  
28 employer's conduct as intentional . . ." does not turn that conduct into an intentional tort.) An

1 intentional tort requires facts showing a deliberate intent to bring about injury, (*id.*), but Hyatt has  
2 neither plead nor presented *facts* suggesting any such deliberate intent here. To the contrary, Hyatt's  
3 pleading simply shows that the FTB conducted a residency tax audit for tax year 1991 and, at Hyatt's  
4 request, applied the results of the 1991 audit to the 1992 tax year. The FTB subsequently issued  
5 proposed California tax assessments for tax years 1991 and 1992 against Hyatt that he vehemently  
6 opposes. The facts properly in evidence show that Hyatt's evasions and the need to check his change  
7 of residency claim, not governmental malice, were why the FTB took the actions and made the  
8 minimal information disclosures that it did. Hyatt's evasions, and the facts prompting a need to check,  
9 included: (1) unsatisfied information requests to Hyatt; (2) Hyatt's multiple claimed move dates; (3)  
10 credit card statements showing dining charges almost exclusively in California in late 1991 and early  
11 1992; (4) a Las Vegas apartment lease with a start date weeks after Hyatt's claimed move, with no  
12 explanation of where Hyatt lived in the interim; and (5) patent license agreements executed after  
13 Hyatt's claimed move listing his California mailing address. (*See* App. Ex. 7 at 6-9 (citing evidence  
14 in App. Ex. 8, Cox. Aff.).)

15 Thus, there is nothing about the FTB's conduct, or Nevada's own immunity laws, that justifies  
16 denial of Full Faith and Credit to California's immunity and administrative exhaustion laws in this  
17 case.

18 **D. Hyatt's cursory discussion of California's immunity and administrative**  
19 **exhaustion laws does not demonstrate that Hyatt's case should proceed.**

20 Hyatt next argues that even California law, specifically California Government Code section  
21 860.2, does not accord the FTB the immunity that it asserts, as it only provides immunity in regard  
22 to "instituting" a tax proceeding. (Hyatt Answer at 36.) But Hyatt is only reading the first half of the  
23 statute, which in its entirety immunizes *all* FTB acts or omissions concerning the application of  
24 California's tax laws:

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

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

28 (b) An act or omission in the interpretation or application of any law  
relating to a tax. Cal. Gov't Code § 860.2.

1 By its own terms, this statute covers far more than the FTB "instituting" a tax proceeding. *Id.*  
2 The statute immunizes the FTB from liability for all of the acts or omissions of its employees  
3 concerning their application of California's tax laws, which are the only types of acts or omissions that  
4 Hyatt alleges here. (App. Ex. 4 p.2, ¶ 4 (Hyatt First Am. Compl.) (Alleging that all claims concern  
5 acts of FTB employees "within the course and scope of their employment"). The FTB's immunity  
6 under this statute is not dependent on whether its employees' acts were operational or discretionary,  
7 even if the FTB's acts here were operational (which they were not). Cal. Gov't Code § 860.2;  
8 *Mitchell v. Franchise Tax Bd.*, 183 Cal. App. 3d 1133, 228 Cal. Rptr. 750 (1986) (finding FTB  
9 immune under this section in tort action without consideration of any discretionary/operational  
10 distinction). The FTB's immunity under this statute is also not dependent on any distinction between  
11 intentional and other torts, even if the FTB's acts here could be construed as intentional torts (which  
12 they cannot). *Id.*; see also *Gates v. Superior Court*, 32 Cal. App. 4<sup>th</sup> 481, 510, 38 Cal. Rptr. 2d 489  
13 (1995) ("[U]nless an immunity otherwise provides, the [California] governmental tort immunities  
14 apply to intentional tortious conduct."); Cal. Gov't Code § 818.8 (immunizing the California  
15 government from all intentional or negligent misrepresentation claims for damages, such as those in  
16 Hyatt's complaint.). Instead, the FTB's immunity under this statute depends on the subject matter of  
17 the acts (application of California's tax laws), and that subject matter is precisely what Hyatt  
18 complains about here.<sup>1</sup>

19 Predictably, Hyatt also cites to what his counsel (not the FTB's counsel) called "loopholes"  
20 in California's immunity laws during the dismissal/summary judgment hearing in the district court.  
21 But as the FTB noted in its writ petition, none of these "loopholes" has any application to Hyatt's  
22 common law tort case. (Jurisdictional Writ at 24-25.) Furthermore, Hyatt's Answer contains no  
23

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24 <sup>1</sup> While this subject-based approach in California Government Code section 860.2 may be  
25 different from the discretionary/operational approach of Nevada's immunity laws, this does not mean  
26 that the two states' immunity laws conflict in the context of this case. As described *supra*: (1) the  
27 Nevada legislature has never had to consider an immunity law concerning personal income tax  
28 administration activities; (2) the discretionary/operational distinction has far less meaning in the  
analogous Nevada gaming regulation context, and (3) the FTB's actions in this case were not  
"operational" in any event.

1 persuasive authority that he was excused from the claims filing requirements of California Tort Claims  
2 Act, which are a jurisdictional prerequisite to a damages action for "any . . . injury for which the  
3 State is liable." *Cal. Code Regs., tit. 2, § 630(h) (emphasis added)*; see also *Cal. Govt. Code § 905.2*;  
4 Jurisdictional Writ at 24-25. Hyatt's suggestion that this blanket rule does not apply because his  
5 California tax protest is not an "administrative proceeding," (Hyatt Answer at 66-67), is a non-  
6 sequitur; the Tort Claims Act requires claims filing no matter how Hyatt characterizes the protest.

7 Thus, there is no real question about whether application of California's immunity and  
8 administration exhaustion laws immunize the FTB from Hyatt's common law tort case. If this Court  
9 applies those laws, Hyatt's case in Nevada is over. This Court should apply those laws as a Full Faith  
10 and Credit matter.

11 Applying these California laws would be fully consistent with the general rights and  
12 immunities of taxing agencies. Federal and state courts have long recognized the concepts of absolute  
13 and/or qualified immunity for the acts of governmental agencies and their personnel. See, e.g., *Barr*  
14 *v. Matteo*, 360 U.S. 564, 571-72 and 576 (1959); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).  
15 In addition, because taxation is such a vital governmental function, a state may limit suits arising out  
16 of its exercise of the taxation power to its own courts. *Kennecott Copper Corp. v. State Tax Com.*,  
17 327 U.S. 573, 579-80 (1946) (statute authorizing "an action in any court of competent jurisdiction"  
18 for return of taxes paid under protest limited such actions to Utah's own courts); *Smith v. Reeves*, 178  
19 U.S. 436, 438-39, 441 (1900) (suit in federal court against California's Treasurer for illegal  
20 assessment of taxes by State Board of Equalization was barred because California consented to such  
21 a suit only in its own courts). There is also no basis for Hyatt's suggestion that recognizing FTB's  
22 immunity in this case will somehow result in a new legal principle that will subject Nevada citizens  
23 to sinister acts of sister states as Hyatt argues. Just because Nevada courts have no authority to  
24 adjudicate Hyatt's tort claims, does not mean that Nevadans generally are without legal remedy in  
25 California for alleged FTB wrongdoing. See, e.g., *Cal. Rev. & Tax. Code § 21021*.

26 //

27 //

28 //

**E. Hyatt's analysis of the FTB's policies, procedures, and regulations does not justify denying Full Faith and Credit to California's laws.**

Hyatt's argument that the FTB violated its own "policies, procedures, and regulations," and thus must be barred from relying on any California laws in this case, is also wrong. Even if these supposed violations proved that the conduct of FTB auditors involving Hyatt was "operational" (which they do not), it does not follow that any Nevada public policy requires denial of Full Faith and Credit to California's immunity and administrative exhaustion laws. As described *supra* at page 14, Nevada has never had to consider what immunity it would allow concerning tax activities like the FTB's in this case, because Nevada has no personal income tax. In the analogous area of Nevada gaming regulation, Nevada has particularly broad immunities, given the broad waivers that gaming applicants sign. In addition, the operational/discretionary distinction has nothing to do with Hyatt's indisputable failure to comply with California's Tort Claims Acts. The FTB's acts involved tax administration, a function essential to California's existence. Allowing this suit to proceed would interfere with this inherent sovereign function of California, for all of the reasons stated in the FTB's petition.

Moreover, California has an express statutory remedy for any possible violation of FTB policies and procedures. Cal. Rev. & Tax. Code § 21021. Subsection (a) is a limited statutory waiver of California's sovereign immunity for claims arising out of reckless disregard of FTB published procedures. The statute expressly limits actions arising from such conduct to California's own superior courts. *Id.* ("If any officer or employee of the board recklessly disregards board published procedures, a taxpayer aggrieved by that action may bring an action for damages against the State of California in *superior court*."). (Emphasis added).

Such language is not a waiver of sovereign immunity that allows Nevada courts to exercise subject matter jurisdiction over Hyatt's case. The language of Section 21021 is more specific than that found in *Kennecott Copper Corp.*, cited *supra* at page 18, and Nevada does not even have a "superior court." In addition, the process of superior courts in California is limited to the State of California, *see* Cal. Civ. Proc. Code § 71, and other California statutes specifically refer to courts of other states. *See* Cal. Rev. & Tax Code § 31; Cal. Civ. Proc. Code § 1913. Hyatt has no right to

1 proceed with his Nevada common law tort action involving California's "policies, procedures, and  
2 regulations" where he had an available statutory remedy in California

3 As previously discussed at pages 24-25 of the Jurisdictional Writ, at oral argument before the  
4 district court, Hyatt argued that three other "loopholes" in California's sovereign immunity laws  
5 allowed Nevada courts to hear his case: 1) privacy rights under the California Constitution; 2)  
6 California's Information Practices Act; and 3) a claimed exception to governmental immunity for  
7 breach of contract. App. Ex. 16 at 30-34 (Tr. of Proceedings). But, Hyatt's claims are for Nevada  
8 common law torts, not for violation of the California Constitution, any California statute or any  
9 California contract law. In fact, Hyatt avoided removal to federal court by conceding:

10 "The action is based *entirely on Nevada law*." (App. Ex. 14, FTB  
11 Reply Ex. A (Plaintiff's Motion to Remand) at p. 19, lns. 2-3.  
(Emphasis added).

12 "His causes of action are *grounded in the law of the State of Nevada*.  
13 His tort claims speak for themselves as cause of action recognized  
under Nevada law." (Id. at p. 22, lns. 17-18). (Emphasis added).

14 In any event, what is significant is that Hyatt now admits in his Hyatt Answer that he has  
15 remedies in California. "California's Constitution, California's privacy act, and the California  
16 Taxpayer Bill of Rights all forbid the FTB from engaging in the conduct now alleged by Hyatt . . .".  
17 (Hyatt Answer at page 36, line 20 — page 37, line 1.) "California law provides remedies,  
18 constitutional and statutory as opposed to common law, through which an individual may obtain  
19 redress for injuries stemming from conduct akin to the FTB's actions in this case." (Hyatt Answer  
20 at page 56, lines 10-12).

21 In footnote 123 at page 37 of his Answer, Hyatt even quotes the California Information  
22 Practices Act (Cal. Civ. Code § 1798 et seq.) as allowing suit against California to be brought in "any  
23 court of competent jurisdiction." That, of course, is the same phrase that the U.S. Supreme Court held  
24 in *Kennecott Copper* limits suits to a state's own courts. When Cal. Civ. Code § 1798 is considered  
25 in conjunction with Cal. Rev. & Tax Code § 21021 and *Kennecott Copper*, Hyatt's exclusive remedy  
26 was a statutory action in California's own courts, not a common law "tort" action in Nevada.

27 That California can limit suits against it concerning taxation to statutory proceedings in  
28 California's own courts can be easily understood by analogy to federal law:



- The IRS and individual IRS agents are entitled to immunity when, in the course of collecting income taxes or enforcing income tax laws, IRS personnel allegedly commit torts. As in Hyatt's case, the actions complained of often occur during the course of an investigation to determine tax liability. Where such actions are based on common law tort or involve the initiation or continuation of proceedings subject to further agency adjudication, the IRS and the federal government are protected by sovereign immunity and individual agents are entitled to official immunity. *See, e.g., Stankevitz v. IRS*, 640 F.2d 205 (9<sup>th</sup> Cir. 1981); *Zimmerman v. Spears*, 428 F. Supp. 759, 762 (W.D. Tex. 1977), aff'd 565 F.2d 310 (5<sup>th</sup> Cir. 1977); *McKenzie v. Moeller*, 1976 U.S. Dist. LEXIS 14610 (E.D. Wis. 1976).
- Even actions for wrongful publication to third parties of information regarding a person's failure to pay federal income taxes has been barred against IRS agents based upon their official immunity. *See, e.g., Downey v. Nix*, 1977 U.S. Dist. LEXIS 16276 (N.D. Ga. 1977).
- IRS agents are also immune from suits in which it is alleged that taxes were improperly assessed. *See, e.g., Johnson v. District Director of IRS*, 1976 U.S. Dist. LEXIS 12148 (N.D. Ga. 1976).
- Hyatt's argument that federal courts have not granted IRS immunity for alleged torts committed during an audit is not supported by any reported case; the cases he cites are based on statutory claims not common law torts. For example, Hyatt cites to pages 127-28 of a book entitled "Invasion of Privacy" by Louis R. Mizell as evidence that the IRS has been held liable for invasion of privacy. That case, however, is reported as *Ward v. United States*, 973 F. Supp. 996 (D. Colo. 1997) and involved statutory claims, not common law tort claims.
- Federal law is clear: the United States retained its sovereign immunity (i.e. privilege) against tort claims that arise out of the conduct of an IRS audit; Congress waived sovereign immunity and created a statutory right to sue for improper conduct in the collection of a federal tax; but retained sovereign immunity against suits seeking money damages based upon illegal determination of a federal tax obligation. Title 26 U.S.C. § 7433; *Miller v. United States*, 66 F.3d 220, 222-23 (9<sup>th</sup> Cir. 1995), cert. denied 517 U.S. 1103.

Just as Congress waived the federal government's sovereign immunity and created statutory remedies for federal taxpayers who allege improper (i.e. "tortious") conduct by IRS agents under 26 U.S.C. § 7433, so too California has created a statutory remedy which limits damage actions against the FTB concerning taxation to California's own courts under Cal. Rev. & Tax Code § 21021.

In any event, the acts of FTB's employees did not violate any policies or procedures of the FTB. California law expressly authorizes disclosure of identifying information to third parties during an audit:

A return or return information may be disclosed in an judicial or

1 administrative proceeding pertaining to tax administration, if any of the  
2 following apply:

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

6 *See also Franchise Tax Bd. v. Superior Court*, 164 Cal. App. 3d 526, 537, 210 Cal. Rptr. 605 (1985)  
7 (FTB investigations regarding tax liability matters are "administrative inquiries"); *cf. Norman E.*  
8 *Duquette Inc. v. Commissioner of Internal Revenue*, 110 F.Supp.2d 16, 20 (D.C. Cir. 2000) (audits  
9 are administrative proceedings under virtually identical federal statute.). The FTB auditor disclosures  
10 of minimal identifying information about Hyatt to third parties in the course of the FTB's audits was  
11 fully consistent with this law, and with the FTB's "policies, procedures and regulations." The  
12 information disclosed to third parties *at most* revealed Hyatt's name, address, social security number,  
13 and selection for audit.

14 **F. Hyatt's analysis of the *Nevada v. Hall* exception is designed to mislead.**

15 Hyatt's claim that the "so-called exception to *Nevada v. Hall*" has no application to this case  
16 is structured as if Hyatt's own California tax protest is the only California "sovereign responsibility"  
17 that could conceivably be threatened by Hyatt's lawsuit. *Nevada v. Hall*, 440 U.S. at 424 n.24. But  
18 allowing this action to proceed has had, and would have, effects not only on the protest process, but  
19 on many other components of California's residency audit program as well. Hyatt's case has already  
20 consumed hundreds of hours of otherwise productive auditor time in depositions by Hyatt's counsel.  
21 In addition, the district court's December 21, 1999 protective order that is the subject of the FTB's  
22 Discovery Writ purports to preclude FTB from using evidence that the FTB develops during the  
23 defense of this case in the Hyatt protest, unless the FTB goes through procedures imposed by the  
24 Nevada court. Furthermore, the detrimental effects of Hyatt's lawsuit that are described in the FTB's  
25 Jurisdictional Writ are not exclusive. Hyatt's case, if allowed to proceed, would also do the following:

- 26 • Chill the FTB's performance of its public duties, setting a precedent for  
27 protracted Nevada litigation whenever the FTB requests information  
28 from Nevada sources in a residency audit;
- Effectively preclude FTB from conducting audits in Nevada without  
some unspecified prior approval of Nevada courts or agencies (*see*  
Hyatt's First Amended Complaint ("FAC") at ¶¶ 22 and 32);

- 1 • Discourage FTB from approaching or questioning neighbors,  
2 businesses, governmental officials or others in Nevada who may have  
3 pertinent information concerning long-time California taxpayers'  
4 claims of change of residency to Nevada (FAC ¶ 34);
- 5 • Deter the FTB from using a person's name, address and social security  
6 number to identify that person during an audit due to the risk of  
7 litigation (FAC ¶¶ 35, 41, 42 and 62);
- 8 • Deter the FTB from sending its standard "Demand for Information"  
9 form and other requests for information into Nevada (FAC ¶¶ 46, 55,  
10 56, and 62);
- 11 • Set a precedent that merely telling a third party FTB is auditing a  
12 person — and therefore is seeking information — could be tortious  
13 (FAC ¶¶ 34, 46 and 47);
- 14 • Militate in favor of the FTB conducting residency audits in total  
15 secrecy, running the risk that the FTB will not uncover all relevant  
16 facts;
- 17 • Allow the person being audited to control the audit process as well as  
18 the decision-making process; and
- 19 • Impose a fiduciary obligation (FAC ¶ 71) between FTB and California  
20 taxpayers who claim to move to another state (FAC ¶ 60), even though,  
21 as a matter of law, no such fiduciary relationship exists. (*Schaut v.*  
22 *First Federal Savings & Loan Ass'n of Chicago*, 560 F. Supp. 245, 246  
23 (N.D. Ill. 1983), *appeal dismissed without opinion*, 735 F.2d 1366 (7th  
24 Cir. 1984)).

25 Hyatt argues that the FTB has not provided the requisite proof that his lawsuit interferes with  
26 the FTB's capacity to fulfill its sovereign taxation responsibilities. (Hyatt Answer at 49-51.) But all  
27 of the above effects can be divined from the record, and from ordinary common sense. Hyatt's lawsuit  
28 does interfere with the FTB's capacity to fulfill its sovereign taxation responsibilities, and would do  
so even more if allowed to proceed. This militates in favor of this Court applying California's  
immunity and administrative exhaustion laws and ending this case.

23 **G. The Supreme Court's recent sovereign immunity cases fully support the FTB's  
24 mandamus petition.**

25 Hyatt is correct that none of the Supreme Court's recent sovereign immunity decisions  
26 expressly overrule *Nevada v. Hall*. But as the FTB described at pages 29-30 of its petition, these cases  
27 confirm that the *Nevada v. Hall* exception should apply fully to this case. The Supreme Court's recent  
28 cases reflect an ever-increasing respect for sovereign dignity, an expansive view of sovereign

1 immunity, and an unwillingness to intrude on a state's own sovereign duties. In so doing, they  
2 underscore the importance of the *Nevada v. Hall* exception, counter Hyatt's claim that the exception  
3 is not viable, and compel application of that exception to this case.

4 **6. Hyatt's choice of law analysis is similarly flawed.**

5 Hyatt's claim that *Nevada v. Hall* and *Mianecki* conclusively prove that California laws should  
6 not be applied as a Constitutional Choice of Law matter is wrong. The FTB's petition describes fully  
7 how fairness and the parties' expectations compel application of California's immunity and  
8 administrative exhaustion laws. (*See* Jurisdictional Writ at 30-32.) If these laws are not applied, and  
9 this case is not dismissed, Nevada courts and juries would effectively regulate California's tax  
10 collection process. At the same time, applying California law is not unfair, since Hyatt admittedly  
11 was a long-time resident who enjoyed the benefits and privileges of living in California for many  
12 years while he developed his computer technologies. Hyatt also was, and still is, pursuing his  
13 California remedies as to the audit and to his tax liability.

14 In contrast, what *would* be patently unfair is to treat California's immunity and administrative  
15 exhaustion laws as if they do not exist in this case, merely because Hyatt allegedly crossed the  
16 California state line into Nevada. Fully 96.8% of the FTB's audit man hours involving Hyatt were  
17 expended in California, and only 3.2% in Nevada.<sup>2</sup> All decisions to propose additional assessments  
18 against Hyatt were made in California, and all administrative review occurred in California. The audit  
19 activity and administration was done by the California government, and Hyatt is pursuing his  
20 administrative remedies and review in California at the present time. California law also provides  
21 various statutory remedies in California's superior courts for certain improper FTB conduct causing  
22 injury. Given these considerations, it is patently unfair and contrary to expectations to view all of the  
23 FTB's conduct in this case solely through the lens of Nevada law.

24  
25  
26 <sup>2</sup>An analysis of the man hours related to the audit itself, exclusive of administrative review  
27 by the FTB protest office (the first stage of review), was 624 total man hours. The number of man  
28 hours allocated to any activity in Nevada (less than three business days) was approximately 20 man  
hours. (Affidavit of Sheila Cox, 0005-11 at ¶ 34). The ratio of California man hours to Nevada man  
hours was 624 to 20, or 96.8% to 3.2%.

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Hyatt argues that the potential impact of this case upon Nevada's own agencies, especially the GCB and Commission is misleading. (Hyatt Answer at pages 60-63.) But Hyatt's argument reflects a serious lack of knowledge of the GCB's public duties, and no concept at all of the potential impact of this case on Nevada's own inherent sovereign responsibility to regulate the gaming industry and protect state revenues.

1 At pages 60-63 of his Answer to the Jurisdictional Writ, Hyatt challenges the FTB's analogy  
2 to the GCB on the grounds that:

3 "the inquiry and investigative powers of Nevada's gaming agencies are based on the  
4 *express request, consent, and authorization* of the applicant." Hyatt Answer at p. 60,  
lines 11-12, emphasis in original.

5 But while applicants for gaming licenses sign application forms consenting to GCB  
6 investigations, third parties who become the subject of GCB investigation do not sign such forms  
7 (unless they decide to file an application after being called forward for a finding of suitability). Yet,  
8 the GCB has full and complete authority to investigate non-applicant third parties in order to carry out  
9 the GCB's public duty of regulating the Nevada gaming industry and protecting state revenues.  
10 Indeed, under Hyatt's limited view of the GCB's investigative powers, those organized crime figures  
11 from around the country who are currently in jail for having hidden interests in Nevada casinos and  
12 skimming gaming revenues would be surprised to hear the GCB never had the authority to investigate  
13 them because they did not file gaming applications. *See generally, United States v. De Luna*, 763 F.2d  
14 897 (8th Cir. 1985), cert. denied, 474 U.S. 980. Perhaps the GCB itself would be even more surprised  
15 to learn that its investigative powers are limited to only those who file applications for licensure and  
16 consent to GCB investigations.

17 Hyatt's argument at pages 61-62 that a Nevada gaming license is a privilege is completely  
18 nonsensical. Because Hyatt claimed a change of residency in his 1991 California state income tax  
19 return, FTB had a public duty and was privileged to conduct an audit of claim. *See, cases cited at*  
20 *pages 5-6, supra.*

21 Finally, at pages 62-63 of his Answer, Hyatt argues that the GCB does not commit torts in  
22 other states because gaming applicants consent to investigation. The GCB investigates third parties  
23 wherever and whenever the Nevada gaming authorities themselves decide it is in their public duty to  
24 do so. The GCB conducts interstate (and international) investigations just like the FTB conducted a  
25 tax audit, part of which was done in Nevada. As previously shown, FTB conducted an audit, not a  
26 tort. Nevertheless, Hyatt has been able to drag the FTB through nearly three years of litigation over  
27 his tort claims.

28 If Nevada declines to extend comity to California in this case, then other forums will be more

1 likely to entertain tort suits against the GCB by third parties who the GCB decides to investigate for  
2 whatever reason. It is those third parties who never apply for licensure who will be able to sue the  
3 GCB for the type of "tort" claims Hyatt is asserting against FTB in this case. As FTB said in its writ,  
4 the State of Nevada has a special interest in extending comity to California in this case.

5 **8. Hyatt's analysis of Nevada's administrative**  
6 **exhaustion laws displays Hyatt's hypocrisy.**

7 At pages 38-39 of its Jurisdictional Writ, the FTB argued that the district court was also  
8 obligated to dismiss this case under Nevada's own administrative exhaustion and ripeness law. The  
9 FTB showed that Nevada applies its ripeness doctrine to preclude jurisdiction over claims based upon  
10 a plaintiff's anticipation of final administrative adjudication. *See, e.g., Resnick v. Nevada Gaming*  
11 *Com'n*, 104 Nev. 60, 65-66, 752 P.2d 229 (1988). As in *Resnick*, Hyatt is attempting to sue the FTB  
12 for matters that are still being adjudicated administratively. The FTB also showed that the proper  
13 procedure for raising a claim of an illegal; i.e., "extortionate," tax agency proceeding is as a defense  
14 in the tax enforcement proceeding itself. *See Stankevitz v. IRS*, 640 F.2d 205, 206 (9th Cir. 198).

15 In his Answer at pages 63-67, Hyatt argues that *Faulkner v. University of Tennessee*, 627  
16 So.2d 362 (Ala. 1992), *cert. denied*, 510 U.S. 1101 (1994), and *Ambassador Ins. Co. v. Feldman*, 95  
17 Nev. 538, 598 P.2d 630 (1979) are dispositive on this issue against FTB. Hyatt argues that the  
18 ongoing tax proceedings in California do not allow him to sue FTB for money damages, so therefore  
19 he has no administrative remedy to exhaust in California.

20 Hyatt's argument that he cannot sue FTB for tort damages in the ongoing proceedings  
21 completely begs the question. The tax proceedings will determine Hyatt's residency and tax status  
22 for 1991 and 1992. That determination will necessarily decide if the Notices of Proposed Assessments  
23 were valid or invalid. As previously shown, his complaint here is that the entire audit itself was  
24 "extortionate" and therefore tortious. *See* pages 3-8, *supra*. Hyatt should not be allowed to sue FTB  
25 at the very least until there is a final decision on the audit.

26 Hyatt also argues that the cases cited by FTB have no relevance, but it is Hyatt who has  
27 miscited the case law. In *Faulkner*, the Alabama Supreme Court said:

28 We note that before exhaustion of administrative remedies becomes an issue

1 in any case, there must be a administrative remedy available. UT points to no specific  
2 authority indicating that a cognizable administrative remedy through UT exists for  
persons like Faulkner.

3 627 So.2d at 365 (footnote omitted). There was no administrative remedy in that case for two reasons:  
4 1) the University of Tennessee had no established procedures for Faulkner to challenge the decision  
5 to rescind his degree; and 2) the letter to him from the graduate school dean offering a hearing itself  
6 stated the University had already "judged [Faulkner's] dissertation to lack evidence of original work  
7 and to constitute essentially duplication of material in the [Frost] reports." *Id.* at 363-64. Here, in  
8 contrast, the Proposed Notices of Assessment against Hyatt are by their very nature tentative and  
9 subject to change based upon further evidence that Hyatt is presenting to the FTB.

10 The sole issue addressed by the Nevada Supreme Court in *Ambassador Ins. Corp. v. Feldman*  
11 was whether private party insurance companies who sued another private party insurance agency for  
12 defamation were precluded from pursuing such an action until the Insurance Commission made a  
13 decision concerning a dispute between those two private parties. Neither the Insurance Commissioner  
14 nor the State of Nevada were parties to the defamation suit. Such a private defamation action was  
15 outside the Insurance Commissioner's authority to consider; therefore, there was no administrative  
16 agency remedy to exhaust.

17 Contrary to Hyatt's argument, neither case has much to do with this case, and neither is  
18 dispositive on anything that is relevant to FTB's administrative exhaustion and ripeness argument.  
19 Since Hyatt is suing the FTB for matters that are still being decided in the administrative adjudication  
20 process, his case should be barred by Nevada's own administrative exhaustion and ripeness law.

21 Finally, Hyatt's argument that Nevada's own administrative exhaustion and ripeness laws have  
22 no application to this case evidences Hyatt's hypocrisy. On the one hand, Hyatt asks this Court to  
23 disregard California's immunity and administrative exhaustion laws, and make Nevada law the start  
24 and end of this Court's inquiry. But on other hand, when faced with adverse Nevada law on  
25 administrative exhaustion and ripeness, Hyatt argues that this adverse Nevada law does not apply.  
26 Hyatt's pick-and-choose strategy should be rejected, and the Court should dismiss this case under  
27 Nevada's own administrative exhaustion and ripeness law.

28 //



1                   **9. Hyatt's response to the FTB's alternative writ petition is flawed.**

2           Finally, Hyatt's response to the FTB's alternative writ petition is unpersuasive. Hyatt  
3 completely ignores that he once promised the Nevada federal court, to which the FTB originally  
4 removed this case, that his claims "stem *strictly* from the FTB's tortious actions directed against him  
5 as a Nevada citizen *within the State of Nevada*." (See Jurisdictional Writ at 15 (emphasis added).)  
6 Hyatt also completely ignores that he also told the federal court that he "seeks relief for the FTB's past  
7 tortious activities against him *in Nevada*," asking that Nevada exercise jurisdiction over the FTB "so  
8 that it will be required to answer for its tortious conduct committed against a Nevada resident *in*  
9 *Nevada*." (*Id.* at n. 4 (emphasis added).) Unlike Hyatt, this Court should not ignore these statements,  
10 which are sufficient in and of themselves to estop Hyatt from opposing the FTB's alternative writ  
11 request. *See. e.g., Breliaut v. Preferred Equities Corp.*, 112 Nev. 663, 668-69, 918 P.2d 314 (1996).

12           Even apart from these glaring omissions, Hyatt's Answer to FTB's alternative writ petition  
13 is flawed. Hyatt claims that there is no authority for the FTB's alternative request, but there are  
14 numerous supporting authorities cited in the FTB's Jurisdictional Writ. (See Jurisdictional Writ at 39-  
15 43.) As a matter of Full Faith and Credit, choice of law, comity, and basic common sense, Hyatt  
16 cannot prosecute a Nevada common law tort action that includes litigation over California internal,  
17 non-Nevada acts and contacts of the California government that are not actionable in tort in California.  
18 Just because Hyatt allegedly crossed the California state line does not change what the California  
19 government did within California, or what laws regulate the California government's non-Nevada  
20 conduct. Applying anything other than California law to such conduct makes no sense, and not a  
21 single California law allows Hyatt to recover for alleged common law torts incident to California's  
22 application of its tax laws.

23           Hyatt argues that he should be allowed to litigate in Nevada over everything that the California  
24 government did to him, because to hold otherwise would "split" his claims. But all of the cases Hyatt  
25 relies on for his "no splitting" argument involved service of process issues, personal jurisdiction, and  
26 venue. None of them even addresses subject matter jurisdiction, let alone the exercise of subject  
27 matter jurisdiction over tort claims involving a sister state's acts within its own boundaries that are  
28 not actionable in common law tort under the sister state's own laws.

1 For example, *Sweeney v. Schultes*, 19 Nev. 53, 54 (1885) was an action for recovery of real  
2 property and damages for wrongful possession. The plaintiff was not suing a nonresident for acts  
3 outside the state. Hyatt takes the statement: "After this appearance the court had jurisdiction to  
4 proceed and grant any relief to which the plaintiff was entitled, regardless of the mistake in the form  
5 of the notice inserted in the summons" (*id.* at 57), completely out of context.

6 *Gans v. M.D.R. Liquidating Corp.*, 1990 WL 2851 (Del. Ch. Jan. 10, 1990) was an action to  
7 enforce a contract to provide retirement benefits brought against the corporate directors at the time of  
8 dissolution. *Posner Laboratories, Inc. v. Pro-line Corp.*, 1978 U.S. Dist. Lexis 16334 (S.D. N.Y.  
9 1978) was an action for unfair competition, and *Geo-Physical Maps, Inc. v. Toycraft Corp.*, 162 F.  
10 Supp. 141 (S.D. N.Y. 1958) was for copyright infringement. In all of those cases, the courts had  
11 subject matter jurisdiction over all the asserted claims. That is not the situation in this case.

12 Finally, Hyatt's "no splitting" argument is completely refuted by long practice, especially in  
13 federal courts, where a court often may lack subject matter jurisdiction over some claims but not  
14 others. Such claims are "split" when the court dismisses some, but not all of the claims before the  
15 court. *See, e.g.*, 28 U.S.C. § 1367(c) (specifying situations in which a federal district court may decline  
16 to exercise supplemental jurisdiction over a claim). In fact, the district court "split" Hyatt's claims  
17 when it dismissed Hyatt's First Cause of Action for declaratory relief.

18 At a minimum, California's laws immunize the California government from common law tort  
19 liability for its California internal, non-Nevada taxation conduct involving Hyatt. A Nevada trial  
20 involving litigation over such non-actionable conduct is not proper, and justifies, at a minimum,  
21 granting the FTB's alternative writ request.

22 DATED this 26<sup>th</sup> day of December, 2000.

23 MCDONALD CARANO WILSON MCCUNE  
24 BERGIN FRANKOVICH & HICKS LLP

25  
26 By: 

27 THOMAS R.C. WILSON

28 Attorneys for Petitioner Franchise Tax Board

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**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing **FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA'S REPLY IN SUPPORT OF ITS PETITION FOR A WRIT OF MANDAMUS ORDERING DISMISSAL, OR ALTERNATIVELY FOR A WRIT OF PROHIBITION AND MANDAMUS LIMITING THE SCOPE OF THIS CASE** on this 26<sup>th</sup> day of December, 2000, by depositing same in the United States Mail, postage prepaid thereon to the addresses noted below, upon the following:

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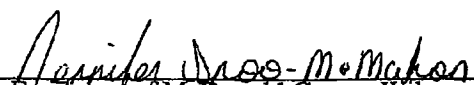
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An Employee of McDonald Carano Wilson  
McCune Bergin Frankovich & Hicks LLP

# **EXHIBIT 31**

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR  
THE COUNTY OF CLARK, AND THE  
HONORABLE NANCY M. SAITTA,  
DISTRICT JUDGE,

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest.

No. 35549

**FILED**

JUN 13 2001

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR  
THE COUNTY OF CLARK, AND THE  
HONORABLE NANCY M. SAITTA,  
DISTRICT JUDGE,

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest.

No. 36390

ORDER GRANTING PETITION (DOCKET NO. 36390) AND  
DISMISSING PETITION (DOCKET NO. 35549)

Franchise Tax Board petitions this court for a writ of mandamus and/or prohibition in Docket No. 35549, arguing that the district court erred in determining that certain documents were not protected by the attorney-client, work product, and/or deliberative process privileges and subsequently ordering those documents released. Franchise Tax Board separately petitions this court for a writ of mandamus

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in Docket No. 36390, arguing that the district court erred in denying its motion for summary judgment because the doctrine of comity precludes the district court's exercise of jurisdiction over the claims since Franchise Tax Board is immune from liability under California law.

We conclude that the district court did err in denying Franchise Tax Board's motion for summary judgment, albeit on grounds other than those alleged in the petition. Thus, we grant the petition for a writ of mandamus in Docket No. 36390 and direct the district court to conduct further proceedings consistent with this order. Because our resolution of Docket No. 36390 renders the petition in Docket No. 35549 moot, we deny that petition.

A writ of mandamus may be issued to compel the performance of an act that the law requires as a duty resulting from an office, or to control an arbitrary or capricious exercise of discretion.<sup>1</sup> This extraordinary remedy is available only when there is no plain, speedy and adequate remedy at law, and it is entirely within this court's discretion whether to issue a writ.<sup>2</sup> Even though a writ of mandamus is the appropriate remedy to review the denial of a motion for summary judgment because the order is otherwise unappealable, this court has limited the exercise of this extraordinary remedy to instances when judicial economy or the need to clarify important issues require our intervention.<sup>3</sup>

<sup>1</sup>NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

<sup>2</sup>NRS 34.170; Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

<sup>3</sup>Sorenson v. Pavlikowski, 94 Nev. 440, 442, 581 P.2d 851, 853 (1978); Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997); State v. Babayan, 106 Nev. 155, 787 P.2d 805 (1990); cf. State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 361, 662 P.2d 1338, 1340 (1983).

Because this case implicates the principles of Full Faith and Credit and comity, which are of great importance with respect to interpreting each state's sovereign responsibilities and rights, we elect to exercise our extraordinary writ powers.

According to the United States Supreme Court case of Nevada v. Hall<sup>4</sup> and the Nevada case of Mianeki v. District Court,<sup>5</sup> the crucial inquiry in determining whether to afford deference to another state's laws under the doctrines of Full Faith and Credit or comity is whether the sister state's laws conflict with or contravene the forum state's laws or policies. In this case, our inquiry rests in determining whether Nevada law, which grants immunity to state agencies only for discretionary acts,<sup>6</sup> is affronted by recognizing California law, which grants Franchise Tax Board immunity for intentional torts, as well as discretionary and operational acts.<sup>7</sup>

Although the parties addressed only the issue of comity in Docket No. 36390, our review of the record to determine whether comity or Full Faith and Credit should be applied revealed that there is no probative evidence to support Hyatt's claims. Thus, because Hyatt failed to meet his burden of providing probative evidence to generate genuine issues of material fact on each of his claims, the district court erred in denying Franchise Tax Board's motion for summary judgment. We, therefore, grant the petition for a writ of mandamus.

<sup>4</sup>440 U.S. 410, 422, 424 n.24 (1979).

<sup>5</sup>99 Nev. 93, 96, 658 P.2d 422, 424 (1983).

<sup>6</sup>NRS 41.032(2); cf. NRS 41.031; Prell Hotel Corp. v. Antonacci, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970).

<sup>7</sup>Cal Gov't Code § 860.2; see Mitchell v. Franchise Tax Board, 228 Cal. Rptr. 750 (Ct. App. 1986).

In the context of a summary judgment motion, Franchise Tax Board, as the moving party, has the burden of establishing the non-existence of genuine issues of material fact.<sup>9</sup> But this burden is sustained if Franchise Tax Board demonstrates a lack of probative evidence of at least one element of Hyatt's prima facie case.<sup>9</sup> Hyatt then has the burden of demonstrating specific evidence indicating a genuine dispute of fact.<sup>10</sup> Mere allegations are insufficient to sustain this burden; specific facts must be produced to show a genuine dispute that justifies the denial of a motion for summary judgment.<sup>11</sup>

Upon our review of the record, we conclude that Hyatt failed, as a matter of law, to meet his burden to produce sufficient facts,<sup>12</sup> indicating a genuine dispute, that Franchise Tax Board's acts during its investigation constituted intentional torts.<sup>13</sup> There is no evidence, aside

<sup>9</sup>NRCF 56(c); NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1156, 946 P.2d 163, 166-67 (1997).

<sup>9</sup>Rains, 113 Nev. at 1156, 946 P.2d at 167 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

<sup>10</sup>Id. at 1157, 946 P.2d at 167.

<sup>11</sup>NRCF 56(e); see Bird v. Casa Royale West, 97 Nev. 67, 70-71, 624 P.2d 17, 19 (1981); see also Garvey v. Clark County, 91 Nev. 127, 130, 532 P.2d 269, 271 (1975).

<sup>12</sup>Franchise Tax Board has met its burden that at least one element of Hyatt's claims has not been shown by demonstrating undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its investigation or findings outside the scope of the investigation, (3) complied with its internal operating procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its investigation through phone calls and letters.

<sup>13</sup>See, e.g., Barnettler v. Reno Air, Inc., 114 Nev. 441, 447-49, 956 P.2d 1382, 1386-87 (1998) (negligent misrepresentation and outrage), limited by Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000); PETA v. Bobby Berosini, Ltd., 111 Nev. 615, 628-36, 895 P.2d 1269, 1278-83 (1995) (invasion of privacy claims); Posadas v. City of Reno, 109 Nev. 448, 457, 851 P.2d 444-45 (1993) (abuse of process); M & R Investment Co. v. Mandarin, 103 Nev. 711, 718-19, 748 P.2d 629, 631 (1987) (continued on next page . . .



from Hyatt's own conclusory allegations, that Franchise Tax Board's investigation unreasonably intruded into his private life or seclusion, published false information about him, or published information to third parties that was not of a legitimate public concern. The myriad depositions and documents submitted to this court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard investigation to determine residency status for taxation pursuant to its statutory authority. Merely because a state agency is performing an investigation in the course of its duties does not automatically render its acts an invasion of privacy or otherwise intentionally tortious absent evidence of unreasonableness or falsity of statements. No such evidence has been presented in this case.

There is also insufficient evidence of Hyatt's remaining claim of negligent misrepresentation.<sup>14</sup> As with Hyatt's claims for intentional torts, there is no evidence that Franchise Tax Board supplied any false information regarding confidentiality or business relations.

In light of the lack of evidence supporting Hyatt's claims for intentional torts and negligent misrepresentation, we conclude that it was error for the district court to deny the motion for summary judgment.<sup>15</sup> Because we conclude that it was error to deny Franchise Tax Board's motion for summary judgment, and Hyatt's claims should have been dismissed, we

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. . . continued  
488, 493 (1987) (invasion of privacy claims); Star v. Rabello, 97 Nev. 124, 125-26, 625 P.2d 90, 92 (1981) (outrage).

<sup>14</sup>See Barnettler, 114 Nev. at 447-49, 956 P.2d at 1386-87.

<sup>15</sup>Although neither party addressed this issue in the petitions to this court, the record indicates that the issue of the absence of probative evidence was presented to the district court on the initial motion.

need not address the issues raised in Docket No. 35549 regarding purportedly privileged materials.

Consistent with our discussion above, we therefore GRANT the petition in Docket No. 36390 AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to grant Franchise Tax Board's motion for summary judgment in light of the lack of evidence presented.<sup>16</sup> We DISMISS AS MOOT the petition in Docket No. 35549.

Maupin, C.J.  
Maupin

Young, J.  
Young

Shearing, J.  
Shearing

Agosti, J.  
Agosti

Rose, J.  
Rose

Leavitt, J.  
Leavitt

cc: Hon. Nancy M. Saitta, District Judge  
California Attorney General  
McDonald Carano Wilson McCune Bergin Francovich & Hicks  
Bernhard & Leslie  
Hutchison & Steffen  
Thomas K. Bourke  
Riordan & McKenzie  
Marquis & Aurbach  
Clark County Clerk

<sup>16</sup>The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

# **EXHIBIT 32**

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GILBERT P. HYATT

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

12 FRANCHISE TAX BOARD OF THE STATE )  
13 OF CALIFORNIA, )

14 Petitioner, )

15 vs. )

16 EIGHTH JUDICIAL DISTRICT COURT of )  
the State of Nevada, in and for the County of )  
17 Clark, Honorable Nancy Saitta, District Judge, )

18 Respondent, )

19 and )

20 GILBERT P. HYATT, )

21 Real Party in Interest. )  
\_\_\_\_\_)

Case No. 36390

**REAL PARTY IN INTEREST  
GILBERT P. HYATT'S PETITION  
FOR REHEARING RE THE  
COURT'S JUNE 13, 2001 ORDER  
GRANTING PETITION FOR WRIT  
OF MANDAMUS**

***CONFIDENTIAL INFORMATION  
TO BE FILED UNDER SEAL***

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RA001577

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1 **I. Issues presented.**

- 2 A. Did the Court overlook or misapprehend genuine, material facts at issue when it  
3 concluded “that there is no probative evidence to support Hyatt’s [tort] claims?”  
4 B. Did the Court overlook or misapprehend the law when it granted the FTB’s petition  
5 “on grounds other than those alleged in the petition?”

6 **II. Summary of argument and relief requested.**

7 Hyatt sued the FTB for torts based on its invasion of his privacy and its fraudulent conduct.  
8 Since the Court decided the Writ Petition on issues not raised, briefed or argued, Hyatt has minuscule  
9 space to describe – *for the first time to this Court* – his specific claims and the evidence that has been  
10 overlooked or misapprehended by the Court. Despite an enormous record, he has space here to address  
11 a scant portion of the sufficient probative evidence *in the record* of prima facie claims regarding: (i) a  
12 single invasion of privacy claim – disclosure of private facts – and (ii) his fraud claim. Hyatt has  
13 equally strong supporting evidence for his various other related tort claims, but no space to address  
14 them. Hyatt therefore requests rehearing on all of his tort claims. Surely this Court must accord respect  
15 for the fact that the district court twice validated Hyatt’s tort claims, the discovery commissioner saw  
16 and heard sufficient evidence to indicate that the FTB may be guilty of fraud, and even the FTB did not  
17 challenge in its writ petition the sufficiency of Hyatt’s evidence. Indeed, the record is irrefutably alive  
18 with supportive evidence.

19 **III. The Court has overlooked or misapprehended Hyatt's substantial evidence  
20 of the FTB's invasion of Hyatt's privacy by its illegal disclosures of Hyatt's  
21 private facts.**

22 A. **Elements of claim:** (i) disclosure or publicity of private facts; and (ii) a reasonable  
23 expectation of privacy in regard to the disclosed facts.<sup>1</sup>

24 B. **Supporting evidence:**

25 The evidence establishes beyond any doubt that the FTB violated its own non-discretionary  
26

---

27 <sup>1</sup> This claim is really two: the more recently emerged invasion of informational/constitutional privacy and the more  
28 traditional branch of disclosure of private facts. Each claim involves the disclosure of private facts for which an expectation of  
privacy had been created and for which a reasonable person would find offensive – particularly informational/constitutional  
privacy under which disclosure of private, personal information gathered by the government is *per se* unlawful. See detailed  
discussion in Hyatt’s opposition to the FTB’s motion for summary judgment on pages 21-26 and 31-33, respectively, [Appdx.,  
Exh. 27]. See also Cal. Const., Art. I, Sec. 1. For the Court’s convenience and for clarity in this petition, Hyatt has attached an  
Appendix hereto containing copies of all exhibits cited herein. Hyatt cites to the attached Appendix in the following format:  
[Appdx., Exh. “x”]. All exhibits included in the attached Appendix are materials from the record before the Court, and the record  
cite for each exhibit is set forth in the table of contents for the Appendix.

1 rules, regulations, and procedures in illegally disclosing Hyatt's private information and thereby injuring  
2 Hyatt. Regardless of whether an individual owes taxes to California, the FTB has no right to ignore its  
3 own confidentiality requirements and commit actionable privacy torts under the guise of a tax audit.  
4 This claim, and all of Hyatt's claims, are for torts committed by the FTB irrespective of the independent  
5 tax proceeding in California.

6 The Court incorrectly concluded that Hyatt's only evidence in support of this claim (and all  
7 others) consisted of his own allegations. The Court overlooked a record replete with documentary  
8 evidence, affidavits, and depositions of third persons that establish this claim.

9 **1. Hyatt reasonably expected an audit by the FTB with no public disclosure of  
his private information.**

10 As addressed below, based on the FTB's own published regulations, statutory requirements, and  
11 explicit representations to Hyatt and his representatives, Hyatt rightly and reasonably expected that the  
12 FTB would keep his private information confidential. Hyatt's heightened privacy concerns were, he  
13 thought, allayed by the FTB's explicit promises to Hyatt and citations of law mandating confidentiality.

14 There are numerous examples of FTB publications mandating confidentiality. "It is the *auditor's*  
15 responsibility to maintain the security of *all* confidential data during the audit process and to prevent *any*  
16 unauthorized disclosure."<sup>2</sup> The FTB is forbidden from providing "confidential information to persons to  
17 whom issuance of this information has not been authorized."<sup>3</sup> The FTB emphasizes: "It is the  
18 responsibility of FTB agents to ensure that confidential information is not disclosed to unauthorized  
19 persons."<sup>4</sup> Auditors are instructed: "*If in doubt, don't disclose*," repeating this mandatory, non-  
20 discretionary requirement 16 times in 14 pages in one manual.<sup>5</sup> The FTB even warns its auditors of  
21 possible private lawsuits for unauthorized disclosures.<sup>6</sup> Yet, included in the FTB's definition of  
22 confidential information is the very type of information it disclosed regarding Hyatt.<sup>7</sup>

23 The record is overflowing with evidence, testimonial and documentary, that provided Hyatt with  
24

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25 <sup>2</sup> FTB Field Audit Manual, at FTB 3762 [*Appdx., Exh. 1*].

26 <sup>3</sup> FTB Statement of Incompatible Activities and Rules of Conduct, at (1), paragraph I(3) [*Appdx., Exh. 2*].

27 <sup>4</sup> FTB Disclosure Education Manual, at 11 [*Appdx., Exh. 3*].

28 <sup>5</sup> FTB Disclosure Education Manual, emphasis in original [*Appdx., Exh. 3*].

<sup>6</sup> FTB Disclosure Education Manual, at 14 [*Appdx., Exh. 3*].

<sup>7</sup> FTB Statement of Incompatible Activities and Rules of Conduct, at (3), paragraph II(2), at (5), paragraph IV, and at (7), paragraph IX [*Appdx., Exh. 2*]; FTB Disclosure Education Manual, at 4 (emphasis added), at 5, and at 13 [*Appdx., Exh. 3*]; and FTB Security and Disclosures Manual, at H 06603, H06659 [*Appdx., Exh. 4*].

1 an absolute, reasonable expectation that his unique need for privacy would be strictly honored by the  
2 FTB as stated verbally and in writing, and as required by its own rules. In its initial audit letter, the FTB  
3 promised "confidential treatment of any personal and financial information from the auditor assigned to  
4 you."<sup>8</sup> In the same document, the FTB sent Hyatt its Privacy Notice, FTB Form #1131,<sup>9</sup> that  
5 represented to Hyatt that the FTB was subject to the California privacy act<sup>10</sup> and was required to  
6 disclose "why we ask you for information." The FTB indicated that it would only share information  
7 with the IRS and other governmental agencies. *It uttered no hint that it intended to divulge Hyatt's*  
8 *private information to non-governmental third parties at the unfettered discretion of its auditors.* It  
9 nonetheless did so on a grand scale as summarized below.

10 The affidavit of Eugene Cowan, Hyatt's tax attorney, explained in great detail the lengths Hyatt  
11 and his representatives went to obtain assurances from the FTB regarding confidentiality.<sup>11</sup> The FTB  
12 clearly understood Hyatt's compelling need for keeping not only his private information confidential but  
13 also the fact that he was being audited to the point that Hyatt's insistence upon confidentiality was so  
14 non-negotiable that the FTB promised strict confidentiality as a *quid pro quo* for obtaining the  
15 information and documents its auditors claimed it needed to complete the audit.<sup>12</sup>

16 Hyatt is by all accounts, a recognized world-class inventor, researcher and licensor whose  
17 demands for strict confidentiality were solidly based upon concerns of industrial espionage and theft of  
18 trade secrets.<sup>13</sup> Having previously experienced the disastrous effects of security leaks early in his  
19 career,<sup>14</sup> Hyatt's need for confidentiality was paramount, as he had licensed many of the world's largest  
20 corporations on crucial technologies and was negotiating with many others.<sup>15</sup> The FTB was keenly  
21 aware that Hyatt's privacy concerns were both reasonable and non-negotiable, as his secret research lab  
22 and secret document files were located in a highly confidential setting not available or discernible as  
23

24 <sup>8</sup> FTB Form #1131 [Appdx., Exh. 5].

25 <sup>9</sup> FTB Form #1131 [Appdx., Exh. 5].

26 <sup>10</sup> Officially known as the California Information Practices Act of 1977 ("IPA"), Cal. Civ. Code §§ 1798 *et seq.*

27 <sup>11</sup> Cowan Affid., ¶¶ 9-26 [Appdx., Exh. 6], submitted in opposition to the FTB's motion for summary judgment.

28 <sup>12</sup> Cowan Affid., ¶¶ 9-26 [Appdx., Exh. 6].

<sup>13</sup> Hyatt Affid., ¶¶ 18b, 131, 137 [Appdx., Exh. 7].

<sup>14</sup> Hyatt Affid., ¶¶ 80, 130-31, 137 [Appdx., Exh. 7].

<sup>15</sup> Hyatt Affid., ¶¶ 44, 67, 85, 86 [Appdx., Exh. 7].



1 such to the public.<sup>16</sup> Security was so important to Hyatt that he even purchased the facility containing  
2 his research lab and invaluable documents through the Kern trust<sup>17</sup> to avoid public disclosure.

3 **2. The FTB unreasonably and illegally divulged Hyatt's private facts.**

4 In violation of the FTB's non-discretionary regulations and statutory requirements, as well as its  
5 explicit representations to Hyatt, and contrary to this Court's "findings" that the FTB "complied with its  
6 internal operating procedure" and acted "in line with a standard investigation . . . pursuant to its statutory  
7 authority," the FTB publicly, repeatedly, and defiantly disclosed Hyatt's private information.

8 **i. The FTB wrongly disclosed the address of Hyatt's secret research lab.**

9 The FTB's disclosure of Hyatt's highly secret Las Vegas address to third parties was a calculated  
10 outrage.<sup>18</sup> Despite express assurances that it would not reveal Hyatt's secret information, the FTB  
11 violated its own regulations and disclosed Hyatt's secret Las Vegas address to utility companies,  
12 including Southwest Gas Corp., Silver State Disposal Service, and Las Vegas Valley Water District<sup>19</sup>  
13 and to three separate newspapers.<sup>20</sup> As a result, Hyatt's painstaking care in locating, securing, and  
14 protecting a secret facility was all for naught, as the FTB made it available to public knowledge, a fact  
15 that is of the utmost concern and disgust to Hyatt for reasons that any reasonable person in his situation  
16 would consider to be of compelling importance.<sup>21</sup>

17 This reprehensible effort to publicly expose Hyatt's secret address resulted in a major security  
18 risk and loss of time and money. As a direct result of the FTB's deliberate privacy violation, Hyatt was  
19 forced to purchase another Nevada property, under another trust, and move the research lab, his  
20 sensitive documents, and intellectual property to this new location.<sup>22</sup> Since 1995 when the FTB  
21 publically disclosed the secret research lab address, various ones of Hyatt's most sensitive trade secrets  
22 have appeared in commercial products and in publications.<sup>23</sup>

24 <sup>16</sup> Hyatt Affid., ¶¶ 10-133, 137 [Appdx., Exh. 7].

25 <sup>17</sup> Michael Kern is a prominent Certified Public Accountant in Las Vegas.

26 <sup>18</sup> Portions of FTB 1991 tax year audit file: H01639, H01614, H01643, H01853, and FTB 01992 [Appdx., Exh. 8].

27 <sup>19</sup> Portions of FTB 1991 tax year audit file: H 01639, 01641, 01643 [Appdx., Exh. 9].

28 <sup>20</sup> Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [Appdx., Exh. 10].

<sup>21</sup> Hyatt Affid., ¶ 137-138 [Appdx., Exh. 7].

<sup>22</sup> Hyatt Affid., ¶ 138 [Appdx., Exh. 7].

<sup>23</sup> Hyatt Affid., ¶¶ 80, 130-31, 137 [Appdx., Exh. 7].

1                   **ii. The FTB wrongly disclosed Hyatt's social security number.**

2           Hyatt had strong reasons to expect that the FTB would respect his right to keep his social  
3 security number confidential given FTB representations and published policies. Yet, the FTB made over  
4 *40 unauthorized and illegal disclosures to third parties.*<sup>24</sup> None of the recipients were disclosed to Hyatt  
5 in advance, as was required by law and FTB regulation, before the FTB disclosed a taxpayer's social  
6 security number.<sup>25</sup>

7                   **iii. The FTB wrongly disclosed to Hyatt's Japanese licensees that he was being  
8 investigated, thereby destroying Hyatt's patent licensing business.**

9           After assurances of strict confidentiality, Hyatt reluctantly agreed to provide excerpts of his  
10 agreements with his Japanese patent licensees, Hitachi and Matsushita, and his membership in the  
11 Licensing Executives Society.<sup>26</sup> Hyatt contractually committed to his Japanese licensees that the  
12 agreements would remain strictly confidential.<sup>27</sup> The FTB violated Hyatt's privacy rights by sending  
13 excerpts of the licenses to his Japanese licensees, making clear that Hyatt was under investigation by the  
14 FTB, and disclosing that the licensing agreements had been disclosed by Hyatt in violation of the  
15 agreements' confidentiality provisions.<sup>28</sup>

16           The effect of the licensing disclosures by the FTB in breach of its commitment to Hyatt and the  
17 confidentiality clause of the licenses, was significant. Hyatt's patent licensing business was destroyed.  
18 From the time of the FTB's unlawful disclosure, Hyatt has obtained no new licensees at all, and his  
19 royalty income from new licensees dropped to zero.<sup>29</sup>

20           The record thus reflects, irrefutably, that there was widespread, unlawful dissemination of  
21 Hyatt's personal and confidential information by the FTB. At least 90 pieces of correspondence were  
22 disseminated by the FTB to individuals, businesses, trade groups, licensees, etc., whose collective  
23 membership totaled in the thousands.<sup>30</sup>

24           <sup>24</sup> Portions of FTB 1991 tax year audit file [Appdx., Exh. 8].

25           <sup>25</sup> IPA, § 1798.15 [Appdx., Exh. 12]; FTB Security and Disclosure Manual, at H 06706 [Appdx., Exh. 4].

26           <sup>26</sup> Hyatt Affid., ¶ 138 [Appdx., Exh. 7].

27           <sup>27</sup> Cowan Affid., ¶¶ 8-26 [Appdx., Exh. 6].

28           <sup>28</sup> FTB 02143 and 02147 [Appdx., Exh. 11].

29           <sup>29</sup> Hyatt Affid., ¶¶ 136, 162 [Appdx., Exh. 7].

30           <sup>30</sup> Cox Narrative Report, at H00039-00078, [Appdx., Exh. 13].

1 **IV. The Court has overlooked or misapprehended substantial evidence of the**  
2 **FTB's fraud.**

3 **A. Elements of claim:** One or more knowingly false representations, made with the intent  
4 it be relied upon, and it is reasonably and detrimentally relied on by a party, resulting in  
5 damage to that party.<sup>31</sup>

6 **B. Supporting evidence:**

7 The FTB made two types of false promises to induce Hyatt's cooperation with the audit: (i) that  
8 the FTB would keep Hyatt's information confidential, and (ii) that the FTB would conduct a fair,  
9 unbiased review. The FTB not only breached its promises, but it sought an extorted settlement from  
10 Hyatt by overtly threatening further disclosure and publicity. The evidence and damages regarding the  
11 first false promise are essentially the same as that addressed in the above section on the closely-related,  
12 but separate, invasion of privacy claim. This section therefore addresses the second false promise.

13 As summarized below, Hyatt has established that the lead auditor created false evidence – which  
14 is a criminal offense under California law<sup>32</sup> – and used it to try to extort a settlement from Hyatt.

15 **1. The one-sided fraudulent audit.**

16 The FTB publicly claims to be fair and impartial in its dealings with taxpayers. It professes to  
17 interpret the law evenly and fairly with neither a state nor a taxpayer point of view. FTB personnel have  
18 testified to this in depositions.<sup>33</sup> Hyatt's first auditor, Marc Shayer, even testified that he promised to  
19 conduct a fair and unbiased audit.<sup>34</sup>

20 Yet, the record shows that the FTB's methods at that time targeted high-income, former  
21 California residents, rewarded its own auditors based on the amount they could assess (measured by a  
22 cost-benefit ratio), penalized auditors who found "no change" in their audits, and used penalties as  
23 "bargaining chips" to induce settlements, making the Hyatt audit the biggest potential boost to any  
24 auditor's career.<sup>35</sup>

25 The FTB's third auditor, Sheila Cox, fully acknowledged in deposition testimony that she  
26 focused exclusively on information obtained which could be construed as supporting the FTB's  
27

28 <sup>31</sup> See, e.g., *Albert H. Wohlers and Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (Nev. 1998).

<sup>32</sup> See, e.g., Cal. Rev. & Tax Code § 461, Cal. Pen. Code § 134.

<sup>33</sup> Illia depo., p. 303 [Appdx., Exh. 14]. See also the FTB Mission Statement [Appdx., Exh. 28].

<sup>34</sup> Shayer depo., pp. 474, 476, 482-83 [Appdx., Exh. 15].

<sup>35</sup> See supporting deposition excerpts and documents cited and included in Hyatt's *Crime/Fraud* brief to the discovery  
commissioner [Appdx., Exh. 29]; see also Les depo., pp. 226-228, 615, 674, 678, 684-687 [Appdx., Exh. 17].

1 position.<sup>36</sup> She completely ignored documentary evidence and witness statements directly contrary to  
2 the FTB's preordained conclusion.<sup>37</sup> She did not investigate the most relevant information. If she had,  
3 she would have had to conclude Hyatt was a Nevada resident from September 26, 1991 to the present.

4 The FTB did not conduct a legitimate, bona-fide audit. Instead, the FTB conducted a biased,  
5 fraudulent investigation in which Cox destroyed key evidence that supported Hyatt (*e.g.*, her  
6 contemporaneous handwritten notes and computer records of bank account analysis).<sup>38</sup> Relevant to her  
7 intent, Cox told her husband and others during the Hyatt audits that she was "going to get the Jew  
8 bastard."<sup>39</sup> After the audit was concluded and she had assessed Hyatt millions of dollars in trumped-up  
9 taxes and penalties, she *telephoned* Hyatt's bitter ex-wife from whom he had been divorced for many  
10 years and bragged about the "conviction."<sup>40</sup> Cox was hardly a fair and unbiased auditor. The discovery  
11 commissioner even declared that the FTB may have committed fraud and accordingly ordered that Hyatt  
12 was entitled to further discovery on this point.<sup>41</sup>

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

- 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;
- the adult son who knew of Hyatt's move to Nevada;
- 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;
- Nevada religious, professional, and social affiliations of Hyatt; and
- Hyatt's changes of address from California to Nevada address.<sup>42</sup>

19 The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages which  
20 supposedly detail the evidence in favor of its conclusion concerning Hyatt's residency as well as  
21 asserting fraud penalties against Hyatt.<sup>43</sup> The depositions conducted to date establish that the FTB  
22 ignored substantial evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt  
23

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24 <sup>36</sup> Cox depo., pp. 168-69, 1618-19 [*Appdx.*, *Exh. 16*].

25 <sup>37</sup> Cowan Affid., Exhibit 14 thereto [*Appdx.*, *Exh. 6*].

26 <sup>38</sup> Cox depo., pp. 17, 174-175, 190, 341, 342, 423-24, 569, 605, 661, 861, 971 [*Appdx.*, *Exh. 16*].

27 <sup>39</sup> Les depo., p. 10 [*Appdx.*, *Exh. 17*].

28 <sup>40</sup> Maystead depo., pp. 182-84 [*Appdx.*, *Exh. 18*].

<sup>41</sup> November 9, 1999 hearing transcript (excerpt), pp. 55-56 [*Appdx.*, *Exh. 26*].

<sup>42</sup> Cowan Affid., Exhibit 14 thereto [*Appdx.*, *Exh. 6*].

<sup>43</sup> Cox Narrative Report, at H00039-00078 [*Appdx.*, *Exh. 13*].

1 and contrary to the FTB's pre-determined conclusion.<sup>44</sup> It never even interviewed Hyatt. The FTB did  
2 not even speak with Hyatt's son, Dan, with whom Hyatt had a close ongoing relationship, who loaned  
3 Hyatt his utility trailer for Hyatt's move to Las Vegas, and who visited with Hyatt in Las Vegas during  
4 April 1992. Rather than interviewing two of Hyatt's long-time business associates, the FTB proceeded  
5 to audit them, seeking through intimidation to separate them from Hyatt.<sup>45</sup>

6 Instead, the FTB interviewed and obtained statements from estranged relatives and an ex-wife  
7 that were falsely termed "affidavits," and which formed the cornerstone of the FTB's "case" despite the  
8 complete lack of credibility and relevance of the statements.<sup>46</sup> More importantly, the statements  
9 contained in the "non-affidavits" were nothing more than vague and general attacks on Hyatt and  
10 provided no specific evidence supporting the FTB's conclusions. The only specific statements in the  
11 unsworn "affidavits" were expressly disclaimed by the declarant in concluding that she could not be  
12 held to what is stated therein in a court of law.<sup>47</sup> In other words, the "cornerstone" of the FTB's case  
13 was built on sand that crumbles upon even mild cross-examination.

## 14 **2. The \$9 million fraud penalty and the FTB's urging Hyatt to settle.**

15 The FTB not only assessed Hyatt taxes for a period after which he had moved to Nevada based  
16 on its trumped-up investigation, it assessed Hyatt penalties for alleged fraud in regard to his Nevada  
17 residency. The penalties amounted to an additional 75% of the alleged taxes. The FTB teaches its  
18 auditors to use the fraud penalty as a "bargaining chip" to obtain "agreement" from the taxpayer to pay  
19 the assessed tax.<sup>48</sup> To make its point, the FTB's penalties training manual has on its cover a menacing  
20 "skull and cross-bones,"<sup>49</sup> an attitude of intimidation directed at Hyatt through tortious conduct.

21 In classic extortion form, Jovanovich boldly "suggested" to Hyatt's representative that settling at  
22 the "protest stage" would avoid public revelation of Hyatt's personal and financial information.  
23 Deposition testimony has confirmed that Jovanovich, the FTB's first protest officer, told Hyatt's tax  
24 representative that if he did not settle at the outset of the protest stage,<sup>50</sup> the privacy and confidentiality

25 <sup>44</sup> Cox depo., pp. 1181, 1187-1188 [Appdx., Exh. 16]; Cowan Affid., Exhibit 14 [Appdx., Exh. 6].

26 <sup>45</sup> Cox depo., pp. 29, 168-69, 181, 1460-61, 2021 [Appdx., Exh. 16]; Hyatt Affid., ¶ 164 [Appdx., Exh. 7].

27 <sup>46</sup> Maystead depo., pp. 182-84 [Appdx., Exh. 18]; Hyatt affid., ¶¶ 63, 164, 174, 175, 181 [Appdx., Exh. 7].

28 <sup>47</sup> H 00302-07 [Appdx., Exh. 19].

<sup>48</sup> Ford depo., pp. 128-29 [Appdx., Exh. 20].

<sup>49</sup> FTB H 08950 [Appdx., Exh. 21].

<sup>50</sup> Cowan Affid., ¶ 32 [Appdx., Exh. 6].

1 that Hyatt so valued would be lost.<sup>51</sup>

2 Specifically, she told Hyatt's tax representative that it would be necessary for the FTB to engage  
3 in extensive additional requests for information from Hyatt as that is its practice "in high profile, large  
4 dollar" residency audits. In fact, Ms. Jovanovich's own hand-written notes confirm that she told Hyatt's  
5 tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "of  
6 many unresolved facts and questions" related to Hyatt.<sup>52</sup> Jovanovich also testified that she understood  
7 Hyatt had a unique and special concern regarding his privacy<sup>53</sup> and that he was "paranoid" about his  
8 privacy – an understanding shared among the FTB auditors and the FTB residency unit.<sup>54</sup>

9 **3. Hyatt was damaged by the FTB's fraud.**

10 Hyatt, having no reason to suspect that the FTB, as an organ of California government, would  
11 act in a false, predatory manner, reasonably relied on the truthfulness of the assurances and  
12 representations (both explicit and implied) by the FTB and its agents.<sup>55</sup> Thus relying, Hyatt agreed to  
13 cooperate with the FTB and provide it with his highly sensitive and confidential information and  
14 documents.<sup>56</sup> Hyatt in fact relied upon the false representations and assurances of the FTB and its agents  
15 to his extreme detriment, as explained above.

16 Two simple facts demonstrate the potential magnitude of the damages.

- 17 1. In the past four years prior to the FTB's early-1995 tortious invasions of Hyatt's privacy,  
18 he closed license agreements for hundreds of millions of dollars.
- 19 2. After the FTB's early-1995 tortious invasions of Hyatt's privacy, he was not able to close  
20 a single new license agreement.<sup>57</sup>

21 If Hyatt's right to a trial is not taken from him, he will prove that the timing of the FTB's tortious  
22 conduct and the total destruction of his licensing program is not coincidental, but rather the former  
23 caused the latter. In addition to his economic damages, Hyatt suffered emotional distress.<sup>58</sup>

24 <sup>51</sup> Jovanovich depo., pp. 50-52, 168, 185-186 [Appdx., Exh. 23].

25 <sup>52</sup> Jovanovich notes from June 12, 1997 [Appdx., Exh. 24].

26 <sup>53</sup> Jovanovich depo., p. 125, lns. 20-24 [Appdx., Exh. 23].

27 <sup>54</sup> Jovanovich depo., p. 126, lns. 4-8 [Appdx., Exh. 23].

28 <sup>55</sup> Hyatt Affid., ¶¶ 10-12 [Appdx., Exh. 7].

<sup>56</sup> Cowan Affid., ¶¶ 9-26 [Appdx., Exh. 6].

<sup>57</sup> Hyatt Affid., ¶ 136 [Appdx., Exh. 7].

<sup>58</sup> This 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." See *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949, 958 (1998).

1 **V. The Court overlooked or misapprehended the law when it granted the FTB's**  
2 **petition "on grounds other than those alleged in the petition."**

3 First, the Court's order violates Hyatt's due process rights by denying Hyatt his day in court  
4 without even a hearing before this Court on an issue never raised in the FTB's writ petition. Second, the  
5 order is contrary to this Court's own line of cases reversing district court orders that mistakenly grant  
6 summary judgment when material issues of fact are in dispute and that require all reasonable inferences  
7 to be drawn in favor of the non-moving party, as well as its line of cases refusing to review denials of  
8 summary judgment.

9 These propositions are self evident and very familiar to this Court. Hyatt has no more space in  
10 this petition to further develop these points, except to emphasize that the Court is not only unfairly  
11 denying him his day in court but is doing so prematurely before he has completed discovery. A  
12 substantial part of discovery, including court-ordered discovery, was pending when the Court stayed the  
13 action. The remaining discovery was detailed in an affidavit submitted to the district court as an  
14 alternative ground for denying the FTB's summary judgment motion.<sup>59</sup> Given this Court's disagreement  
15 with the district court regarding the sufficiency of the evidence after its own review and reweighing,  
16 Hyatt renews his request to complete discovery before his case is dismissed on such grounds.

17 **VI. Hyatt again requests leave to file an additional briefing specifically**  
18 **addressing the evidentiary support for his claims.**

19 Hyatt requested leave of court to file a petition in excess of the Court's ten- page limit.<sup>60</sup> Hyatt  
20 again renews this request. Whether the Court is inclined to grant or deny the petition, Hyatt should be  
21 given a full and fair opportunity to demonstrate the adequacy of his evidence to date. It may be his only  
22 "day in court."

23 DATED this 2 day of July, 2001

HUTCHISON & STEFFEN

BERNHARD & LESLIE, CHTD.

By:

  
Peter C. Bernhard, Esq.  
Bryan Murray, Esq.

Attorneys for Gilbert P. Hyatt

27 <sup>59</sup> Bourke Affidavit, ¶¶ 182, 183, and 186 [Appdx., Exh. 25].

28 <sup>60</sup> Hyatt filed his request to exceed the ten page limitation for petitions for rehearing and to extend the time for filing  
such petitions on June 18, 2001. As of the filing of this petition, the Court had not ruled on this request.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Bernhard & Leslie, and that on this 7<sup>th</sup> day of July,  
3 2001, I served a true and correct copy of the foregoing **REAL PARTY IN INTEREST GILBERT P.**  
4 **HYATT'S PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER**  
5 **GRANTING PETITION FOR WRIT OF MANDAMUS** via regular mail, in a sealed box(s) upon  
6 which postage was prepaid, to the addresses noted below, upon the following:

7  
8 Thomas R.C. Wilson, Esq.  
9 McDonald, Carano, Wilson, McCune,  
10 Bergin, Frankovich & Hicks  
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12 California Attorney General  
13 300 South Spring Street  
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Los Angeles, California 90013

14 Honorable Nancy Saitta  
15 Department XVIII  
16 Eighth Judicial District Court of the State of Nevada  
in and for the County of Clark  
200 S. Third Street  
17 Las Vegas, NV 89155

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19   
20 An employee of Bernhard & Leslie  
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9 Attorneys for Real Party in Interest  
GILBERT P. HYATT

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

12 FRANCHISE TAX BOARD OF THE STATE )  
13 OF CALIFORNIA, )

14 Petitioner, )

15 vs. )

16 EIGHTH JUDICIAL DISTRICT COURT of )  
the State of Nevada, in and for the County of )  
17 Clark, Honorable Nancy Saitta, District Judge, )

18 Respondent, )

19 and )

20 GILBERT P. HYATT, )

21 Real Party in Interest. )  
22  
23  
24  
25  
26  
27  
28

Case No. 36390

**APPENDIX OF EXHIBITS CITED  
IN REAL PARTY IN INTEREST GIL  
HYATT'S PETITION FOR  
REHEARING RE THE COURT'S  
JUNE 13, 2001 ORDER GRANTING  
PETITION FOR WRIT OF  
MANDAMUS**

***CONFIDENTIAL INFORMATION TO  
BE FILED UNDER SEAL***

1  
2 Real party in interest Gil Hyatt attaches to his Petition for Rehearing this Appendix containing  
3 copies of all exhibits cited in his petition. Each exhibit cited in the petition and attached hereto is from  
4 the record before the Court. Copies of the cited exhibits have been compiled in this Appendix for the  
5 convenience of the Court. The record cite for each attached exhibit is set forth in brackets<sup>1</sup> after the  
6 description of the exhibit in the table of contents below.

7  
8 **Table of Contents re Attached Exhibits**

- 9  
10 1. FTB Field Audit Manual [*Supp. Hyatt Appendix, Vol. XI, Exh. 31*].  
11  
12 2. FTB Statement of Incompatible Activities and Rules of Conduct for Departmental  
13 Employees [*Supp. Hyatt Appendix, Vol. XIII, Exh. 38*].  
14  
15 3. FTB Disclosure Education Manual [*Supp. Hyatt Appendix, Vol. XIII, Exh. 39*].  
16  
17 4. FTB Security and Disclosures Manual [*Supp. Hyatt Appendix, Vol. XI, Exh. 30*].  
18  
19 5. FTB Form #1131 [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 18 thereto)*].  
20  
21 6. E. Cowan Affidavit (minus exhibits) [*Hyatt Appendix, Vol. VIII, Exh. 15*].  
22  
23 7. G. Hyatt Affidavit (excerpts and minus exhibits) [*Hyatt Appendix, Vol. VIII, Exh. 12*].  
24  
25 8. Portions of FTB 1991 tax year audit file on Gil Hyatt [*Supp. Hyatt Appendix, Vol. X, Exh. 28*].  
26

27 <sup>1</sup> The term "Hyatt Appendix" refers to volumes I through VII of the appendix of exhibits Hyatt submitted on July 7,  
28 2000 with his Answer to the FTB "discovery" writ. The term "Supp. Hyatt Appendix" refers to volumes VIII through XIV of  
the supplemental appendix of exhibits Hyatt submitted on October 13, 2000 with his Answer to the FTB "jurisdictional" writ.

- 1 9. Portions of FTB 1991 tax year audit file on Gil Hyatt [*Hyatt Appendix, Vol. VII, Exh. 11*  
2 (*Exhibit 11 thereto*)].
- 3
- 4 10. Portions of FTB 1991 tax year audit file on Gil Hyatt [*Hyatt Appendix, Vol. VII, Exh. 11*  
5 (*Exhibit 12 thereto*)].
- 6
- 7 11. Portions of FTB 1991 tax year audit file on Gil Hyatt [*Hyatt Appendix, Vol. VII, Exh. 11*  
8 (*Exhibit 2 thereto*)].
- 9
- 10 12. Information Practices Act of 1977, California Civil Code § 1798 *et seq.* [*Hyatt Appendix,*  
11 *Vol. V, Exhibit 8 (Exhibit 1 thereto)*].
- 12
- 13 13. Cox Narrative Report [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 1 thereto)*].
- 14
- 15 14. S. Illia deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 31 thereto)*].
- 16
- 17 15. M. Shayer deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 28 thereto)*].
- 18
- 19 16. S. Cox deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 29 thereto)*].
- 20
- 21 17. C. Les deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 37 thereto)*].
- 22
- 23 18. P. Maystead deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 35*  
24 *thereto)*].
- 25
- 26 19. Beth Hyatt "affidavit" to FTB [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 21 thereto)*].
- 27
- 28 20. C. Ford deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 32 thereto)*].

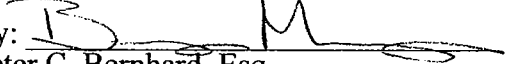
- 1
- 2 21. Skull and Crossbones cover page for Penalties Manual (H08950) *[Hyatt Appendix, Vol. VII,*
- 3 *Exh. 11, (Exhibit 22 thereto)]*.
- 4
- 5 22. First Amended Complaint *[FTB Appendix Filed July 7, 2000, Vol. I, Exh. 4]*.
- 6
- 7 23. A. Jovanovich deposition transcript excerpts *[Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 30*
- 8 *thereto)]*.
- 9
- 10 24. A. Jovanovich's hand-written notes of June 12, 1997 *[Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit*
- 11 *3 thereto)]*.
- 12
- 13 25. T. Bourke Affidavit (excerpts and minus exhibits) *[Hyatt Appendix, Vol. VIII, Exh. 13]*.
- 14
- 15 26. November 9, 1999 transcript excerpt from hearing by Discovery Commissioner *[Hyatt*
- 16 *Appendix, Vol. VII, Exh. 11 (Exhibit 5 thereto)]*.
- 17
- 18 27. Gil Hyatt's Opposition to FTB's Motion for Summary Judgment *[Hyatt Appendix, Vol. VII,*
- 19 *Exh. 11]*.
- 20
- 21 28. FTB Mission Statement *[Hyatt Appendix, Vol. III, Exh. 6 (Exhibit 19 thereto)]*.
- 22
- 23
- 24
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1 29. Appendix to Plaintiff Gil Hyatt's Post-Hearing Memorandum Containing Prima Facie  
2 Showing of FTB Consultation with Attorneys to Further Future and Ongoing Extortion,  
3 Breach of Confidentiality Statute, and Fraud ("Hyatt *Crime/Fraud* brief") [*Hyatt Appendix*,  
4 *Vol. II, Exh. 4*].  
5

6 DATED this 2 day of July, 2001.

7 HUTCHISON & STEFFEN, LTD.  
8 Mark A. Hutchison, Esq.  
9 John T. Steffen, Esq.  
10 Lakes Business Park  
11 8831 West Sahara Avenue  
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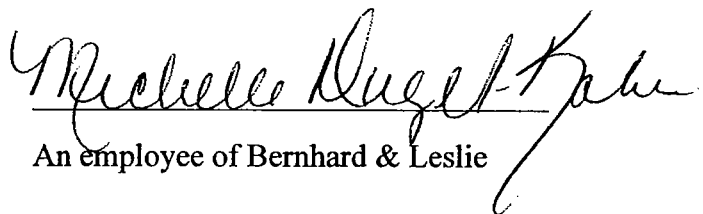
**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Bernhard & Leslie, and that on this 2<sup>nd</sup> day of July, 2001, I served a true and correct copy of the foregoing **APPENDIX OF EXHIBITS CITED IN REAL PARTY IN INTEREST GIL HYATT'S PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** via regular mail, in a sealed box(s) upon which postage was prepaid, to the addresses noted below, upon the following:

Thomas R.C. Wilson, Esq.  
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Honorable Nancy Saitta  
Department XVIII  
Eighth Judicial District Court of the State of Nevada  
in and for the County of Clark  
200 S. Third Street  
Las Vegas, NV 89155

  
An employee of Bernhard & Leslie

# **EXHIBIT 33**

## IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA, IN  
AND FOR THE COUNTY OF CLARK, AND  
THE HONORABLE NANCY M. SAIITA,  
DISTRICT JUDGE,

Respondents,

and

GILBERT P. HYATT,

Real Party in  
Interest.

No. 35549

FILED

JUL 13 2001

JENNIFER M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERKFRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA, IN  
AND FOR THE COUNTY OF CLARK, AND  
THE HONORABLE NANCY M. SAIITA,  
DISTRICT JUDGE,

Respondents,

and

GILBERT P. HYATT,

Real Party in  
Interest.

No. 36390

ORDER GRANTING MOTION IN PART, AND DIRECTING ANSWER

On June 13, 2001, this court entered an order dismissing the petition in Docket No. 35549 and granting the petition in Docket No. 36390 in these consolidated writ proceedings. On June 20, 2001, real party in interest, Gilbert P. Hyatt ("Mr. Hyatt"), filed a motion for an extension of time to file a petition for rehearing and for leave to file a forty-

01-11919



page petition. As cause for that motion, Mr. Hyatt represents that "the petition for rehearing must address matters never raised by either party and must specifically describe the evidence with citations to the record supporting each element of his claims for relief." This is because, Mr. Hyatt avers, the relief granted in this court's June 13, 2001, order was "based upon grounds that were neither raised in the Writ Petition nor addressed by Hyatt."

On June 21, 2001, petitioner Franchise Tax Board of the State of California ("Tax Board") filed an opposition to Mr. Hyatt's motion. In that opposition, the Tax Board argues that because the entire record that was before the district court was considered by this court in these consolidated proceedings, any extension of the time period or permission to exceed the page limitation provided in NRAP 40 would be unnecessary.

On June 25, 2001, Mr. Hyatt filed a motion for permission to file a reply in support of his motion for an extension of time to file a petition for rehearing and to exceed the page limitation. We grant that motion. Accordingly, the clerk of this court shall file Mr. Hyatt's reply received on June 25, 2001.

On July 5, 2001, Mr. Hyatt filed, in Docket No. 36390 only,<sup>1</sup> a timely ten page petition for rehearing.<sup>2</sup> In addition to addressing some of the issues Mr. Hyatt believes support rehearing, the petition also renews the request to exceed the

<sup>1</sup> As noted above, the writ petition in Docket No. 35549 was denied as moot and Mr. Hyatt is seeking only a rehearing of the granting of the writ petition in Docket No. 36390.

<sup>2</sup> The petition was time stamped and placed in the Las Vegas drop box on July 2, 2001, and thus is considered to have been timely filed. See NRAP 25(3)(c).

ten page limit to present additional points that Mr. Hyatt believes are relevant as to whether a rehearing should be granted.

Upon consideration of all the documents filed on this matter, we grant Mr. Hyatt's motion, in part. Mr. Hyatt may file a fifteen (15) page supplement to the petition for rehearing that was filed in Docket No. 36390 on July 5, 2001. In that supplement Mr. Hyatt may present the additional points that he was not able to address or fully develop in the ten page petition for rehearing. That supplement shall be filed and served within ten (10) days from the date of this order. Further, the Tax Board shall have fifteen (15) days from the date of service of Mr. Hyatt's supplement to the petition for rehearing to file a twenty-five (25) page answer to the petition and supplement. See NRAP 40(d). We caution the parties that failure to meet any of the filing deadlines set forth in this order may be deemed as a waiver of the right to file either the supplement or the answer, respectively.

It is so ORDERED.

Marquis, C.J.

cc: Hon. Nancy M. Saitta, District Judge  
California Attorney General  
McDonald, Carano, Wilson, McCune, Bergin,  
Frankovich & Hicks  
Bernhard & Leslie  
Thomas K. Bourke  
Riford & McKenzie  
Hutchinson & Steffen  
Marquis & Aurbach

# **EXHIBIT 34**

RECEIVED  
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01 JUL 23 PM 4:19

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Attorneys for Real Party in Interest  
GILBERT P. HYATT

IN THE SUPREME COURT OF THE  
STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT of  
the State of Nevada, in and for the County of  
Clark, Honorable Nancy Saitta, District Judge,

Respondent,

and

GILBERT P. HYATT,

Real Party in Interest.

Case No. 36390

REAL PARTY IN INTEREST  
GILBERT P. HYATT'S 15 PAGE  
SUPPLEMENT TO HIS PETITION  
FOR REHEARING RE THE  
COURT'S JUNE 13, 2001 ORDER  
GRANTING PETITION FOR WRIT  
OF MANDAMUS

**CONFIDENTIAL INFORMATION TO  
BE FILED UNDER SEAL**

Pursuant to this Court's order, Petitioner Gil Hyatt submits this Supplement to his Petition for Rehearing, timely filed on July 2, 2001 (the "Petition"). The Petition addressed the substantial evidence supporting Hyatt's most significant invasion of privacy claim and his fraud claim. This Supplement first demonstrates that there are material facts in dispute in regard to the four issues upon which the Court based its order granting the FTB's petition and then discusses additional facts, evidence and law that the Court overlooked or misapprehended in its order granting the FTB's petition.

RA001601

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RA001602

1 **I. Genuine issues as to material fact exist as to the four conclusions reached by the**  
2 **Court in footnote 12 of the June 13 Order.<sup>1</sup>**

3 The Court's June 13 Order concluded that the FTB had met its burden that at least one element  
4 of each of Hyatt's claims had not been shown. The Order said the FTB did that "...by demonstrating  
5 undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its  
6 investigation or findings outside the scope of the investigation, (3) complied with its internal operating  
7 procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its  
8 investigation through phone calls and letters."<sup>2</sup> Based on this, the Court then found no genuine dispute  
9 "that Franchise Tax Board's acts during its investigation constituted intentional torts[.]" citing Nevada  
10 law as to Hyatt's causes of action, at footnote 13. The evidence cited throughout the Petition and this  
11 Supplement refutes this. A brief summary of the evidence, and reasonable inferences which can be  
12 derived therefrom, contradicts each of these allegedly undisputed issues."<sup>3</sup>

13 **A. Evidence of record shows that the FTB "produced false statements".** Genuine  
14 issues of material fact exist as to issue (1) in footnote 12. Evidence of the FTB's false statements  
15 include:

- 16 (1) FTB written confidentiality promises contained in its communications to Hyatt;<sup>4</sup>
- 17 (2) FTB verbal confidentiality promises, given when Hyatt's representatives insisted on specific  
18 pledges of confidentiality in return for Hyatt providing additional information;<sup>5</sup>
- 19 (3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but  
20 instead buried all evidence favorable to Hyatt;<sup>6</sup>
- 21 (4) Audit narrative report re Hyatt was "fiction" according to a former FTB employee;<sup>7</sup>

22 <sup>1</sup> The Petition cited to an Appendix of Exhibits 1 through 29 attached thereto in the following format: [*Appdx., Exh. "x"*]. For  
23 clarity, this Supplement cites to exhibits in the same manner, with additional exhibits attached to a Supplemental Appendix.  
24 Citations to the record for the exhibits attached to the Supplemental Appendix are set forth in its table of contents.

25 <sup>2</sup> See footnote 12 of June 13 Order. In addition, Hyatt urges the Court to review pages 21 through 26 of Hyatt's opposition to  
26 the FTB's motion for summary judgment [*Appdx., Exh. 27*] that discusses the Constitutional and statutory basis and origin of the  
27 invasion of informational privacy alleged by Hyatt. The informational privacy rights of Hyatt, and corresponding obligations of  
28 the FTB, establish in great part the objective reasonableness of Hyatt's invasion of privacy claims. Moreover, and as discussed  
below, the FTB is not immune under California law for the invasions of privacy, particularly, the informational privacy, asserted  
by Hyatt.

<sup>3</sup> These facts represent, at a minimum, sufficient evidence to refute the four "undisputed" facts. Because of the FTB's invocation  
of the "deliberative process" privilege, Hyatt was prevented from getting further facts from the FTB (this was the subject of the  
FTB's other writ, declared moot in this Court's June 13 order). Since discovery was stayed by this Court's earlier order, Hyatt  
has not been able to complete his investigation of these and other relevant facts.

<sup>4</sup> Petition, at 2-3. (Hyatt cites to the Petition or this Supplement, *infra*, when the supporting evidence is summarized therein).

<sup>5</sup> Petition, at 3.

<sup>6</sup> Petition, at 6-8.

<sup>7</sup> Les Depo., pp. 10, 25, 172, 176 [*Appedx., Exh. 17*].

1 (5) Auditor Cox's statements re interviews with Hyatt's Las Vegas apartment managers, directly  
2 contradicted by deposition testimony of the apartment manager;<sup>8</sup>

3 (6) FTB "Demand for Information" form, which falsely represented to Nevada respondents that  
4 they were required by California law to comply with these demands;<sup>9</sup>

5 (7) FTB false "affidavits," which were not even sworn to, and which were falsely represented by  
6 Auditor Cox as containing damaging information about Hyatt;<sup>10</sup>

7 (8) The FTB falsely stated that the audit file had been through extensive levels of review by  
8 FTB reviewers: "The reviewers in Sacramento have finished their extensive examination of the  
9 audit file and all of the information regarding Mr. Hyatt's residency status." However, in  
10 deposition, the reviewers expressly admitted that they simply relied upon Cox's work in their  
11 review of her assessment.<sup>11</sup> This cursory review also led to the assessment of an additional \$6.4  
12 million in taxes and penalties for a total assessment of \$9.9 million.<sup>12</sup>

13 Therefore, this Court cannot say that the FTB "never produced false statements". If the Court believes  
14 that these false statements are *de minimus*, it is performing, inappropriately, a fact-finder's function.

15 **B. Evidence of record shows that the FTB publicized its investigation or findings**  
16 **outside the scope of the investigation.** Genuine issues of material fact exist as to issue (2) in footnote  
17 12. Evidence of the FTB's publication of its investigation or findings outside the scope of its  
18 investigation include:

19 (1) Auditor Cox's publication of her investigation and findings, and personal defamatory  
20 opinions of Hyatt, to Candace Les who had no "need to know."<sup>13</sup>

21 (2) Auditor Cox's publication of her investigation and findings, and personal defamatory  
22 opinions of Hyatt, to non-FTB personnel;<sup>14</sup>

23 (3) Auditor Cox's publication of her work and findings to Priscilla Maystead, Hyatt's ex-wife  
24 when Cox boasted, "We got him."<sup>15</sup>

25 (4) Disclosure to Hyatt's Japanese customers that he was under investigation, and revealing that  
26 Hyatt had provided the FTB with copies of their confidential agreements;<sup>16</sup> and

27 <sup>8</sup> Kopp Depo., pp. 75 - 76 [Supp. Appdx., Exh. 39]; Lewis Depo., pp. 29, 45, 51 [Supp. Appdx., Exh. 30].

28 <sup>9</sup> *Infra*, at 8-9.

<sup>10</sup> Bourke Affid., ¶¶ 15, 16, 51, 73 (evidence is cited and summarized therein) [Appdx., Exh. 25]. The FTB knew that what it  
labeled as an affidavit was indeed not a true affidavit – the FTB has reverted to calling them "interview summaries." However,  
Cox clearly intended to misrepresent these "interview summaries" in her Narrative Report because they served as the foundation  
for Cox's assessment of fraud penalties (an extremely serious penalty requiring clear and convincing evidence to support): "[A]s  
evidence of the taxpayer's specific intent to defraud the government, we have gotten affidavits from several individuals that the  
taxpayer may have cheated on his taxes in the past." See FTB audit work-papers, at H 01892. [Supp. Appdx., Exh. 45].

<sup>11</sup> Lou Depo., p. 81 [Supp. Appdx., Exh. 44].

<sup>12</sup> Ford Depo., p. 90-92 [Supp. Appdx., Exh. 43].

<sup>13</sup> *Infra*, at 7-8.

<sup>14</sup> *Infra*, at 7-8.

<sup>15</sup> Maystead Depo., pp. 182-84. [Appdx., Exh. 18].

<sup>16</sup> Petition, at 9.

1 (5) Disclosure of Hyatt's private information to three newspapers.<sup>17</sup>

2 Again, this Court cannot say that the FTB never publicized its investigation or findings outside the  
3 scope of the investigation. If the Court believes that these publications are *de minimus*, it is performing,  
4 inappropriately, a fact-finder's function.  
5

6 **C. Evidence of record shows that the FTB did not comply with its internal operating**  
7 **procedures with regard to contacting individuals.** Genuine issues of material fact exist as to issue  
8 (3) in footnote 12. Evidence of the FTB's failure to comply with its internal operating procedures with  
9 regard to contacting individuals include violating its policies, rules and procedures:

10 (1) Despite talking to Hyatt's adversaries, Auditor Cox never interviewed or spoke with Hyatt,  
11 or his close associates and close family members, thereby failing to conduct a fair, unbiased  
12 audit;<sup>18</sup>

13 (2) Failure to notify Hyatt or obtain the requested information from Hyatt before disclosing  
14 social security numbers and other confidential Hyatt information to individuals or businesses;<sup>19</sup>

15 (3) Failure to contact Hyatt before contacting third parties;<sup>20</sup>

16 (4) Sending "Demands for Information" to individuals outside the State of California, absent  
17 special circumstances;<sup>21</sup>

18 (5) Advising Hyatt that other taxpayers usually settle to avoid further dissemination of private  
19 information, inferring that "this could happen to you, too, if you don't agree to settle".<sup>22</sup>

20 Therefore, this Court cannot say that the FTB complied with its internal operating procedures with  
21 regard to contacting individuals. If the Court believes that these false statements are *de minimus*, it is  
22 performing, inappropriately, a fact-finder's function.

23 **D. Evidence of record shows that the FTB did more than "merely visit Hyatt's house**  
24 **and conduct its investigation through phone calls and letters."** Genuine issues of material fact exist  
25 as to issue (4) in footnote 12. Evidence of the FTB's additional actions include:

26 (1) Visits to Las Vegas apartment complexes and making records of questionable accuracy  
27 regarding interviews with apartment managers;<sup>23</sup>

28 <sup>17</sup> Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [Appdx., Exh. 10].

<sup>18</sup> Petition, at 6-8.

<sup>19</sup> Petition, at 5.

<sup>20</sup> Cal. Civ. Code 1798.15; FTB Security and Disclosure Manual, at H06706 [Appdx., Exh. 4].

<sup>21</sup> *Infra*, at 9-10.

<sup>22</sup> Jovanovich Depo., 50-52, 268, 185-86 [Appdx., Exh. 23]; Cowan Affid., ¶¶ 38 to ¶¶ 41 [Appdx., Exh. 6].

<sup>23</sup> Kopp Depo., pp. 75-76 [Supp. Appdx., Exh. 39]; Lewis Depo., pp. 29, 45, 51 [Supp. Appdx., Exh. 30]



1 (2) Sending an unprecedented number of "Demands for Information" to individuals outside the  
2 State of California;<sup>24</sup>

3 (3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but  
4 instead buried all evidence favorable to Hyatt;<sup>25</sup>

5 (3) Searching through Hyatt's Las Vegas trash and mail;<sup>26</sup>

6 (4) Taking a "trophy" picture in front of Hyatt's Las Vegas home;<sup>27</sup>

7 (5) Initiating tax audits of close Hyatt associates;<sup>28</sup>

8 (6) Acknowledging that the FTB believed Hyatt was "paranoid" about privacy, then warning his  
9 tax attorney that without a settlement, Hyatt's finances would become public;<sup>29</sup>

10 (7) Vowing to "get that Jew bastard."<sup>30</sup>

11 Therefore, this Court cannot say that the FTB did nothing more than visit Hyatt's house and conduct its  
12 investigation through phone calls and letters. If the Court believes that these actions are *de minimus*, it  
13 is performing, inappropriately, a fact-finder's function.

14 In effect, the June 13 Order has validated, for all Nevada residents, that the FTB's predatory  
15 conduct against Hyatt is reasonable and free of falsity as a matter of law – a cause for celebration at the  
16 FTB since such treatment of a California resident would be unlawful and subject to redress under  
17 California's Constitution and statutes. The FTB conduct reflected in the record against Hyatt now  
18 becomes a "hunting license" for the FTB, where everything it has done against Hyatt may be done with  
19 impunity against other Nevada residents. Even deceptive, unauthorized, quasi-subpoenas may now be  
20 directed at Nevadans with this Court's blessing in the FTB's most-certain future efforts to target former  
21 California residents who have moved to Nevada. Private addresses for celebrities living in Nevada,  
22 along with their social security numbers and allegations of possible criminal accountability to  
23 California, are now Nevada Supreme Court-approved methods to achieve the FTB's objectives against  
24 wealthy Nevada residents, as the June 13 Order has determined that these are reasonable invasions of a  
25 Nevada citizen's privacy rights as a matter of law. And under this Court's new standard, any tort claims  
26 brought by a Nevada citizen against the FTB will, if not summarily dismissed at the district court level,

27 <sup>24</sup> *Infra*, at 9-10.

28 <sup>25</sup> Petition, at 6-8.

29 <sup>26</sup> Cox Depo., pp. 1077 [Appdx. Exh. 16]; Les Depo., pp. 268-69, 405 [Appdx., Exh. 17].

30 <sup>27</sup> Les Depo., pp. 264, 402 - 03 [Appdx., Exh. 17].

<sup>28</sup> Hyatt Affid., ¶ 164 [Appdx., Exh. 7].

<sup>29</sup> Jovanovich Depo., pp. 50-52, 168, 185-86 [Appdx., Exh. 23]; Cowan Affid., ¶¶ 38 to ¶¶ 41 [Appdx., Exh. 6].

<sup>30</sup> Les depo., p. 10 [Appdx. Exh. 17].

1 enjoy a *de novo* review by this Court as to the facts, and, unless they are found to be more egregious  
2 than those against Hyatt, be ordered dismissed in the district courts.

3 **II. Substantial, probative evidence supports Hyatt's invasion of privacy claims.**

4 **A. Substantial evidence of the FTB's illegal disclosures of Hyatt's private facts.**

5 As Hyatt briefly addressed in footnote 1 of the Petition, Hyatt's invasion of privacy claim for  
6 disclosure of private facts encompasses both the newer, well-recognized claim for invasion of  
7 informational privacy as well as the more traditional claim of public disclosure of private facts. The  
8 district court so found in liberally construing Hyatt's claims as consistent with Nevada's notice-  
9 pleading standard.<sup>31</sup> Hyatt summarized the supporting evidence in the Petition and through various  
10 exhibits attached to the appendix submitted with the Petition.<sup>32</sup> Hyatt's additional invasion of privacy  
11 claims are interrelated with this claim, and each is supported by the evidence summarized in the  
12 Petition, and further by the additional evidence summarized below.

13 **B. Substantial evidence of the FTB's intrusion upon Hyatt's seclusion.**

- 14 1. **Elements of claim:** (1) an intentional intrusion (physical or otherwise);  
15 (2) on the solitude or seclusion of another; and (3) that would be highly  
16 offensive to a reasonable person."  
17 2. **Supporting evidence:**

18 In addition to the evidence summarized in the Petition, affidavits and depositions have  
19 established the following facts, which give rise to the inference that the FTB unreasonably intruded  
20 upon Hyatt's seclusion. First, FTB auditor Sheila Cox made at least three trips to Las Vegas to  
21 investigate Hyatt. During these visits, Cox contacted neighbors and other fellow Nevada residents with  
22 whom Hyatt either in the past or in the future has had or might reasonably expect to have social or  
23 business interactions, and she either disclosed or implied to them that Hyatt was under investigation in  
24 California.<sup>33</sup> On one trip she took a colleague, Candace Les, on a covert visit to Hyatt's Las Vegas  
25 home<sup>34</sup> — after the audit was over<sup>35</sup> — and took a trophy photograph of Les standing on Hyatt's  
26 property in front of Hyatt's residence.<sup>36</sup> This corroborates Les' testimony that Cox was obsessive in her  
27 zeal to "get" Hyatt, personalizing the audit in ways that were clearly not "standard" and should be found  
28

<sup>31</sup> Nev. R. Civ. P. Rule 8(a).

<sup>32</sup> Petition, at 1-5.

<sup>33</sup> Cox Depo., pp. 426-27, 957, 1329-30, 1873 [Appdx., Exh. 16]; Hyatt Affid., ¶ 129 [Appdx., Exh. 7].

<sup>34</sup> Les Depo., p. 42 [Appdx., Exh. 17].

<sup>35</sup> Les Depo., pp. 54 - 55 [Appdx., Exh. 17].

<sup>36</sup> Les Depo., pp. 264, 402 - 03 [Appdx., Exh. 17].

1 tortious. Because the audit was closed, FTB policies forbade this curiosity-driven visit as unauthorized  
2 stalking.<sup>37</sup> Because the visit was for a nontax purpose, the surveillance was forbidden by the Taxpayers'  
3 Bill of Rights.<sup>38</sup> Because the visits were forbidden by FTB policies, Cox's surveying of Hyatt's former  
4 apartment and his Las Vegas home violated California's privacy act and published FTB procedures.<sup>39</sup>  
5 Cox also made three or more trips to the neighborhood of Hyatt's prior residence in La Palma, which  
6 trips included unannounced visits with residents of Hyatt's former neighborhood and questions about  
7 private details of Hyatt's life.<sup>40</sup> All of these facts and circumstances, taken together, support Hyatt's  
8 claims that he was singled out, by FTB actions which should be found tortious, for unlawful purposes,  
9 to further ambitions of FTB auditors and the revenue-enhancing goals of the FTB.

10 The FTB contacted over one hundred sources, including three newspapers, a dozen neighbors,  
11 the Licensing Executive Society, and Hyatt's Japanese licensees, causing the inference that Hyatt was  
12 under a cloud of suspicion.<sup>41</sup> The FTB, through its investigative actions, and in particular the manner in  
13 which they were carried out in California, Nevada and Japan, intruded into Hyatt's solitude and  
14 seclusion. The intrusions by the FTB support the inference that any reasonable person, including Hyatt,  
15 would find them to be highly offensive.<sup>42</sup> Even if these intrusions were part of a "standard" FTB  
16 investigation, this is not a defense to this tort, which only requires that the intrusions be intentional,  
17 affect the seclusion of another, and be highly offensive to a reasonable person. Clearly, the intrusions  
18 were intentional; they affected Hyatt's seclusion; and would be highly offensive to a reasonable person  
19 under the circumstances.  
20  
21  
22

<sup>37</sup> Les Depo., pp. 54 - 55 [Appdx., Exh. 17].

<sup>38</sup> California Revenue & Taxation Code § 21014, *forbidding* any FTB employee from conducting an investigation or surveillance of any person except for tax purposes. For purposes of the prohibition, the Legislature defined investigation as "any oral or written inquiry" and surveillance as "the monitoring of persons, places, or events by means of . . . overt or covert observations, or photography, or the use of informants."

<sup>39</sup> California Information Practices Act of 1977, Civil Code § 1798.14; Disclosure Manual, Exhibit 118 at H 06708 [Appedx., Exh. 3] ("employees *shall not access or use* personal or confidential information about individuals maintained by the department without a legal right to such information as provided by law and a 'need to know' to perform his/her official duties.") (Emphasis added.)

<sup>40</sup> Cox Depo., pp. 1158, 1161, 1165, 1176 [Appdx., Exh. 16]; Les Depo., pp. 24-25, 385-86 [Appdx., Exh. 17].

<sup>41</sup> Cox Narrative Report [Appdx., Exh. 13].

<sup>42</sup> See, e.g., Hyatt Affid., ¶ 129-138 [Appdx., Exh. 7].

1           **C. Substantial evidence of the FTB's casting Hyatt in a false light.**

2           **1. Elements of claim:** (1) giving publicity to a matter concerning another; (2) that  
3           places the person in a false light; (3) that would be highly offensive to a  
4           reasonable person; and (4) that the actor had knowledge of or acted in reckless  
5           disregard as to the falsity of the publicized matter and the false light in which the  
6           other would be placed.<sup>43</sup>

7           **2. Supporting evidence:**

8           The evidence summarized above and in the Petition is fully applicable to this claim as well.  
9           Moreover, the California Revenue and Taxation Code, and the laws and regulations compiled in the  
10          FTB disclosure education materials, forbid disclosure of personal information about a taxpayer to  
11          anyone, even to other auditors, who have *no* need to know. But Cox told Les about the murder of  
12          Hyatt's son — and called him a "freak" because of it. She disclosed to Les her unsuccessful attempts to  
13          start special investigations to investigate Hyatt for fraud, showed Les the narrative report, audit papers,  
14          and position letters that lay out extensive detail about Hyatt's personal life and finances, disclosed to Les  
15          alternative theories to tax Hyatt, told Les of her meetings with higher-ups on the Hyatt case, and talked  
16          about Hyatt incessantly.<sup>44</sup> Cox talked about the case "constantly," "year after year." She talked about  
17          the Hyatt case so much and was so unwilling to let it go — even after it was closed — that Les  
18          concluded she was so "fixated" and "obsessed" with it that she was beginning to create a fiction in her  
19          own head about it.<sup>45</sup>

20          She told Les about Hyatt's Las Vegas apartment, and his Las Vegas home and his former  
21          California house — referring to his old house as a "dump," falsely stating it contained a "dungeon," and  
22          calling Hyatt "a bad man." She falsely alleged to Les that he had several Californians on the lookout for  
23          the FTB: a "secret" Chinese "gook" girlfriend named Grace Jeng, a "one-armed man," and other  
24          "ghouls."<sup>46</sup> She disclosed facts to her friend about his family members, his colon cancer, his patent  
25          business, the amount of taxes at issue, her first trip to Las Vegas, her several trips to La Palma, her  
26          interviews with Hyatt's Nevada landlord, the tenor of her dealings with Hyatt's tax representatives, and

27          <sup>43</sup> See *Restatement (Second) of Torts* § 652E (1977). Courts have held, however, that to recover for false light, the subject of  
28          the publication need not necessarily be false. 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.")

29          <sup>44</sup> See Les Depo., pp. 10-11, 24-26, 42, 49-51, 94-95, 103 - 104 - 105, 113-114 , 125-126, 140-141, 141-142, 143-144, 167-168  
30          171-172, 176; 181-82, 245-246; 253-255, 263, 268-269; 275, 345-56, 357-358, 371, 375-376, 385-389, 391 respectively  
31          [Appdx., Exh. 17].

32          <sup>45</sup> See Les Depo., pp. 59 - 60, 61 -63, 167 - 168 [Appdx., Exh. 17].

33          <sup>46</sup> Les Depo., pp. 10, 25, 172, 176 [Appdx., Exh. 17].

1 that the Hyatt audit was one of the largest, if not the largest, in history.<sup>47</sup> Cox obtained written  
2 statements only from Hyatt's estranged relatives and not from his friends, associates and other family  
3 members.<sup>48</sup>

4 During the FTB's contacts with Hyatt's neighbors, trade association, licensees, employees of  
5 patronized businesses, and governmental officials in Nevada, the FTB disclosed that Hyatt was under  
6 investigation in California,<sup>49</sup> and engaged in other conduct that would reasonably cause these persons to  
7 have doubts as to Hyatt's moral character and his integrity.<sup>50</sup> In short, the FTB's actions in conducting  
8 interviews and interrogations of Hyatt's neighbors, business associates, and other Nevada residents, and  
9 its conduct in issuing deceitful, unauthorized "Demands to Furnish Information" gave the false, yet  
10 distinct, appearance that Hyatt was a fugitive from California being investigated as a tax cheater.<sup>51</sup>

11 In so doing, the FTB: (1) gave publicity to a matter concerning Hyatt; (2) placed Hyatt in a false  
12 light; (3) which was highly offensive to Hyatt, as it would be to any reasonable person; and (4) which  
13 the FTB had knowledge of or acted in reckless disregard the false light in which it would place Hyatt.

### 14 **III. Substantial evidence supporting Hyatt's abuse of process claim.**

15 **A. Elements of claim:** Government agencies commit abuse of process when their demands  
16 for information are motivated by an improper purpose, such as to harass the taxpayer or  
17 put pressure on him to settle a collateral dispute, or for any other purpose reflecting on  
the good faith of the particular investigation.<sup>52</sup> An agency that acquires information in  
an investigation by fraud, deceit, or trickery commits an abuse of process.<sup>53</sup>

#### 18 **B. Supporting evidence:**

19 The FTB sent numerous Nevada business and professional entities and individual residents  
20 "quasi-subpoenas" entitled "Demand to Furnish Information," which cited the FTB's authority *under*  
21 *California law* to issue subpoenas and demanded that the recipients thereof produce the information  
22 concerning Hyatt.<sup>54</sup> Moreover, these Demands were captioned on behalf of the "People of the State of  
California" and were prominently identified as relating to "In the Matter of: Gilbert P. Hyatt", thus

23 <sup>47</sup> Ford Depo., pp. 148-55 [Supp. Appdx., Exh. 43].

24 <sup>48</sup> Hyatt Affid., ¶¶ 117, 118, 174, 175 [Appdx., Exh. 6].

<sup>49</sup> Appdx., Exhs. 9-10.

25 <sup>50</sup> E.g., Chang Depo, pp. 32-33 [Supp. Appdx., Exh. 32].

<sup>51</sup> See, e.g., Hyatt Affid., ¶¶ 129, 143-44 [Appdx., Exh. 6].

26 <sup>52</sup> *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977).

27 <sup>53</sup> *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 317 (5th Cir. 1981).

28 <sup>54</sup> 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 [Appdx., Exhs. 9-10].

1 creating a reasonable inference that a tax, criminal or punitive investigation of Hyatt had been  
2 instituted. The FTB has never claimed that it sought or received permission from any Nevada court or  
3 any Nevada government agency to send such "quasi-subpoenas" into Nevada. Many Nevada residents  
4 and business entities responded with answers and information concerning Hyatt. These "quasi-  
5 subpoena" Demands on their face support the inference that they were calculated to coerce Nevada  
6 residents into responding through deception, fear and intimidation. In contrast, more polite  
7 correspondence requesting, rather than demanding, information, was sent to Nevada officials such as  
8 Governor Bob Miller, Senator Richard Bryan and others who were not sent the illicit "Demands". The  
9 inference can be drawn that these individuals would have recognized the absence of any authority for a  
10 California tax agency to "Demand" information from a Nevada resident and would have taken offense at  
11 such a "Demand."<sup>55</sup>

12 The Demands wrongfully disclosed Hyatt's social security number and in some instances his  
13 private address. Contrary to the requirements of the California privacy act, the FTB did not first go to  
14 Hyatt; instead, the Demands were sent without his knowledge. Contrary to the same act, the Demands  
15 did not disclose to the Nevada recipients that they were voluntary, since California has no power to  
16 subpoena information directly from Nevadans. Contrary to the same act, the Demands did not require  
17 the recipients to agree to keep Hyatt's personal information confidential. Contrary to the California  
18 Financial Privacy Act and the Discovery Statute in California, Cox questioned Hyatt's lawyers,  
19 accountants, and financial institutions without Hyatt's knowledge or consent and without first sending  
20 Hyatt the required Notice to Consumer. And Cox wrote to two of Mr. Hyatt's most sensitive Japanese  
21 customers, enclosing portions of sensitive, confidential multi-million dollar patent licensing  
22 agreements, showing that he may have violated the confidentiality clause of the agreements. A  
23 reasonable inference is that these actions were intended to damage Hyatt's business relationships.

24 Moreover, after consulting with Anna Jovanovich,<sup>56</sup> Cox began sending out the Demands For  
25 Information. She sent out more Demands to third parties on the Hyatt audits than some auditors sent  
26 out in their entire careers.<sup>57</sup> She did so without first ascertaining that the third party was uncooperative,

27 <sup>55</sup> FTB H 01715, 01716 [Supp. Appdx., Exh. 35].

28 <sup>56</sup> 1991-tax-year audit workpapers, FTB 100139 [Supp. Appdx., Exh. 34].

<sup>57</sup> Ford Depo., pp. 91-92 [Supp. Appdx., Exh. 43]; Shigemitsu Depo., p. 187 [Supp. Appdx., Exh. 41]; Alvarado Depo., p. 44, [Supp. Appdx. Exh. 35], S. Semana Depo., pp. 82-83 [Supp. Appdx., Exh. 36], B. Gilbert Depo., pp. 35-36 [Supp. Appdx. Exh.

1 as required by the FTB's Residency Manual.<sup>58</sup> She did so without first seeking the information from the  
2 taxpayer, as required by law.<sup>59</sup> This invasion of Hyatt's privacy has been condemned by the auditors  
3 who have been asked about it.<sup>60</sup> A reasonable inference can be drawn that these actions were  
4 undertaken with an illegitimate purpose, to further personal and institutional goals at Hyatt's expense,  
5 rather than for legitimate, residency audit purposes.

6 **IV. The Court has overlooked or misapprehended the law in considering an issue never**  
7 **raised in the FTB's petition for extraordinary relief.**

8 Since *State v. Thompson*<sup>61</sup> was decided in 1983, Hyatt has not found any instance like this one,  
9 where the Court granted a petition for extraordinary relief, on the ground that the district court erred in  
10 denying summary judgment because the plaintiff did not establish sufficient probative evidence. Here,  
11 the Court specifically stated that "[b]ecause this case implicates the principles of Full Faith and Credit  
12 and comity, which are of great importance with respect to interpreting each state's sovereign  
13 responsibilities and rights, we elect to exercise our extraordinary writ powers."<sup>62</sup> Despite the Court's  
14 stated ground for entertaining the FTB's petition, the Court has granted the FTB relief on grounds never  
15 raised in its petition.<sup>63</sup> Hyatt is similarly unaware of any opinion in which this Court granted  
16 extraordinary relief on a ground which was never raised by the petitioner. Such a notion is contrary to  
17 established precedent holding that "the burden on the party seeking extraordinary relief is a heavy  
18 one."<sup>64</sup> By granting the FTB's petition on grounds never raised in the petition, the Court has  
19 disregarded its own precedent and completely relieved the FTB from its heavy burden.

20 If, in fact, the Court intended to establish new policy related to writ practice and return to pre-  
21 1983 authority under which the Court reviewed denials of summary judgment motions based on

22 <sup>37</sup>], Illia Depo., pp. 178-179 [Supp. Appdx. Exh. 42].

23 <sup>58</sup> FTB 00844 [Supp. Appdx., Exh. 38] (To obtain information from *uncooperative* third parties, the auditor should use the  
Demand for Information Form (FTB Form 4973).) (Emphasis added.)

24 <sup>59</sup> Information Practices Act of 1977, California Civil Code § 1798.15 ("Each agency shall collect personal information to the  
greatest extent practicable directly from the individual who is the subject of the information rather than from another source.")

25 <sup>60</sup> Illia Depo., p. 248 [Appdx., Exh. 42]; Bauche Depo. p. 439 [Supp. Appdx., Exh. 40].

26 <sup>61</sup>99 Nev. 358, 662 P.2d 1338 (1983).

27 <sup>62</sup>Order, June 13, 2001, at 3.

28 <sup>63</sup>*Id.*, at 3 (The Court specifically recognized that neither party addressed the sufficiency of Hyatt's evidence.).

<sup>64</sup>*Poulos v. District Court*, 98 Nev. 453, 652 P.2d 1177 (1982). In *Poulos*, although the plaintiff failed to support his opposition  
to summary judgment with *any* affidavits or other evidence as required, the district court did not grant the defendant's motion for  
summary judgment. This Court denied the defendant's petition for a writ of mandamus concluding that extraordinary relief was  
unwarranted because there was "no substantial issue of public policy or precedential value in this case, and . . . no compelling  
reason why [the Court's] intervention by way of extraordinary writ is warranted." *Id.* at 455-56, 652 P.2d at 1178.

1 sufficiency of the evidence, it should simply deny the FTB writs on the grounds advanced by the FTB,  
2 then remand this matter to the district court for further proceedings. Then, an appeal can be taken with  
3 an appropriate lower court record, appellate court briefing and argument, and ultimate decision by this  
4 Court. This process would avoid what happened here: this Court essentially acting as a super trier-of-  
5 fact through its independent review of a record, which, although large, was not complete (the parties  
6 had not completed discovery, which was stayed by this Court). Moreover, the court's duty regarding  
7 appeals from summary judgment has always been to scour the record to see *if there are material issues*  
8 *of fact in dispute that would entitle the non-moving party to a trial on the merits, which is always*  
9 *avored.* And it is well-established that an appellate tribunal may not weigh the facts, as the court has  
10 done here.

11 **V. The Court has overlooked or misapprehended its own standards regarding review**  
12 **of denials of summary judgment motions.**

13 The essential test for this Court in reviewing Hyatt's Petition for Rehearing is whether the  
14 evidence presented on the FTB's summary judgment motion *and reasonable inferences from that*  
15 *evidence, which must be drawn favorably to Hyatt,*<sup>65</sup> meet all the elements of one or more of the claims  
16 in Hyatt's First Amended Complaint.<sup>66</sup> Hyatt's facts and the reasonable inferences drawn therefrom  
17 entitle him to his day in court to argue that the FTB, in and after 1993, undertook a concerted effort to  
18 illicitly exact funds from him through fraud and the commission of the other torts that were all utilized  
19 to achieve its ultimate, unlawful objectives. As part of the FTB's outrageous attempt to develop a  
20 colorable claim against Hyatt, the FTB implemented a strategy which resulted in all Hyatt-adverse  
21 facts accepted as true, and the disregard of all Hyatt-supportive facts. The results of this strategy were  
22 two FTB audit assessments of enormous amounts. Hyatt is entitled to show that the FTB audits were

23 <sup>65</sup>NGA #2 Limited Liability Co. v. Rains, 113 Nev. 1151, 1157, 96 P.2d 163, 167 (1997) ("In deciding whether summary judgment  
24 is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought;  
the factual allegations, evidence, and all reasonable inferences in favor of that party must be presumed correct. . . . A litigant has  
a right to trial when there remains the slightest doubt as to remaining issues of fact.").

25 <sup>66</sup>As the Court is aware, Judge Saitta dismissed the declaratory relief count from Hyatt's First Amended Complaint when she  
26 granted that aspect of the FTB's Motion for Judgment on the Pleadings. In that count, Hyatt had sought a declaration as to when  
27 he became a Nevada resident in September, 1991 (per Hyatt) or April 1992 (per the FTB). Therefore, the FTB's references to  
28 facts in Hyatt's First Amended Complaint and its assertions as to "undisputed" facts which pertain to Hyatt's residency in 1991  
and 1992 are no longer part of Hyatt's claims for relief, the district court having properly exercised her function as a gate-keeper  
to make sure that sufficient evidence was presented on the claims which she allowed to proceed (no formal amended complaint  
was filed, or needed to be filed, by Hyatt after Judge Saitta dismissed the declaratory judgment claim as to residency on the FTB  
Motion for Judgment on the Pleadings).



1 invasions of his privacy, violations of the FTB's express promises and commitments to him, abuses of  
2 process, and fraud. Even the U.S. Congress has criticized the FTB in the Congressional Record for the  
3 types of acts complained of by Hyatt.<sup>67</sup> All Hyatt wanted was a fair audit, and the FTB promised that to  
4 him. Hyatt is entitled to present to a jury his evidence and theories of the case, that the FTB's promises  
5 were never intended to be kept and that Hyatt was singled out for extraordinarily unfair and damaging  
6 treatment because of the FTB's institutional needs to justify its audit (and the auditors' personal goals of  
7 advancement) by assessing large taxes, interest, and fraud penalties.

8         The FTB has repeatedly accused Hyatt of placing his own "spin" on the facts, and Hyatt fully  
9 expects the FTB's answer to Hyatt's petition for rehearing to again attack the facts which support each  
10 element of Hyatt's claims. Of course, "spin" is just a derogatory expression for a party arguing its  
11 version of the facts and the inferences which those facts support, an essential part of our adversary  
12 system. If what the FTB derisively calls "spin" is, in fact, a reasonable inference which a fact-finder  
13 can draw from the evidence, then this Court's June 13 Order adopts a new standard under which  
14 inferences will no longer be permitted to satisfy the elements of a party's claim. In essence, any civil  
15 case will require "smoking gun" direct evidence of each element of each claim, and circumstantial  
16 evidence and reasonable inferences will not be available to establish such elements for the fact-finder.  
17 Clearly, such a drastic change in civil practice should come only after an appropriate district court  
18 proceeding and appellate record made with an understanding that those are the rules which now govern  
19 civil practice. Hyatt should not be the one to suffer when his case is used as the vehicle for  
20 implementing, in an unpublished order, such major changes in civil practice.

21         Of course, the FTB has and will undoubtedly put forth its own version of the facts, based on its  
22 own inferences which it wants this Court to draw (i.e., that it conducted a "standard", fair investigation  
23 perfectly within the bounds of its authority). But our adversarial system has always relied on the fact-  
24 finder to resolve those issues: does the fact-finder accept Hyatt's evidence that the FTB was motivated  
25 to and did conduct a biased, unlawful and tortious investigation resulting in great personal and  
26 professional benefits to the FTB and its auditors, all at Hyatt's expense? Or does the fact-finder accept  
27 the FTB's contention that its auditors merely followed their procedures in conducting a standard

28 <sup>67</sup> Vol. 145 No. 114 - Part III Congressional Record (pp. E1773-75) [*Supp. Appdx. Exh. 46*].

1 investigation? This Court stepped into that fact-finder role, as if it were a panel of jurists, and decided  
2 to accept the FTB's version of the facts over Hyatt's.<sup>68</sup> Again, such a change in this Court's appellate  
3 role should be pronounced in a published opinion, followed by a remand to let the district court review  
4 the evidence under this new standard governing the relationship between the district courts and the  
5 Supreme Court.

6 **VI. The Court has overlooked or misapprehended the law regarding the FTB's**  
7 **immunity in California for the conduct at issue.**

8 In footnote 7 of its June 13, 2001 order, the Court cites to Section 860.2 of the California  
9 Government Code and *Mitchell v. Franchise Tax Board*<sup>69</sup> for the proposition that California accords its  
10 government agency immunity for intentional torts. But the statute's plain language provides immunity  
11 in California to the FTB and its employees in regard to "instituting" a tax proceeding. It does not apply  
12 in this tort case because Hyatt's claims are not based on the FTB *instituting* a procedure or action to  
13 collect taxes. Moreover, *Mitchell* held that the plaintiff's claims were all *directly* based on the FTB's  
14 institution of an action or proceeding to collect taxes against the taxpayer and placement of a tax lien on  
15 that individual's property. While the very fact that the FTB initiated an audit against an individual  
16 cannot be the basis of a tort claim, this is not the basis of Hyatt's suit.<sup>70</sup> Here, as repeatedly stated  
17 throughout this lawsuit, Hyatt is not attempting to nor is interfering with the tax protest proceeding in  
18 California.<sup>71</sup> Moreover, California's Constitution and California's privacy laws forbid the FTB from  
engaging in the conduct now alleged by Hyatt and waive sovereign immunity for such conduct.<sup>72</sup>

19 <sup>68</sup>The majority of the "facts" stated by the FTB relate to whether the FTB had good reason to initiate an audit of Hyatt. Hyatt  
20 does not challenge the FTB's right to conduct residency audits, or its right to audit him. His tort claims, instead, deal with the  
21 FTB's conduct in performing its audit. This Court's June 13 Order reaches the merits by deciding that the FTB's conduct was not  
so bad that it gives rise to a tort claim, which is the traditional fact-finder role. This Court, then, is signaling its willingness to  
evaluate whether the conduct of a particular FTB investigation was (or was not) ordinary and reasonable.

22 <sup>69</sup>183 Cal.App. 3d 1133, 228 Cal.Rptr.750 (1986).

23 <sup>70</sup>*Martinez v. City of Los Angeles*, 141 F.3d, 1373, 1379 (9th Cir. 1998) ("Here, [Plaintiff's] allegations, go beyond the contention  
24 that the LAPD officers acted improperly in deciding to seek his arrest. He alleges they acted negligently in conducting the  
investigation . . . , and they caused his arrest and imprisonment in Mexico."); *see also Bell v. State*, 63 Cal.App. 4th 919, 929,  
74 Cal.Rptr. 2d 541 (1998) (holding no immunity under Cal. Govt. Code § 821.6 to state investigators for conduct in executing  
a search warrant). Section 821.6 of the California Government Code provides immunity for public employees for "investigating  
or prosecuting any judicial or administrative proceeding."

25 <sup>71</sup>The evidence is undisputed that this case has not interfered with the tax proceeding. Hyatt's Opp. to Mot. for Sum. Judg., pp.  
55-56 [*Appdx. Exh. 27*] and Cowan affd., ¶¶ 43, 44 [*Appdx. Exh. 6*].

26 <sup>72</sup>California Constitution, Art. I, Sec. 1 (providing that dissemination of data gathered on or about an individual by state agencies  
27 is illegal and actionable as invasion of privacy). The California Supreme Court has held that the primary purpose of the  
Constitutional amendment was to provide protection against the encroachment on personal freedom caused by increased  
surveillance and data collection. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975). The legislative history of the amendment  
28 demonstrates that it was intended to prevent the improper use of information properly obtained for a specific purpose, for

1 California cannot therefore object if held liable in Nevada for conduct not protected by its own  
2 immunity statute and for which its own laws provide relief to an aggrieved party.

3 Hyatt's invasion of privacy claims are interrelated and stem from the FTB's iron-clad,  
4 Constitutionally-mandated requirement that it respect and not invade Hyatt's privacy. The Court's order  
5 of June 13, 2001 properly cited to Nevada law relating to invasion of privacy,<sup>73</sup> but the analysis does not  
6 stop there. When "auditing" Nevada residents, the FTB as a public agency of the State of California  
7 must comply with its internal, statutory and Constitutional privacy obligations — obligations entirely  
8 consistent with Nevada law on invasion of privacy.<sup>74</sup> Otherwise, Nevada residents targeted for audit by  
9 the FTB have fewer rights and less privacy than their counterparts in California: a result that neither the  
10 Court nor the citizens of Nevada would find palatable.

## 11 VII. Conclusion.

12 For the aforementioned reasons, rehearing and remand should be granted in order to afford  
13 Hyatt the opportunity to be heard on what this Court found, *sua sponte*, to be the determinative issue.<sup>75</sup>  
14 Before the court *rules* in a writ petition on an issue which it declares as determinative of Hyatt's entire  
15 case, and which he was not *allowed* to address (because under N.R.A.P. 21, Hyatt was ordered to file an  
16 answer "directed solely to the issues of arguable cause against issuance of an alternative or peremptory  
17 writ..."") he should be given the right to be heard on the issue. Where this court thinks a writ may  
18 appropriately issue on a ground not even raised, requested or addressed by the party requesting the writ  
19 (the FTB), the appropriate remedy is *not* to grant the writ where the prevailing party in the lower court  
20 (Hyatt) has been precluded from refuting that ground.

21 The effect of the Court's broad, sweeping Order is to close the doors of Nevada's courts and  
22 prevent any Nevada resident from bringing an action in Nevada for torts committed by a sister state  
23 agency. The facts discussed above show clearly that this is not a case built "on gossamer threads of

24 \_\_\_\_\_  
25 example, the use of it for another purpose or the disclosure of it to some third party. *Id.* at 234 n.11. California Information  
26 Practices Act (Cal. Civ. Code § 1798 *et seq.*) (also providing that improper dissemination of information gathered by state  
27 agencies is actionable against the state and allows claim to be brought in "any court of competent jurisdiction").

28 <sup>73</sup> Order, June 13, 2001, n. 13.

<sup>74</sup> See Hyatt Opp. to FTB Mot. for Sum. Judg., pp. 21-26 [*Appdx.*, *Exh.* 27].

<sup>75</sup> At a subsequent hearing before Judge Saitta on July 10, 2001, she commented, with a smile, "I got reversed in the supreme  
court on an issue that wasn't even raised in the appellate briefs." (Unofficial Transcript page 4, lines 21-23, attached hereto as  
*Supp. Appdx. Exh.* 47, but this was not a formal part of the record, since this hearing took place after this Court's June 13 Order.)

1 speculation and surmise.”<sup>76</sup> None of the tortious acts committed against Hyatt, now a 10-year Nevada  
2 resident, are triable in a Nevada court under this Court’s June 13 Order, even torts committed *entirely in*  
3 *Nevada*, because that Order takes over the role traditionally (and appropriately) entrusted to the fact-  
4 finder.

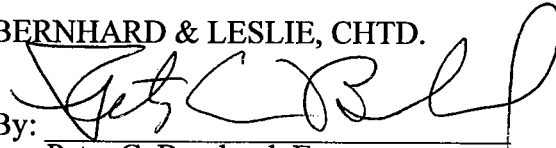
5 Finally, this is an extremely high profile matter,<sup>77</sup> and a decision like the June 13 Order which  
6 appears to depart from established procedures and precedents of this Court on writ practice and  
7 summary judgment standards should be fully argued and briefed before being resolved, before trial, by  
8 this Court. As this Court recognizes, “the law favors trial on the merits.”<sup>78</sup> If Hyatt is to be denied a  
9 trial on the merits, then at a *minimum* he should be allowed to fully argue and brief the issue under any  
10 new summary judgment standards which this Court seems to enunciate and find determinative in its  
11 June 13 Order.

12 Accordingly, Hyatt respectfully requests that this Court vacate its June 13 Order, issue an order  
13 denying the FTB writ petition as to the grounds for relief asserted therein by the FTB, order the recall of  
14 any summary judgment entered pursuant to the June 13 Order, and remand this matter for trial on the  
15 merits. The Court should also review the extensive record of the Discovery Commissioner and the  
16 district court on the second writ (Docket No. 35549, which would no longer be moot, as it was under  
17 the Court’s June 13 Order) and deny that FTB writ petition as well, ordering the FTB to provide the  
18 ordered discovery. Alternatively, Hyatt respectfully requests that this Court remand this matter to the  
19 district court to evaluate Hyatt’s evidence in light of the standards for writ practice and summary  
20 judgment review which the Court establishes in its order following rehearing.

21 DATED this 23 day of July, 2001

HUTCHISON & STEFFEN

22 BERNHARD & LESLIE, CHTD.

23 By:   
Peter C. Bernhard, Esq.

24 <sup>76</sup> *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588 (1992).

25 <sup>77</sup> For example, immediately after this Court’s order, the FTB was publicly touting it before its Franchise Tax Board Advisory  
26 Board. “FTB Attorney Ben Miller . . . reported that the Nevada Supreme Court sustained FTB auditor efforts in the high-profile  
27 Hyatt residency case. The taxpayer had asked the court to halt the FTB audit as ‘too intrusive.’ In a non-written opinion on June  
28 13, the Nevada Supreme Court held that a Nevada trial court should have granted the FTB’s request for summary judgment. Mr.  
Miller, who has been with the FTB for 31 years, expressed extreme satisfaction with the outcome.” (California Taxpayer’s  
Association, *Caltaxletter*, Vol. XIV, No. 26, July 3, 2001, p. 3, [Supp. Appdx., Exh. 48].

<sup>78</sup> *Home Sav. Ass’n Nev. Sav. & Loan Ass’n et al v. Aetna Casualty & Surety Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993).

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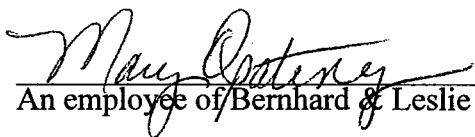
**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Bernhard & Leslie, and that on this 23<sup>RD</sup> day of July, 2001, I served a true and correct copy of the foregoing **REAL PARTY IN INTEREST GILBERT P. HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** via regular mail, in a sealed box(s) upon which postage was prepaid, to the addresses noted below, upon the following:

Thomas R.C. Wilson, Esq.  
McDonald, Carano, Wilson, McCune,  
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Honorable Nancy Saitta  
Department XVIII  
Eighth Judicial District Court of the State of Nevada  
in and for the County of Clark  
200 S. Third Street  
Las Vegas, NV 89155

  
An employee of Bernhard & Leslie

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John T. Steffen (4390)  
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3 8831 West Sahara Avenue  
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4 (702) 385-2500

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3980 Howard Hughes Parkway  
7 Suite 550  
Las Vegas, Nevada 89109  
8 (702) 650-6565

9 Attorneys for Real Party in Interest  
GILBERT P. HYATT

10  
11 **IN THE SUPREME COURT OF THE**  
**STATE OF NEVADA**

12 FRANCHISE TAX BOARD OF THE STATE  
13 OF CALIFORNIA,

14 Petitioner,

15 vs.

16 EIGHTH JUDICIAL DISTRICT COURT of  
the State of Nevada, in and for the County of  
17 Clark, Honorable Nancy Saitta, District Judge,

18 Respondent,

19 and

20 GILBERT P. HYATT,

21 Real Party in Interest.  
22  
23  
24  
25  
26  
27  
28

Case No. 36390

**SUPPLEMENTAL APPENDIX OF  
EXHIBITS CITED IN REAL PARTY  
IN INTEREST GIL HYATT'S  
PETITION FOR REHEARING RE  
THE COURT'S JUNE 13, 2001  
ORDER GRANTING PETITION  
FOR WRIT OF MANDAMUS**

**CONFIDENTIAL INFORMATION TO  
BE FILED UNDER SEAL**

1  
2 Real party in interest Gil Hyatt attaches to his 15 Page Supplement to His Petition for Rehearing  
3 this Supplemental Appendix containing copies of exhibits cited in his Supplement and not included in  
4 his initial Appendix. Unless otherwise indicated, the exhibits cited in the Supplement and attached  
5 hereto are from the record before the Court. Copies of the cited exhibits have been compiled in this  
6 Appendix for the convenience of the Court. The record cite for each attached exhibit is set forth in  
7 brackets after the description of the exhibit below.<sup>1</sup>

8  
9  
10 **Table of Contents re Attached Exhibits**

- 11  
12 30. S. Lewis deposition transcript excerpts (pp. 29, 45, 51) [*Supp. Hyatt Appendix, Vol. VIII, Exhibit 12*  
13 (*Exhibit 5 thereto*)].
- 14  
15 31. Portions of FTB 1991 tax year audit file on Gil Hyatt (H01637, 01853, 01855, 01857, 01899)  
16 [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 12 thereto)*].
- 17  
18 32. L. Chang deposition transcript excerpts (pp. 31-32) [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 36*  
19 (*thereto*)].
- 20  
21 33. Portions of FTB 1991 tax year audit file on Gil Hyatt (FTB H 01715, 01716) [*Hyatt Appendix, Vol. VII,*  
22 (*Exh. 11 (Exhibit 14 thereto)*].
- 23  
24 34. S. Cox 1991 tax year audit work papers (excerpt) (FTB 100139) [*Hyatt Appendix, Vol. III, Exhibit 6*  
25 (*Exhibit 30 thereto*)].
- 26

27  
28 <sup>1</sup> The term "Hyatt Appendix" refers to Volumes I through VII of the Appendix of Exhibits Hyatt submitted on July 7,  
2000 with his Answer to the FTB's "discovery" writ. The term "Supp. Hyatt Appendix" refers to Volumes VIII through XIV of  
the Supplemental Appendix of Exhibits Hyatt submitted on October 13, 2000 with his Answer to the FTB "jurisdictional" writ.

- 1 35. J. Alvarado deposition transcript excerpts (p. 44) [*Supp. Hyatt Appendix, Vol. VIII, Exhibit 6 (Exhibit 31*  
2 *thereto)*].
- 3
- 4 36. S. Semana deposition transcript excerpts (p. 82-83 ) [*Supp. Hyatt Appendix, Vol. VIII, Exhibit 6 (Exhibit 40*  
5 *thereto)*].
- 6
- 7 37. B. Gilbert deposition transcript excerpts (pp. 35-36) [*Hyatt Appendix., Vol. III, Exhibit 6 (Exhibit 36*  
8 *thereto)*].
- 9 38. FTB Residency Manual (excerpt) (FTB 00844) [*Hyatt Appendix., Vol. III, Exhibit 6 (Exhibit 8 thereto)*].
- 10
- 11 39. C. Kopp deposition transcript excerpts (pp. 75-76) [*Supp. Hyatt Appendix, Vol. VIII, Exhibit 12 (Exhibit 4*  
12 *thereto)*].
- 13
- 14 40. P. Bauche deposition transcript excerpts (p. 439) [*Hyatt Appendix., Vol. III, Exhibit 6 (Exhibit 32 thereto)*].
- 15
- 16 41. A. Shigemitsu's deposition transcript excerpts ( p. 187) [*Hyatt Appendix., Vol. III, Exhibit 6 (Exhibit 41*  
17 *thereto)*].
- 18
- 19 42. S. Illia deposition transcript excerpts (pp. 178-179, 248) [*Hyatt Appendix., Vol. III, Exhibit 6 (Exhibit 37*  
20 *thereto)*].
- 21
- 22 43. C. Ford deposition transcript excerpts (pp. 90-92, 148-55) [*Hyatt Appendix, Vol. III, Exhibit 6 (Exhibit 35*  
23 *thereto)*].
- 24
- 25 44. P. Lou deposition transcript excerpts (p. 81) [*Hyatt Appendix, Vol. III, Exhibit 6 (Exhibit 39 thereto)*].
- 26
- 27 45. FTB audit work-papers (FTB 01892) [*Hyatt Appendix, Vol. VII, Exhibit 11 (Exhibit 13 thereto)*].
- 28



1  
2 46. Congressional Record excerpt [*Hyatt Appendix, Vol. VII, Exhibit 11 (Exhibit 10 thereto)*].  
3  
4

5 Hyatt also directs the Court to the following referenced exhibits. Hyatt does not ask that the  
6 record be augmented to include these exhibits, but he includes them to demonstrate proceedings relative  
7 to this case subsequent to the Court's June 13, 2001 Order.  
8


9 47. July 10, 2001 transcript (unofficial) from district court hearing re FTB motion for extension of  
10 time to file memorandum of costs.  
11

12 48. California Taxpayer's Association, *Caltaxletter*, Vol. XIV, No. 26, July 3, 2001, p. 3.  
13

14 DATED this 23 day of July, 2001.

15 HUTCHISON & STEFFEN, LTD.

16 BERNHARD & LESLIE, CHTD.

17   
18 By: \_\_\_\_\_  
Peter C. Bernhard, Esq.

19 Attorneys for Gilbert P. Hyatt  
20  
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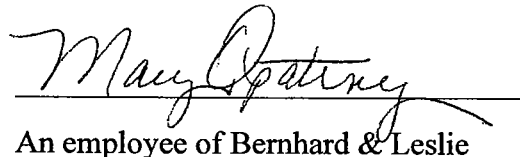
**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Bernhard & Leslie, and that on this 23<sup>rd</sup> day of July, 2001, I served a true and correct copy of the foregoing **SUPPLEMENTAL APPENDIX OF EXHIBITS CITED IN REAL PARTY IN INTEREST GIL HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** via regular mail, in a sealed box(s) upon which postage was prepaid, to the addresses noted below, upon the following:

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Honorable Nancy Saitta  
Department XVIII  
Eighth Judicial District Court of the State of Nevada  
in and for the County of Clark  
200 S. Third Street  
Las Vegas, NV 89155

  
An employee of Bernhard & Leslie



1 Q. Were you ever involved that you can recall, in  
2 such activity, resurrecting a tenant's file from  
3 move-out storage?

4 A. Yes.

5 Q. What kind of occasion would that be?

6 A. When we needed to verify a previous residency  
7 for another apartment community or mortgage company.

8 Q. Can you think of any other reasons that might  
9 have been done?

10 A. No.

11 Q. Have you ever heard of Mr. Hyatt by  
12 reputation?

13 A. No.

14 Q. Were you ever part of any media inquiry into  
15 Mr. Hyatt's affairs?

16 A. No.

17 Q. Do you know Sheila Cox?

18 A. No.

19 Q. Do you know Sheila Semana?

20 A. No.

21 Q. Do you recall ever hearing those names?

22 A. Yes.

23 Q. On what occasion?

24 A. Few weeks ago from the private investigator.

25 Q. Okay. Let's look at Exhibit 523. Do you have

1 Q. Did you give the same answers to her that you  
2 gave today?

3 A. Yes.

4 Q. Basically, you don't recall ever speaking with  
5 Sheila Cox?

6 A. No, I don't.

7 Q. Did you ever talk with Sheila Cox over the  
8 phone?

9 A. I don't recall.

10 Q. Did you ever promise Sheila Cox that you would  
11 give her the file?

12 A. I don't recall any of that. It was just too  
13 long ago.

14 Q. Did you ever tell Sheila Cox she couldn't have  
15 the file?

16 A. I don't recall that. I don't believe I would  
17 have said that, but I don't recall.

18 Q. Now, have you ever had any discussions with  
19 Mr. Bradshaw, sitting there?

20 A. No, I don't believe so.

21 MR. BOURKE: Do we have that exhibit?

22 THE WITNESS: Also, my first knowledge of a  
23 file missing is, was today. When it was mentioned  
24 today. Andrea Boggs never mentioned that a file was  
25 missing.

1 A. Yes, I did.

2 Q. Did you tell her you wouldn't take a thousand  
3 dollars?

4 A. She didn't ask me that, but it was basically  
5 towards the end of our conversation, and I felt at that  
6 point that I did need to contact Mr. Chapin, because I  
7 had been with the company a long time and that question  
8 did raise some concerns with me.

9 Q. Did you feel that that question raised some  
10 concerns about your reputation?

11 A. Yes, it did. And she was very aggressive.

12 Q. She was?

13 A. Yes, she was.

14 Q. What do you mean by that?

15 A. She was aggressive on the phone. She  
16 basically didn't tell me who she was and what it was  
17 regarding. I did request that she send me the fax  
18 because I did want to know what this was all about. It  
19 doesn't matter who it is, I need to know what this is  
20 about before I set up a meeting unless it's a resident,  
21 because that's what I'm at my job for. And we never did  
22 set a meeting. I got the fax I believe that Friday and  
23 she shows up Monday.

24 Q. So she showed up without an appointment?

25 A. She showed up without an appointment. She did

**RECEIPT OF COPY**

RECEIPT OF COPY of REAL PARTY IN INTEREST GILBERT P. HYATT'S 15 PAGE  
SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001  
ORDER GRANTING PETITION FOR WRIT OF MANDAMUS and SUPPLEMENTAL  
APPENDIX OF EXHIBITS CITED IN REAL PARTY IN INTEREST GIL HYATT'S  
PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING  
PETITION FOR WRIT OF MANDAMUS from Bernhard & Leslie is hereby acknowledged this 23  
day of July, 2001.

MCDONALD, CARANO, WILSON, MCCUNE,  
BERGIN, FRANKOVICH & HICKS

By: Bryan R. Clark / MAS 4:45pm  
Bryan R. Clark, Esq.  
2300 West Sahara Avenue, #10, Suite 1000  
Las Vegas, Nevada 89102

RA001628





SC 3/24/95



STATE OF CALIFORNIA

FRANCHISE TAX BOARD

13 N. GLENOAKS BLVD., SUITE 200  
DURBANK, CA 91502-1170

DEMAND TO FURNISH  
INFORMATION

Authorized by  
California Revenue & Taxation Code  
Section 19504 (formerly 19254 (a) and 26423 (a)\*)

The People of the State of California to:

Las Vegas Sun  
800 S. Valley View Blvd.  
Las Vegas, Nevada 89153

In the Matter of:

Gilbert P. Hyatt

Social Security No. : 069-30-9999  
or Corporation No. :  
For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Las Vegas Sun during the period from 10/91 to the present. If yes, indicate the address that the subscription was sent to.
2. Was there a subscription to the Las Vegas Sun at 3225 S. Pecos apt. 237 during the period 11/91 - 4/92? If so, indicate the name of the person on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox

Authorized Representative

Dated: 3/24/95

Telephone: (818) 556-2942

\* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

3/109:1

CONFIDENTIAL

H-01637

STATE OF CALIFORNIA

FRANCHISE TAX BOARD  
333 N. GLENOAKS BLVD., SUITE 200  
BURBANK, CA 91502-1170

## DEMAND TO FURNISH INFORMATION

Authorized by  
California Revenue & Taxation Code  
Section 19504 (formerly 19254 (a) and 26423 (a)\*)

The People of the State of California to:

Las Vegas Sun  
800 S. Valley View Blvd.  
Las Vegas, Nevada 89153

In the Matter of:

Gilbert P. Hyatt

Social Security No. : 069-30-9999  
or Corporation No. :  
For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Las Vegas Sun during the period from 1991 to the present. If yes, please indicate the start and stop dates of service and the address that the subscription was sent to.
2. Indicate if there were any subscriptions to the Las Vegas Sun at 3225 S. Pecos Apt 237 during 1991-1992 and at 7335 Tara from 1992 to the present. If so, indicate the start and stop dates of service and the name(s) of the person(s) on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox  
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

\* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

STATE OF CALIFORNIA

FRANCHISE TAX BOARD

333 N. GLENOAKS BLVD., SUITE 200  
BURBANK, CA 91502-1170

DEMAND TO FURNISH  
INFORMATION

Authorized by  
California Revenue & Taxation Code  
Section 19504 (formerly 19254 (a) and 26423 (a)\*)

The People of the State of California to:

Times Orange County  
Times Mirror Square  
Room 410  
Los Angeles, CA 90053

In the Matter of:

Gilbert P. Hyatt

Social Security No.: 069-30-9999  
or Corporation No.:  
For the years:

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Times Orange County during the period from 1991 to the present. If yes, please indicate the start and stop dates of service and the address that the subscription was sent to.
2. Was there a subscription to the Times Orange County at 7841 Jennifer Circle in La Palma during 1991 to the present? If so, indicate the start and stop dates of service and the name(s) of the person(s) on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox  
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

\* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

CONFIDENTIAL

RA0016321855



STATE OF CALIFORNIA

FRANCHISE TAX BOARD

333 N. GLENOAKS BLVD., SUITE 200  
BURBANK, CA 91502-1170

DEMAND TO FURNISH  
INFORMATION

Authorized by  
California Revenue & Taxation Code  
Section 19504 (formerly 19254 (a) and 26423 (a)\*)

The People of the State of California to:

Orange County Register  
625 N. Grand Ave.  
Santa Ana, CA 92701

*In the Matter of:*

Gilbert.P. Hyatt

Social Security No. : 069-30-9999  
or Corporation No. :  
For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the O.C. Register during the period from 1991 to the present. If yes, indicate the start and stop dates of service and the address that the subscription was sent to.
2. Was there a subscription to the O.C. Register at 7841 Jennifer Circle in La Palma during 1991 to present. If so, indicate the start and stop dates and the name of the person on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox

Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

\* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

SC 8/17

**LAS VEGAS  
REVIEW-JOURNAL**

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BUR AUG 17 1995 REC'D

August 15, 1995

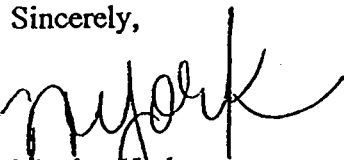
Sheila Cox  
Franchise Tax Board  
333 N. Glenoaks Blvd  
Suite 200  
Burbank CA 91502-1170

RE: Gilbert P. Hyatt

Dear Ms. Cox:

In response to your letter dated 8/4/95, please be advised that we do not have an account for Mr. Gilbert P. Hyatt. In response to item #2 - we do not have any subscriber at 3225 S. Pecos Apt. 237 or 7335 Tara.

Sincerely,



Monica York  
Accounts Payable Supervisor

CONFIDENTIAL

H 01899



DISTRICT COURT  
CLARK COUNTY, NEVADA

**CERTIFIED  
COPY**

GILBERT P. HYATT,

Plaintiff,

VS.

NO. A382999

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

Defendants.

DEPOSITION OF LOBO CHANG

LOS ANGELES, CALIFORNIA

MONDAY, NOVEMBER 29, 1999

REPORTED BY:

Jean F. Holliday

CSR No. 4535



15250 Ventura Boulevard, Suite 410 • Sherman Oaks, CA 91403  
(800) 993-4GNG (4464) • FAX: (818) 995-4248

RA001636

14:37 1           A.           I do not have a complete recollection  
14:37 2 of their visit. After they came in the first thing  
14:37 3 they did was to show me that one-page document, and I  
14:38 4 didn't quite understand what they were saying but  
14:38 5 from what I did understand, they were there looking  
14:38 6 for some kind of information. So I figured these  
14:38 7 people must be either from the State or the IRS  
14:38 8 conducting an audit there. Then they showed me their  
14:38 9 business cards. So one sat down, the other one  
14:38 10 started walking around, and he asked me when I  
14:38 11 started working there, where was I working, and I  
14:39 12 told him that I started by working in Costa Mesa. At  
14:39 13 that time I was the owner, and approximately three  
14:39 14 years ago we changed the name of the owner to my  
14:39 15 older brothers. I worked in Costa Mesa for a little  
14:39 16 more than a year and then we went to another place  
14:39 17 for like maybe four or five years and after that we  
14:39 18 moved to a few other locations. Eventually we  
14:40 19 settled in where we were.

14:40 20                       Then he said he wanted to look into  
14:40 21 the record of Hyatt, so I went to look for it. Well,  
14:40 22 after I found it he saw it. I showed it to him as  
14:40 23 well, and then they copied a telephone number and the  
14:40 24 names and also the travel plans. Later on I realized  
14:41 25 that they were not there auditing my books. They







STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
333 N. GLENOAKS BLVD., STE. 200  
BURBANK, CA 91502-1170

(818) 556-2942

April 12, 1995

Nevada Governor Robert Miller  
555 E. Washington Avenue  
Las Vegas, Nevada 89101

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates Gilbert P. Hyatt visited your office and/or attended meetings or events to discuss international trade activity.

For your own convenience, you may make marginal notations on the extra copy of this letter and return it in the enclosed postage paid envelope.

Thank you for your valuable cooperation.

Sheila Cox  
Tax Auditor  
Telephone (818) 556-2942

RA001639  
CONFIDENTIAL  
11 01715

Sc 4/12/9



STATE OF CALIFORNIA

FRANCHISE TAX BOARD  
333 N. GLENOAKS BLVD., STE. 200  
BURBANK, CA 91502-1170

(818) 556-2942

April 12, 1995

Nevada Senator Richard Bryan  
300 S. Las Vegas Blvd.  
Las Vegas, Nevada 89101

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates Gilbert P. Hyatt visited your office and/or attended meetings or events to discuss international trade activity.

For your own convenience, you may make marginal notations on the extra copy of this letter and return it in the enclosed postage paid envelope.

Thank you for your valuable cooperation.

Sheila Cox  
Tax Auditor  
Telephone (818) 556-2942

RA0091840  
CONFIDENTIAL  
11 01716



02 1997

PROGRESS REPORT

TAXPAYER		Gilbert P. Hyatt				AUDITOR			
REPRESENTATIVE		Mike Kern / Eugene Cowan				TELEPHONE NO.			
						TELEPHONE NO.		702-384-1120	
DATE	INITIALS	ACTION TAKEN					TIME		
		DATE ASSIGNED	TAX YEAR(S)	MODEL NUMBER	ESTIMATED DATE OF COMPLETION:		CURRENT HOURS	TOTAL TO DATE	
		DATE SCOPE	EARLIEST STATUTE DATE	ESTIMATED HOURS TO COMPLETE AUDIT:					
12/1/96	sc	Continued appt. for today - w/ Michael Hyatt - (John Lu will be accompanying me as a witness) Checked DMV for Lexis - (which may be under the name of Grace Teng - Nothing shown - Grace Teng's DMV record shows that she had a moving violation in 1993 Interviewed taxpayer's brother -							
12/1/96	sc	Organized and reviewed file (Need to request additional hours to complete case)					8		216
12/1/96	sc	Continued organizing file					8		231
1/5/97	sc	Mike Kern (rep from Las Vegas) called - he has not met deadline - He wants to know why we want checks - He said that it would be too expensive - He said that he will provide a letter from the governor - He wants to know if we will pay for copying checks - I told him that I will check on this and get back to him Called Anne Jovanovich in Legal and discussed the case with her briefly - She will call me back next week to discuss the case					3		227
					continued -				

FTB-100139



UNCERTIFIED ROUGH DRAFT ONLY

1 DISTRICT COURT  
2 CLARK COUNTY, NEVADA  
3  
4  
5 GILBERT P. HYATT, )  
6 Plaintiff, ) Case No. A382999  
7 VS. )  
8 FRANCHISE TAX BOARD OF THE )  
STATE OF CALIFORNIA, )  
9 and DOES 1-100, inclusive, )  
10 Defendants. )  
-----  
11  
12 DEPOSITION OF JAHNA ALVARADO  
13 COSTA MESA, CALIFORNIA  
14 THURSDAY, MAY 27, 1999  
15  
16  
17  
18  
19  
20

RA001644

1 Q. Does the Franchise Tax Board have any policy  
2 against intruding into a taxpayer's privacy?

3 A. I am not aware of a policy.

4 Q. Does the Franchise Tax Board have any policy  
5 about against destruction of documents relating to a  
6 taxpayer

7 A. I am not aware of a policy. There could be  
8 one.

9 Q. Have you ever sent out a demand for  
10 information to a third party?

11 A. Yes, sir.

12 Q. Have you ever sent out a demand for  
13 information to a third party across state lines?

14 A. Not that I recall.

15 Q. Would you tell me in your tenure -- is it ten,  
16 year career?

17 A. Ten, yes.

18 Q. In your ten year career, how many times have  
19 you sent out demands to a third party?

20 A. Oh, my. Maybe 30 maybe.



21 Q. Have you ever sent out demand for information

22 to a rabbi?

23 A. Not that I'm aware of, no.

24 Q. Or a priest?

25 A. Not that I recall.

26 Q. Or a minister?

44

27 A. Not that I recall.

28 Q. How about to a dating service?

1 A. Not that I recall.

2 Q. Have you ever interviewed third parties?

3 A. Yes, sir.

4 Q. When you interview third parties, did you use  
5 set questions? Or did you have an outline for areas you  
6 wanted to cover?

7 A. I don't recall.

8 Q. Have you ever prepared affidavits?

9 A. Not that I recall.

10 Q. Are you authorized to administer oaths?

11 A. No, sir.

12 Q. Are any of your auditors under your  
13 supervision authorized to administer oaths?

14 A. Not that I'm aware of, no.

15 Q. Have you ever asked a taxpayer to provide an  
16 affidavit?

17 A. Not that I can recall, no.

18 Q. Is there any program by which the Franchise  
19 Tax Board targets high income taxpayers?

20 A. Targets? No, sir.

21 Q. How about selects them for audit?

22 A. Large income taxpayers do come up for audit,

23 yes.

24 Q. Have you ever heard of a program called LIT.

25 LIT?

26 A. Yes.

45

27 Q. Does that refer to the large income taxpayer

28 program?

1 said my name had come up in connection with the case.

2 Q. Now, what about the work you did with Sheila

3 Cox when you went to interview a fellow named Hyatt who is

4 first name was Brian or Michael or both, Michael and

5 Brian. Do you remember knowing the name Hyatt at that time?

6 A. I don't recall knowing the name, no.

7 Q. What do you recall about the work you did on

8 that interview?

9 A. I accompanied Sheila to the gentleman's home,

10 I believe it was. And I think I took a few notes. And

11 that was really about it that I remember.

12 Q. Did you sign and date your notes?

13 A. I don't believe I did.

14 Q. Did you give your notes to Sheila Cox?

15 A. That is my recollection, yes, sir.

16 Q. What is the procedure about what happens to

17 notes after an interview? What is the normal procedure at

18 the Franchise Tax Board?

19 A. I don't know.

20 Q. What do you do with notes after you do an

21 interview?

22 A. In my current position, they go in a working

23 file.

24 Q. How about when you were an auditor?

25 A. They went into the file. Sometimes they were

26 summarized, and the originals were not included.

49

27 Q. So when was the last time you saw your notes?

28 A. It would have been the day of the interview, I

1 Q. Agreeing too much.

2 A. No. I don't think so.

3 Q. Do you know what a no change audit it?

4 A. Yes, sir.

5 Q. What is it?

6 A. It's when you complete an audit and things  
7 that were looked at were fine and the return is accepted as  
8 filed.

9 Q. Would it be [straining|strange] if an auditor  
10 had a grader than normal number of no change audits?

11 A. Strange?

12 Q. Yes. Out of the ordinary.

13 A. If they had a greater than average number,  
14 that would be out of the ordinary.

15 Q. Have you ever heard of anyone called the queen  
16 of no change audits?

17 A. Me at one point. Not that I can recall, no.

18 Q. Were you regarded as that at one point?

19 A. Oh, I don't know that I was. When I was still  
20 in Santa Barbara I turned in five or six cases in a row

21 that were fine, accepted as filed. And I told my boss that

22 that's what I was.

23 Q. The queen of no change audits?

24 A. Yes. Which did not play out to be true.

25 Q. So you've assessed your fair share of high

26 dollar cases, I take it?

101

27 A. Oh, I don't know. I think I've done a good

28 job for the state and for the people that I work for.

1 chips?

2 A. I can't think of anything that was phrased

3 that way.

4 Q. Were you ever encouraged to use bargaining

5 chips?

6 A. No, sir, not that I recall.

7 Q. Did you ever attend any residency training in

8 which bargaining chips were used as a visual aid?

9 A. Residency training?

10 Q. Yes.

11 A. Not that I can remember.

12 Q. Have you ever attended any training by Doug

13 Dick 124?

14 A. Yes, sir, I have.

15 Q. What has he trained you in?

16 A. What was that training. You know, I don't

17 remember the name of his class.

18 Q. Was he teaching about negotiate techniques?

19 A. Yes, he was.

20 Q. Did he use any visual aids of looking like



21 a pock err chip?

22 A. Yes, he had a PowerPoint presentation.

23 Q. What was his PowerPoint presentation

24 illustrating if you recall

25 ((CORRECTION: poker chip)

26 ?

164

27 A. That there are -- or can be legitimate audit

28 issues that are brought up, are discussed with the rep and



10:54 1 is FTB Form 4973-39, last revised in March of '94.

2 Do you see that?

3 A. Yes.

4 Q. Did you talk to Sheila Cox about  
10:54 5 sending demands to furnish information to anybody?

6 A. No.

7 Q. Have you ever sent out demands to  
8 furnish information out of state?

9 A. No.

10:54 10 MR. HELLER: Objection, asked and answered.

11 BY MR. BOURKE:

12 Q. No, you haven't?

13 A. No.

14 Q. Do you recall ever putting on a Social  
10:54 15 Security number for a taxpayer on a demand for  
16 information sent to a third party within the state of  
17 California?

18 A. I don't think I've sent out any  
19 demands for information.

10:54 20 Q. Is it not standard policy of the FTB  
21 to use a demand for information to send to third  
22 parties? Is that not normal?

23 A. No. It's just that in my cases the  
24 taxpayers provided the information I required or  
10:55 25 requested and I did not have to go outside to get

10:55 1 that information.

2 Q. And was it your practice to first ask  
3 for information from the taxpayer?

4 A. Yes.

10:55 5 Q. Is it your understanding that that is  
6 recommended policy at the FTB to first go to the  
7 taxpayer to ask for information before you go to  
8 third parties?

9 A. I don't know if that's a recommended  
10:55 10 policy. It's practice, although with respect to the  
11 DMV information, voter registration information,  
12 that's something I would send out in the process of  
13 scoping the return prior to contacting.

14 Q. But other than DMV and voter  
10:55 15 registration, it would be your practice to first ask  
16 the taxpayer for information before going to third  
17 parties?

18 A. Yes.

19 Q. Would you look at the questionnaire  
10:56 20 that's at H 01688? There is a questionnaire  
21 addressed to Keith L. Kalm, K-a-l-m, Jennifer Circle  
22 in La Palma. Did you ever discuss with Sheila Cox  
23 sending out questionnaires to neighbors of Mr. Hyatt,  
24 or former neighbors of Mr. Hyatt?

10:56 25 A. No.



09:46 1 A. Yes.

2 Q. And the demand for information is an

3 FTB form that is printed up and you can type in the

4 variable information on a typewriter?

09:46 5 A. Correct.

6 Q. Now, there is a place in the form that

7 says SSN, I believe.

8 A. Correct.

9 Q. Does that refer to Social Security

09:46 10 number?

11 A. I believe so.

12 Q. And have you used the form to disclose

13 the Social Security number of taxpayers to third

14 parties?

09:47 15 MR. HELLER: Objection to form.

16 THE WITNESS: I can't recall doing that but I

17 may have done that.

18 BY MR. BOURKE:

19 Q. As I understand your testimony, you've

09:47 20 been an auditor for about 20 years?

21 A. Correct.

22 Q. Could you tell me approximately how

23 many demands for information you think you've sent

24 out in your 20 years?

9:47 25 A. A handful.

09:47 1 Q. Less than 10?

2 A. Yes.

3 Q. Have you ever sent a demand for

4 information to an out-of-state recipient?

09:47 5 A. I don't believe so.

6 Q. Does the FTB have any rules or

7 regulations about sending demands for information to

8 out-of-state recipients?

9 A. I would think they have some

09:47 10 guidelines on that.

11 Q. Based on your 20 years of experience,

12 which is considerably more than mine, could you tell

13 me what documents I should ask for in order to find

14 whatever rules and regulations there are about

09:48 15 demands for information?

16 A. I would think they would be in our

17 audit manuals.

18 Q. And to focus in on the relevant audit

19 manuals for a residency audit in 1993 to 1996 time

09:48 20 period, what audit manuals would those be?

21 A. I would say -- in this case?

22 Q. Yes. For Gil Hyatt.

23 A. The Residency Audit Manual.

24 Q. Yes, okay. Now, I have a copy of a

9:48 25 Residency Audit Manual that was modified in October





obtained from the postal employee's supervisor before conducting the interview.

Occasionally, a third party will be apprehensive about furnishing information in writing. The telephone is an effective technique in obtaining preliminary information verbally, then requesting that it be confirmed in writing. If the individual contacted refuses to furnish any written information, documentation of the call using the Public Contact Memo will suffice as support for the information obtained. Also, 'prompting techniques' for purposes of confirming suspicions, work well verbally. As an example, a school official may not be authorized to release the address of a student. The auditor may merely want confirmation of a suspected address. The official is then confronted with the address and just asked to confirm or deny it. More times than not, the auditor will obtain the information necessary to either confirm or deny his suspicions. This technique is used when time constraints are involved, or when the auditor feels he may not otherwise obtain the information.

Section 19504 (formerly Section 19254) authorizes the Department to request and obtain information from third parties. This section may be cited/quoted if the requested information is not provided. It is advisable not to quote the section in the first request because it does not leave much recourse. To obtain information from uncooperative third parties, the auditor should use the Demand For Information form (FTB Form 4973). See Exhibit XXIII. Financial institutions will not release information without authorization from the taxpayer and/or payment of fees. Authorization To Release Financial Information (FTB Form 2590) is used in this instance. Procedures for when FTB incurs the cost are in Exhibit XXII.

If the auditor is still unable to obtain the information a subpoena duces tecum may be required. This may also be used to reduce the fees imposed by certain financial institutions. Instructions and procedures for issuing a subpoena duces tecum are contained in the Subpoena Manual located in each District Office.

See the Information Sources section of this manual for a comprehensive discussion of potential third party sources.



1 Q. That was basically a requirement from Wagon  
2 Trails management, you had to prorate it if you wanted  
3 to move in any sooner than the first?

4 A. Oh, yes. Even if it's one day.

5 Q. Could you reserve it, say I wanted two weeks  
6 from now to start on the first?

7 A. When you rent it there was a two-week if you  
8 wanted, if you couldn't come in, we did two weeks from  
9 the day of application to move-in.

10 Q. I see. That's the most you would do?

11 A. Right.

12 Q. What was the date of the application here?

13 A. Unless it's military, then we have nothing to  
14 tell Uncle Sam.

15 Q. Was the application here on the 8th?

16 A. That was the date that the application  
17 probably was filled, and then we start making up the  
18 lease. And that was the date that the lease was made  
19 up. But then we don't know the day of move-in, and  
20 that's when that work is done, when we know the day of  
21 move-in.

22 Q. Now, if someone from an out of state agency  
23 had come in and asked to look at the rental agreement  
24 with Mr. Hyatt, would you have given access to the  
25 rental agreement without Mr. Hyatt's consent?

1       A.     I can't unless I know who it is. I'd have to  
2 go through either the resident or upper management.

3       Q.     Do you have any negative feelings about the  
4 HUD residents at Wagon Trails?

5       A.     No.

6       Q.     You don't think any less of them because --

7       A.     No.

8       Q.     -- they are receiving subsidies?

9       A.     Unfortunately, they didn't have the income to  
10 pay and they have to live. We had seniors as well as  
11 young people.

12      Q.     That received the HUD subsidies?

13      A.     Oh, yes. The one bedrooms were reserved for  
14 the seniors.

15      Q.     And are they allowed to have any higher income  
16 and still receive a subsidy because they're aged?

17      A.     You have to have the requirements to receive  
18 it.

19      Q.     How many of the, what percentage, how low is  
20 the percentage of all of the tenants that are low income  
21 at Wagon Trails?

22      A.     That was the 45 units.

23      Q.     Out of 224?

24      A.     Out of 224.

25      Q.     So that would be about 20 percent?



1           A.     This is 1 of 4.

2           Q.     Would you turn to the page of the work  
3 papers numbered H01199?

4           MR. WILSON:   1199?

5           MR. BOURKE:   Yes.

6           Q.     This is a portion of the work papers  
7 that Sheila Cox prepared and she, in this portion of  
8 the work papers, she has done an alphabetical  
9 sorting of the demands for information and  
10 correspondence, and under S. is the name Shapiro.

11                   This is the incident I talked to you  
12 about where Sheila Cox did not know Dr. Shapiro's  
13 first name so she sent out demands or letters  
14 requesting information about Gil Hyatt to all the  
15 Shapiros in the phone book.

16           MR. WILSON:   We have a lot of them, Eric  
17 and Melvin, Richard.

18           THE WITNESS:   And some with no name.

19           MR. BOURKE:   Q.   As I understand your  
20 testimony, that is not proper procedure even back  
21 before the audit plan, correct?

22           A.     No, it would not be proper procedure.

23           Q.     Now, with respect to asking about  
24 medical information, is it also true when medical  
25 information about an individual is sought, the



15:17 1 A. I have no idea.

2 Q. Is this a preprinted form where Jerry

3 Goldberg's signature is affixed to the form?

4 A. I have no idea. I've never used it

15:17 5 myself.

6 Q. Have you ever in your practice sent

7 out demands for information to third parties to

8 out-of-state recipients?

9 A. A demand for information, no.

15:18 10 Q. Have you sent out any demands for

11 information within the state of California to third

12 parties?

13 A. A demand. I don't know if you would

14 call it demand. We've requested information from, as

15:18 15 I say, banks and things like that. I don't know if

16 you call it a demand.

17 Q. Well, there is a specific form I'm

18 referring to at the FTB called a "Demand for

19 Information" that at least in the Hyatt case was used

15:18 20 to communicate with third parties. Are you familiar

21 with that form?

22 A. Not -- I'm not familiar myself.

23 Q. Did you get any training on the use of

24 that form at the FTB?

15:18 25 A. No, I didn't.





1 A. I was the witness.  
2 Q. On all three occasions?  
3 A. All three occasions.  
4 Q. On any of those three occasions did you  
5 bring your spouse? 02:21:50  
6 A. No, did not.  
7 Q. Did any other auditor bring his or her  
8 spouse?  
9 A. No, they did not.  
10 Q. Would that be unusual at the FTB, to 02:21:58  
11 bring spouses along to an out-of-state trip?  
12 A. Not necessarily.  
13 Q. So it's nothing that you would forbid?  
14 A. No.  
15 Q. In your residency audits, did you send 02:22:20  
16 out demands for information to third parties?  
17 A. I personally did not send out demands.  
18 Q. In all 100 of your cases?  
19 A. I'm sorry. I was referring -- I was in  
20 the present. Yes, I've sent out demands. 02:22:34  
21 Q. In your 100 cases, do you think you have  
22 sent out an average of one per case?  
23 A. I have no way of even estimating that.  
24 Q. What I'm trying to get at, did you send  
25 out a lot of these requests or was it on occasion 02:22:50

1       you would send out a demand to a third party?

2               A.     Demands to a third party were a fairly  
3       common practice.

4               Q.     Once per audit or ten times per audit?

5               A.     Some cases dictated more than one,               02:23:06  
6       others dictated zero. It depended on the complexity  
7       of the case and the cooperation of the rep.

8               Q.     Did you ever send out demands to third  
9       parties across state lines?

10              A.     I don't recall.                               02:23:18

11              Q.     Do you recall whether the Franchise Tax  
12     Board has a practice of sending out demands for  
13     information to third parties across state lines?

14              A.     Yes, we do send out requests for  
15     information across state lines.                               02:23:32

16              Q.     And those requests for information are  
17     entitled demand for information?

18              A.     Demand to Furnish Information.

19              Q.     And the demands to furnish information  
20     sent out by the Franchise Tax Board says that the               02:23:44  
21     response to this is mandatory, does it not?

22              A.     I don't recall the exact wording on the  
23     form.

24              Q.     Do you know of any authority that would  
25     allow the Franchise Tax Board to force people in               02:23:58

1 understood by the tax rep and the taxpayer so that  
2 we could deal with this intrusiveness and burden  
3 issue. In other words, they had to explain the why  
4 behind why we were asking the information, and they  
5 were to look at alternatives that were -- that could 04:36:36  
6 possibly reduce the burden and the intrusiveness on  
7 both sides.

8 Q. Now, on intrusiveness, for example,  
9 would you think it's appropriate, when an  
10 investigator is trying to find out how many times a 04:36:58  
11 taxpayer visited Dr. Shapiro, to send out demands  
12 for information to all the Dr. Shapiros in the phone  
13 book, or should you try to find out from the  
14 taxpayer the name of the Dr. Shapiro that was  
15 consulted? 04:37:12

16 A. Correct, I would -- the latter.

17 Q. Has anyone ever looked at the Gil Hyatt  
18 file to see whether or not there was an intrusion  
19 into Mr. Hyatt's privacy?

20 A. Not that I'm aware of. 04:37:28

21 Q. Did you tell your auditors at this  
22 meeting to stop talking about the Gil Hyatt audit?

23 A. No.

24 Q. Did you tell them to refrain from  
25 mentioning taxpayer information unless there was a 04:37:48



1 A. Yes. 11:43:40  
2 Q. And is that a grounds for termination at 11:43:42  
3 the FTB? 11:43:45  
4 A. I don't know what the grounds are for 11:43:45  
5 termination. 11:43:47  
6 Q. And did you criticize Candace Les for 11:43:48  
7 anything else? 11:43:53  
8 A. I don't believe I ever criticized her. 11:43:56  
9 I reviewed the work that was done. And I would have 11:43:58  
10 testified to work that I saw in the audit file. 11:44:03  
11 Q. And did you say that the work you saw 11:44:07  
12 was sometimes less -- did not have adequate 11:44:10  
13 substantiations for the conclusions reached? 11:44:15  
14 A. Yes, I did. 11:44:16  
15 Q. And is that something that you as a 11:44:17  
16 reviewer are doing in part of your normal course of 11:44:22  
17 business? 11:44:24  
18 A. My job is to evaluate a case and see if 11:44:26  
19 the documentation and the write-up support the 11:44:30  
20 auditor's decision. 11:44:34  
21 Q. On the Gil Hyatt case, did you read the 11:44:35  
22 documentation in the Gil Hyatt record? 11:44:39  
23 A. I did not review all the documentation 11:44:40  
24 in the file. 11:44:43  
25 Q. How many pages did you review? 11:44:43

1           A.   My normal process in review is to read   11:44:47  
2           the narrative, the progress report and the       11:44:53  
3           correspondence.                               11:44:59  
4           Q.   You remember whether or not you did that 11:45:05  
5           for Gil Hyatt?                               11:45:07  
6           A.   Yes, I remember doing that.           11:45:09  
7           Q.   You did that. You read every page of   11:45:10  
8           the correspondence section?               11:45:12  
9           A.   Probably.                               11:45:13  
10          Q.   But you don't remember?               11:45:14  
11          A.   I do not remember.                   11:45:16  
12          Q.   Do you remember reading every page of   11:45:16  
13          the narrative?                               11:45:18  
14          A.   Yes.                                   11:45:19  
15          Q.   And of the progress report?           11:45:19  
16          A.   Probably, but I'm not positive.       11:45:22  
17          Q.   And does the correspondence include   11:45:26  
18          demands for information to third parties?   11:45:32  
19          A.   It should.                           11:45:35  
20          Q.   Have you ever sent a demand for       11:45:36  
21          information to a third party across state lines? 11:45:38  
22          A.   I don't remember.                   11:45:40  
23          Q.   In your work that you do as an auditor, 11:45:43  
24          have you sent out a lot of demands for information 11:45:45  
25          to third parties?                       11:45:48

1	A. I have sent demands for information.	11:45:49
2	Q. Was the Gil Hyatt case one of the	11:45:53
3	largest cases at the Franchise Tax Board residency	11:45:56
4	section?	11:46:01
5	A. Define largest.	11:46:02
6	Q. In terms of hours. 600 or more hours?	11:46:02
7	A. I have spent that many hours on a case.	11:46:05
8	Q. On a residency case?	11:46:08
9	A. Yes, I have.	11:46:09
10	Q. What year did you do that?	11:46:10
11	A. It could have been through -- I'm	11:46:14
12	guessing, I'm sorry. I do not remember	11:46:18
13	specifically. Probably 19 -- the case probably	11:46:20
14	closed in 1993 or '4.	11:46:24
15	Q. Okay. Without telling me any taxpayer	11:46:28
16	information, did that result in an NPA or was that a	11:46:31
17	no change audit?	11:46:35
18	A. Assessments were issued.	11:46:36
19	MR. BOURKE: I think we better break now for	11:46:38
20	lunch.	11:46:41
21	THE VIDEOGRAPHER: We have to close that tape	11:46:41
22	also.	11:46:42
23	We are going off the record at 11:47.	11:46:44
24	This ends tape one in the deposition of Carol Ford	11:46:49
25	on May the 4th, 1999.	11:46:52



1 Q. So if we deleted the account number too, 14:26:36  
2 then -- 14:26:39  
3 A. Yes. 14:26:39  
4 Q. Then we could have a printout of the 14:26:39  
5 number of hours to date, correct? 14:26:42  
6 A. I can't answer that, if you just had 14:26:44  
7 that, but that information would be available. 14:26:47  
8 Q. Now with respect to whether or not 14:26:50  
9 there's a big case, are you aware of how much money 14:26:53  
10 is being sought from Gil Hyatt as of today by the 14:26:59  
11 Franchise Tax Board? 14:27:02  
12 A. I have no knowledge. 14:27:03  
13 Q. Have you ever heard that there's -- that 14:27:05  
14 the Franchise Tax Board is seeking 28.8 millions 14:27:09  
15 from him in penalty, taxes and interest? 14:27:12  
16 A. I don't know what the dollar amount is. 14:27:14  
17 Q. Do you recall what the dollar amount was 14:27:17  
18 of the assessments that you worked on, the MPAs that 14:27:19  
19 you worked on? 14:27:24  
20 A. To be really specific, no. 14:27:25  
21 Q. Can you tell me what would be a big case 14:27:28  
22 at the FTB in terms of the dollars of an assessment 14:27:30  
23 for a residency case? 14:27:39  
24 A. I assume -- I don't know what would be a 14:27:42  
25 big case. Anything over five million I would say. 14:27:47

1 Q. Five million in taxes plus penalty and 14:27:52  
2 interest? 14:27:55  
3 A. That would be a large case. 14:27:56  
4 Q. Could you tell me in a typical year how 14:27:58  
5 much money the residency unit generates for the 14:28:02  
6 State of California? 14:28:06  
7 A. I don't know. 14:28:06  
8 Q. Do you know in a typical year how much 14:28:07  
9 money the residency unit assesses? 14:28:10  
10 A. I have no idea. 14:28:13  
11 Q. Did you attend any presentations by 14:28:15  
12 management of the residency unit where they would 14:28:18  
13 give results to the residency auditors of how much 14:28:21  
14 money was assessed or collected through the 14:28:25  
15 residency program for various fiscal years? 14:28:28  
16 A. I don't specifically remember anybody 14:28:32  
17 mentioning dollar amount. 14:28:35  
18 Q. Do you remember Steve Illia or Brad 14:28:37  
19 Lacour giving a presentation of how well the 14:28:39  
20 residency unit was doing? 14:28:42  
21 A. I know that they both presented -- I 14:28:45  
22 know that they both presented at 1997 or spoke at 14:28:47  
23 the 1997 conference, but I didn't pay attention to 14:28:51  
24 dollar amounts. 14:28:55  
25 Q. Do you recall them making any 14:28:57

1 comparisons between the moneys generated by the 14:28:59  
2 residency unit versus other units or programs at the 14:29:02  
3 FTB, such as partnerships, corporations, multistate, 14:29:07  
4 RAR? 14:29:15  
5 A. I don't have -- I don't remember 14:29:17  
6 specifics. They may have done that, but -- 14:29:19  
7 Q. Now I wanted to clarify something about 14:29:23  
8 as I understand it there's a case that you said you 14:29:27  
9 were proud of your issues relating to an 14:29:29  
10 out-of-state taxpayer, and that involved more than a 14:29:31  
11 million dollars worth of taxes assessed, correct? 14:29:34  
12 A. I did not say I was proud of the case. 14:29:38  
13 It was a case. It was a good case that I had 14:29:40  
14 developed. 14:29:43  
15 Q. I just wanted to keep that in mind, 14:29:44  
16 whatever that case is. That's different from the 14:29:47  
17 James H taxpayer case, correct? 14:29:49  
18 MR. LEATHERWOOD: I'm going to move to strike. 14:29:53  
19 Can you restate the question? 14:29:56  
20 MR. BOURKE: Q. Is that different from the 14:29:56  
21 James H. taxpayer case referred to in the residency 14:29:57  
22 work papers? 14:30:00  
23 MR. WILSON: Excuse me, Counsel. Do you mean 14:30:02  
24 different than not the same or different in some 14:30:03  
25 respect? 14:30:06

1 MR. BOURKE: Different -- is that case 14:30:06  
2 different -- involve a different taxpayer than the 14:30:12  
3 case that you did such good work on that related to 14:30:17  
4 a one million dollars assessment. 14:30:21  
5 MR. LEATHERWOOD: First of all, Counsel, I'm 14:30:23  
6 going to direct her not to respond to that, because 14:30:25  
7 you obviously don't know the identity of the 14:30:30  
8 taxpayer related to James H. taxpayer, and I'm -- 14:30:32  
9 and any question that you ask her is going to either 14:30:36  
10 confirm or deny information by the taxpayer that you 14:30:39  
11 already knew the identity of. How you got the 14:30:41  
12 identity of the taxpayer, I don't know. It really 14:30:44  
13 is of no concern. It still would be on her part 14:30:47  
14 disclosing information I think should be precluded 14:30:51  
15 from her disclosure. 14:30:54  
16 In other words, you're asking her to 14:30:56  
17 affirm or deny information about a particular 14:30:57  
18 taxpayer. 14:31:01  
19 MR. BOURKE: Q. Is that case that you did 14:31:01  
20 good work on that related to the one million dollar 14:31:04  
21 assessment, is that a different taxpayer than the 14:31:07  
22 one you spent over 600 hours assessing? 14:31:09  
23 A. Yes. 14:31:12  
24 Q. Do you know how many hours you spent on 14:31:13  
25 that case with the most hours? Was it 700 hours? 14:31:15

1	A.	It could have been at the end, yes.	14:31:20
2	Q.	Could it have been 800 hours?	14:31:22
3	A.	I don't recall.	14:31:25
4	Q.	Is there something at the Franchise Tax	14:31:26
5		Board called the CBR or cost benefit ratio?	14:31:28
6	A.	Yes.	14:31:33
7	Q.	Could you tell me what that is?	14:31:34
8	A.	It was a method that was used -- we'll	14:31:37
9		call it the olden days, that how many -- let's see,	14:31:42
10		somehow it was a calculation of how much tax was	14:31:50
11		being generated based upon how many hours were	14:31:53
12		involved in the case.	14:31:59
13	Q.	Okay. And could you tell me how you	14:32:03
14		learned about the CBR or cost benefit ratio?	14:32:06
15	A.	It used to be discussed.	14:32:11
16	Q.	When was it discussed?	14:32:15
17	A.	When I was a new auditor.	14:32:20
18	Q.	And did it stop being discussed at a	14:32:23
19		certain time?	14:32:25
20	A.	Yes. The emphasis went away from that,	14:32:28
21		and I believe it had something to do with the	14:32:33
22		Taxpayer Bill of Rights.	14:32:35
23	Q.	Could you tell me what about the	14:32:45
24		Taxpayer Bill of Rights had anything to do with the	14:32:47
25		cost benefit ratio?	14:32:50

1           A.    I can't really tell you the answer to       14:32:51  
2           that.   14:32:54  
3           Q.    What was the cost benefit ratio that       14:32:54  
4           auditors were expected to live up to during the time 14:32:57  
5           it was discussed in the residency program?       14:33:00  
6           A.    I'm not -- I'm trying to remember.   So   14:33:08  
7           just a minute.   It could have been like \$350 per   14:33:11  
8           hour.   But I could be very wrong on that.       14:33:21  
9           Q.    Could it have been \$1,000 an hour?       14:33:27  
10          A.    I've never heard that figure.           14:33:29  
11          Q.    \$600 an hour?                           14:33:31  
12          A.    I don't think I've -- I remember 350 and 14:33:34  
13          I remember 500.   But I don't remember -- and I don't 14:33:38  
14          remember specifically when that was.           14:33:41  
15          Q.    Were people requested to keep the CBR in 14:33:47  
16          other than written form?   Were you discouraged from 14:33:52  
17          writing down the CBR?                           14:33:56  
18          A.    I don't ever remember seeing the CBR       14:33:57  
19          written down.                                   14:34:00  
20          Q.    Did you ever hear the managers of the       14:34:03  
21          Franchise Tax Board residency program talk about a 14:34:06  
22          CBR goal or objective for auditors?           14:34:10  
23          A.    I don't think so.                       14:34:17  
24          Q.    Do you remember Mr. Illia talking about 14:34:20  
25          a CBR at all?                               14:34:23

1 | A. He could have. | 14:34:24

2 Q. Was the CBR supposed to be kind of a 14:34:30

3 minimum figure that you're supposed to drop an audit 14:34:34

4 | if it didn't look like you were going to meet the 14:34:36

5 | \$350 or \$500 an hour objective? | 14:34:39

6 A. I believe we evaluated the case at the 14:34:52

7 beginning and determined how many hours we thought 14:34:57

8 we were going to be devoting to the case prior to 14:35:00

9 opening an examination. 14:35:04

10 Q. Does a typical residency case take about 14:35:07

```
11 | 100 hours? 14:35:11
```

12 | A. That's our goal. 14:35:12

13 Q. The goal is to make a residency case 14:35:14

14 | complete by the end of 100 hours? 14:35:17

15 | A. Yes. 14:35:20

16 Q. Do you know whether or not the residency 14:35:26

17 | program has ever had a taxpayer with as large a tax 14:35:29

18 | assessment as Gil Hyatt? 14:35:34

19 A. I don't have access to that knowledge. 14:35:36

20 I don't know. 14:35:38

21 Q. You're not aware of any as large as his? 14:35:39

22	A. No.	14:35:42
----	--------	----------

23 | MR. WILSON: Well, I have to object. Did you 14:35:43

24 | understand the question? 14:35:50

25 THE WITNESS: Not for sure. 14:35:51

1 MR. WILSON: Do you want to restate it, 14:35:53  
2 please? 14:35:54  
3 MR. BOURKE: Q. Are you personally aware of 14:35:55  
4 any other taxpayer being assessed as much money as 14:35:56  
5 Gil Hyatt was assessed? 14:36:00  
6 A. Of the cases I have reviewed, I don't 14:36:05  
7 think I've ever seen a case with as large an 14:36:10  
8 assessment as his. 14:36:13  
9 Q. Have you ever seen a penalty assessment 14:36:15  
10 relating to fraud as large as the penalty assessment 14:36:17  
11 assessed against Gil Hyatt? 14:36:22  
12 A. I've seen a fraud penalty assessed, but 14:36:24  
13 I don't remember the dollar amount. 14:36:28  
14 Q. In your career how many fraud 14:36:31  
15 assessments have you seen? 14:36:33  
16 A. I have only seen two. 14:36:35  
17 Q. And is that other case still pending, 14:36:38  
18 the other case with the fraud assessment besides Gil 14:36:41  
19 Hyatt's? 14:36:43  
20 A. I think it is closed and has been 14:36:48  
21 closed. 14:36:50  
22 Q. On that other case involving a fraud 14:36:52  
23 audit, was Sheila Cox involved? 14:36:54  
24 A. I don't think she was involved. 14:36:59  
25 Q. Were you the reviewer on the case? 14:37:01





11:23 1 information that she obtained from the bank  
2 statement, I will say probably I will not go to the  
3 file and locate for that particular bank statement.  
4 I assume that she had that document in her file.

11:24 5 Q. So you didn't feel it was necessary  
6 because you trusted Sheila Cox?

7 A. Based on my recollection, yes, I do  
8 trust her, but I do not remember I did it, whether I  
9 located that bank statement or not, but I will say if  
11:24 10 I do not trust her work, yes, I will go back to  
11 locate that statement.

12 Q. Now, when she said that she had  
13 affidavits, you trusted her that she had affidavits,  
14 right?

11:24 15 A. Yes, I can make that assumption.

16 Q. And when she wrote down that she had  
17 affidavits you trusted her that she had affidavits?

18 A. Yes.

19 Q. And if she wrote down that she had  
11:24 20 three affidavits you trusted her that she had three  
21 affidavits, right?

22 A. I will say yes, I can trust her.

23 Q. Do you know whether Sheila Cox knows  
24 what an affidavit is?

1:25 25 A. I have no knowledge. We have never



STATE OF CALIFORNIA

FRANCHISE TAX BOARD

3 N. GLENOAKS BLVD., SUITE 200  
DURBANK, CA 91502-1170



DEMAND TO FURNISH  
INFORMATION

Authorized by  
California Revenue & Taxation Code  
Section 19504 (formerly 19254 (a) and 26423 (a)\*)

The People of the State of California to:

Great Expectations  
11640 Sopth Sepulveda Suite 100  
Los Angeles, CA 90025

In the Matter of:

Gilbert P. Hyatt

Social Security No. : 069-30-9999  
or Corporation No. :  
For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for membership and type of membership.
2. Copy of any address changes submitted and date submitted.
3. Current status of membership.
4. Records of contact with the Great Expectations office.
5. Records of attendance at any functions.

FRANCHISE TAX BOARD

By: S. Cox  
Authorized Representative

Dated: January 24, 1995

Telephone: (818) 556-2942

Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.



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# Congressional Record



United States  
of America.

PROCEEDINGS AND DEBATES OF THE *106<sup>th</sup>* CONGRESS, FIRST SESSION

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Additionally, the Corporation shall create criteria for African governments to establish matching funds based upon ability to pay and to demonstrate a national commitment to combating HIV/AIDS by establishing, for example, a national HIV/AIDS council or agency.

Additionally, Mr. Speaker, the administrative costs, or overhead associated with the AMPFA Corporation, are mandated to be no more than 8 percent of the Corporation's overall budget. The AMPFA Act authorizes the appropriation of \$200 million for each of the fiscal years 2001 through 2005. Also, for each of the fiscal years 2002 through 2005, the Act authorizes an appropriation to fund an additional amount equal to 25 percent of the total funds contributed to the Corporation.

Mr. Speaker, in a June 1999 lecture entitled "The Global Challenges of AIDS", United States Secretary General Kofi Annan stated that "no company and no government can take on the challenge of AIDS alone. What is needed is a new approach to public health—combining all available resources, public and private, local and global". It is my intent that the AIDS Marshall Plan for Africa serve as a replicable model for addressing this crisis globally. Already, this proposed legislation has received the support of over 40 Members of Congress and has caught the interest of the African diplomatic corps, African and African-American organizations, AIDS activists, and global health organizations that are interested in providing assistance to pass the legislation.

In closing, Mr. Speaker, I am committed to seeing this legislation through to final passage and encourage my colleagues to review the legislation and to contact me or my staff with questions. This bill will support Africa in a substantive and meaningful manner.

#### ABUSES BY STATE TAXING AUTHORITIES

HON. JERRY WELLER

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 5, 1999

Mr. WELLER. Mr. Speaker, I submit for the RECORD the following letter:

Hon. DAVID WALKER,  
Comptroller General of the United States,  
Washington, DC.

DEAR MR. WALKER: I am writing to request an investigation by the United States General Accounting Office ("GAO") of alleged abuses by State taxing authorities against former residents.

As a Member of the Oversight Subcommittee of the House Ways and Means Committee, I spent significant time last year addressing the issue of taxpayer abuses by the Internal Revenue Service. As a result of our work, and Congressional and GAO investigations, many serious tax violations and wrongdoings were uncovered within the IRS. Last year, Congress held a series of hearings on the issue and addressed these serious problems by passing significant reforms and taxpayer protections as part of the "Internal Revenue Service Restructuring and Reform Act of 1998."

I am, therefore, disturbed to learn that while we addressed taxpayer abuses at the federal level, there may be just as many oppressive actions occurring throughout the country at the State level. A recent *Forbes* Magazine article entitled "Tax torture, local style" (July 6, 1998), highlights the fact that

"[T]here are at least half as many revenue agents working for the states as the federal government" and "[C]ollectively, they are just as oppressive as the feds." See, Attached Article. In another recent article, the *Los Angeles Times* reported that the state taxing authority, the California Franchise Tax Board, "is second in size and scope only to the Internal Revenue Service—and by all accounts the state agency is the more efficient, more aggressive and more relentless of the two" and "there is little to stop the agency from becoming more aggressive." See, attached article, "State Agency Rivals IRS in Toughness," *Los Angeles Times* (August 2, 1999, page 1).

The *Forbes* article lists a number of state tax department problems including: (1) privacy violations by California, Connecticut, and Kentucky; (2) criminal or dubious activities by Connecticut, Indiana, Kentucky, New Mexico, North Carolina, Oklahoma, and Wisconsin; and (3) mass erroneous tax-due bills by Arizona, California, Indiana, Michigan, and Ohio. In addition, my office has recently received materials from taxpayers alleging abuse by State taxing agencies (e.g., materials from Mr. Gil Hyatt alleging a number of abuses by the California Franchise Tax Board ("FTB") against former residents of the State of California). See, Attachment.

I believe this issue is important and deserves study and a full investigation by the GAO. Should taxpayer abuses exist at the State level against former residents, I would consider recommending any and all appropriate legislation to address these deplorable activities and encourage State's Attorney Generals to begin separate investigations into such actions. We should do whatever we can to protect the rights of our citizens against overzealous Federal or State tax agencies.

I look forward to working with you and your staff on this important investigation.

Sincerely,

JERRY WELLER,  
Member of Congress.

#### STATE TAXING AGENCIES ARE ABUSING FORMER TAXPAYERS IN VIOLATION OF THE CONSTITUTION THE WIDESPREAD ABUSE

When Congress passed the Internal Revenue Service Restructuring and Reform Act of 1998, an era of tyranny at the IRS came to an end. Congressional hearings revealed story after story of taxpayer abuse by the IRS. The stories of abuse so inflamed the public and Congress that sweeping reform soon followed. But taxpayers abuse is still as prevalent as ever—only the perpetrators of this abuse are the state taxing agencies. In its rush to reform the IRS, Congress overlooked a whole other level of taxpayer abuse at the state level. This type of abuse by state taxing agencies has received attention from the press. In the article "Tax torture, local style," William Barrett discusses the "extortion," "sweepingly false declarations of taxes," "false notices," "[p]rivacy violations," and "criminal or dubious activities" by state taxing agencies. (William Barrett, *Forbes*, July 6, 1998). Many states have resorted to the same type of abusive tactics for which their federal counterpart—the IRS—was reprimanded by Congress.

In many cases, a state taxing agency has even exceeded the IRS in its recklessness and abusiveness. In a front-page *LA Times* article entitled "State Agency Rivals IRS in Toughness," Liz Pulliam compares the FTB unfavorably with the IRS—"the Franchise Tax Board is second in size and scope only to the Internal Revenue Service—and by all ac-

counts the state agency is the more efficient, more aggressive and more relentless of the two". (Liz Pulliam, "State Agency Rivals IRS in Toughness," *L.A. Times*, August 2, 1999, at A1). She also quotes Mr. Dean Andal, a former FTB Board member, who criticizes the FTB as "brutal" and "hard and sometimes arbitrary" and states that "there is little to stop the agency from becoming more aggressive" (Pulliam, *supra*).

States are particularly abusive towards former residents who have moved to another state. Moving to another state is a common occurrence in the U.S., where citizens have the constitutional right to travel to and establish residency in any state in the United States. In 1996, Congress passed legislation which prevents states from taxing the pensions of retirees living in other states. This congressional legislation illustrates the need for federal intervention in order to prevent states from overreaching in their pursuit of tax revenue. Unfortunately, this action by Congress only focused on one small avenue in which states illegally pursue nonresidents for additional taxes. Another tactic is to assess a tax on citizens leaving the state by contesting when the former resident moved out of the state. Years after a citizen has relocated to another state, the state taxing agency will open a "residency audit" to extort a former resident.

#### THE ABUSE EXEMPLIFIED: THE CALIFORNIA FRANCHISE TAX BOARD

The abusive taxing tactics used by states is best illustrated by the California Franchise Tax Board (FTB), as indicated in the *LA Times* article *supra*:

"[The FTB] is tainted by arrogance and a stubborn unwillingness to compromise."

"For two years in a row, corporate tax executives have ranked California's [FTB] among the toughest, least fair and least predictable state tax agencies in the country."

#### STATE IS RANKED MOST AGGRESSIVE

Many corporate taxpayers agree. In both 1997 and 1998, company tax executives ranked California at the top of a "worst offenders" list compiled by *CFO* magazine to rate the tax agencies of the 50 states. . . . The state [California] was described as among the least predictable in administering tax policy and among the most likely to take a black-and-white stance on unclear areas of tax law. (Pulliam, *supra*).

The FTB particularly targets for abuse Nevada residents who formerly resided in California. The FTB agents are well trained in targeting such nonresidents. For example, the FTB targets wealthy and famous people living in gated affluent communities of Las Vegas. Agents develop a list of potential victims compiled from property rolls, tax records, and newspaper accounts. This list is supplemented by trips into the wealthy neighborhoods of Las Vegas in order to survey former California residents. Wealthy and famous individuals are the preferred targets because they are particularly vulnerable to threats of violating their privacy and causing them bad publicity. The FTB then audits the victim's financial and personal affairs. This includes agents making periodic trips across state lines in order to secretly survey victims. The agents trespass onto the victim's property, record the victim's movements, and even probe the victim's garbage and mail all while making sure to avoid contact with the victim. All of this is done stealthily, without the

knowledge of the Nevada authorities. If the agents are caught in the act, they falsely claim immunity for their auditing tactics under color of authority and they claim a false constitutional right to collect taxes in Nevada—all while violating the constitutional rights of their victims and the sovereignty of Nevada. This is not a legitimate investigation, but a covert operation to uncover private information for what is best characterized as extortion of the victim.

The FTB hires inexperienced and unsuccessful recruits as auditors. Many of these auditors are untrained and unsupervised. They are given training manuals that they do not study. The training materials are illustrated with such sadistic cartoons as a skull-and-crossbones on the cover of the penalties section (which is to illustrate how to pirate an additional 75% override on the tax assessment). They have little or no legal background or training and do not know nor do they care about the victim's Constitutional rights. They except legal clichés and case law from other audits and insert them throughout their workpapers indiscriminately. They mimic comments that they read that supports the FTB's position and they ignore information about supports the victim's position. Some auditors are so inept that they actually use pseudonyms from "boilerplate" and training manuals audits (e.g., Marie Assistant) in their own audits because they do not understand such an obvious step as the need to replace the pseudonyms in the "boilerplate" audits with the actual names of the individuals in the particular case under audit. These are the kind of people that California has charged with the awesome power of auditing taxpayers—"the power to tax is the power to destroy."

The FTB gathers large quantities of private information about the victim during the audit. The FTB goes to the victim's adversaries, who are not privy to the victim's private information, and offer them a way to help dispose of their adversary, the FTB's victim, by concocting damaging victims evidence against the FTB's victim. A bitter ex-spouse or ex-girlfriend, an estranged relative, or a vengeful former employee are preferred. The FTB avoids contacting the victim's friends, and close relatives who are privy to the victim's private information because such witnesses would undermine the FTB's attack on the victim. The FTB has actually sent out intimidating and harassing letters to the victim's friends, colleagues, and business associates and has even gone so far as to audit these people apparently to intimidate and harass them, to isolate the victim, and to deprive the victim of the support that he or she needs at such a crucial time. The FTB's apparent intent is to have the victim embattled by adversaries and separated from supporters. "They tend to look at every audit as a battle. In the gray areas, they push the envelope rather than work out a reasonable compromise." (Pulliam, *supra*).

The FTB auditors boldly admit to emphasizing bad evidence for the taxpayer and ignoring good evidence for the taxpayer. In one of the FTB's largest residency audits, the auditor trumped-up a large assessment with penalties based on false affidavits from the victim's adversaries while completely ignoring all of the victim's close relatives, friends, and associates. Also in this same audit, the auditor relied on about the fifty false California connections while ignoring a thousand solid Nevada connections and preempted submission

of thousands-more solid Nevada connections by the victim. Even more significant, the thousands of Nevada connections involved thousands-of-times more value (purchase offers on custom homes,

The California Legislature was so suspicious of and concerned about the FTB that it passed the Taxpayer's Bill of Rights statute, which among other things, forbids the FTB from evaluating employees based upon revenue collected or assessed or upon revenue quotas. The law also states that the head of the FTB must certify in writing annually to the California State Legislature that the FTB has not evaluated employees based upon revenue collected or assessed or quotas. But this certification is misleading since, by an indications, promotions and rewards still go to those FTB employees who bring in the most revenue. And quotas by different names abound in the FTB. Once FTB employee rapidly progressed from a low-ranking auditor to a high-prestige position for making one of the FTB's largest residency assessments ever. FTB auditors must generate over \$1,000 of revenue for every hour charged to an audit. A quota system is indicated in the LA Times article *supra*: "The agency [FTB] added 362 auditors between 1992 and 1996, promising the legislature that the new positions would boost collections."

Furthermore, there is little supervising of FTB auditors. Instead, this type of auditing and tax collection appears to be encouraged by management. The FTB claims to have layers of review in order to ensure accuracy and fairness; however, these layers actually proliferate the fraud of the FTB auditors. The auditor's supervisors do not get involved in the audits, instead relying completely on an auditor's self-serving narrative report in reviewing an audit without any regard for the victim's evidence or arguments. Unbelievably, FTB auditors and management get credit for assessments and get promotions and rewards immediately after the audit even though the assessments may never be collected at all and any collection may be decades away. This encourages excessive tax assessments for immediate promotions and rewards, but the feedback that it was a bad audit may be more than a decade away.

The legal department gets involved in reviewing penalties, but indications are that the lawyers encourage unwarranted penalties to force a settlement rather than provide an independent review. This is confirmed by the fact that the FTB audit and protest proceedings are expressly exempted from the California administrative proceedings act to permit the FTB to proceed in violation of the victim's Constitutional right to due process. The FTB implies that the "protest" proceeding is an independent review of an objective protest officer, when in fact it is a continuation of the investigation to gather more information, to attempt to force the victim into an extortionate settlement, and to prepare the FTB's case for any appeal by the victim to the next stage of the administrative proceeding. The victim tells his case to a wolf-in-sheep's-clothing, misleading the victim into presenting his or her case to an independent reviewer when in fact the protest officer is an important part of the FTB's abuse. The FTB's denial of due process to a victim under the sham that the audit and the protest are merely investigations is untenable and will be easily declared unconstitutional when chal-

lenged. The FTB has deprived victims of their Constitutional rights for too long.

#### THE FTB'S PLOT—FALSIFY THE OFFICIAL RECORDS

By contesting the residency of former California residents who have moved from the state, the FTB assesses additional taxes on money earned after the former resident moved from California. This type of treatment of non-residents is a blatant violation of the victim's Constitutional right to move between states. Despite overwhelming evidence to the contrary from the victim, the FTB will often allege a residence date that allows it to encompass as much additional tax revenue as possible. In order to support its outlandish residency date, the FTB will disregard the victim's substantial Nevada connections, will overly emphasize and rely upon minimal (and often erroneous) California connections, will distort Nevada connections into California connections, and will devise nonexistent California connections.

The FTB maintains, for example, that a six-month lease on an apartment in Nevada and opening escrow on a custom home purchased in Nevada are not Nevada residency connections. The FTB has gone so far as to actually maintain that, for purposes of residency, a former California resident can only claim to have resided in a Nevada apartment if: 1) the apartment complex has security gates, 2) the apartment is left "trashed" after moving out, 3) the apartment managers can provide information on the movements of the tenant (even after several years have passed since the tenant lived there), and 4) poor people do not reside in the apartment complex.

Furthermore, the FTB maintains that a former California resident is only permitted to sell a California house to a stranger and that a former California resident is only permitted to reside in a Nevada house if he can prove the Nevada house was not purchased for investment or appreciation and only if the Nevada house has security gates. The FTB asserts that California voter registration and obtaining a California driver's license are significant California residency connections, but disregards the same actions when taken in Nevada as mere formalities that are easy to do and not relevant to the issue of Nevada residency despite the FTB's own regulations and decades of case law to the contrary. All of these holdings can be found in the FTB's own audit files.

Unbelievably, the FTB relies on the following considerations as supporting California residency:

An overnight stay in a California motel is a California residency connection while a six-month lease on an apartment in Nevada is not a Nevada residency connection.

A bank account in a Nevada bank is a California residency connection because the Nevada bank also has a California branch.

A mail-order purchase made from Nevada to a California mail order provider for delivery of merchandise to a Nevada home is a California residency connection even though the mail order purchase was made from Nevada by a Nevada and was delivered to a Nevada address.

This type of California mail-order purchase is a sham purchase because, the FTB argues, the Nevada could have bought the product in Nevada and saved the cost of freight.

The FTB uses circular reasoning by concocting a late Nevada residency date and then



alleging that purchases made in Nevada after the concocted Nevada residency date are California residency connections for the period before this concocted Nevada residency date in order to attempt to support this date.

Actual Nevada receipts are not Nevada connections while false California receipts that the FTB concocts are California connections.

A credit-card purchase made in Nevada for use in a Nevada house is a California residency connection if the credit-card charge, unknown to the Nevada, is cleared through a California credit-card office.

A California driver's license, surrendered to the Nevada DMV upon obtaining a Nevada driver's license, is a California residency connection because the surrendered California driver's license had not yet expired while the Nevada driver's license is not a Nevada residency connection because it is easy to get.

Gifts sent by a Nevadan to an adult child or a grandchild living in California constitutes a California residency connection.

Checks drawn on a Nevada bank are California residency connection even though the checks were written in Nevada by a Nevada resident to Nevada workers for work done on a Nevada house and where the checks were even cashed in Nevada; and a regulated investment company open-ended fund (a mutual-fund money-market account) was deemed by the FTB auditor to be a California bank account constituting a California residency connection and a basis for a fraud determination even though the FTB Legal branch gave a legal opinion stating that the regulated investment company is not a bank and normally not a California residency connection.

This is only a partial list of the kind of absurd considerations that the FTB will use to rationalize its residency determinations. Such far-fetched and concocted California connections are what the FTB relies upon to support its residency determinations—the FTB must make the most of what it has available and what it can concoct in order to extort California income taxes from nonresidents.

#### CELEBRATING THE SERVICE OF MS. EMILY AMOR

**HON. TONY P. HALL**

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 5, 1999

Mr. HALL of Ohio. Mr. Speaker, I rise today to recognize a wonderful woman and exemplary citizen of the District of Columbia. Ms. Emily A. Amor is now 96 years old and has just been named the "Volunteer of the Century" by the Central Union Mission. She has been an active volunteer for almost 20 years.

Her dedication to God, to her country and to those in need has been proven through a lifetime of service. She has served by praying, working and volunteering. Her commitment has led her to join me every Wednesday morning at 7 am to pray for the city of Washington, DC, its leaders and its residents. She has served meals to the homeless on every major holiday for years. And before retiring at age 70, she worked with the Department of Housing and Urban Development.

She is truly an amazing example of a selfless servant. She has a heart-felt compassion for others, especially those who are poor and

hurting. Her life has truly exemplified Jesus Christ's example of loving one's neighbor, no matter who they might be. I only hope that I can have half as much life in me as she does when I reach age 96.

I ask my colleagues to join me in commending Emily for all of her great work. I am glad to be able to call her a friend and am humbled by her servant's heart. I wish her the best for many years to come.

#### THE NUCLEAR WEAPONS DE- ALERTING RESOLUTION

**HON. EDWARD J. MARKEY**

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 5, 1999

Mr. MARKEY. Mr. Speaker, 54 years ago tomorrow a single bomb in a single city changed our world. The atomic bomb dropped on Hiroshima leveled the city, engulfed the rubble in a fireball, and killed 100,000 people. Three days later another 70,000 people died at Nagasaki, and people are still dying today from leukemia and other remnants of those explosions.

The victims of Hiroshima cast shadows from the explosion's blinding light that were permanently etched not only in the remaining buildings but also in our souls. Since August 6th, 1945 we have lived in fear that such nuclear destruction would happen again, perhaps in the United States. Today, the accidental launch of a single missile with multiple warheads could kill 600,000 people in Boston, or 3,000,000 people in New York, or 700,000 people in San Francisco or right here in Washington, DC. If that missile sparked a nuclear exchange, the result would be worldwide devastation.

For 40 years of Cold War we played a game of nuclear chicken with the Soviet Union, racing to make ever more nuclear bombs, praying that the other side would turn aside. During the Cuban missile crisis and many other times we came perilously close to going over the cliff. Then in 1991 the Cold War and the Soviet Union ended. Yet today we not only keep hundreds of nuclear missiles with nowhere to point them, we keep many of them ready to fire at a moment's notice.

This threat from this "launch-on-warning" policy is real. On January 25, 1995, when Russia radar detected a launch off the coast of Norway, Boris Yeltsin was notified and the "nuclear briefcase" activated. It took eight minutes—just a few minutes before the deadline to respond to the apparent attack—before the Russian military determined there was no threat from what turned out to be a U.S. scientific rocket. The U.S. is not immune: on November 9, 1979 displays at four U.S. command centers all showed an incoming full-scale Soviet missile attack. After Air Force planes were launched it was discovered that the signals were from a simulation tape.

And the danger of an accidental nuclear war is growing. The Russian command and control system is decaying. Power has repeatedly been shut off in Russian nuclear weapons facilities because they couldn't afford to pay their electricity bills. Communications at their nuclear weapons centers have been disrupted because thieves stole the cables for their computer. And at New Year's the "Y2K" bug in com-

puters that are not programmed to recognize the year 2000 could cause monitoring screens to go blank or even cause false signals.

There is no reason to run the terrible risk of an accidental nuclear war. It is hard today to imagine a "bolt out of the blue" sudden nuclear attack. And even if the U.S. was devastated by an attack, the thousands of nuclear warheads we have on submarines would survive unscathed. Keeping weapons on high alert is an intemperate response to an implausible event.

Mr. Speaker, it is time to take a large step away from the brink of nuclear war, to take our nuclear weapons off of hair-trigger alert. Today I am introducing a resolution that expresses the sense of Congress that we should do four things:

We should immediately remove some nuclear weapons from high alert.

We should study methods to further slow the firing of all nuclear weapons.

We should use these unilateral measures to jump-start an eventual agreement with Russia and other nuclear powers to take all weapons off of alert.

And we should quickly establish a joint U.S.-Russian early warning center before the Year 2000 turnover.

These are not new or radical ideas. President George Bush in 1991 ordered an immediate standdown of nuclear bombers and took many missiles off of alert. President Gorbachev reciprocated a week later by deactivating bombers, submarines, and land-based missiles. Leading security experts including former Senator Sam Nunn, former Strategic Air Command chief Gen. Lee Butler, and a National Academy of Sciences panel have endorsed further measures to take weapons off of high alert. Two-third of Americans in a 1998 poll support taking all nuclear forces off alert, and this week I received a petition signed by 270 of my constituents from Lexington, MA calling on the President to de-alert nuclear missiles.

I urge my colleagues to join together to cosponsor this resolution. The best way we can commemorate the anniversary of the nuclear explosion at Hiroshima is to make sure we will never blunder into an accidental nuclear holocaust.

#### INTRODUCTION OF LEGISLATION

**HON. CHARLES W. "CHIP" PICKERING**

OF MISSISSIPPI

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 5, 1999

Mr. PICKERING. Mr. Speaker, I rise today to address one of the many reforms I believe are necessary to improve the administrative processes of the Federal Communications Commission (FCC). The issue that I believe needs to be addressed immediately relates to the proliferation of merger activity in the telecommunications industry.

Since passage of the Telecommunications Act of 1996, the industry has seen massive upheaval as companies try to position themselves for the new Information Age economy. Many of these companies are attempting to combine their strengths to better position themselves to compete in a deregulated marketplace. One of the problems these companies have faced recently is the regulatory uncertainty of the FCC's merger review process.



DISTRICT COURT  
CLARK COUNTY, NEVADA

GILBERT P. HYATT, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FRANCHISE TAX BOARD OF THE )  
 STATE OF CALIFORNIA, and )  
 DOES 1-100, inclusive, )  
 )  
 Defendants. )  
 )

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Case No. A382999  
Department No. XVIII

TRANSCRIPTION OF TAPE RECORDED PROCEEDINGS

BEFORE THE HONORABLE NANCY M. SAITTA

Recorded on Tuesday, July 10, 2001  
Las Vegas, Nevada

Transcribed by: Paul E. DeGagne, CCR 161

1 APPEARANCES:

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6 and  
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11 BY: PETER C. BERNHARD, ESQ.  
12

13 For the Defendants: McDONALD, CARANO, WILSON, McCUNE  
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16 Suite 1000  
17 Las Vegas, Nevada 89102  
18 BY: BRYAN R. CLARK, ESQ.  
19  
20  
21  
22  
23  
24  
25

1 THE COURT: Hyatt. Good morning.

2 MR. CLARK: Good morning, your Honor. Bryan  
3 Clark for the Franchise Tax Board.

4 MR. BERNHARD: Your Honor, I'm also co-counsel  
5 for Mr. Hyatt.

6 MR. HUTCHISON: Hi, Judge. Mark Hutchison on  
7 behalf of Mr. Hyatt.

8 THE COURT: Again, I'm sure it doesn't have  
9 anything to do with you, Mr. Hutchison, although I'm  
10 inclined to blame you. One of the cases, again, that I  
11 was educated on -- of course, that doesn't have  
12 anything to do with the volumes and volumes and volumes  
13 of paper that was spent in this case.

14 This is a defense motion for an extension  
15 of time to file a memorandum of costs. And, you know,  
16 here I have to kind of go the other way from what I  
17 just said about this case.

18 It saddens me when I see counsel who can't  
19 agree to allow one another what I would refer to as  
20 some reciprocal extensions of time. And, you know, if  
21 I don't grant your request for an extension of time, I  
22 think there's a lot of money at stake.

23 MR. CLARK: Your Honor, if I may explain just  
24 briefly, what they were asking for -- and they don't  
25 have any substantive objection to our additional time.

1 It's really a tit-for-tat objection.

2 What we were asking for here is an  
3 additional ten days within which to compile the  
4 information necessary to perform a ministerial task,  
5 that is, submitting cost information to the court in a  
6 case that has consumed three to four years, tens of  
7 thousands of pages of documents, dozens of depositions  
8 across two states and numerous different cities.

9 So it is a relatively large administrative  
10 task, and we are only asking for an additional ten  
11 days. What they were asking for in the supreme court  
12 was an additional 30 pages and a month and a half  
13 within which to file a substantive motion that would  
14 overturn the disposition of the case before the Nevada  
15 Supreme Court.

16 So I do think that there is a fundamental  
17 difference between the ten days that we're asking for  
18 here and the 45 days and the 30 pages that they were  
19 asking for in the supreme court on a substantive  
20 disposition of the case.

21 THE COURT: Mr. Clark, I got reversed in the  
22 supreme court on an issue that wasn't even raised in  
23 the appellate briefs.

24 MR. HUTCHISON: That's right. So you should  
25 not be happy with that whole situation, Judge.

1 MR. CLARK: I hoped that you wouldn't hold that  
2 against me on my ten-day request.

3 THE COURT: I said that with a smile on my  
4 face.

5 MR. CLARK: And really, the logistical problem,  
6 if I may explain, is that when my firm submitted bills  
7 on the case, which included cost information, they went  
8 to the California Attorney General's office, which  
9 would submit, in turn, its bills internally to the  
10 Franchise Tax Board.

11 THE COURT: Right.

12 MR. CLARK: Those bills would incorporate not  
13 only the costs incurred by the attorney general's  
14 office, but also the costs incurred by my firm. So the  
15 hangup is in assuring that there is no duplication on  
16 those costs, and that's why the administrative task is  
17 not just as simple as "Everybody give me your bills and  
18 we'll add it all up." And that's why we're asking for  
19 the additional time. I don't believe that there's any  
20 real prejudice here.

21 MR. HUTCHISON: Judge, you know, Mr. Clark  
22 wasn't involved in the extension of time thing and  
23 don't blame him --

24 THE COURT: I'm not.

25 MR. HUTCHISON: I think that was the FTB's

1 decision because of just the position they have taken  
2 in this litigation. But he underscores the point here.  
3 We wanted a little extra time to be able to educate the  
4 Nevada Supreme Court about a decision that they based  
5 on an issue never raised.

6 THE COURT: Which clearly they needed to be  
7 educated on.

8 MR. HUTCHISON: They clearly need to be  
9 educated on it. You spent weeks going through that  
10 stuff and found that there were issues of fact, believe  
11 it or not, and so we said we need a little extra time  
12 to be able to put that on before the Nevada Supreme  
13 Court. We asked for an extension of time. It was  
14 denied. As a matter of fact, actually, they came to us  
15 saying, "Why don't you give us a little extra time?"  
16 and we said, "We'll do that, but we need some extra  
17 time, too."

18 So, you know, I don't see the difference  
19 in terms of extending courtesy in terms of between the  
20 parties. I understand counsel has to do what their  
21 clients tell them to do, but the the fact is the  
22 courtesy was not reciprocated, and then they come  
23 before the court saying, "Come on. Come on. We have  
24 clean hands. We need some more time here." It just is  
25 a disingenuous position to take.



1                   One of the more practical issues perhaps  
2   is 27 days have already lapsed since the Nevada Supreme  
3   Court's decision came out. Why in the heck do they  
4   need more time? Plus, I don't believe that the  
5   judgment has even been entered yet.

6                   THE COURT: I checked again this morning. I  
7   don't believe that it has been.

8                   MR. HUTCHISON: So that's another five days  
9   whenever that enters. We're talking about a whole  
10   bunch of time already, Judge. They just don't need the  
11   extra time. There's been sufficient time that has  
12   passed already. They don't need the additional time.  
13   They ought to stay within the framework of the rules.

14                  MR. CLARK: Your Honor, we are trying to avoid  
15   wasting as much time as possible for the -- we will  
16   file something within five days if you deny us our  
17   extension, but we'll use the additional time to try to  
18   assure that there is no duplication of costs so that  
19   the inevitable dispute over our memorandum of costs  
20   will take as little of this court's time as possible.  
21   That's why we are asking for the additional time, but  
22   recognize that it is within your discretion. You need  
23   to be entirely pleased with the supreme court --

24                  THE COURT: And I want to make clear, although  
25   the record will not reflect the fact that I, hopefully,

1 quite obviously had a smile on my face when I made that  
2 comment, I never hold that against counsel. That  
3 obviously would be inappropriate, and more importantly,  
4 on -- as I said, I've learned a lot in this case. So  
5 there is always a benefit, regardless of which column  
6 you come out on, if you will.

7           Having said that, I checked again this  
8 morning, and as I said, I do not believe that the  
9 judgment has been filed yet. And I really, although I  
10 believe that we have time constraints set forth in our  
11 procedural rules for very good reason, I also have  
12 practiced law before and recognize that it's awful nice  
13 to have a few extra days every now and then.

14           Under the circumstances, what I'm going to  
15 do is I'm going to give you -- you've requested, I  
16 believe, a ten-day extension. I'm going to give you a  
17 five-day extension. That's it.

18           MR. CLARK: Your Honor, I don't believe that  
19 the reason -- or excuse me. I believe that the reason  
20 the order has not been signed is that it is somewhere  
21 in your chambers. We have submitted it.

22           THE COURT: We looked for it. I can't seem to  
23 find it, because that was my concern. Let me look  
24 again, but I'm -- we'll check again. We've just  
25 changed administrative assistants, as you know, and we

1 are initiating --

2 MR. HUTCHISON: It needs to be resubmitted and  
3 be done with it, right?

4 THE COURT: Yes, that's probably going to be  
5 your best idea.

6 MR. CLARK: So this will be a total then of ten  
7 days, and I will submit another copy and --

8 THE COURT: Please do.

9 MR. HUTCHISON: Judge, this is going to be a  
10 big memorandum of costs.

11 THE COURT: Oh, I know.

12 MR. HUTCHISON: Guaranteed. We've already had  
13 27 days. Let's say the judgment issues today. That's  
14 giving them 37 days, in theory, since they have known.  
15 We're not going to even have an idea of what the  
16 memorandum of costs are until we see it. That's a very  
17 short time frame within the rules for us to oppose. We  
18 would like to have at a minimum a 20-day extension  
19 beyond what we are entitled to under the rules so that  
20 we can have a proper opportunity to respond.

21 MR. CLARK: We would agree to half of that.

22 THE COURT: And -- boy oh boy, you guys make my  
23 job difficult.

24 In order to be fair, this is what I will  
25 do. I will give you the half that you request as well.

1 I will give you an extra ten days. And please,  
2 Counsel, if you need more time, get ahold of chambers  
3 and I can help you out in that regard. So don't worry  
4 about it.

5 MR. HUTCHISON: So, Judge, are you saying that  
6 we could get on the telephone if we can't agree and  
7 need more time, we could just call your chambers and  
8 you could help us resolve that?

9 THE COURT: Yes. And you can do it -- that way  
10 I take it out of either of your client's hands. I can  
11 be the bad guy or the good guy, as the case may be. I  
12 can handle it that way.

13 MR. CLARK: Thank you, Judge.

14 THE COURT: Thank you both.

15 MR. CLARK: I will submit an additional order,  
16 Judge, and an order from today's hearing.

17 THE COURT: Thank you very much.

18 MR. HUTCHISON: Thank you.

19

20 \* \* \* \* \*

21

22 ATTEST: Full, true and correct transcription of tape  
23 recorded proceedings, to the best of my  
24 ability.

25

  
PAUL E. DEGAGNE

7/23/01  
DATE



Weekly News and Analysis from the California Taxpayers' Association

# ***Caltaxletter***

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David R. Doerr, *principal contributor*  
Ronald W. Roach, *editor*

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Vol. XIV, No. 26  
July 3, 2001

## **BUDGET BLUES: IMPASSE CONTINUES**

On the third day of the new fiscal year, there was no visible evidence of efforts to end the impasse over the \$101 billion state budget bill, with Republicans maintaining that the Democrats-designed plan would unnecessarily increase the sales tax.

With Tuesday's high forecast to reach a scorching 107 degrees, none of the major newspapers in the state even carried an account of presumably behind-the-scenes budget talks. Instead, editors focused on State Controller Kathleen Connell's release of heretofore-secret details of the \$43 billion in electricity contracts negotiated by the Davis Administration since January.

Newspapers sued to get the information released, and Dr. Connell beat Governor Gray Davis to the punch in getting the news out. She said that even after weeks of analyzing the 41 agreements, her staff was unable to say how much the costs would be, except that they could leave the state vulnerable to wild fluctuations over the next decade. The governor's office responded that Dr. Connell did not have all the facts.

Apparently looming larger than budget impasse news was a report that liberal Assembly Member Herb Wesson has emerged as the heir apparent to Assembly Speaker Robert Hertzberg, who cannot seek re-election next year due to term limits. Mr. Wesson would be the third Los Angeles Democrat in a row to hold the speakership and would be expected to take the helm next January, said reports in the *Los Angeles Times* and the *Sacramento Bee*.

Catching up on budget developments, or lack thereof, on the eve of the Fourth of July holiday:

RA001707

The three provisions with tax relief shortfalls are the teacher tax credit, the child-and-dependent care tax credit, and the long-term care tax credit. The teacher tax credit was estimated to provide \$218 million in tax relief. Only \$134 million in credits were actually claimed. The child-and-dependent care tax credit was estimated to provide \$197 million in tax relief. Only \$154 million has been claimed. The long-term care credit was estimated to provide \$43 million in tax relief. Only \$2 million in credits were claimed.

From these three tax relief provisions in the bill, taxpayers actually got \$290 million, rather than the advertised \$456 million, a 36 percent shortfall. If the other provisions of the package are also 36 percent below what was promised, the 2000-01 tax relief would be less than \$1 billion, rather than the \$1,519 billion for which politicians took political credit.

There is also concern about fraudulent claims for the child-and-dependent care credit. According to the FTB, \$141 million in credits were attributable to refundable returns, and only \$12 million in credits were on returns that reduced the tax due. There were reports that claims for the credit had cited persons who were deceased as providers of the care.

- **Nevada Court Supports FTB.** FTB Attorney Ben Miller, who is headed for a vacation in Hawaii, reported that the Nevada Supreme Court sustained FTB auditor efforts in the high-profile *Hyatt* residency case. The taxpayer had asked the court to halt the FTB audit as "too intrusive." In a non-written opinion on June 13, the Nevada Supreme Court held that a Nevada trial court should have granted the FTB's request for summary judgment. Mr. Miller, who has been with the FTB for 31 years, expressed extreme satisfaction with the outcome.
- **FTB "Phase III" Construction.** Fred Cordano, in charge of the Phase III building project for the FTB, said the new buildings should be ready for occupancy in 2004. He said the "stops and starts" in the project have resulted "in a better product."

Phase III includes two new buildings for the FTB and a town hall area at the entrance that includes a 300-seat auditorium. Taxpayers will not have to go through the FTB "Checkpoint Charlie" security check to access the town hall area, which also includes an eating area and rooms for training and conferences.

Advisory Board members were impressed with the environmental features built into the plan, including rooftop photovoltaic panels. The Phase III project will be located in front of the current Butterfield Road complex, taking much of the current parking lot used by riders of Sacramento's light-rail system.

# **EXHIBIT 35**



ORIGINAL

**SEALED**

**FILED**

AUG 7 2001

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BY *[Signature]*  
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13 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

14  
15 \*\*\*\*\*

16 **FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,**

17 **Petitioner,**

18 **vs.**

19 **EIGHTH JUDICIAL DISTRICT COURT of**  
20 **the State of Nevada, in and for the County of**  
21 **Clark, Honorable Nancy Saitta, District Judge,**

22 **Respondent,**

23 **and**

24 **GILBERT P. HYATT,**

25 **Real Party in Interest.**  
26  
27  
28

Case No.: 36390  
Consolidated with Case No. 35549

**Answer to Hyatt's Petition for Rehearing  
and Supplemental Petition for Rehearing**

**CONFIDENTIAL INFORMATION  
FILED UNDER SEAL**

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RA001710

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and

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RA001711

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