

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

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant

v.

GILBERT P. HYATT

Respondent

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

**APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P.
HYATT - VOLUME 9 OF 17**

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Doc No.	Description	Vol.	Bates Nos.
1	Court Minutes re: case remanded, dated September 3, 2019	1	RA000001
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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6	Exhibits 83-94 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of	16, 17	RA003698- RA004027

	Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019		
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

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 1st day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 9 OF 17** to be served by the method(s) indicated below:

_____ via U.S. mail, postage prepaid;
 X via Federal Express;
_____ via hand-delivery;
_____ via Facsimile;

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Supreme Court of the United States

No.

02-42

FRANCHISE TAX BOARD OF CALIFORNIA,

Petitioner

v.

GILBERT P. HYATT, ET AL.

ON WRIT OF CERTIORARI to the Supreme Court of Nevada.

THIS CAUSE having been submitted on the transcript of the record and was
argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court
that the judgment of the above court is affirmed.

April 23, 2003

EXHIBIT 48

DISTRICT COURT
CLARK COUNTY, NEVADA

COPY

GILBERT P. HYATT,

Plaintiff,

vs.

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

Defendants.

CASE NO. A382999
DEPT. NO. X

TRANSCRIPT OF PROCEEDINGS

BEFORE THOMAS W. BIGGAR, DISCOVERY COMMISSIONER

Taken on Friday, September 30, 2005

At 10:00 a.m.

At 200 South Third Street
Las Vegas, Nevada

Reported by: John L. Nagle, CCR 211

1 APPEARANCES:

2

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24 BY: ROBERT DUNN, TAX COUNSEL

22

23

24 Also present: Gilbert P. Hyatt
25 Michael Kern

25

1 COMMISSIONER BIGGAR: Okay. Who wants to
2 go first?

3 MR. HUTCHISON: We'll be happy to, your
4 Honor.

5 COMMISSIONER BIGGAR: Okay.

6 MR. HUTCHISON: We've got several matters
7 before the Court.

8 COMMISSIONER BIGGAR: Right.

9 MR. HUTCHISON: We've got the protest
10 officers' depositions. We've got the Japanese
11 company's depositions. We've got Mr. Goldberg,
12 Mr. Toman's depositions. We also have a report for you
13 regarding the scheduling of depositions. And if you
14 don't care, I would just launch into the protest
15 officer deposition, if you don't mind.

16 COMMISSIONER BIGGAR: Okay.

17 MR. HUTCHISON: Your Honor, you've already
18 reviewed -- well, we set the stage here. We've set the
19 stage numerous times in terms of what's going on with
20 the protest. It's been nine years since Mr. Hyatt made
21 a protest and started that proceeding. Nine years.

22 It's been five years since there was a
23 hearing before the protest officer where Mr. Hyatt's
24 representative appeared, was heard and was told "In six
25 months you'll have a decision." That was back in 2000.

1 So now the question is why has the protest
2 been delayed. It's been delayed because of the
3 advantages that are visited upon the FTB if it was
4 delayed.

5 They have a huge hammer over Mr. Hyatt's
6 head. Interest is accumulating on his assessed taxes
7 to the tune of about \$5,000 a day. So every day that
8 passes, that's another \$5,000 they tack onto Mr. Hyatt.

9 We think that's part of the ongoing effort
10 in this case to extort money out of Mr. Hyatt, to hang
11 this over his head and to cause all the problems and
12 the government abuse we've been talking about and we're
13 litigating about.

14 This is part of our case in chief that
15 we're going to present to the jury. So the protest
16 officers' depositions are important. And you've
17 already gone through this for hours in terms of looking
18 at documents and hearing arguments.

19 And the last time we were in here, or
20 maybe not last time, but several times ago, you said,
21 "I'm going to have them produce, have them, the FTB,
22 produce documents regarding why in the world this
23 protest hasn't proceeded like it was supposed to
24 proceed."

25 You were not very happy with what was

1 going on. You said, "I see no reason why nothing has
2 happened there, no action. I see no good-faith reason
3 why it hasn't happened. I mean, we're not talking
4 about forcing them to make some decision on some
5 multimillion dollar case in two weeks. We're talking
6 about years here that nothing has happened." So you
7 said, "Produce the documents."

8 So they did produce the documents. And
9 Judge, what those documents show, exactly what we said
10 they would show, that the protest has been put on hold.

11 You've been provided under Tab 4 and 5 two
12 e-mails from the protest officer. It says, "From Cody
13 Cinnamon to" her boss, "George McLaughlin. I told
14 Eric" -- that's Eric Coffill, Mr. Hyatt's tax
15 representative in the protest -- "that I was instructed
16 not to work on the case due to the pending Nevada
17 litigation."

18 They can make all the arguments in the
19 world they want to make about why the case has been --
20 why the protest has been pending, why it's been stayed.
21 "Oh, it's Mr. Hyatt's fault. He hasn't given us the
22 documents."

23 I can refute all that stuff, or at least
24 some of that stuff. I'm not supposed to know
25 everything about the protest. Seeing as the FTB

1 doesn't know everything about the protest, we don't.
2 But we can certainly contest those allegations.

3 But their own documents, what you told
4 them to produce last time, says, "I told Eric that I
5 was instructed not to work on the case," not because
6 Mr. Hyatt hasn't been producing documents, not because
7 he's the source of the delay. Due to the pending
8 Nevada litigation, which they deny vehemently. Their
9 own documents contest their points.

10 Then the next e-mail again is from Bill
11 Hilson to Cody Cinnamon, and it says, "I think this" --
12 talking about the Nevada Supreme Court case. "I think
13 this means we should put things on hold with
14 administrative matters, in particular the recent draft
15 letter."

16 This was an e-mail dated back in 2000.
17 The draft letter they're talking about is the draft
18 filed determination of the protest. This has been put
19 on hold since 2002.

20 MR. GIUDICI: Your Honor, excuse me. I
21 need to make an objection. I don't mean to interrupt,
22 Counsel.

23 MR. HUTCHISON: Well, you are
24 interrupting.

25 MR. GIUDICI: There's a lot of hearsay

1 going on and misrepresentation of the documents. I
2 will clean it up. I just want the record to reflect
3 the objections.

4 COMMISSIONER BIGGAR: Go ahead,
5 Mr. Hutchison.

6 MR. HUTCHISON: We're not in trial. We're
7 in a hearing. This is an evidentiary matter. The
8 documents are right in front of the judge.

9 Your Honor, counsel claims he's going to
10 clean it up. I don't know how he's going to clean up
11 the language of his own e-mails. "I think this means
12 we should put things on hold with administrative
13 matters, in particular the recent draft letter."

14 2002, Ben Miller's e-mail to the protest
15 officer and her supervisor. So the protest has been
16 put on hold, and you had already said we're entitled to
17 look at documents and records as to the reason why.
18 And now we're asking that we be able to ask questions
19 of the protest officer concerning why is this protest
20 on hold.

21 For example, are you holding this over
22 Mr. Hyatt's head so that \$5,000 continues to accrue
23 every single day and you think that somehow you're
24 going to get an advantage in the protest or in trying
25 to negotiate a settlement with him on the taxes?

1 It's exactly the kind of thing that went
2 on with Anna Jovanovich telling Mr. Hyatt, "If you
3 don't settle now, if you don't conclude the case now,
4 your confidential information is going to be disclosed,
5 and most people want to settle the case now.
6 Otherwise, you're going to have some problems."

7 It also supplements -- what's going on
8 here as well, even as troubling, is the longer the
9 protest is delayed, the more that they use this
10 litigation, this case in Nevada, to supplement their
11 protest proceedings.

12 That's something you say would be
13 inappropriate. You can't use this case, this
14 litigation, to supplement and prove their points in the
15 protest. Well, Mr. Hutchison, how do you know about
16 that?

17 I'll tell you how I know about it. It's
18 because we got a memo produced for the first time --
19 these memos keep popping up. It's Exhibit 12 to our
20 motion. It was never produced in this case before they
21 filed their motion regarding the protest officer.
22 We've never seen this before.

23 It's a letter, or it's a memo from
24 Mr. Dunn, who is here in the courtroom, dated October
25 5th, 2000, to Terry Collins, and he's saying, "Cody

1 Cinnamon has basically said, and asked you, has
2 Mr. Hyatt given us all the documents that we need in
3 the protest in response to a document request?" In the
4 protest. In the protest.

5 And they passed it on to Bob Dunn, and Bob
6 Dunn says, "Well, I think you need to supplement that
7 request, and you need to ask for specific documents."

8 And then he goes through, and he says,
9 "Here are the documents" -- Cody Cinnamon, the protest
10 officer -- "that you ought to be asking for in the
11 protest that's in the litigation."

12 And he cites it, Judge. Complete copies
13 of all the licensing agreements, the complete
14 transcripts of the depositions of Eugene Cowan,
15 Mr. Hyatt's advisor before the Nevada court, complete
16 transcripts of the deposition of Michael Kern,
17 Mr. Hyatt's CPA, and all the documents that were
18 provided by Mr. Kern's office to the FTB during the
19 ongoing litigation in Nevada.

20 Now, if that's not evidence, Judge, that
21 they're using this case to secure discovery in the
22 protest hearing, I don't know what is. That's another
23 reason that they're delaying the protest.

24 COMMISSIONER BIGGAR: What should I do
25 about that?

1 MR. HUTCHISON: Sanction them. Strike
2 their answer. Enter a default for us since they're
3 ignoring repeatedly your orders.

4 COMMISSIONER BIGGAR: Wasn't there a
5 provision in the protective order that they could seek
6 relief --

7 MR. HUTCHISON: Sure, they could.

8 COMMISSIONER BIGGAR: -- in the California
9 court?

10 MR. HUTCHISON: Absolutely.

11 COMMISSIONER BIGGAR: And they did that?

12 MR. HUTCHISON: Absolutely.

13 COMMISSIONER BIGGAR: So with that ruling,
14 wouldn't it appear that they aren't going to get
15 anything from this litigation.

16 MR. HUTCHISON: Now, that's a very good
17 point. I'll let Don Kula address that since he was
18 involved in the Superior Court action, but that did not
19 happen. They asked for it to happen.

20 MR. KULA: I'll say, the subpoena they
21 went to California with, one of the requests was every
22 document from the Nevada case, and the court didn't
23 give them that.

24 COMMISSIONER BIGGAR: Well, didn't the
25 appellate court say that they should get them?

1 MR. KULA: Not on that request. There was
2 six requests they made on the subpoena. I have a copy
3 of the subpoena here. The sixth request was a
4 catchall, give us everything, every deposition
5 transcript, every document.

6 We objected in the California process with
7 Mr. Coffill, saying, "That's too broad. You don't get
8 that in the process."

9 There's a process to decide what they
10 should get in the protest. They lost on that. They
11 lost on the catchall, "Give us everything."

12 The other five categories were specific
13 documents, which we argued they had and didn't need,
14 but the court gave them those specific, if you will,
15 categories.

16 So no, they don't just get everything.
17 There's a process that will happen in California.
18 Mr. Coffill, whoever will represent Mr. Hyatt, has an
19 opportunity in California to decide what is appropriate
20 and not.

21 COMMISSIONER BIGGAR: So if that's going
22 to be the process, isn't that at least one cause for
23 delay since -- what appears to be happening, to me, is
24 that they switched, or let's say added an additional
25 theory to recover taxes from Mr. Hyatt, you know,

1 pursuing the sourcing theory to -- and that is what --
2 and that is primarily what has occupied them for the
3 past X number of years in trying to, you know, base a
4 tax assessment on that theory as opposed to the
5 residency.

6 MR. KULA: They can argue that after the
7 fact. Our view is they're coming up with this after
8 the fact.

9 COMMISSIONER BIGGAR: And in regard to the
10 claims made in this case, which for the most part hinge
11 around the initial audit and the actions primarily by
12 Sheila Cox and maybe some others in making that
13 determination on Nevada residency, I -- now, they had
14 that determination, and now it's before the protest
15 officer.

16 And the protest officer allegedly, in
17 trying to reach the correct decision, is now not only
18 investigating and re-evaluating the residency analysis,
19 but is also seeking the additional documents -- sought
20 the additional documents -- who knows where that
21 stands -- to explore this sourcing theory.

22 And there's no question that that is the
23 primary -- one of the primary things that is delaying
24 that protest and to further bolster whatever assessment
25 they may make, I guess, ultimately.

1 And because the court has allowed them to
2 get at least specific documents that they seek and the
3 procedure for doing that, it took what, a year and a
4 half on the initial documents. It would probably take
5 somewhere along that line for -- if there were any
6 other requests for documents that were produced in this
7 litigation that have not been produced in the protest
8 proceeding. And I'm just saying that that's one of the
9 reasons for that, is it not?

10 MR. KULA: Our view is that may be, but
11 that's why we want to finish the discovery on this
12 issue. We've got some of the documents, maybe all the
13 documents. Maybe. We don't know. Now we want to move
14 to depositions on this.

15 And by the way, on the issue of whether
16 they have all the documents, just as a brief aside,
17 they make a big point about supposedly Mr. Hyatt didn't
18 give a certain document, a big schedule relating to
19 Philips.

20 And we have a copy -- what -- maybe
21 counsel doesn't know this. I don't know. But it's a
22 misstatement because the next month, Philips came in
23 with a revised schedule, and the protest officers had
24 that. So they're talking about a document that's
25 irrelevant. There's a document that came out in the

1 next month, the protest officers had.

2 I only mention that because they're trying
3 to bloody the waters here. They're trying to make us
4 and Mr. Hyatt look bad. Obviously, the court doesn't
5 want to get into what happened and what didn't happen.
6 I'm just saying, they're trying to win this discovery
7 motion by saying, "Hey, we're right on this issue.
8 Don't take discovery."

9 No. We need to take discovery.

10 MR. HUTCHISON: Judge, and your point
11 about isn't this really a reason for the delay, they're
12 now looking at some new theory, some new sourcing
13 theory. Two points. I would love them to be looking
14 at another theory. I hope their protest officers say
15 that, because now, after nine years of the protest,
16 they're going to come up with some new theory, what --

17 COMMISSIONER BIGGAR: It would appear as
18 though the plan would be to not even have that in place
19 until this case is over.

20 MR. HUTCHISON: Sure. Well, here's my
21 point, though, your Honor. If they're going to come up
22 with some new theory, one of the points that we're
23 going to make to the jury was this a bogus, flat-out
24 extortionist audit.

25 And it was based on residency, and now

1 that we've blown them out of the water on residency and
2 they can't support that because of discovery in this
3 case, they have to switch gears and find another
4 theory.

5 Fine. But I'm going to argue to the jury,
6 if you'll give me an opportunity to depose the protest
7 officer to bring this out, that's damning in itself.
8 Why can't they stay with their theory that he assessed
9 him millions and millions of dollars?

10 And the reason they can't is because they
11 never thought they would have the support. They never
12 had the support, and now they're changing theories.

13 Another reason why we've got to take the
14 protest officer's deposition is it's part of our case
15 in chief, your Honor, in terms of the ongoing
16 governmental abuse and problems that they're having.

17 COMMISSIONER BIGGAR: All right. I got
18 all of your argument on that, Mr. Hutchison.

19 MR. HUTCHISON: Okay. Fine. So that's my
20 argument for the residency --

21 COMMISSIONER BIGGAR: Move on to the --

22 MR. HUTCHISON: -- portion.

23 COMMISSIONER BIGGAR: Let me hear about
24 Toman.

25 MR. HUTCHISON: How about the Japanese

1 companies?

2 COMMISSIONER BIGGAR: Okay.

3 MR. HUTCHISON: Is that okay?

4 COMMISSIONER BIGGAR: Okay.

5 MR. HUTCHISON: What we're looking for
6 there, Judge, is to determine the level and the nature
7 of the FTB's contact with the Japanese companies and
8 the Japanese government officials from '90 to '97.

9 Let me put it in context. It's different
10 than our document request, which you said no to. In
11 the document request, I understand that you were
12 concerned, the FTB was concerned about getting
13 information that may be in third-party audit documents
14 and audit files and that sort of thing.

15 We're not looking for that. This is what
16 happened in this case, and this is going to be a very
17 important part of the causation question at trial.

18 We've said, and our allegation is, that
19 the FTB improperly contacted Mr. Hyatt's sublicensees,
20 Japanese companies, and informed them and told them he
21 was under investigation and that they were seeking
22 information about taxing matters.

23 They said -- as a result of that, that led
24 to the demise of his business licensing. They said --
25 their position at trial, and they've said it

1 repeatedly, "That's ludicrous. How in the world can
2 that happen? They would never have a response like
3 this to these two little innocent letters that were
4 sent out to these guys, and you're overblowing
5 everything."

6 We now want to put in the context for the
7 jury, your Honor, to be able to say, these weren't two
8 little innocent letters, and you have to understand the
9 political and the business climate at the time.

10 During the course of the mid 1990s and
11 even before that, these Japanese companies were being
12 audited on a regular cycle basis -- and believe me,
13 that will be the testimony. We've got little bits and
14 pieces, but we haven't got it from the FTB yet -- on a
15 regular basis on a three-year cycle.

16 They were being targeted by United States'
17 state taxing authorities as well as the IRS. They were
18 very concerned about the taxing environment in the
19 United States at the time.

20 As you recall back then, that was back
21 when the Japanese were buying up lots of assets in the
22 United States. There was lots of criticisms of
23 Japanese companies, and they were very concerned about
24 the United States taxing system, including one of the
25 largest one in the country, the state of California.

1 They had been audited regularly. They
2 thought the practices weren't fair. They were also
3 lobbying -- Japanese officials and government agencies
4 were lobbying the FTB and others to change those
5 policies and practices. So this is a very tough
6 environment for the Japanese to be involved in.

7 Now, these letters come out saying, "We're
8 investigating Mr. Hyatt about tax issues."

9 We have to be able to put to the jury in
10 context the political and the economic and the business
11 environment under which they received these letters,
12 your Honor, and that's what we're seeking to do with
13 the PMK depositions.

14 COMMISSIONER BIGGAR: Why aren't you doing
15 it with some Japanese representatives? I haven't seen
16 one Japanese piece of evidence that says we weren't --
17 you know, when we saw this letter, you know.

18 MR. HUTCHISON: We went nuts over this.
19 Let me tell you why. Let me tell you the difficulty.
20 Those witnesses are in Japan. They're Japanese
21 companies. They're headquartered there and they're in
22 Japan. You have to first go through the headache --
23 it takes about two years to get service of any kind of
24 a legal proceeding.

25 COMMISSIONER BIGGAR: Plenty of time in

1 this case, fortunately.

2 MR. HUTCHISON: It may. And then if you
3 happen to be fortunate enough, after years of them
4 putting you off -- there's no real enforcing mechanism
5 there. We've looked into this. There's no real
6 enforcement mechanism there to enforce any kind of
7 United States legal process.

8 Then if you're fortunate enough and you
9 get to the point where you're giving a deposition, the
10 Japanese culture, they won't talk about this stuff.
11 They don't want to disclose what's going on internally.

12 So I would love to have that testimony.
13 It's just, as a practical matter, not as easy as you
14 may think, your Honor.

15 But the point is it's discovery that under
16 Rule 26 would be permitted from the FTB. We can get it
17 from them. They have the internal documents. They
18 know what their proceedings were and their processes
19 were with the Japanese companies.

20 I'm not asking for specific audit
21 information. I'm asking for what was going on
22 politically and economically and as a business matter
23 at the time. So that's where we're going on that.

24 COMMISSIONER BIGGAR: Let's go to the next
25 one.

1 MR. HUTCHISON: Okay. The next one is
2 Mr. Goldberg and Mr. Toman. You had granted a
3 protective order on Mr. Goldberg, as you may recall.
4 He's no longer the current CEO of the Franchise Tax
5 Board. He's retired. He doesn't have ongoing duties.
6 I think that was an important consideration the last
7 time we were here.

8 More importantly, in your report and
9 recommendation you said, "Look, I'm granting this
10 motion without prejudice, and Hyatt can bring it back
11 after -- near the close of discovery if you have more
12 information for me that would justify Mr. Goldman's
13 deposition."

14 Here's the evidence that we had -- that we
15 have now, that we didn't have last time. And you've
16 heard about this a little bit, your Honor. We have
17 Mr. Goldberg making speeches about Hyatt and about the
18 Hyatt case, passing judgment on him as the taxpayer
19 from hell.

20 The FTB disputes that and says that wasn't
21 what he said. So there's a dispute about what he says
22 and is characterizing about Mr. Hyatt during the course
23 of the litigation.

24 We've got copies that Mr. Goldberg was
25 copied on a letter relative to the Hyatt audit

1 regarding whether or not the mutual fund companies
2 ought to be the source of a contact for Mr. Hyatt in
3 California.

4 He's also put together -- Mr. Goldberg put
5 together reports of the taxes that he had instituted
6 reporting on the Hyatt case. We've given you all these
7 documents as exhibits.

8 And what we want to know about is what his
9 involvement was concerning this protest and putting it
10 on hold and, you know, his view in terms of is that
11 something that's unusual.

12 You've always said you can find out what's
13 going on with the Hyatt case and the Hyatt audit and
14 what should have happened. What should have happened.
15 What's the standard.

16 "Mr. Goldberg, you know, what's the
17 standard in that regard? Were you aware of the Hyatt
18 audit? Were you aware of the Hyatt protest? Did you
19 understand it would be put on hold? Even if you
20 weren't, what in your experience has been the case when
21 the audit has been performed and a protest has been
22 lodged? How long does that typically take? Even on a
23 big case."

24 Those kind of questions are the kind of
25 things we like to have answers, your Honor. And you

1 had said in terms of what the criteria will be in this
2 case, last -- I get the hearings mixed up. This was on
3 August 5th. I think this was one or two times before
4 we were here -- about what you would do in terms of the
5 request to have depositions taken.

6 "I'm not going to preempt them from the
7 depositions where they make at least a prima facie, you
8 know -- it doesn't have to be much. They want to take
9 this deposition because this person was a supervisor,
10 and this person had a conversation, and then was copied
11 on an e-mail. You know, unfortunately in this case I'm
12 going to let them spend their dime on that."

13 And you then told Mr. Bradshaw if he
14 doesn't think it's that important, he can send somebody
15 else to go.

16 So with Mr. Goldberg, we think we met that
17 minimum criteria to take his deposition. As I said,
18 he's retired. We can take a half a day or a day with
19 him, your Honor, and just ask him some of those types
20 of questions.

21 The same analysis applies to Mr. Toman,
22 who was the chief counsel, and want to really focus in
23 on and have him talk to us about the protest being
24 placed on hold. We have a document from him where he
25 was the co-chair of the round table on California

1 residency issues, and we would like to question him
2 about that as well, your Honor.

3 So those are the three areas.

4 COMMISSIONER BIGGAR: All right. Did you
5 want to make any argument on the in-camera documents,
6 the submitted record that they --

7 MR. HUTCHISON: Yeah. We didn't even know
8 that that would be something that we would be
9 discussing, your Honor, so I'm not even prepared to
10 talk about the in-camera submission. Is that something
11 you would like to address?

12 COMMISSIONER BIGGAR: Not if you're not
13 prepared to address it, I guess.

14 MR. KULA: I've honestly never seen it
15 before. Our objection to that is they're submitting
16 something in camera, arguing in a motion from it.
17 We've never seen it. "It's privileged. But here, your
18 Honor, here is why we win."

19 We never even heard of this document
20 before. That's the position we're in right now. So we
21 would object to the court -- we think it should be
22 stricken from the record given it's a privileged
23 document, and yet they're trying to argue in a motion
24 for it that it somehow supports their position.

25 COMMISSIONER BIGGAR: All right. Well,

1 you got the points and authorities?

2 MR. HUTCHISON: Yes, your Honor.

3 COMMISSIONER BIGGAR: And I thought you
4 had -- I thought in deposition discovery that you had
5 gone over the particular system that they're talking
6 about in the past, whatever it is, you know, and that
7 this was -- and I would assume that you would know that
8 they had this kind of calendaring system, I guess we
9 would call it --

10 MR. HUTCHISON: Right.

11 COMMISSIONER BIGGAR: -- by computer.

12 MR. HUTCHISON: There's been deposition
13 testimony on that, your Honor. I'm just not prepared
14 to address their points and authorities today on that.

15 COMMISSIONER BIGGAR: You'll be prepared
16 the next hearing?

17 MR. HUTCHISON: Yes, your Honor.

18 COMMISSIONER BIGGAR: All right. Then
19 let's see. I think -- let's see. Then I guess I need
20 to hear from -- you got the tapes? Did you get the
21 tapes?

22 MR. HUTCHISON: Did we get the tapes?

23 COMMISSIONER BIGGAR: Did you get the
24 tapes on the fraud conference? They said you did. I'm
25 not sure why I got them.

1 Mr. Bradshaw, maybe you can --

2 MR. GIUDICI: That's my bailiwick, your
3 Honor. If you recall, when they filed the motions to
4 compel the production of all of those documents, there
5 was one section in a group of their requests relating
6 to these recessed minute meetings. And your order to
7 us was to produce everything responsive in that group
8 to you, and then tell you what we gave them. I thought
9 you wanted to see everything.

10 COMMISSIONER BIGGAR: I didn't want to see
11 it if you were giving it to them. I guess that was
12 where we got --

13 MR. GIUDICI: Yeah.

14 COMMISSIONER BIGGAR: I really am not that
15 interested in anything that there's not an issue about.
16 Really, you might think I am, but I'm not.

17 MR. GIUDICI: Your Honor, if you
18 remember --

19 COMMISSIONER BIGGAR: I can watch Law and
20 Order on tape if I want, as opposed to this
21 presentation. That's okay. As long as they've got it,
22 we don't need to -- let's move on.

23 MR. GIUDICI: Okay.

24 COMMISSIONER BIGGAR: Who is going to
25 address any --

1 MR. GIUDICI: I will address the PHO
2 issues, your Honor.

3 COMMISSIONER BIGGAR: All right.

4 MR. GIUDICI: And I want to make a couple
5 quick points, and then I need to make an introductory
6 statement first.

7 The protest hearing officer is not trying
8 to "build a case." She has a public duty, and that
9 public duty is to get to the truth of whether or not
10 Mr. Hyatt still owes taxes to the State of California
11 after the date he claims he does not.

12 They start out, their Exhibit 7, Counsel
13 says they were promised a decision. Well, Exhibit 7,
14 the last page that's at P 00889 over to '890,
15 Mr. Coffill himself is complaining, "You can't make a
16 decision by the first quarter of 2001 because I will
17 not have enough time to respond to this new information
18 that you are trying to develop. There is nothing in
19 there as a promise as to when a final decision is going
20 to be made."

21 Now, I need to back up and make an
22 introductory statement, because I do have to correct
23 the record, and I need to apologize to the Court.

24 When I was here last time, I said they
25 didn't have anything except Coffill's letter. And it's

1 true that I was unaware of those three memos until the
2 day they popped up, but it doesn't change anything.

3 And the reason I need to apologize, your
4 Honor, is I didn't have time to read the event log
5 because I got that at the same time I was trying to get
6 everything else done. And if I had, I would have put
7 this in my brief.

8 The reference to the recent draft letter
9 that appears on that e-mail that we gave up -- and
10 again I was so rushed, I didn't realize that all those
11 people are attorneys. I probably should have submitted
12 it in camera, but you said there was no inadvertent
13 production, so they can keep it.

14 But the reference, the date is April 5 of
15 2002. Ben Miller is talking about a recent draft
16 letter. They think that is this secret final decision
17 that was made and that is being withheld from them.

18 Your Honor, you have the event log
19 in-camera submission. I don't know if you have it with
20 you.

21 COMMISSIONER BIGGAR: I do have it with
22 me. And I have reviewed it in preparation for today,
23 but apparently I'm going to have to review it again.

24 MR. GIUDICI: I'm going to walk you
25 through a couple of the pages, or I can just make the

1 record for you.

2 On page 63 of the event log, those are the
3 dates, April 4, and then it shows up April 11.
4 Mr. Miller's e-mail is April 5, so his -- the time of
5 his e-mail is between these two entries that you can
6 see in your event log.

7 On the 4th, the protest hearing officer is
8 doing additional factual development. On the 11th, she
9 has had an auditor who was helping her develop and
10 analyze information. So they're saying that there's
11 supposed to be a final decision.

12 You can tell just by the sequence, the
13 protest hearing officer is still working on it, but
14 here's what gets even better, what I didn't realize.

15 The reference to the draft letter would be
16 in sequence before that date, so on page 62 of the
17 event log, the first --

18 COMMISSIONER BIGGAR: Let me cut you off.
19 I think we should go to the bottom line. I really am
20 pretty familiar with what your argument would be, and I
21 agree with you to the extent that I couldn't find
22 anywhere in any of the memos anything -- anything that
23 said, you know, we promise the other side or that we're
24 going to be -- give a decision by this date, or that
25 says internally that okay, we're going to have this

1 done by this date.

2 There's nothing. There are many
3 references -- whether they have them or not -- to the
4 fact that everybody -- everybody on both sides, it
5 seems, is pointing to a certain date, and then it just
6 kind of goes by, and now we're trying to -- we're
7 working toward a next date.

8 Usually counsel for the plaintiff, the tax
9 counsel in California, Mr. Coffill, you know, for a
10 number of years has been trying to get a date, and they
11 just seem to be going from one to another for one
12 reason or another, information on both sides.

13 So I'm not ever saying -- I'm never going
14 to make a ruling that you said that the FTB said, you
15 know, we'll have a decision by this date.

16 Here's what my problem is. They are
17 arguing, and they want to argue, and they'll want to
18 argue at trial that a part and parcel of the
19 persecution of Mr. Hyatt by the FTB, as they would
20 characterize it, the Tax Board's abuse in regard to
21 him, would be this failure to reach a decision in the
22 protest -- at the protest level for X number of years,
23 and however they will characterize it, whenever they
24 want to start counting, from when the audit started or
25 when the first report was made or whenever they want to

1 say.

2 And they're going to be talking about
3 years and years and years, and they're going to be
4 saying this is unprecedented and it's never happened
5 before.

6 Your position is obviously no, that's not
7 right. You know, and we have all of these good
8 reasons, but they're going to say, well, they want to
9 say that, and they want to produce this e-mail, and
10 they want to produce this memo, and they want to give
11 us these lines, but they don't want to let us talk to
12 any of these witnesses because they have privileged
13 information and their attorney, so they can't talk
14 about these procedures.

15 Now, to me, that is -- we have arrived at
16 an unfair impasse here. I think they're entitled to
17 make this claim, because I think any reasonable person
18 would say, "I've never seen -- you've never given me
19 any documents -- you've never given me -- look,
20 Mr. Commissioner, you know, here's 50 other cases that
21 took this long. Here's their names and so forth. And
22 if you want to check details on them, you can see that
23 many cases the last ten years or seven years or eight
24 years at this level, and it's not unusual."

25 I haven't gotten anything like that. They

1 haven't gotten anything like that. If they got
2 something like that, I think that would be puncturing
3 their balloon and they wouldn't have much to say.

4 But, you know, I would think that -- I'm
5 certainly not making a decision, but that a judge would
6 let them argue that as part of their argument.

7 On the other hand, you know, I'm going to
8 preclude you from arguing against it unless you allow
9 them to take depositions or have discovery about --

10 MR. GIUDICI: The delay?

11 COMMISSIONER BIGGAR: Well, about the
12 process. And that's it. Why are we having this delay?
13 I've got all the argument. I see your event log. You
14 know, I think that provides a kind of a -- at least a,
15 you know, timeline and things that were happening.

16 I don't know -- I'm sure there's a lot of
17 others things happening in addition to things that are
18 recorded in this event log, but -- you know, as to
19 what's going on, but to not let them have that
20 information or talk to the people who are -- you know,
21 who can say, "Yes, this is what I was doing. Yes, we
22 were still considering that because we didn't have the
23 information," or "This is what we were doing at that
24 point," you know, I don't know how we're going to get
25 around that.

1 So it, to me, is yes, I -- there's no
2 question, and I've ruled earlier in the case that, you
3 know, this is information that is really not related to
4 the initial -- the underlying claim.

5 This all has to do with this litigation in
6 part and the protest proceedings in part, which I think
7 the court, from the Supreme Court on down, you know,
8 says, you know, we shouldn't be interfering in the
9 business of, you know --

10 MR. GIUDICI: The decision-making?

11 COMMISSIONER BIGGAR: -- of the state.
12 And I agree with all that. But it would be unfair, I
13 feel, to allow you to argue that you were doing
14 everything in a nice orderly fashion, and here's the
15 reason, but you can't -- you know, but you can't
16 question any of our witnesses or you can't examine any
17 of the documents except the ones we give you, you know,
18 that tend to support our position. You can't do that.

19 So number one, they've either got to be
20 prevented from making an argument about delay; number
21 two, they've got to be allowed to make the argument,
22 and you can rebut the argument, and in return they get
23 to cross-examine any of the information that you have
24 to support that; or number three, they get to argue and
25 you don't have to support the information, but you can,

1 you know, argue that you have evidence that supports
2 your side.

3 And if you have a response to that, that
4 you think there's another -- you think there's another
5 way to do it, that's what I need to hear.

6 MR. GIUDICI: Your Honor, I don't even
7 hardly know where to start. The complaint alleges that
8 the notices of proposed assessment, a specific event in
9 this process, were issued in bad faith. That, plus
10 Anna Jovanovich, is what the Nevada Supreme Court has
11 asserted jurisdiction over.

12 This ongoing process is not even pled in
13 their first amended complaint. Now you're making all
14 sorts of contentions they're going to get past this and
15 then be able to get to trial.

16 COMMISSIONER BIGGAR: Perhaps we should
17 have some kind of motion from your side to have a
18 determination by the court on that.

19 MR. GIUDICI: We've been -- in these
20 discovery fights, we keep pounding that, and you keep
21 kind of ignoring us.

22 COMMISSIONER BIGGAR: I'm not the one who
23 is going to make a decision on whether or not they can
24 argue that, that that's a claim that they have viable
25 in this case.

1 They're saying it is. You're saying it's
2 not. But as far as discovery is concerned, we're going
3 to go forward until you say -- until the judge says,
4 "Wait a minute, you know, that's not part of that
5 case."

6 Believe me, I would be happy. If that's
7 not part of that case, fine. It limits it. But if it
8 is part of the case, then the discovery has got to go
9 forward.

10 So I think -- you're the one who is
11 resisting the discovery. I think it's your burden to
12 address the court and say, you know, "They haven't pled
13 this. Why should they be getting this information, and
14 their argument is this is a continuation of the bad
15 faith. How could we plead it? We didn't know it was
16 going to happen until -- you know, every day goes by
17 and this is -- and they'll say, this is how we're being
18 prejudiced. There's no other case in history that they
19 haven't made a decision by now. What's the deal? It
20 must be abuse of some kind."

21 And you say whatever your argument is, and
22 the judge makes a decision.

23 MR. GIUDICI: Right now part of what I'm
24 going to say is, your Honor, is as you'll recall, the
25 last time I was here, one of their requests for

1 production of documents in their own possession
2 referred to a letter from the taxpayers association or
3 something, complaining to a legislature in California
4 about a protest that took 15 years, and we've provided
5 you the timeline. Just a snapshot shows 40 months is
6 directly attributed to Mr. Hyatt.

7 COMMISSIONER BIGGAR: That's your
8 position, and that's because your -- you know, I'm not
9 arguing either side. What I'm saying is that's your
10 position that he hasn't produced documents and that
11 causes the delay. His position is he shouldn't have
12 had to produce the documents and, you know, so we go
13 round and round on that.

14 I don't know what it is. The question is
15 whether or not they're going to be allowed to argue
16 this claim in this case, and until -- and they've said
17 that it's part of their claim.

18 You know, I'm not going to make a
19 decision, because I'm not the one who has -- talking
20 about jurisdiction -- jurisdiction to make that
21 decision here or not. I think the judge has to make a
22 decision, and I'm -- the way this case goes, I don't
23 think it will stop with the judge, depending on
24 whatever they rule, that it goes on to a higher judge.

25 So, you know -- but I'm not going to --

1 it's very difficult for me to say that this kind of
2 delay, you know, doesn't at least give them a
3 reasonable argument on their side. I mean, it just
4 does. When I see the case, you know, we're going to
5 get -- all we need is -- you know, we're talking about
6 this in 2000. We're talking about it in 2001. I'm
7 talking, you know, the --

8 MR. GIUDICI: The process.

9 COMMISSIONER BIGGAR: -- the processes
10 they're talking about. Both sides are talking about
11 it, and aiming at this, and we're going to finish this
12 up by then, and we'll get you a decision.

13 And oh, well, this is on hold. Okay. And
14 we're all in agreement that we're waiting for this, you
15 know, so now we're going on.

16 And the thing that troubles me is that
17 whereas I tried and I thought that the issues in this
18 case, as they initially were presented, could be
19 separated as the courts ruled so that the discovery in
20 this case would not go to the continued case in
21 California, that the case in California would rise or
22 fall on what they had at the time that the audit was
23 made, or they would have -- you would have a new case
24 or something that -- you know, and whatever the process
25 is. But now, this case is just feeding the California

1 protest proceeding.

2 And so -- and they're arguing that that
3 isn't fair. I can't prevent them from arguing that,
4 and so we're kind of at an impasse there.

5 That's why, you know, I'm certainly -- I
6 don't want to get -- I don't think that these people
7 should be -- that these protest officers should be
8 subject to discovery in this case because it's not part
9 of it.

10 But when we get to this point where the
11 question of delay in just reaching a simple decision --
12 after this decision, we go on to another decision, and
13 we're past this hurdle, and we don't have this
14 argument.

15 But as long as this continues to drag out,
16 you know, on the straw of, "We need more
17 information" -- that's basically what the FTB is
18 saying. "We can't make a decision because we don't
19 have the information. They aren't supplying the
20 information."

21 MR. GIUDICI: The protest hearing officer,
22 a quasi-judicial administrative official of a sister
23 state, is saying, "I need more information before I can
24 make that decision."

25 In all due respect, your Honor, you are

1 the Discovery Commissioner. You are being asked to
2 exercise a power in discovery, and I would think that
3 before you made that decision, you would want to make
4 sure you knew what the facts were and make sure they
5 have at least laid down a sufficient factual basis.

6 I was trying to point through the event
7 log their references to this sourcing -- this memo that
8 they think is this hidden decision, is actually
9 referring back to a draft letter that attorneys in the
10 protest are trying to draft because they need the
11 information.

12 And they're saying, you know, the protest
13 attorneys can't send that letter to Mr. Coffill because
14 it would violate the Nevada's protective order, your
15 Honor.

16 It's your protective order that's causing
17 all the delay. And you're sitting here accepting
18 everything they have to say, and I'm absolutely amazed.

19 The hidden -- the so-called hidden order,
20 it refers back -- when you track it through the event
21 log, the evidence that is in front of you, it refers
22 back to the protest hearing officer's report that we
23 gave them a long time ago.

24 And in that report on page 1, which they
25 hid from you, she is talking about she spotted this

1 sourcing problem. She doesn't even have the contracts.
2 She wants to know. She ends her report. They talk
3 about the alleged computational error, which we have
4 laid out twice in detail for you. Mr. Cowan's memo or
5 schedule is bogus. It is false and fraudulent.

6 COMMISSIONER BIGGAR: Let me ask you this.
7 I understand that. And you're reading, I believe, the
8 documents, like a 2000 document, is it not? Does the
9 FTB have a process where if the taxpayer does not give
10 them information, that they go ahead and make a ruling?

11 I mean, in every protest hearing, isn't
12 there a -- if the taxpayer doesn't produce the
13 information, there's never going to be a decision
14 because that would seem to me a wonderful way to avoid
15 ever paying any taxes.

16 "Oh, you need this before you make a
17 decision."

18 "Fine. We'll look around for it."

19 Doesn't there come a point where there's a
20 decision made because in the view of the taxing entity
21 that the taxpayer has failed to -- fails to do it, so
22 our decision is based on this, and that seems to me to
23 be a reasonable basis.

24 You talk about discovery rulings. That's
25 the way I rule. If I say get this discovery up, and I

1 don't care if you have it or not, but if you don't
2 produce it, you lose. That's the way it is.

3 For some reason the FTB, instead of doing
4 that -- because that's the whole thing. You're talking
5 about 2000, the year 2000. Yes, I agree that they
6 brought up that sourcing thing. I agree that they
7 wanted to look into that. I agree that they've asked
8 for documents. I agree with all of that.

9 Now, your position is, and Hyatt
10 adamantly, you know, "They didn't give us anything.
11 Okay. Well, so that's why we haven't made a decision."

12 Is that not what you're arguing?

13 MR. GIUDICI: I don't know why the protest
14 hearing officer has made the decision. She is engaging
15 in a search for the truth.

16 COMMISSIONER BIGGAR: Well, we have a
17 problem here in Nevada, sir, that says, you know, if
18 this case doesn't get to trial within a certain time,
19 then it's dismissed.

20 Now, it seems to me, you know, that's the
21 way it goes. It doesn't make any difference what the
22 court orders. A certain time goes by, the case is
23 over.

24 And, you know, unfortunately that's
25 working against this side in this particular case

1 because the case apparently is never over in front of
2 the FTB. I mean, it can go on forever, ever and ever
3 and ever. You know, and that's --

4 So they have to make a case out of saying
5 there was delay, and I just don't know what they are
6 supposed to do. I'm trying to give both sides an even
7 playing field here to discuss the issues in this case.

8 MR. GIUDICI: Your Honor, here's what's
9 going on. We are producing witnesses. Mr. Dunn is
10 going to be deposed. Mr. Ben Miller is going to be
11 deposed. But what we are doing is we are protecting
12 the mental process of that -- of the protest hearing
13 officer.

14 Mr. Dunn and Mr. Miller are going to
15 testify about what they did, how they struggled to
16 comply with the protective order and the delay.

17 There's a difference, in my mind -- and I
18 can segregate in that event log -- different things
19 that you can see is her thought process. She's
20 evaluating all of these statements that Mr. Hyatt has
21 given you -- or given her, and you can see that in that
22 event log.

23 She's making a statement to herself about
24 how she's evaluating the evidence. That is mental
25 process. That is privilege. That is beyond the

1 constitutional authority of any Nevada court to intrude
2 into.

3 Now, these witnesses are going to be
4 produced, and they are going to explain what they did,
5 how they've complied with the protective order, but
6 there is a difference between that and the protest
7 hearing officer's ongoing mental process.

8 COMMISSIONER BIGGAR: I agree with that,
9 but most of the event log, I think you will agree with,
10 has got very little work product. It's just a
11 recording of events that happened.

12 Am I correct about that? Out of all of
13 the events recorded, there's very little substantive
14 discussion whatsoever. And most of that is -- not most
15 of it. Well, a good part of it is referred to in your
16 points and authorities that -- you know, and say, "This
17 is what this entry says and it supports our" --

18 MR. GIUDICI: It shows -- this is on the
19 front. Your Honor, again, I had so much on my plate, I
20 barely had a chance to look at that event log. I knew
21 that --

22 COMMISSIONER BIGGAR: Well, maybe we
23 should postpone the event-log argument because they're
24 not ready for it, and it will be argued at the next --
25 I mean, nothing is going to happen about that.

1 Let me do this. You know, if you -- if
2 indeed Mr. Dunn's deposition is coming up, and I
3 believe you mentioned one or two others coming up who
4 are going to testify and are prepared to testify about
5 the procedure and delay or what happened event by event
6 or whatever through that period.

7 MR. GIUDICI: Right.

8 COMMISSIONER BIGGAR: Perhaps that may
9 solve the problem to some degree, and, you know, I
10 would rather -- because I'm reluctant, in the first
11 place, to allow these depositions to go forward at this
12 point in time.

13 And I think it would be more advantageous
14 for me to -- and for you to be able to argue, "Here's
15 what we've told them. We presented witnesses and they
16 talked about all of the process."

17 At least we'll have that, and then I can
18 hear argument about why they need more, is what they're
19 going to be arguing.

20 MR. GIUDICI: Your Honor, in fact, I was
21 going to request permission. If I could go through
22 that event log and redact out all of the things that
23 are mental process, and I would do that in yellow
24 highlight and submit it to you so that you can see what
25 I think is this mental process.

1 COMMISSIONER BIGGAR: The rest of the log
2 could then be produced to them?

3 MR. GIUDICI: Yeah, because as I told my
4 client, I said, this stuff helps us.

5 COMMISSIONER BIGGAR: Well, I say there's
6 very --

7 Wait a minute, Mr. Hutchison. Sit down a
8 minute.

9 MR. HUTCHISON: Judge, I'm concerned
10 because you're switching gears now on a point that is
11 absolutely wrong.

12 COMMISSIONER BIGGAR: No. Wait. I think
13 that may be a reasonable solution, if you accept my
14 ruling on what is mental thoughts or anything, because
15 there really is very few. I don't think that would be
16 a big burden.

17 And what I would like to see, then, is
18 what you think would be reasonable to be produced to
19 them so they would have it at the next hearing, and I
20 would have the information that was redacted.

21 MR. GIUDICI: Yeah.

22 COMMISSIONER BIGGAR: All right?

23 MR. GIUDICI: That's what I was going to
24 even request.

25 COMMISSIONER BIGGAR: We'll do that.

1 MR. GIUDICI: Okay.

2 COMMISSIONER BIGGAR: Now, let me see.

3 MR. HUTCHISON: May I be heard, your
4 Honor?

5 COMMISSIONER BIGGAR: Okay. Okay.
6 Briefly.

7 MR. HUTCHISON: Here's what I want to be
8 heard on. All of this with Mr. Miller and Mr. Dunn,
9 two lawyers, telling us -- well, the protest officer's
10 ruling would tell us anyway -- if the FTB counsel will
11 limit me, telling them everything that Mike Kern is
12 going to say or Gil Hyatt or Grace Jane, we don't need
13 to take their depositions, either. I'll just tell you
14 what they're going to say. Judge, this is crazy.

15 COMMISSIONER BIGGAR: First of all -- wait
16 a minute. It's a different scenario here. We're not
17 talking about anything substantive that these people
18 did. We're talking about what happened, a process.

19 And, you know, I don't know what other --
20 there's depositions that are set for whatever reason,
21 but in this area, we're talking about what was done
22 during this period working on the case and what, if
23 any -- "delay" has been the word that's used. What has
24 caused it? What have been the reasons that there's
25 been no decision on the protests up to this point?

1 MR. HUTCHISON: Right. We didn't notice
2 them on that process, because frankly, we don't think
3 Bob Dunn or Bill Miller are going to be able to tell us
4 what the protest officer did or didn't do, but we will
5 ask them that question if you want us to do that.

6 My point is now counsel is thumping on the
7 table, pointing fingers and making this big, huge point
8 that you're just wrong.

9 COMMISSIONER BIGGAR: And that's fine. He
10 can do that.

11 MR. HUTCHISON: He can do that, Judge, but
12 first of all, Mr. Giudici is a little late coming to
13 the case. You already had your protective order
14 litigated and affirmed at the Nevada Supreme Court,
15 this terrible document that is supposed to cause all
16 the delay and all the problems for the State of
17 California.

18 Well, a bunch of justices up in Carson
19 City decided you were right on that. I know the State
20 of California doesn't like that. They don't believe
21 that you have a constitutional right to do what you're
22 doing.

23 It's already been litigated before the
24 U.S. Supreme Court, Judge, and now we're going back and
25 arguing these same arguments again?

1 What we're arguing about is what you've
2 already said, and that is a proceeding that continues
3 on the tortious conduct that we are going to prove in
4 this case and present to the jury. Why can't we talk
5 to the percipient witnesses? That's as simple as it
6 is.

7 COMMISSIONER BIGGAR: One way or the
8 other, and apparently nobody is going to take my advice
9 about the scope of the case, but I can tell you if
10 we -- that until the court, until the judge or
11 appellate judge says discovery into the delay or
12 argument about the delay is not part of the case, I'm
13 going to let that go forward.

14 MR. HUTCHISON: Okay.

15 COMMISSIONER BIGGAR: But I'm trying to
16 get the problem resolved. I would like to see some
17 sort of ruling in that regard, but I can tell you that
18 eventually a ruling that I would make would be that you
19 would have the opportunity to take these depositions of
20 the people who were involved in the delay, or I would
21 prevent them from arguing information that you didn't
22 have a chance to cross-examine.

23 That seems to me to be the only fair way
24 to rule in this case, but I think that what's important
25 to do is to get the -- is to get the facts about what

1 caused the delay.

2 MR. HUTCHISON: Right.

3 COMMISSIONER BIGGAR: And I don't really
4 care who can produce them, but I mean, you know, it's
5 got to start somewhere.

6 And the information that the FTB is at
7 this point without contention, without further delay,
8 is willing to produce to flesh out the facts of, you
9 know, the delay in the process and getting this
10 resolution, I think that's a good starting point, and
11 then we can make a determination as to what's missing,
12 if anything, and who is right to do it, and then you
13 can make what argument. So that's the way --

14 MR. HUTCHISON: One point of
15 clarification. Judge, are you instructing them, the
16 FTB, to bring a motion before the district court --

17 COMMISSIONER BIGGAR: I'm not instructing
18 anybody how to run their case.

19 MR. HUTCHISON: Because if they don't,
20 let's just go forward with the depositions.

21 COMMISSIONER BIGGAR: I'm going to stay
22 these depositions, at least temporarily, Cinnamon,
23 Woodward, McLaughlin. Those are the three that I think
24 you wanted.

25 MR. HUTCHISON: Right.

1 COMMISSIONER BIGGAR: At this time,
2 pending further -- I'm not foreclosing them at this
3 point, but I'm giving the FTB an opportunity, and as I
4 explained earlier, I'm giving them the opportunity to
5 explain the delay with more than argument, which is not
6 enough, but with facts to support what has been going
7 on.

8 Otherwise, I feel as though the plaintiff
9 is entitled to argue the delay and do the discovery in
10 the delay, and they then have the -- they then have the
11 right to say, "No, we're not going to bring these
12 people for a deposition," and at that point, then my
13 ruling will be that they'll be precluded from arguing
14 against that, as opposed to a recommendation to strike
15 the answer or something.

16 I don't think that would be appropriate.
17 I don't think it would fit the -- it would be an
18 appropriate sanction for, you know, their actions in
19 that regard, but I would preclude that. That would be
20 my ruling. All right. So I hope we're clear on that.
21 So we got to move on.

22 The -- as far as the -- I can tell the FTB
23 people here that they're obviously the puffery of
24 Mr. Toman, and I don't know, maybe less or so
25 Mr. Goldberg, but I still don't find the -- I still

1 don't find the necessary foundation set to take their
2 depositions.

3 I think it's more -- it's not going to
4 leave the discovery of admissible evidence at this
5 point in time. I don't see sufficient connection.

6 Toman, who is currently the chief counsel
7 -- or he was chief counsel at the time. I forgot which
8 it is. One or the other. I still don't see enough
9 connection to allow their depositions. I think we're
10 getting way too far away. We have to deal with the
11 people who are controlling the case.

12 Now, as far as the Japanese deposition is
13 concerned, I'm going to deny that as well. I'm not
14 going to compel the Japanese depositions.

15 What I need -- all I've got,
16 Mr. Hutchison, is argument from your side that says
17 that these two letters, you know, caused a huge
18 rippling effect in the Japanese business world. And if
19 I had one thing, if I had one witness, one witness that
20 could give me something that that happened, I would
21 then let you go forward on it.

22 MR. HUTCHISON: Okay.

23 COMMISSIONER BIGGAR: But I just don't
24 have it. I've got speculation. You know, it's very
25 reasonable. It's a very --

1 MR. HUTCHISON: It's plausible. It makes
2 sense.

3 COMMISSIONER BIGGAR: Nice argument, yes.
4 Knowing the culture, allegedly. I don't know the
5 culture, but I mean, that's certainly the -- you know,
6 what -- at least as one gloss on the Japanese culture
7 is that it would be like this. I've got to have
8 something more before I let you go into what their
9 policies were in regard to the Japanese companies. So
10 I'm denying that at this point in time.

11 MR. HUTCHISON: Without prejudice to let
12 us come back later?

13 COMMISSIONER BIGGAR: Yes.

14 MR. HUTCHISON: And we will be back
15 because we believe we have that information.

16 COMMISSIONER BIGGAR: I guess the
17 in-camera documents we'll postpone until the next time,
18 and we'll do it the way we proposed. And I think
19 that's basically all we have today.

20 MR. HUTCHISON: Well --

21 COMMISSIONER BIGGAR: Okay. Did I not
22 rule on something?

23 MR. HUTCHISON: No. You ruled. I'm just
24 not clear about the protest officers.

25 COMMISSIONER BIGGAR: Protest officers,

1 I'm denying their depositions at this point in time,
2 pending further information to be supplied concerning
3 the facts of delay in resolving the protest, and then I
4 will let both sides argue about why you still need
5 these particular depositions.

6 MR. HUTCHISON: And in my mind, I'm just
7 thinking, is the triggered event for this the Miller
8 and the Dunn depositions? So you come back after
9 that --

10 COMMISSIONER BIGGAR: The Miller and Dunn
11 depositions, plus the supply of this event log, plus
12 anything else they want to turn over that might help
13 their case. Then I'll listen to further argument.

14 MR. HUTCHISON: So all you're doing is
15 continuing the motion pending additional discovery of
16 the case?

17 COMMISSIONER BIGGAR: Right.

18 MR. HUTCHISON: So you're continuing the
19 motion. That's fine.

20 COMMISSIONER BIGGAR: Okay. Did you have
21 something else, Mr. Hutchison?

22 MR. HUTCHISON: Well, I was just going to
23 make a comment. I'm not sure how -- you know, we
24 have --

25 COMMISSIONER BIGGAR: I don't think we

1 need any further comments.

2 MR. HUTCHISON: It kills me. Mr. Dunn is
3 supposed to have an ethical wall up as a litigator in
4 this case, and yet he can tell about a protest
5 proceeding.

6 MR. BRADSHAW: Process.

7 COMMISSIONER BIGGAR: In any event, we'll
8 see what happens. Here's my concern with the State of
9 California. I get the feeling and I get the argument
10 today, on one hand you argue that, you know, you're
11 acting on behalf of the state.

12 On the other hand, I feel as though this
13 is a private litigation between counsel here and your
14 clients, whoever it might be on the Tax Board, and
15 Mr. Hyatt on the other side.

16 I don't think it's supposed to be like
17 that. Isn't the state supposed to be doing the right
18 thing and, you know, ignoring -- whatever Mr. Hyatt may
19 be doing in trying to rightfully protect his tax status
20 or wrongfully trying to avoid taxes? That's an
21 individual.

22 The state, it seems to me, has a little
23 higher obligation to conduct the -- on the one hand,
24 conduct their tax audit and reach a decision, and on
25 the other hand, defend the allegations in this case.

1 And you -- I guess you have that feeling,
2 too, because, you know, you think I'm accepting
3 everything they say, but on the other hand, I'm -- this
4 is not supposed to be a contest. It's supposed to be a
5 search for the truth and that kind of thing.

6 And the way it -- you know, the way we're
7 going about it, it's a struggle between the sides
8 before they release information. It's not -- it
9 doesn't seem like we're trying to reach the merits of
10 the case.

11 We're trying to get the upper hand, so to
12 speak. We're having strategy on what to present and
13 produce on one side or another. Whereas I expect that
14 from private litigants, I don't really expect it from
15 legal entities. Whether it's a county or a state or
16 another government, I think they should -- I think you
17 should be trying to do the right thing and perhaps on a
18 higher level.

19 So I don't need any argument in response
20 to that. I'm just saying that that's the way I think,
21 and that's why I guess I find that I'm -- problems are
22 building up for me and for the court in this case
23 simply because of the lack of resolution of an
24 administrative matter in the State of California.

25 I don't know that that's a good idea, and

1 so if I tend to be slanted toward the plaintiff, as you
2 see me, it may be for the very reason that, you know,
3 that these items are not forthcoming.

4 And I really find that until Mr. Bradshaw
5 came into the case, that the State of California was
6 even less, you know, willing and flexible to produce
7 information and, you know, thought that this was a
8 witch-hunt or something.

9 And I can assure you that it is not
10 against the state and the taxing entity. It's an
11 attempt to try and give everybody their day in court
12 here.

13 So I put a higher burden on the state to
14 act, you know, according to the rules, whereas, yes,
15 it's nice to win, but it's also -- I think it should be
16 playing fair and by the rules, not only in this case,
17 but in your other connections with Mr. Hyatt and the
18 State of California.

19 Now, any other questions on the matters
20 that we have before us? There was somebody mentioned
21 the witness or the depositions. Are those all worked
22 out?

23 MR. HUTCHISON: Mr. Bernhard can give you
24 a little more information on that. In regard to the
25 scheduling, given the court's ruling, what I would like

1 to do is accelerate, to the extent possible, the
2 depositions of Mr. Miller and Mr. Dunn so we can get
3 this matter clarified rather quickly.

4 I can't remember where they are in the
5 schedule, but I would just request that the FTB counsel
6 work with us in accelerating those depositions so we
7 can get them sooner, rather than in December or
8 something like that, more like in the October time
9 frame.

10 MR. BERNHARD: They are.

11 COMMISSIONER BIGGAR: They're coming up in
12 the next three weeks.

13 MR. BERNHARD: The 17th and the 19th of
14 October. On the 18th, we have a hearing before you, so
15 Mr. Dunn's depo will be taken on the 17th. We'll have
16 that before you on the 18th, before we take
17 Mr. Miller's depo on the 19th.

18 COMMISSIONER BIGGAR: That's fine. Let's
19 not move him around. That will cause him more trouble
20 than anything. If I have to listen to more argument
21 after that, at least we'll have the log thing out of
22 the way.

23 And Mr. Miller and Mr. Dunn, whichever it
24 is, deposition will be fresh in your mind. I'm sure
25 both sides will be interpreting that for me on that

1 middle day. Anyway, we'll go from there. Okay.

2 MR. GIUDICI: May I be heard? First of
3 all, I apologize for losing my temper.

4 COMMISSIONER BIGGAR: I didn't realize you
5 did.

6 MR. GIUDICI: Wait until my Irish kicks
7 in. That's just the Italian side.

8 Because, your Honor, I started to smile
9 when you talked about this. I started my career in
10 this community 20 years ago, and I spent six years in
11 the Nevada Attorney General's office, and I had --
12 actually, I clerked for the late Roger Foley, and then
13 I had gone to the AG's office, and I handled some of
14 the major cases. I don't need to go into those.

15 I have never been involved in a case in my
16 career where the animosity, and especially early on --
17 I don't mean to cast aspersions on either side, but
18 there clearly was a time when the chemistry between
19 counsel and the former counsel for the FTB, I had never
20 seen anything like that.

21 I think I'm speaking for Mr. Bradshaw and
22 my firm. We were appalled at what was going on. And
23 some of it has still carried on.

24 And I am still amazed at this case. I
25 still have never seen a case like this. I had worked

1 24/7 all summer. I haven't shaved since I was in front
2 of you because I've been crunching to respond to what I
3 feel are outrageous demands on discovery.

4 MR. HUTCHISON: What's the point?

5 MR. GIUDICI: The tension of all this --
6 you're right, your Honor. When I was in this
7 community -- and I know these guys, but there's
8 something about this case.

9 COMMISSIONER BIGGAR: Mr. Hutchison, it
10 doesn't do any good really to sigh and moan. You're
11 not prone to that very often, you know, but -- but you
12 can do it when you're rattled. So it doesn't do any
13 good. You know, that's not helpful.

14 And you've had your chance, and I've got
15 to listen to them sigh and moan on this side, and he's
16 not saying anything except that there's been animosity
17 in the case, mostly previously. There's been tension.

18 I agree with all of that. So you know,
19 there's no use -- and nobody is saying Mark Hutchison
20 is the one who is doing it. Mark Hutchison is
21 advocating for his client. Nobody is causing you a
22 problem. I'm sure it's all Mr. Kula's fault.

23 MR. HUTCHISON: I'm lead counsel. I wish
24 I had a quarter for every time I heard counsel say
25 "I've never seen this before in a case." It's always

1 that way. It's always every time counsel is outraged
2 by the comments of opposing counsel.

3 COMMISSIONER BIGGAR: I don't think that's
4 what he was saying. I do agree with many things that
5 he hasn't seen except in this case, and probably I
6 haven't seen them except in this case either, but that
7 doesn't mean they're bad things. It's --

8 MR. HUTCHISON: Good and bad.

9 COMMISSIONER BIGGAR: So in any event, on
10 the 18th, and we will pick up, and I'm sure if there's
11 any other motions that, you know, get them to me prior.

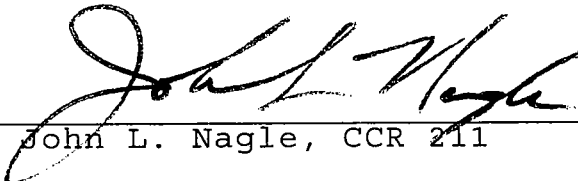
12 I do -- it's just when I get a stack of
13 significant -- you know, high stack, I really need to
14 have them a few days before the hearing in order to be
15 able to review them and everything, especially if
16 they're more in-camera documents, but we will discuss
17 that, and I expect that exchange of information before
18 the next hearing.

19 Thank you, gentlemen.

20 MR. HUTCHISON: Thank you.

21 *****

22 ATTEST: Full, true and accurate transcript of the
23 proceedings.

24 
25 John L. Nagle, CCR 211

10-1-05
Date

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From temper to you've

EXHIBIT 49

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2005 NOV -4 PM 3: 53

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,
Plaintiff,

vs.

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

Defendants.

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

**FTB'S MOTION FOR PARTIAL
SUMMARY JUDGMENT RE: ONGOING
CALIFORNIA ADMINISTRATIVE
PROTEST PROCESS**

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

Hearing Date:
Hearing Time:

Defendant Franchise Tax Board of the State of California ("FTB") moves for partial summary judgment and/or dismissal on Plaintiff's newly-minted "claim" which attempts to litigate in this Nevada court any and all gripes he has concerning the ongoing California Administrative Protest Process, including his newly asserted "allegation" that the California Administrative Protest Process is being purposely delayed. As in the case of the previous motion for partial summary judgment FTB was forced to bring, Plaintiff has not formally asserted any claims about the California Administrative Protest Process, but Plaintiff has sought extensive discovery into that process and Plaintiff has repeatedly suggested that such a "claim" will be made at trial. Plaintiff's present actions clearly reveal that he is attempting to erode the clear lines of demarcation established by previous courts which

1 extensively examined and decided the jurisdictional boundaries of this case. Additionally, Plaintiff's
2 present actions reveal that he is attempting to re-litigate final decisions made by California courts.

3 This motion is brought pursuant to NRCP 56 and NRCP Rule 12(h)(3). This motion is based
4 upon the following memorandum of points and authorities, the supporting exhibits attached hereto, as
5 well as all matters properly of record, and any oral argument the Court may allow.

6 Dated this 4th day of November, 2005.

7 McDONALD CARANO WILSON LLP

8
9
10 By

THOMAS R. C. WILSON, ESQ.

Nevada State Bar # 1568

JAMES W. BRADSHAW, ESQ.

Nevada State Bar # 1638

JEFFREY A. SILVESTRI, ESQ.

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McDONALD CARANO WILSON LLP

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(775) 788-2000

Attorneys for Defendant Franchise Tax Board
of the State of California

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19 NOTICE OF MOTION

20 TO: All Parties and Their Counsel of Record:

21 PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion for Partial
22 Summary Judgment re: Ongoing California Administrative Protest Process for hearing before the

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 above-entitled Court on the 12 day of Dec, 2005 at the hour of 9AM in Department X of the
2 above-entitled Court, or as soon thereafter as counsel can be heard.

3 Dated this 4th day of November, 2005.

4 McDONALD CARANO WILSON LLP

6 By 

7 THOMAS R. C. WILSON, ESQ.

8 Nevada State Bar # 1568

9 JAMES W. BRADSHAW, ESQ.

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18 Attorneys for Defendant Franchise Tax Board
19 of the State of California

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POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves the Franchise Tax Board of the State of California ("FTB"). The facts arise from FTB's audits of a long-time resident of the State of California, Gilbert P. Hyatt ("Hyatt" or "Plaintiff"). On a California income tax return, Hyatt represented that he terminated his California residency in October 1991, immediately before receiving multi-millions of dollars in patent licensing fees. FTB conducted an audit to verify that representation. After conducting an extensive audit, FTB made a contrary finding about Hyatt's residence and issued Notices of Proposed Assessments for tax years 1991 and 1992 seeking additional taxes, interest and penalties. In response, Plaintiff took two forms of action.

First, Plaintiff exercised his rights under California law and filed California Administrative Protests against both the 1991 and 1992 Notice of Proposed Assessments pursuant to the procedures set forth in California's Revenue and Tax Code. A "protest" is a California administrative *de novo* review or appeal of a Notice of Proposed Assessment. The California Administrative Protest is conducted by a California Administrative Protest Hearing Officer charged with the public duty of making a decision as to the taxpayer's potential tax liability to the State of California. This process is referred to herein as the "California Administrative Protest Process." **That process is presently ongoing in the State of California.**

The second action Plaintiff took after the FTB audited him was to file the instant action against FTB seeking a declaration concerning his status as a resident of Nevada, and asserting various causes of action for alleged negligent and intentional tortious conduct on the part of FTB auditors taken when they audited Plaintiff's residency status. Following certain motions heard by the district court, the Nevada Supreme Court and the U.S. Supreme Court challenging the jurisdictional basis of Plaintiff's claims, only the intentional tort claims remain. In sum, what remains of Plaintiff's claims after that jurisdictional review are Plaintiff's allegations that the FTB auditors intentionally invaded his privacy as they sought to determine his residency status.

Plaintiff now seeks to erode the jurisdictional limits previously established by the higher courts in this case. Plaintiff is attempting to litigate before this Court his new "allegation" regarding the

1 ongoing California Administrative Protest Process, specifically that such process has been purposefully
2 delayed. In addition to eroding away at the jurisdictional decisions of the higher courts in this case,
3 Plaintiff is also seeking a **redetermination** in this Court of decisions **already reached** by the
4 California Superior Court and the California Court of Appeals concerning Plaintiff's allegation of
5 purposeful delay of the California Administrative Protest Process. Those California courts have
6 already found that Plaintiff's allegation of purposeful or bad faith delay **are without merit**. For the
7 reasons set forth in this motion, FTB respectfully requests that this Court dismiss Plaintiff's new
8 "claim" and thereby decline to assert any jurisdiction over the ongoing California Administrative
9 Protest Process.

10 It is important in deciding this motion for the Court to be advised of the limits prior decisions
11 have already established. Notably, no Nevada court has made any substantive determinations
12 concerning the merits of any of Plaintiff's claims; rather, prior Nevada decisions have only examined
13 this Court's jurisdictional limits, which include:

- 14 1) Nevada will not assert jurisdiction over Plaintiff's claim for declaratory relief to
15 determine his residency, finding a lack of subject matter jurisdiction, and thus
16 committing the question of his residency to the sole discretion of the State of California.
17 See April 16, 1999 Partial Judgement on the Pleadings, Exhibit 1.
- 18 2) Nevada will not assert jurisdiction over the discretionary acts taken by California's
19 agents, finding that Nevada accords immunity to its own agents for such acts and
20 therefore should accord comity to California on that basis. See April 4, 2002, Nevada
21 Supreme Court Order Granting Petition for Rehearing, Vacating Previous Order,
22 Granting Petition for Writ of Mandamus in Part in Docket No. 36390 and Granting
23 Petition for Writ of Prohibition in Part in Docket No. 35549, Exhibit 2.

24 Equally important to be advised of is the fact that the California courts – both the California
25 Superior Court and the California Court of Appeals – have already examined and rejected Plaintiff's
26 allegations of undue delay or bad faith delay concerning the California Administrative Protest Process.
27 See Exhibits 3(A) and 3(B). Those California decisions are now final. This Court is obligated to
28

1 accept and enforce those determinations under the Full Faith and Credit Clause of both Nevada's and
2 the U.S. Constitution, and under the legal doctrine of collateral estoppel/issue preclusion.

3 The sole question posed by this motion is simply whether Nevada can or should assert
4 jurisdiction over the ongoing California Administrative Protest Process, occurring entirely in
5 California, which process was voluntarily invoked by Plaintiff as part of his statutory rights granted by
6 California. FTB respectfully submits that the answer to that question is simple as well – no. Nevada
7 cannot and should not assert jurisdiction over the California Administrative Protest Process, especially
8 since the very issue Plaintiff intends to raise has already been decided by the California courts.

9
10 II. STATEMENT OF MATERIAL, UNDISPUTED FACTS RELEVANT TO THIS MOTION.

11 FTB is the California government agency with responsibility for enforcing California's income
12 tax laws. See CAL. REV. & TAX. CODE § 19501. FTB's statutory duties include ensuring collection of
13 state income taxes from California residents and from income earned in California by non-residents.
14 (Cal. Rev. & Tax. Code § 17001 et seq.).

15 Hyatt admits to being a long-time California resident through most of tax year 1991. See First
16 Am. Compl. at ¶ 60, Exhibit 4. Hyatt filed a part-year income tax return for 1991, representing that
17 he moved to Nevada on October 1, 1991, just before receiving many millions of dollars in income in
18 late 1991 and early 1992 from his patent license agreements with Japanese companies. See id. at ¶ 8
19 and Exhibit 26. Substantial publicity surrounded Hyatt's patent and licensing program, including a
20 newspaper article that attracted an FTB auditor's attention to Hyatt in mid-1993. See First Am. Compl.
21 at ¶ 25.

22 FTB reviewed its records and found that Hyatt filed only a part-year income tax return with the
23 State of California for 1991. See id. at ¶ 10, and Exhibit 26. After auditing Hyatt, FTB's auditors
24 made a conclusion, finding that Hyatt remained a resident of California liable for payment of income
25 tax until April 3, 1992, the date Hyatt closed escrow on purchase of a home in Las Vegas. See First
26 Am. Compl. at ¶ 30 and Exhibit 5.

27 When the FTB completes an audit, it sends the taxpayer a Notice of Proposed Assessment
28 setting forth the amount of tax proposed to be assessed and the reasons for the assessment. (Cal. Rev.

1 & Tax. Code § 19042). At the time of mailing, the Notice of Proposed Assessment is not final but
2 merely proposed. Id. In Hyatt's circumstance, two Notices of Proposed Assessments were issued: one
3 for tax year 1991 (Exhibit 5) and a second for tax year 1992. Exhibit 6. In this case, the audit
4 processes terminated with the issuance of the Notices of Proposed Assessment on April 23, 1996 for
5 the tax year 1991; and on April 14, 1997, for the tax year 1992. (Exhibits 5 and 6). A Notice of
6 Proposed Assessment may only become final, and therefore enforceable, 60 days after the FTB mails
7 the Notice of Proposed Assessment (Sec. 19042, Cal. Rev. & Tax. Code), **unless** the taxpayer files
8 a written "protest" or appeal, thereby invoking the California Administrative Protest Process, against
9 the proposed tax within that same timeframe. (Sec. 19041, Cal. Rev. & Tax Code).

10 The California Administrative Protest Process began when Hyatt filed his protest of the 1991
11 Notice of Proposed Assessment on June 20, 1996. Exhibit 7. At the request of Hyatt's attorney, the
12 1991 protest was delayed for approximately 16 months until the 1992 Notice of Proposed Assessment
13 was issued so that both protests could be consolidated and processed together. Exhibit 8 (FTB02777
14 and FTB100680).

15 When the California Administrative Protest Process is invoked by a taxpayer, the primary
16 function of the California Administrative Protest Hearing Officer is to resolve protest cases by:

- 17 • Further developing and/or clarifying the facts through contact with the taxpayer. This
18 is accomplished by correspondence and an oral hearing, if requested.
- 19 • Conducting additional research, as necessary, of the appropriate law and court cases.
- 20 • Considering whether the conclusion reached in the Notice of Proposed Assessment is
21 sustainable based on information developed/provided upon protest. Special
22 consideration is given to objectivity and supportability.
- 23 • When resolving a case, the California Administrative Protest Hearing Officer may
24 consider issues other than those contained in the Notice of Proposed Assessment or by
25 the taxpayer's Protest.
- 26 • If an oral hearing is not requested, the California Administrative Protest Hearing Officer
27 assigned to the case will initiate correspondence to enable the taxpayer to submit
28 information and documentation to determine whether or not the grounds asserted by the
taxpayer in the Protest are valid.

26 See Legal Division Protest Manual, dated June 15, 1994, Exhibit 9.

27 When a decision has been made by the California Administrative Protest Hearing Officer, a
28 Notice of Action will notify the taxpayer of whether the California Administrative Protest Hearing

1 Officer has sustained the proposed assessment or modified it. The California Administrative Protest
2 Hearing Officer may withdraw the assessment, revise it or affirm it for the amount of the tax proposed.
3 If the taxpayer disagrees with the California Administrative Protest Hearing Officer's determination,
4 the taxpayer may appeal to the State of California's Board of Equalization or pay the deficiency and file
5 a claim for refund. (Sec. 19045 Cal. Rev. & Tax. Code). If no appeal is filed within the 30-day period,
6 the deficiency becomes final and the tax is due and payable within ten days after demand for payment
7 is mailed to the taxpayer. Id.

8 In Hyatt's circumstance, the California Administrative Protest Process is ongoing.

9 III. RELEVANT PROCEDURAL HISTORY

10 Plaintiff filed his original Complaint on January 6, 1998, On June 6, 1998, Plaintiff filed his
11 First Amended Complaint. Plaintiff's asserted First Cause of Action sought a declaration from a
12 Nevada court - presumptively intended to be binding in California - that Plaintiff was a bona fide
13 resident of the State of Nevada from September 26, 1991 to the present time, and that FTB's audit
14 activity in Nevada was conducted without the authority of Nevada law. Exhibit 4, ¶'s 28-32.

15 On February 9, 1999, FTB moved the district court for judgment on the pleadings based on lack
16 of subject matter jurisdiction, sovereign immunity, comity and other asserted legal principles. The
17 district court stayed the proceedings until the matter was briefed. The district court heard argument on
18 FTB's motion on April 7, 1999. On April 16, 1999, the Honorable Nancy M. Saitta entered her order
19 granting FTB judgment on Plaintiff's First Cause of Action concerning a declaration of Plaintiff's
20 alleged residency status, and FTB's alleged lack of lawful authority to investigate Plaintiff's residential
21 status in Nevada, due to lack of subject matter jurisdiction. Exhibit 1. Judge Saitta did not grant
22 judgment on the pleadings concerning Plaintiff's negligent and intentional tort causes of action. Id.

23 After the parties conducted considerable discovery, FTB filed a motion for summary judgment
24 on Plaintiff's tort causes of action. By order dated May 31, 2000, Judge Saitta denied FTB's motion
25 for summary judgment. Judge Saitta made it clear at the April 21, 2000 hearing on the motion for
26 summary judgment that the denial was without prejudice and that the issues should be revisited once
27 discovery had progressed further. See Exhibit 10, April 21, 2000 hearing transcript pg. 48, ln. 10 - pg.
28 50, ln. 1.

1 Following denial of its motion for summary judgment, FTB petitioned the Nevada Supreme
2 Court for a writ of mandamus arguing that the district court erred because the doctrine of comity
3 precluded a Nevada court's exercise of subject matter jurisdiction over Plaintiff's negligent and
4 intentional tort claims based on FTB's immunity from liability for such under California law. The
5 Nevada Supreme Court then stayed the district court proceedings.

6 By order dated June 13, 2001, the Nevada Supreme Court granted FTB's petition and instructed
7 the district court to enter an order granting summary judgment concerning all of Plaintiff's tort claims,
8 both negligent and intentional torts. Exhibit 11. Plaintiff then petitioned the Nevada Supreme Court
9 for reconsideration. Thereafter, the Nevada Supreme Court partially reversed its prior position, and
10 determined that Nevada had subject matter jurisdiction over the intentional tort causes of action, but
11 that Nevada would apply the doctrine of comity and decline to exercise jurisdiction over the negligence
12 claim pled by Plaintiff, as well as Plaintiff's First Cause of Action for declaratory relief concerning his
13 residency. Exhibit 2.

14 FTB then petitioned the United States Supreme Court for a Writ of Certiorari which was granted
15 on October 15, 2002. On April 23, 2003, the United States Supreme Court entered its decision
16 affirming the Nevada Supreme Court's decision. In doing so the U.S. Supreme Court made it clear that
17 California's sovereign immunity was not extinguished in this case, but must be accommodated by the
18 Nevada courts:

19 The Nevada court *sensitively applied* principles of comity with a *healthy*
20 *regard for California's sovereign status*, relying on the contours of
21 *Nevada's own sovereign immunity* from suit as a benchmark for its
analysis.

22 Exhibit 12, *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 499 (2003) (emphasis added).

23 In determining whether Plaintiff can now expand this litigation to include "claims" or
24 "allegations" about the ongoing California Administrative Protest Process, this Court must follow the
25 lead of the Nevada and United States Supreme Courts and sensitively apply principles of comity "with
26 a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign
27 immunity..." When this analysis is made, the Court will conclude that Nevada may **not** properly assert
28 jurisdiction over the California Administrative Protest Process. Such a conclusion becomes even more

1 mandatory as this Court learns that the appropriate California courts have already examined and rejected
2 Plaintiff's allegation about purposeful or bad faith delay in the ongoing California Administrative
3 Protest Process.

4 IV. LEGAL DISCUSSION

5 A. Standard of Review.

6 1. Dismissal Under NRCP Rule 12(h)(3).

7 The Nevada Rules of Civil Procedure require dismissal of an action or claim "whenever
8 it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject
9 matter." NRCP 12(h)(3). Issues of sovereign immunity are jurisdictional, and are properly raised under
10 Rule 12(h)(3). *E.g., Ramey Const. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318
11 (10th Cir. 1982).

12 2. Summary Judgment Under NRCP 56.

13 Recently, Nevada's Supreme Court had the occasion to reaffirm its previous decisions
14 outlining appropriate summary judgment standards and to reaffirm that "Rule 56 should not be regarded
15 as a 'disfavored procedural shortcut' but instead 'as an integral part of [our procedural rules]' as a
16 whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Wood v. Safeway, Inc.*, 121 Nev. Adv. Op. No. 73, p.3 (October 20, 2005) (citations omitted). The
17 relevant portion of that decision bears inclusion for this Court's benefit:
18

19 We now adopt the standards employed in Liberty Lobby, Celotex, and Matsushita.
20 Summary judgment is appropriate under NRCP 56 when the pleadings, depositions,
21 answers to interrogatories, admissions, and affidavits, if any, that are properly before the
22 court demonstrate that no genuine issue of material fact exists, and the moving party is
23 entitled to judgment as a matter of law. **The substantive law controls which factual
disputes are material and will preclude summary judgment; other factual disputes
are irrelevant.** A factual dispute is genuine when the evidence is such that a rational
trier of fact could return a verdict for the nonmoving party.

24 While the pleadings and other proof must be construed in a light most favorable
25 to the nonmoving party, that party bears the burden to "do more than simply show that
26 there is some metaphysical doubt" as to the operative facts in order to avoid summary
27 judgment being entered in the moving party's favor. The non moving party "must, by
28 affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine
issue for trial or have summary judgment entered against him." The non moving party
"is not entitled to build a case on the gossamer threads of whimsy, speculation, and
conjecture."

1 Id. at pp. 3-4 (emphasis added). FTB bears the initial responsibility of informing the Court of the basis
2 for its motion, and of identifying the evidence that it believes demonstrates the absence of a genuine
3 factual issue relevant to the basis for its motion. *Clauson v. Lloyd*, 103 Nev. 432, 435 n.3, 743 P.2d
4 631 (1987) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986)). FTB satisfies this
5 initial burden by pointing to parts of the record that demonstrate “an absence of evidence supporting
6 one or more of the prima facie elements of the non-moving party's case.” *NGA #2 Limited Liability*
7 *Company v. Rains*, 113 Nev. 1151, 1156, 946 P.2d 163 (also citing *Celotex*). FTB may also discharge
8 its initial burden with evidence that there are complete defenses to Plaintiff's claim. *Lester v.*
9 *Buchanan*, 112 Nev. 1426, 1431, 929 P.2d 910 (1996).

10 Once the FTB satisfies its initial burden, Plaintiff must point to specific facts, rather than
11 general allegations and conclusions, demonstrating the existence of a genuine issue of material fact.
12 *Bird v. Casa Royale West*, 97 Nev. 67, 70, 624 P.2d 17 (1981). Plaintiff ““is not entitled to build a case
13 on the gossamer threads of whimsy, speculation, and conjecture.”” *Wood v. Safeway, Inc. supra*.

14 B. No Nevada Interest Can Be Served By Asserting Subject Matter Jurisdiction Over The
15 California Administrative Protest Process.

16 In considering the unusual question whether to assert subject matter jurisdiction over the actions
17 of the agents of a sister state, the Nevada Supreme Court carefully weighed Nevada's public interest.
18 Exhibit 2. The Nevada Supreme Court then decided to allow Nevada to assert subject matter
19 jurisdiction over Plaintiff's intentional tort claims alleging, in general, invasion of privacy, based upon
20 the acts of FTB auditors in determining Plaintiff's residency **because Plaintiff had no remedy for**
21 **such torts in California since California extends sovereign immunity to FTB's agents against such**
22 **claims. Id.**

23 In contrast to Plaintiff's intentional tort claims arising from alleged acts by FTB's auditors,
24 California has created comprehensive statutory procedures by which a California Administrative Protest
25 may be further reviewed at both the California administrative level and in California courts. (Sec.
26 19041 Cal. Rev. & Tax. Code.) For example: When a decision has been made by the California
27 Administrative Protest Hearing Officer, a Notice of Action advises the taxpayer of whether the
28 proposed assessment has been sustained or whether it has been modified. (Sec. 19044 Cal. Rev. & Tax.

Code). If the taxpayer disagrees with the California Administrative Protest Hearing Officer's decision, the taxpayer may appeal to the State Board of Equalization, or pay the deficiency and file a claim for a refund. (Sec. 19045 Cal. Rev. & Tax. Code). The California State Board of Equalization is a five-member board entirely distinct from the FTB. In lieu of an appeal to the California State Board of Equalization, a taxpayer also has the option of paying the assessment and then bring a suit against FTB for a refund of all or a part of the tax paid. See Sec. 19335, Cal. Rev. & Tax Code. In additional, any taxpayer – including Hyatt – may, after final action by the California State Board of Equalization, file suit in the Sacramento, Los Angeles, or San Francisco Superior Courts against FTB to have the matter of their residency determined, without first paying any assessed tax. See Sec. 19381, Cal. Rev. & Tax Code. Because such procedures and remedies are afforded Plaintiff under California law and in California tribunals, no legitimate Nevada policy can be served by Nevada asserting jurisdiction over the ongoing California Administrative Protest Process.

It should also be clear that in the case of the ongoing California Administrative Protest Process, in contrast to the alleged tortious actions of the FTB auditors, Plaintiff himself invoked the process of which he now complains. By invoking the remedies afforded by California, Plaintiff has submitted to the jurisdiction of California with respect to that process.

Yet, he now complains that the process is taking too long. The reasons for the lengthy proceedings are many, and disputed, including perhaps first and foremost Plaintiff's interference and lack of cooperation with that process. This Court, however, need not concern itself over the reasons for the duration of the California Administrative Protest Process. The Nevada Supreme Court decided in its second opinion issued in this case that the Nevada courts may exercise jurisdiction over Plaintiff's allegations that FTB allegedly committed intentional torts during its audit, in order to afford him a remedy that was apparently unavailable in California. Exhibit 2. However, Plaintiff's new claim, i.e. that the California Administrative Protest Process is being conducted in bad faith, is not within the jurisdictional limits set forth by the Nevada Supreme Court. Why? Because, as made clear by Nevada's Supreme Court, if Plaintiff has remedies in California, then Nevada may not assert subject matter jurisdiction over such claim in Nevada. Exhibit 2. Indeed, as discussed below, Plaintiff has

1 already asserted the same claim of "bad faith delay" in California, and has received an adverse decision.
2 Plaintiff cannot now seek to "reverse" that adverse decision in Nevada.

3 C. Nevada Must Give Full Faith and Credit to the California Court of Appeals Decision
4 That Rejected Plaintiff's "Bad Faith Delay" Claim; And Plaintiff Is Collaterally
5 Estopped From Re-litigating That Same Issue.

6 On July 7, 2002, FTB issued an administrative subpoena to Hyatt requesting documents FTB
7 needed to conduct a complete review Hyatt's 1991 and 1992 tax year. Exhibit 13. FTB's
8 administrative subpoena sought documents already produced by Hyatt in this litigation, but because of
9 the restrictions imposed upon FTB by application of the Protective Order in this case, were not part of
10 the California Administrative Protest Process. Exhibit 14.

11 As this Court is aware, the instant litigation is being conducted under a Protective Order that
12 was entered after Plaintiff insisted many of the documents FTB sought in discovery were sensitive and
13 confidential materials. Although Plaintiff implied in seeking the Protective Order that such an order
14 was needed to protect his intellectual property, in reality it seems Plaintiff sought the Protective Order
15 as an impediment to FTB's discovery into his income, the timing of such income, and the sources of
16 such income.

17 Indeed, the Protective Order requires FTB personnel involved in this litigation to refrain from
18 divulging information designated by Hyatt as "Nevada Confidential" to FTB personnel involved in the
19 California Administrative Protest Process. Thus the very existence of the Protective Order sought by
20 Hyatt is an impediment to that process. One might logically ask that if Hyatt genuinely wanted an
21 expeditious and efficient resolution to the California Administrative Protest, why would he erect
22 barriers to the free flow of information developed through discovery in the instant case to that process?
23 In any event, in simple terms the Protective Order requires FTB to invoke California discovery
24 processes available only in California to acquire the same information which may be generated in this
25 litigation.

26 What is significant for the instant motion is that in resisting such California discovery, Hyatt
27 sought remedies for the alleged "bad faith delay" in the California Administrative Protest Process, and
28 that the California courts found Hyatt's allegations to be without merit.

1 Specifically, despite previously producing the information requested by the FTB administrative
2 subpoena as part of this Nevada litigation, Plaintiff refused to comply with the California administrative
3 subpoena. Exhibit 13. As a result of his refusal, litigation ensued between the parties. On October 11,
4 2002, FTB filed a "Petition for Order to Compel Compliance With Administrative Subpoena" against
5 Plaintiff in California Superior Court (Sacramento County). Exhibit 15. In response, Plaintiff filed a
6 Motion for Protective Order sealing the file. Exhibit 16. FTB opposed Plaintiff's Motion for Protective
7 Order. Exhibit 17. FTB also filed a Reply in Support of its "Petition for Order to Compel Compliance
8 With Administrative Subpoena". Exhibit 18.

9 After reviewing the parties' respective briefs and supporting evidence, the California Superior
10 Court sided with FTB and ordered Plaintiff to comply with five of the six requests for information
11 within FTB's administrative subpoena. Exhibit 3(A).

12 Plaintiff still refused to comply with the administrative subpoena and appealed to the California
13 Superior Court's decision to the California Court of Appeals for the Third Appellate District. Exhibit
14 19. FTB moved to dismiss the appeal or treat it as an application for writ. Exhibit 20. Plaintiff
15 opposed FTB's motion. Exhibit 21. Again, after reviewing the parties' respective briefs, the California
16 Court of Appeals sided with the FTB and upheld the lower court's order directing Plaintiff to comply
17 with the FTB administrative subpoena. Exhibit 3(B). Plaintiff did not appeal the decision further to
18 the California Supreme Court, thus the California Court of Appeals decision became final and binding
19 upon Plaintiff.

20 In resisting the subpoena, Plaintiff argued to the California courts **that FTB purposely abused**
21 **the court's process and delayed resolution of the 1991 and 1992 California Administrative Protest**
22 **Process to gain leverage in settlement of the Nevada litigation.** This is the exact same allegation that
23 Plaintiff is now trying to advance in this case.

24 In the California case, according to Plaintiff, FTB's alleged purposeful delay and wrongful
25 conduct provided sufficient reason for the California courts to expunge FTB's administrative subpoena.
26 Plaintiff, in his California pleadings, castigated FTB for allegedly delaying its California Administrative
27 Protest Process decision. Below are excerpts from Plaintiff's California pleadings making this
28 argument:

1 The FTB issued notices of proposed assessments in 1996 and 1997 (for each of
2 the respective partial years in dispute – 1991 and 1992, respectively), and to this day has
3 failed to issue a final determination so that Hyatt can pursue his administrative
4 remedies. The FTB's pursuit of Hyatt is best demonstrated by the subpoena at issue in
5 this proceeding. It was issued nine years after the FTB commenced the audits and five
6 years after Hyatt filed the last of his two protests formally contesting the proposed
7 assessments (footnote omitted).

8 Indeed, the formal hearings for the protests for the respective tax years in dispute
9 were conducted by the FTB protest office in September and October 2000 (footnote
10 omitted). After over a year passed with no decision and little activity on the protest, the
11 FTB informed Hyatt's tax representative that the proceedings were on hold indefinitely
12 pending the outcome of the tort action against the FTB in Nevada (footnote omitted).
13 Before and since that admission by the FTB, Hyatt has repeatedly requested that the
14 FTB bring the protest to a conclusion by issuing its conclusions for each year at issue
15 (footnote omitted).

16 Moreover, the FTB issued the administrative subpoena in July of 2002 (footnote
17 omitted) As discussed below, this was only a few months after the Nevada Supreme
18 Court issued a definitive order in April 2002 allowing Hyatt's Nevada tort case to
19 proceed to trial. This was almost a year after Hyatt's tax representative had confirmed
20 that he had produced all information requested by the FTB (footnote omitted). The time
21 of the subpoena in-and-of-itself calls into question whether the intended purpose was
22 to try and justify FTB delays in not concluding the tax protest proceedings.

23 Exhibit 21, pp. 6-7. It is clear from Plaintiff's own pleadings that Plaintiff made FTB's alleged
24 purposeful delay of the California Administrative Protest Process and alleged abuse of process of the
25 California Administrative Protest Process a centerpiece of his arguments before the California courts.

26 However, the California courts rejected Plaintiff's arguments in their entirety. Exhibit 3.
27 Specifically, the California Superior Court did not accept Plaintiff's arguments relating to FTB's
28 alleged purposeful delay of the California Administrative Protest Process, because it ordered him to
29 comply with the FTB administrative subpoena. Exhibit 3(A). The California Court of Appeals took
30 this conclusion one step further by expressly finding that Plaintiff's claims of purposeful delay by the
31 FTB had no evidentiary basis whatsoever:

32 Hyatt's reply brief contends FTB does not need the documents because its protest officer
33 is ready to render her decision but is being prevented from doing so by FTB while the
34 Nevada case is pending. He cites a declaration, but his citation does not lead us to any
35 such declaration.

36 Exhibit 3(B), p. 8, fn. 13.

1 In fact, the California Court of Appeals expressly found that all of Plaintiff's accusations of
2 FTB abuse of process lacked evidentiary support, and thoroughly debunked all of his claims of
3 improper FTB conduct:

4 Hyatt makes numerous factual assertions that the FTB staff handling his audit
5 are evil, vindictive, malicious people who are out to get him. He argues the California
6 court's order compelling the enforcement of the administrative subpoena should be
7 reversed because FTB pursued the administrative subpoena for an improper purpose.
8 He cites *United States v. Powell*, (1964) 379 U.S. 48, 13 L. Ed. 2d 112, which said a
9 court could refuse to enforce an administrative subpoena brought for an improper
10 purpose, "such as to harass the taxpayer or to put pressure on him to settle a collateral
11 dispute, or for any other purpose reflecting on the good faith of the particular
12 investigation. The burden of showing an abuse of the Court's process is on the
13 taxpayer, and it is not met by a mere showing, as was made in this case, that the statute
14 of limitation for ordinary deficiencies has run or that the records in question have
15 already been examined." (*Id. at p. 58.*)

16 Here, Hyatt makes no such showing in his opening brief on appeal. *California*
17 *Rules of Court, Rule 14*, requires that "each brief must...support any reference to a
18 matter in the record by a citation to the record." (*See City of Lincoln v. Barringer*
19 (2002) 102 Cal. App. 4th 1211, 1239-1240 & fn. 16.)

20 In the argument portion of his opening brief on appeal, Hyatt gives only three
21 citations to the record, none of which shows evidence of abuse of process. The first
22 two citations are to declarations of two attorneys representing FTB in the Nevada
23 litigation, attesting in support of the petition to enforce the administrative subpoena
24 that Hyatt had not voluntarily agreed that the documents disclosed in the Nevada
25 litigation could be used in the administrative protest. On appeal, Hyatt merely argues
26 that these two lawyers were well-acquainted with the documents and could have
27 provided specificity and insight into why they were relevant to the administrative
28 protest. The third citation to the record is to a memorandum of points and authorities
filed by Hyatt in the trial court. Such a memorandum constitutes argument, not
evidence, and in any event is only cited in Hyatt's appellate brief to support the
assertion that FTB refused to meet and confer with Hyatt . . .

29 "It is the duty of a party to support the arguments in its brief by
30 appropriate references to the record, which includes providing exact
31 page citations.' [Citations.] If a party fails to support an argument with
32 the necessary citations to the record, that portion of the brief may be
33 stricken and the argument deemed to have been waived. [Citation.]"
34 (*Duarte v. Chino Community Hospital* (1999) 72 Cal. App.4th 849,
35 856.)

36 We need not further address Hyatt's contention regarding abuse of process.

37 Exhibit 3(B), p. 8. Based on these judgments by the California Superior Court and the California
38 Court of Appeals, Plaintiff's claims of purposeful delay of the administrative protests and abuse of
process by FTB clearly have no merit.

1 As valid, final judgments from a sister state, this Court, in Nevada, must honor the California
2 court judgments. "The full faith and credit clause of the United States Constitution demands that
3 Nevada courts respect the final judgment of a sister state, absent a showing of fraud, lack of due
4 process, or lack of jurisdiction in the rendering state." *Clint Hurt & Associates, Inc. v. Silver State Oil*
5 *and Gas Co., Inc.*, 111 Nev. 1086, 901 P.2d 703 (1995) citing United States Const. Art. IV, § 1;
6 *Karow v. Mitchell*, 110 Nev. 959, 878 P.2d 978 (1994); *Rosenstein v. Steele*, 103 Nev. 571, 747 P.2d
7 230 (1987). Plaintiff can make no showing of fraud, lack of due process, or lack of jurisdiction in the
8 California litigation. As such, the California court judgments must be given Full Faith and Credit by
9 the Nevada courts.

10 Moreover, because the issue raised by Plaintiff concerning FTB's alleged purposeful delay of
11 the administrative protests and abuse of process was decided adversely against him in the California
12 litigation, and the California court judgments are final, Plaintiff is also collaterally estopped from
13 raising the identical issue in this case. As the Nevada Supreme Court has held:

14 Issue preclusion, or collateral estoppel, (*footnote omitted*) is a proper basis for
15 granting summary judgment. *See Paradise Palms v. Paradise Homes*, 89 Nev. 27, 505
16 P.2d 596 (1973). In *Executive Management*, we clarified the three-part test for issue
17 preclusion as follows: (1) the issue decided in the prior litigation must be identical to
18 the issue presented in the current action; (2) the initial ruling must have been on the
19 merits and have become final; and (3) the party against whom the judgment is asserted
20 must have been a party in privity with a party in the prior litigation. *Executive*
21 *Management*, 114 Nev. at 835-36, 963 P.2d at 473-74 (*citations omitted*). *LaForge*
22 *v. State, University and Community College System of Nevada*, 116 Nev. 415, 419-20,
23 997 P.2d 130, 133 (2000).

24 All three elements for collateral estoppel/issue preclusion are present here. First, as
25 demonstrated by the quotes from Plaintiff's California pleadings previously cited, Plaintiff clearly
26 raised the issue of FTB's alleged purposeful delay of the California Administrative Protest Process
27 and abuse of process before the California courts. Plaintiff now raises the identical issue in this case
28 as an argument in favor of his attempt to make the California Administrative Protest Process a part
of this case. Second, the California Court of Appeals decision was clearly on the merits and it became
final and enforceable against Plaintiff since he chose not to appeal the decision to the California
Supreme Court, and the time for any such appeal has long since passed. Third, Plaintiff was a party
to the California court proceedings and is bound by the California court decisions. Therefore,

1 collateral estoppel applies to foreclose Plaintiff from re-litigating in this Court the issue of purposeful
2 delay of the California Administrative Protest Process and abuse of process involving the California
3 Administrative Protest Process. As a result, this issue has been resolved against Plaintiff, and he is
4 precluded from raising the identical issue once again in this case.

5 D. The Ongoing California Administrative Protest Process Is Shielded by the Quasi-
6 Judicial Administrative Official's Mental Process Privilege to Which Nevada Must
Give Full Faith and Credit.

7 A particularly troublesome facet of Plaintiff's attempts to fold the California Administrative
8 Protest Process into this litigation is that Plaintiff appears to be motivated primarily by his desire to
9 seek discovery into the ongoing California Administrative Protest Process, as opposed to pursuing
10 damages for any alleged tortious conduct associated with the California Administrative Protest
11 Process. Plaintiff characterized the California Administrative Protest Process as an intentional tort
12 (without benefit of any pleading) in order to induce Discovery Commissioner Biggar to allow him to
13 conduct discovery into the decision-making process of the California Administrative Protest Hearing
14 Officers. As set forth in Plaintiff's various discovery motions before the Discovery Commissioner,
15 Plaintiff is insisting that he has a right to depose the California Administrative Protest Hearing
16 Officers, even though the protest has not concluded!

17 Nevada does not have the constitutional authority to legislate with respect to how California
18 conducts a California Administrative Protest Process. Without competency to legislate with respect
19 to how California conducts a California Administrative Protest Process, Nevada is required by the
20 U.S. Constitution to give full faith and credit to California Administrative Protest Process. *See*
21 *generally, Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 494 (2003) (the Full Faith and
22 Credit Clause does not compel a state to substitute the statutes of other states for its own statutes
23 dealing with a subject matter concerning which it is competent to legislate) (*quoting Sun Oil Co. v.*
24 *Workman*, 486 U.S. 7171, 722 (1988) and *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*,
25 306 U.S. 493, 501 (1939)).

26 At this time, the current California Administrative Protest Hearing Officer, Cody Cinnamon,
27 has not yet issued her decision. It is clear that she is acting in an administrative quasi-judicial
28 capacity. She is conducting a *de novo* review of the proposed assessments that were issued to

1 Plaintiff. Her job is an essential part of the State of California's inherent sovereign power of taxation.
2 Just like a judge, her decision-making process is privileged and protected from discovery. *See*
3 *generally, City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975); *State v.*
4 *Superior Court*, 12 Cal. 3d 237, 115 Cal. Rptr. 496 (1974) (a judicial or administrative officer,
5 including a local official acting in a quasi-judicial capacity, generally cannot be questioned regarding
6 the mental processes used to reach a decision). Originating in federal law, the privilege is necessary
7 to preserve the integrity of the judicial process. *See United States v. Morgan*, 313 U.S. 409 (1941).
8 *See also California Civil Discovery Practice*, Section 310 (3d Edition Cal. CEB 2004).

9 The quasi-judicial administrative official's mental process privilege is based upon separation
10 of powers and is an absolute privilege against discovery into the mental, pre-decisional processes of
11 the administrative decision maker. *See Morgan*, 313 U.S. at 409, 422 ("it was not the function of the
12 court to probe the mental processes of the [administrative decision maker]. Just as a judge cannot be
13 subjected to such scrutiny, so the integrity of the administrative process must be equally respected").
14 Accordingly, allegations such as bias, prejudgment of the merits, reliance on improper evidence,
15 failure to weigh the evidence in any particular manner and other attacks on the administrative process
16 do not defeat the privilege. *See, e.g., Morgan*, 313 U.S. at 422 (despite allegations of bias by market
17 agencies, the Secretary made the determination of the maximum rates by dealing with an enormous
18 record "in a manner not unlike the practice of judges in similar situations, and that he held various
19 conferences with the examiner who heard the evidence"); *State v. Superior Court*, 12 Cal. 3d 237, 257,
20 115 Cal. Rptr. 496 (Cal. 1974) (further discovery into Coastal Zone process was rejected even though
21 developer alleged "that the Commission denied it a fair hearing by receiving secret testimony from
22 its staff prior to the hearing and prejudging the application on the basis of improperly received
23 evidence, and that the Commission failed to consider and examine certain documents presented"); and
24 *City of Fairfield v. Superior Court*, 14 Cal.3d 768, 122 Cal. Rptr. 543 (Cal. 1975) (privilege was
25 upheld for two city councilmen who were not "disinterested triers of fact," "administrative law
26 judges," and who did not take "testimony under oath").

27 The Nevada Supreme Court has not had occasion to address whether a quasi-judicial
28 administrative official's mental process is privileged. Nevertheless, based on various opinions of the

1 Nevada Attorney General, it is clear that Nevada treats its own tax agency officials as quasi-judicial
2 administrative decision makers when deciding contested tax matters and extends to them the mental
3 process privilege.

4 First, Nevada recognizes that the role of a hearing officer is quasi-judicial and extends judicial
5 requirements to those officials. *See* 1995 Nev. Opn. Atty. Gen. 83 at *2, No. 95-19 (November 7,
6 1995) (applying code of Judicial Conduct recusal requirements to commissioner of the Public Service
7 Commission when acting as a hearing officer). (Exhibit 22). Second, similar to the facts of Hyatt's
8 appeal before the California Protest Hearing Officer, Nevada recognizes that its own Tax Commission
9 acts as a quasi-judicial deliberative body in the context of contested tax matters. *See* 1980 Nev. Op.
10 Atty. Gen. 110 at *2, No. 80-23 (May 16, 1980) (Exhibit 23); 1997 Nev. Opn. Atty. Gen. 1 at *3, No.
11 97-01 (January 16, 1997) (Exhibit 24). Third, the Attorney General has noted that the "quasi-judicial
12 function of an administrative agency differs completely from the nature of its other activities [and that]
13 the personal and property rights of the parties at issue in such proceedings can only be protected . . .
14 in a judicial atmosphere that assures freedom of expression to each deciding official and encourages
15 a free discussion and exchange of views which is so essential to frank and impartial deliberation."
16 1981 Nev. Opn. Atty. Gen. 94 at *2-3, No. 81-C (June 25, 1981) (Exhibit 25).

17 Because the Nevada Supreme Court has not had occasion to formally consider the quasi-
18 judicial administrative official's mental process privilege, these Nevada Attorney General Opinions
19 are entitled to great weight. *See Prescott v. United States*, 731 F.2d 1388 (9th Cir. 1984). More
20 importantly, they show that Nevada does in fact recognize for its own tax agency the privilege
21 California asserts in this case for its tax agency. Under these circumstances, failure of Nevada to
22 recognize California's Administrative Protest Process and privilege for the decision making mental
23 process of the California Administrative Protest Hearing Officer would exhibit a policy of hostility to
24 the public acts of California in violation of California's status as a sister state and the full faith and
25 credit command of the U.S. Constitution. *See Franchise tax Board v. Hyatt*, 538 U.S. at 499 (*quoting*
26 *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)).

27 ///

28 ///

1 V. CONCLUSION

2 For the foregoing reasons, FTB's motion should be granted. FTB respectfully requests that
3 the Court dismiss from this case any "allegations" or "claims" about the California Administrative
4 Protest Process.

5 Dated this 4th day of November, 2005.

6 McDONALD CARANO WILSON LLP

7
8
9 By

THOMAS R. C. WILSON, ESQ.

Nevada State Bar # 1568

JAMES W. BRADSHAW, ESQ.

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Reno, Nevada 89505-2670

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Attorneys for Defendant Franchise Tax Board

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served a true and correct copy of the foregoing **FTB'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ONGOING CALIFORNIA ADMINISTRATIVE PROTEST PROCESS** on this 4th day of November, 2005 by hand delivery upon the following:

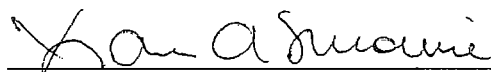
Peter C. Bernhard, Esq.
Bullivant Houser Bailey PC
3980 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89109

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served true and correct copies of the foregoing **FTB'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ONGOING CALIFORNIA ADMINISTRATIVE PROTEST PROCESS** on this 4th day of November, 2005, by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

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

Donald Kula, Esq.
Bingham McCutchen LLP
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Los Angeles, California 90071-3106

COURTESY COPY:
The Honorable Jessie Walsh
Regional Justice Center
200 Lewis Street
Las Vegas, NV 89155


An Employee of McDonald Carano Wilson LLP

1 **AFFT**
THOMAS R. C. WILSON, ESQ.
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6 Reno, Nevada 89505-2670
Telephone No. (775) 788-2000
7 Attorneys for Defendant Franchise Tax Board

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 * * * *

11 GILBERT P. HYATT,
12 Plaintiff,

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

13 vs.

AFFIDAVIT OF JEFFREY A. SILVESTRI

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

17
18 STATE OF NEVADA)
19 COUNTY OF CLARK) ss.

20 I, JEFFREY A. SILVESTRI, affirm under penalty of perjury that the assertions contained in
21 this affidavit are true and correct.

22 1. I am over the age of eighteen (18) years. I have personal knowledge of the facts stated
23 within this affidavit. If called as a witness, I would be competent to testify to these facts.

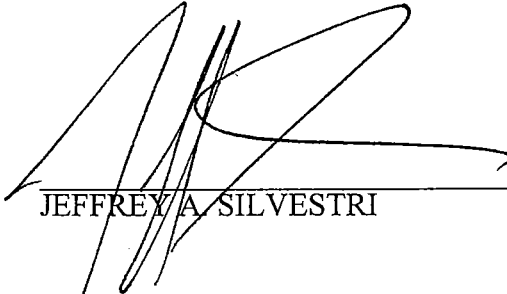
24 2. I am an attorney with McDonald Carano Wilson LLP, counsel of record for Defendant
25 California Franchise Tax Board. I offer this affidavit in support of Defendant California Franchise
26 Tax Board's Motion for Partial Summary Judgment re: ongoing California Administrative Protest
27 Process. This affidavit is not intended to waive any applicable attorney/client privilege or work
28 product doctrine protection and should not be construed as any such waiver.

...

RA002054

1 3. The supporting documents to Defendant California Franchise Tax Board's Motion for
2 Partial Summary Judgment re: ongoing California Administrative Protest Process are attached at tabs
3 1 through 26. These are true and correct copies of original documents either served upon our offices
4 or sent from our offices, certified deposition transcripts, or court documents.

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JEFFREY A. SILVESTRI

SUBSCRIBED AND SWORN TO before me
this 4th day of November, 2005.


NOTARY PUBLIC in and for said
County and State

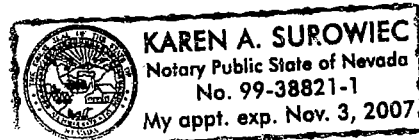


EXHIBIT 50

ORIGINAL

FILED

Nov 10 10 05 AM '05

Shirley B. Higgins
CLERK

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8 *Attorneys for Plaintiff Gilbert P. Hyatt*

9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 GILBERT P. HYATT,

12 Plaintiffs,

13 v.

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

16 Defendants.

Case No.: A382999

Dept. No.: X

**DISCOVERY COMMISSIONER'S REPORT
AND RECOMMENDATIONS**

Date of Hearing: September 30, 2005

Time of Hearing: 10:00 a.m.

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

BullivantHouserBailey PC

3980 Howard Hughes Pkwy., Ste. 550

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NATURE OF ACTION AND APPEARANCES

On August 5 2005, the Discovery Commissioner held a dispute resolution conference and heard oral argument in regard to: (1) Hyatt's Motion to Compel Depositions Of FTB Protest Officers Charlene Woodward, Cody Cinnamon and their Supervisor, George McLaughlin ("Motion to Compel Protest Officers' Depositions"); (2) Hyatt's Motion To Compel Rule 30(B)(6) Deposition re FTB Contacts with Japanese Companies ("Motion to Compel Rule 30(b)(6) Depositions re Japanese Companies"); (3) Motion To Compel Depositions Of Gerald Goldberg And Brian Toman ("Motion to Compel Goldberg and Toman Depositions"); and (4) the FTB Motion For Protective Orders re 30(b)(6) Witnesses and Deposition of Brian Toman ("FTB Motion for Protective Order"). The Discovery Commission reports and recommends the following:

DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS

DISPUTE RESOLUTION CONFERENCE DATE: September 30, 2005

APPEARANCES:

Plaintiff: Mark Hutchison, Esq., of Hutchison & Steffen; Peter C. Bernhard, Esq., of Bullivant Houser Bailey PC; and Donald J. Kula, Esq., of Bingham McCutchen, LLP.

Defendant: James Bradshaw, Esq., and James C. Giudici, Esq., of McDonald Carano Wilson LLP.

I.

FINDINGS

In accordance with the briefing schedule set by the Discovery Commissioner during the August 30, 2005 discovery status check, the above described motions were filed by the

1 respective parties on September 23, 2005, and the parties filed their respective opposition on
2 September 28, 2005.

3 The Discovery Commissioner, having received the parties' moving and opposition
4 papers for the above described motions and having heard oral argument recommends as follows:

5 **II.**

6 **RECOMMENDATIONS**

7 IT IS HEREBY recommended that the Court adopt the following Order:

8 **Hyatt's Motion to Compel Protest Officers' Depositions**

9 1. The Discovery Commission finds that the depositions of Charlene
10 Woodward, Cody Cinnamon, and George McLaughlin should be temporarily stayed pending
11 further information to be supplied by the FTB concerning the facts of delay in resolving the
12 protest. The motion is therefore continued until the next discovery status check scheduled for
13 October 18, 2005. (September 30, 2005 hearing transcript, at 48:21 - 49:21, 51:25 - 52:17.)

14 **Hyatt's Motion to Compel Rule 30(b)(6) Depositions re Japanese Companies**

15 2. The Discovery Commission finds that the Motion to Compel Rule
16 30(b)(6) Depositions re Japanese Companies should be denied without prejudice. The
17 Discovery Commissioner will let the deposition go forward if Hyatt is able to present at least
18 one witness supporting his argument that the FTB's two letters to Japanese sublicensees of
19 Hyatt caused the huge ripple effect in the Japanese business world as alleged by Hyatt.
20 (September 30, 2005 hearing transcript, at 50:12 - 51:13.)

21 **Hyatt's Motion to Compel Goldberg and Toman Depositions**

22 3. The Discovery Commission finds that the Motion to Compel Goldberg
23 and Toman Depositions should be denied without prejudice. The Discovery Commissioner
24 finds that to date Hyatt has not set forth a sufficient foundation of their respective connections to
25 the Hyatt audits or protests to warrant Hyatt taking their respective depositions. (September 30,
26 2005 hearing transcript, at 49:22 - 50:11.)
27
28

The FTB's Motion for a Protective Order

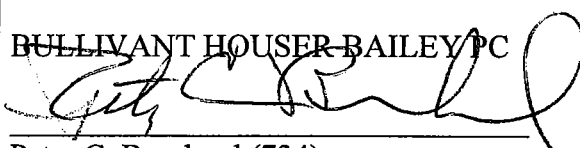
4. The Discovery Commission did not specifically address this motion during the September 30, 2005 hearing and did not issue any protective order as requested by the FTB. Nonetheless, the Discovery Commissioner's findings in regard to the Motion to Compel Rule 30(b)(6) Depositions re Japanese Companies and Motion to Compel Goldberg and Toman Depositions are without prejudice and provide that the depositions subject to the FTB's Motion for a Protective Order, *i.e.*, the Rule 30(b)(6) Depositions re Japanese Companies and the Toman deposition, will not proceed at that this time. As described above, Hyatt may renew his request for these depositions in the future if new evidence is presented that supports the need for these depositions.

Dated this 26th day of October, 2005.


DISCOVERY COMMISSIONER

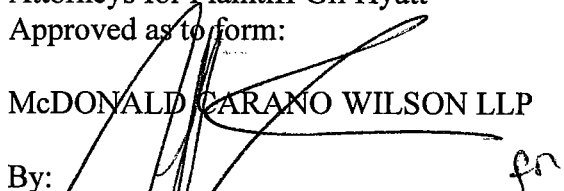
Submitted by:
HUTCHISON & STEFFEN
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~~BULLIVANT HOUSER BAILEY PC~~


Peter C. Bernhard (734)
3980 Howard Hughes Pkwy., Ste. 550
Las Vegas, Nevada 89109
Attorneys for Plaintiff Gil Hyatt

Approved as to form:


McDONALD CARANO WILSON LLP

By:  fr
James W. Bradshaw, Esq. (#1638)
Jeffrey A. Silvestri, Esq. (#5779)
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Attorneys for Defendant FTB

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

[Pursuant to E.D.C.R. 2.34(f), an objection must be filed and served no more than five (5) days after receipt of the Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the clerk of the court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office.]

A copy of the foregoing Discovery Commissioner's Report was:

✓ Mailed to Plaintiff/Defendant ^{counsel} on the 21st day of Oct., 2005 at the following address:

James W. Bradshaw, Esq.
McDonald Carano Wilson
100 West Liberty Street, 10th Floor
P.O. Box 2670
Reno, Nevada 89505
Attorney for Defendant

✓ Placed in the folder of Plaintiff/Defendant's counsel in the Clerk's office on the 21st day of Oct., 2005.

SHIRLEY R. PARRAGUIRRE

By: Maria Mascetta for
Deputy Clerk

MARY DAIGLE

Case Name: *Hyatt v. Franchise Tax Board*

Case Number: A382999

ORDER

The Court, having reviewed the above report and recommendations prepared by the
Discovery Commissioner, and,

The parties having waived the right to object thereto,

No timely objections having been filed thereto,

Having received the objections thereto and the written arguments in support of
said objections, and good cause appearing,

IT IS HEREBY ORDERED the Discovery Commissioner's Report and
Recommendations are affirmed and adopted.

IT IS HEREBY ORDERED the Discovery Commissioner's Report and
Recommendations are affirmed and adopted as modified in the
following manner. (attached hereto)

IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's
Report is set for _____, 2005.

Dated this 7th day of NOV, 2005.


DISTRICT COURT JUDGE

EXHIBIT 51

OPP

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FILED

Nov 23 2 18 PM '05

Shirley S. Hargrave
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiffs,

v.

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

Defendants.

Case No.: A382999

Dept. No.: X

**PLAINTIFF GILBERT P. HYATT'S
OPPOSITION TO THE FTB'S MOTION
FOR PARTIAL SUMMARY JUDGMENT
RE: ONGOING CALIFORNIA
ADMINISTRATIVE PROTEST PROCESS**

Date of Hearing: December 12, 2005**Time of Hearing: 1:30 p.m.****Dept.: X**

**(Filed under seal by order of the Discovery
Commissioner dated February 22, 1999.)**

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1 Plaintiff Gilbert P. Hyatt ("Hyatt") hereby opposes the FTB's Motion for Partial
2 Summary Judgment re Ongoing California Administrative Protest Process ("the Motion").

3 **1. Introduction.**

4 The FTB's motion and its two objections to Commissioner Biggar's Reports and
5 Recommendations try to stop discovery into actions of the FTB's audit and protest process. The
6 protest process in California is part of the audit process, *i.e.*, it is set up by the FTB to continue
7 the investigation into a taxpayer's liability for California taxes. No independent decision-maker
8 is involved until after the auditor and the Protest Officer have finished their tasks. In this case,
9 Hyatt's Complaint and First Amended Complaint expressly alleges intentional wrongdoing by
10 the first Protest Officer, as well as by the auditors, and discovery has occurred as to what the
11 Protest Officers and the auditors did.

12 At the time Hyatt filed his Complaint in January, 1998 the protests had not been
13 completed. However, the FTB assured Hyatt and this Court that the protests would continue
14 unabated by this litigation. Now, almost eight years later, the FTB has not processed the
15 protests, denying Hyatt his right to an independent decision-maker on his tax liability. In sum,
16 Hyatt and the FTB continue their disputes on two parallel but separate tracks: the protests in
17 California deal with the amount of taxes, if any, that Hyatt owes to the FTB; and this Nevada
18 case deals with the conduct of the FTB, its auditors, its reviewers and its Protest Officers during
19 this process. And, the issue in this Motion is whether the FTB's continued conduct in handling
20 the protests is further bad faith conduct that has continued after the filing of the Complaint
21 through the present day. Hyatt respectfully submits that he is entitled to discovery as to such
22 bad faith conduct as well as to substantive relief as part of the intentional torts committed by the
23 FTB.

24 A key aspect of this issue is the delay by the FTB in giving Hyatt his day in court on the
25 underlying tax liability. More than 14 years ago, Hyatt moved to Las Vegas. Even under the
26 FTB's view, Hyatt became a Nevada resident, moving to Las Vegas, 13 ½ years ago. More than
27 12 years ago, the FTB began its audit of Hyatt. More than 10 years ago, the FTB issued its
28 preliminary determination to Hyatt, triggering Hyatt's right to protest that preliminary

1 determination before it became final. Hyatt exercised that right more than nine years ago. To
2 this day, the FTB has not processed that first protest. One would assume that nine years would
3 be sufficient time for a state agency to act on a matter properly before it. With the FTB,
4 however, there is no incentive to give Hyatt a decision: interest accrues at thousands of dollars
5 per day on the FTB's preliminary assessments. With the FTB, there is an incentive to delay a
6 decision: it continues to hold the threat of tens of millions of dollars of potential tax liability
7 over Hyatt, a powerful incentive for Hyatt to give up his rights in this Nevada tort proceeding.
8 This threat of potential liability, coupled with the FTB's previous threats that Hyatt's case
9 would be more intrusive and drawn out for an inordinate time with public disclosure of his
10 income and other personal information, was precisely the allegation made in Hyatt's January,
11 1998, Complaint. Hyatt alleges that these threats constituted extortion, part of the fraud and
12 outrage claims that our Supreme Court and the United States Supreme Court have ruled are
13 properly going to trial in Nevada.

14 Hyatt respectfully submits that the protest process is a proper subject of discovery, and
15 that the bad faith conduct of the FTB in the protest process is properly before this Court as
16 additional evidence of Hyatt's intentional tort claims against the FTB. There is nothing novel
17 about post-complaint events being discoverable and admissible in evidence to support causes of
18 action properly alleged in the operative pleadings. The discovery should be permitted, the
19 protest process should be admissible at trial, and the FTB's motion must be denied.

20 This opposition first summarizes the post-complaint bad faith conduct of the FTB, then
21 explains the California subpoena proceedings on which the FTB places great reliance in its
22 motion. After reviewing the procedural history of this case to correct FTB misstatements, Hyatt
23 then shows how his existing, properly-pled causes of action encompass the post-complaint facts
24 under which the FTB has continued with its tortious conduct in violation of Hyatt's rights.
25 Hyatt then identifies the detailed analysis of the Discovery Commissioner on this issue, reaching
26 the correct conclusion that the protest process is an internal FTB extension of the audit process
27 and appropriately within Hyatt's intentional tort allegations. Hyatt submits that this is
28 especially so when the conduct continues after the filing of the Complaint (cf., in a harassment

1 case, post-filing retaliation is discoverable and admissible to show the intent of the harasser and
2 the pattern of behavior).

3 Moreover, the FTB has waived any objection to discovery directed at the protests or
4 Protest Officers, having produced significant documents relating to the protests, including many
5 post-complaint documents, and having permitted the deposition of the first Protest Officer for
6 several days (without completing it) and the deposition of the second Protest Officer. Finally,
7 Hyatt refutes the FTB's attempted justification to limit discovery and use of its bad faith
8 conduct under non-existent and inapplicable claims of privilege.

9 **2. Summary of argument.**

10 *Post-complaint bad faith conduct of the FTB*

11 The FTB's motion argues that Hyatt is pursuing a new "claim" directed at the FTB's
12 handling of the pending "protests" in the tax proceeding in California and therefore seeks to
13 have this Court impose jurisdiction over that proceeding.¹ Neither is true. Hyatt is not pursuing
14 a new claim. The tortious acts of the first Protest Officer are pled in the Complaint. Nor,
15 obviously, is Hyatt seeking to have this Court impose jurisdiction over that proceeding. Rather,
16 he seeks discovery — that is opposed by the FTB because it is directed at the FTB Protest
17 Officer — that is highly relevant to Hyatt's existing fraud claim which asserts, in part, that the
18 FTB acted in bad faith in issuing a proposed assessment of taxes and then attempted to extort a
19 settlement from him. The discovery also goes to Hyatt's existing claim for outrage that is also
20 based on the FTB's bad faith conduct stemming from both audits of Hyatt and continuing into
21 the protests.

22 To be clear, the discovery Hyatt seeks relates to the FTB's continuing bad faith conduct
23 post-filing of the complaint in this action — conduct that therefore could not have been alleged
24 by Hyatt seven years ago when the action was filed. As discussed below, Nevada law does not
25 require an amendment to obtain this type of discovery relating to a continuing intentional tort of

26
27 ¹ There are two audits and two protests in this case; the audit and protest of Hyatt's 1991 tax year and the audit and
28 protest of Hyatt's 1992 tax year. The disputed period for the audit and protest of Hyatt's 1991 tax year is September
26 to December 31, 1991, and the disputed period for Hyatt's audit and protest of the 1992 tax year is January 1 to
April 2, 1992.

1 the defendant. Nonetheless, and contrary to the impression the FTB seeks to create with its
2 motion, Hyatt did plead alleged bad faith misconduct during the protests as part of these claims,
3 *e.g.*, the extortionate statements of the first Protest Officer Anna Jovanovich.² So the protests
4 are and always have been part of this case.

5 Hyatt's request for this discovery from the Protest Officer, and his assertion that the
6 FTB's post-complaint activity supports his bad faith claims, does not seek relief that exceeds the
7 jurisdiction of this Court. The FTB's motion is actually a bold attempt to avoid and eviscerate
8 the prior rulings of this Court, the Nevada Supreme Court and the United States Supreme Court.
9 Specifically, all of Hyatt's intentional tort claims, including his fraud, outrage and abuse of
10 process claims, have withstood the FTB's motion for summary judgment, as this Court rejected
11 the FTB's argument that the claims lacked sufficient evidentiary support. The Nevada Supreme
12 Court, after receiving briefing on the specific issue of Hyatt's evidentiary support, affirmed this
13 Court's ruling denying the FTB summary judgment on each of Hyatt's intentional tort claims.
14 The United States Supreme Court affirmed the Nevada Supreme Court.

15 In so doing, neither higher court set any jurisdictional limit, as wrongly suggested by the
16 FTB's motion, concerning discovery directed at the Protest Officer or directed at any argument
17 by Hyatt that post-complaint conduct by the Protest Officer evidences the continuing bad faith
18 of the FTB. The rulings of the higher courts affirmatively support Hyatt's right to take
19 discovery supporting his intentional tort claims, particularly regarding the FTB's fraud
20 stemming from its bad faith conduct during the audits and its continuing bad faith conduct in the
21 protests — including but not limited to the FTB's refusal to issue a decision in the protests
22 thereby denying Hyatt a true administrative appeal — as well as Hyatt's outrage and abuse of
23 process claims that are based in part on the same bad faith conduct of the FTB.

24 Indeed, the FTB intentionally misleads the Court by repeatedly stating that Hyatt's
25 intentional tort claims are now limited to his invasion of privacy claims.³ Those claims based
26 on the various prongs of invasion of privacy (including informational privacy) are very much

27 ² First Amended Complt., ¶ 20.

28 ³ FTB Motion, at 4:24-26.

1 alive and quite significant; just as significant are Hyatt's claims for fraud, outrage and abuse of
2 process. The FTB cannot dispense with Hyatt's claims stemming from the FTB's bad faith
3 conduct during and after the audits by simply not mentioning them in its motion. Indeed, it is
4 for these claims that Hyatt seeks the post-complaint discovery relating to the Protest Officer,
5 including her failure and refusal to issue a decision in the protests.

6 In short, the FTB has never, and does not now, dispute that the early stages of the
7 protests involving the first Protest Officer, Anna Jovanovich, are within the scope of this
8 litigation. Ms Jovanovich's conduct provides one of the bases on which Hyatt asserts bad faith
9 on the part of the FTB. Beyond Ms. Jovanovich's conduct as a Protest Officer, the FTB has
10 produced in this case documents from the subsequent Protest Officers' files that support Hyatt's
11 bad faith claims and for which follow-up discovery is necessary. The scope of this case
12 therefore includes the FTB's post-complaint bad faith conduct. No artificial limit restricting the
13 scope of bad faith conduct by the FTB to pre-complaint activity has been issued by this Court or
14 any reviewing court. Bad faith actions of the FTB Protest Officers, even post-complaint, are
15 highly relevant to Hyatt's claims and must be fully explored by Hyatt in discovery.

16 *California subpoena proceedings*

17 The FTB's second argument erroneously asserts that the California courts have made
18 some finding of fact relative to whether the FTB, at least as of 2002, had acted in bad faith by
19 delaying, in fact refusing to make any decision in, the protests. A determination of that issue
20 was never before the California courts in the extremely limited subpoena enforcement
21 proceeding — for which the FTB presents an inaccurate account and an incomplete record.

22 The California proceeding referenced by the FTB involved only the issuance and
23 enforcement of an administrative subpoena. The FTB issued the subpoena in California under
24 the authority of the pending protests. Hyatt opposed the subpoena in California on several
25 grounds, but primarily on the ground that the subpoena sought material from this case that was
26 irrelevant to the protests. Hyatt also argued that the subpoena was issued in bad faith. From
27 this, the FTB somehow argues that the California court decided a very different issue than the
28 one presented in this case: whether the FTB actions in refusing to issue a decision in the protests

1 are in bad faith, in order to prevent Hyatt from obtaining a true administrative appeal relative to
2 the FTB's proposed assessment of taxes and penalties. The California court was never
3 presented with this issue, and it certainly made no such ruling.

4 The California trial court enforced five of the FTB's six requests in the subpoena,
5 finding them relevant to the protest, while rejecting the sixth request as overly broad. The
6 California Court of Appeal upheld the decision of the trial court on relevance grounds. The
7 California Court of Appeal then also commented that Hyatt's arguments for bad faith by the
8 FTB *in issuing the subpoena* were not supported by proper evidentiary cites, and therefore it
9 saw no basis for the bad faith argument. There was no evidentiary hearing, no discovery, and
10 certainly no finding as to whether or not the FTB actually engaged in bad faith in the protests,
11 let alone delayed the protests in bad faith. The bad faith argument related solely to the FTB's
12 issuance of the subpoena. There is simply no legal basis for arguing that the California court's
13 decision to enforce most of the requests in the subpoena creates a *collateral estoppel* effect
14 relative to Hyatt's assertion in this case that the FTB continues to act in bad faith by delaying
15 and refusing to issue a decision in the protests.⁴

16 In sum, there is no "new" claim for the Court to dismiss via this motion. Hyatt is
17 entitled to take discovery of the FTB's continuing, post-complaint bad faith conduct. Both the
18 Nevada Supreme Court and United States Supreme Court rulings in this case support Hyatt's
19 right to take this discovery and argue that the FTB's post-complaint bad faith conduct supports
20 his intentional tort claims. The FTB's motion should therefore be denied.

21 **3. Relevant Procedural History: the decisions of the Nevada Supreme Court**
22 **and the United States Supreme Court do not prohibit post-complaint**
23 **discovery of the FTB's bad faith conduct in the protests.**

24 The FTB's Motion sets forth a purported "Relevant Procedural History" that is neither
25 accurate nor on point to this motion.⁵ First, contrary to the FTB's suggestions, almost all of

26 ⁴ Indeed, at that time in 2002, Hyatt had not yet received what is the best evidence of the FTB's bad faith delay in
27 the protests consisting of e-mails by and between the FTB's Protest Officer and her supervisor that are discussed
28 below.

⁵ Similarly, Hyatt disputes the "undisputed facts" set forth in Section II, pp. 6-8, of the FTB's Motion. Many of the
FTB's "facts" relate to California process and procedure in audits and protests. The statutes cited by the FTB speak
for themselves and are not actually "facts." But the "conclusions" of the auditors are very much disputed by Hyatt.

Hyatt's case as pled remains intact. The FTB's motions for judgment on the pleadings and summary judgment were overwhelmingly rejected.⁶ Most significantly, as described below, the Nevada Supreme Court's review of this case then left intact the entirety of Hyatt's bad faith, intentional tort case, dismissing only a single negligence claim and remanding for trial all intentional tort claims, including Hyatt's fraud and outrage claims.⁷ The United States Supreme Court then unanimously affirmed the Nevada Supreme Court's decision.⁸

A. The FTB's prior motion for summary judgment was denied.

The FTB filed a Motion for Summary Judgment in 2000 making essentially two separate arguments: (i) Hyatt's claims were barred by the sovereign immunity that the FTB was accorded in California under California law and (ii) Hyatt did not have sufficient evidence to establish the necessary elements of his Nevada common law tort claims. The FTB directly argued, unsuccessfully, in its motion for summary judgment that Hyatt did not have evidence of genuine issues of material facts. The FTB argued this point claim by claim for over 10 pages.⁹ Hyatt, in turn, provided detailed and supporting evidence for each element of each Nevada common law tort claim,¹⁰ including his fraud, outrage and abuse of process claims as described above.¹¹

The District Court agreed with Hyatt's position finding disputed material issues of fact for each of Hyatt's Nevada common law tort claims, and denying summary judgment on all

(FTB Motion, at 6.) In particular, Hyatt did not move to Nevada "just before receiving millions" to the extent the FTB asserts Hyatt was expecting such income when he moved. (*See* G. Hyatt Affidavit, ¶ 32, filed in support of Hyatt Opposition to FTB Motion for Partial Summary Judgment Re Economic Damages). Additionally, the 1991 protest was not delayed for 16 months at the request of Hyatt or Hyatt's attorney, contrary to the bald assertion in the FTB's motion. (FTB Motion, at 7.) The delay has been entirely due to the FTB's inaction. This is obviously a disputed material fact. Hyatt will not waste the Court's time addressing every fact the FTB asserts is undisputed, but rather generally asserts that he disputes the "facts" set forth by the FTB as undisputed.

⁶ *See* April 16, 1999 Order re Judgment on the Pleadings, attached hereto as Exhibit 1, and May 31, 2000 Order re FTB Summary Judgment Motion, attached hereto as Exhibit 2.

⁷ *See* Exhibit 2 to FTB Motion.

⁸ *Franchise Tax Board v. Hyatt*, 538 U.S. 488 (2003), attached hereto as Exhibit 3.

⁹ Reply of FTB in Support of Motion for Summary Judgment, at 7-18, attached hereto as Exhibit 4.

¹⁰ Opposition to FTB Motion for Summary Judgment, at 21-48, attached hereto as Exhibit 5.

¹¹ *Id.*, at 34-36, 38-47.

claims.¹² The District Court also denied the FTB's alternative theory that the FTB's sovereign immunity under California law prohibited this suit against the FTB in Nevada.¹³

B. The Nevada Supreme Court affirmed denial of FTB's summary judgment motion and request for immunity.

FTB writ petition re summary judgment ruling. The FTB filed a writ petition with the Nevada Supreme Court seeking review of the District Court's ruling on summary judgment relating to the denial of the recognition of the FTB's asserted right to sovereign immunity under California law.¹⁴ The FTB specifically did *not* seek writ review of the District Court's ruling that disputed material issues of fact existed that precluded summary judgment for any of Hyatt's common law tort claims,¹⁵ and Hyatt did not brief that issue.¹⁶

The Nevada Supreme Court's first ruling. After extensive briefing and oral argument relative to the sovereign immunity argument presented by the FTB, the Nevada Supreme Court issued a ruling in which it admitted that it was going beyond the issues presented in the writ petition, had examined the record presented, and determined Hyatt had not presented evidence sufficient to establish his tort claims.¹⁷

Hyatt's petition for rehearing. Based on the Nevada Supreme Court's acknowledged reaching beyond the issues presented and briefed by the parties, Hyatt filed a petition for rehearing arguing that he had not presented the substantial evidentiary support that established his common law tort claims because that issue was not before the Court in the FTB's writ petition.¹⁸ In particular, Hyatt addressed his invasion of privacy claims and fraud claim. He

¹² Order re Motion for Summary Judgment, at 2, attached hereto as Exhibit 2.

¹³ *Id.*

¹⁴ FTB's Petition for a Writ of Mandamus ordering Dismissal, or Prohibition and Mandamus Limiting the Scope of this Case, at 22 (describing issues presented) attached hereto as Exhibit 6.

¹⁵ *Id.* at 22.

¹⁶ Hyatt's Answer to FTB's Petition for a Writ of Mandamus ordering Dismissal, or Prohibition and Mandamus Limiting the Scope of this Case at 1-2 (describing issues presented) attached hereto as Exhibit 7.

¹⁷ Nevada Supreme Court ruling dated June 13, 2001, *see* Exhibit 11 to FTB Motion.

¹⁸ Hyatt's 10 page petition for rehearing filed with the Nevada Supreme Court is attached hereto as Exhibit 8; Hyatt's 15 page Supplement to his Petition for Rehearing filed with the Nevada Supreme Court is attached hereto as Exhibit 9.

1 demonstrated that there was evidentiary support for each element of each tort, thereby
2 prohibiting the granting of summary judgment.¹⁹

3 ***The Nevada Supreme Court's second ruling.*** In short, the Nevada Supreme Court held,
4 upon actual review of the evidentiary record, that Hyatt had presented sufficient facts supporting
5 his tort claims thereby creating "the existence of a genuine dispute justifying denial of the
6 summary judgment motion."²⁰ The Court then addressed the sovereign immunity issue raised
7 in the FTB's initial writ petition, ruling that for Hyatt's intentional tort claims, Nevada courts
8 should not and would not recognize as a matter of comity that the FTB was immune from the
9 alleged intentional torts because a Nevada government agency would not be immune under
10 Nevada law for alleged bad faith intentional misconduct:

11 ... Nevada does not allow its agencies to claim immunity for
12 discretionary ***acts taken in bad faith, or intentional torts*** committed in
13 the course and scope of employment. Hyatt's complaint alleges that
14 the Franchise Tax Board employees ***conducted the audit in bad faith,***
15 ***and committed intentional torts*** during their investigation. We
16 believe that greater weight is to be accorded Nevada's interest in
17 protecting its citizens from injurious intentional torts and bad faith acts
18 committed by sister states' government employees, than California's
19 policy favoring complete immunity for its taxation agency.²¹

20 In contrast, the Court held that Hyatt's sole negligence claim should be dismissed as a
21 matter of comity because a Nevada government agency would have immunity for the alleged
22 negligence under Nevada law.²²

23 The key discovery ruling made by the Nevada Supreme Court, as addressed below
24 regarding the FTB's privilege assertion, has application to this motion. The Nevada Supreme
25 Court held "And if the [deliberative process] privilege were to apply, it would be overridden by
26 Hyatt's demonstrated need for the documents based on his claims for fraud and government
27

28 ¹⁹ *Id.*

²⁰ See NSC April 4, 2002 Order, at 2, attached hereto as Exhibit 2 to the FTB Motion.

²¹ *Id.* at 8 (emphasis added). Indeed, in rejecting most of the relief sought by the FTB, the Nevada Supreme Court stated, "And if the [Deliberative Process] privilege were to apply, it would be overridden by Hyatt's demonstrated need for the documents based on his claims of fraud and government misconduct." *Id.*, at 9. It is clear therefore that the Nevada Supreme Court's decision to affirm the District Court's denial of the FTB's summary judgment motion was not a close call.

²² *Id.* at 7-8.

misconduct.”²³ Here, the FTB’s objections to Hyatt taking discovery of the protests and Protest Officers should also be overridden by Hyatt’s demonstrated need for this protest and Protest Officer discovery “based on his claims for fraud and government misconduct.”

C. The United States Supreme Court affirmed that Nevada need not grant immunity to the FTB as a matter of comity.

The United States Supreme Court’s review, consistent with the FTB’s certiorari petition, was limited to the sovereign immunity issue and the Nevada Supreme Court’s refusal to grant comity to California in regard to Hyatt’s intentional tort claims. On this issue, the United States Supreme Court unanimously upheld the Nevada Supreme Court.²⁴

The United States Supreme Court has held that a State has no inherent sovereign immunity in the courts of another state. That is the key holding in *Nevada v. Hall*,²⁵ and the FTB deliberately did not challenge that holding before the United States Supreme Court.²⁶ Moreover, the United States Supreme Court specifically rejected the FTB’s attempt to rely on its legislatively conferred sovereign immunity, holding that the Full Faith and Credit Clause does not compel the Nevada courts to honor such immunity.²⁷ Although the Court noted that a State may not exhibit a “policy of hostility to the public acts of a sister State,”²⁸ it expressly found no such hostility here, stating that “The Nevada Supreme Court sensitively applied principles of comity . . .”.²⁹ The United States Supreme Court not surprisingly therefore issued a unanimous 9 to 0 opinion in favor of Hyatt, thereby allowing him to pursue his intentional tort claims at trial.

What is left to the FTB relative to sovereign immunity is only that which the Nevada

²³ See NSC April 4, 2002 Order, at 9, attached hereto as Exhibit 2 to the FTB Motion.

²⁴ 538 U.S. at 497.

²⁵ 440 U.S. 410 (1979).

²⁶ See *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 497 (2003) (attached as Exhibit E to the FTB’s Objections).

²⁷ *Hyatt*, 538 U.S. at 497-99.

²⁸ *Hyatt*, 538 U.S. at 499.

²⁹ *Id.*

1 Supreme Court agreed to recognize as a matter of comity. But that immunity provides no basis
2 for objecting to discovery orders that are aimed at producing evidence relevant to the intentional
3 tort claims and to the bad faith conduct that supports these torts. The FTB has made no showing
4 that any "hostility" towards California law motivates the rulings of this Nevada court of which it
5 complains.

6 **D. The FTB now misstates and misrepresents the above decisions.**

7 The FTB simply misstates constitutional law and the decisions of the Nevada Supreme
8 Court and the United States Supreme Court in arguing that the Protest Officers' post-complaint
9 bad faith actions in the protests are outside the scope of this case. The FTB lost on this issue.
10 Bad faith conduct by the FTB, whether pre-filing or post-filing of the complaint, is at issue in
11 this case.

12 Nothing in the Nevada Supreme Court's decision states, implies, or suggests, as the FTB
13 argues, that the scope of bad faith conduct at issue in this case and for which Hyatt seeks
14 discovery, is limited to pre-complaint conduct. Nor is there anything in the decision that puts
15 actions of the FTB's Protest Officers — after Ms. Jovanovich — off-limits. The decision
16 clearly states, "bad faith acts by [the FTB's] employees" are at issue and within the scope of this
17 case. This includes bad faith actions of the FTB Protest Officers in the protests, even if these
18 actions occurred after the complaint was filed.

19 The FTB argues that the Nevada Supreme Court's decision to allow Hyatt to pursue his
20 intentional tort claims was because Hyatt "had no remedy for such torts in California" and cites
21 without any specificity the Nevada Supreme Court's decision.³⁰ Nowhere does the Court's
22 decision say what the FTB represents. The decision was not based on whether Hyatt had tort
23 remedies in California. Rather, the Nevada Supreme Court found, as quoted in part above, that
24 because Nevada has jurisdiction over the FTB for the conduct alleged, and a Nevada
25 government agency would not be immune if it had committed such acts, the FTB is not immune
26 in Nevada.³¹ The same reasoning and rationale must apply to bad faith acts committed by the

27 ³⁰ FTB Motion, at 11.

28 ³¹ NSC April 4, 2002 Order, at 6, *see* Exhibit 2 to FTB Motion.

FTB during the protests, whether pre or post filing of the complaint in this action.

The FTB then suggests that Hyatt has a remedy for bad faith conduct in the protests because (if the FTB ever makes a decision in the protests) he can seek administrative review and court review.³² But that process in California relates to the “tax case” not this tort case. In this tort case, Hyatt does not seek relief relative to the tax case. That case will be decided in California on the merits. But in pursuing its tax case and continuing to investigate Hyatt during the now long pending protests, the FTB must not engage in continuing bad faith acts. If it does, as it has since the filing of this action, Hyatt may take discovery of that misconduct and present it as evidence in support of his bad faith intentional tort claims in this case.

4. Hyatt’s fraud, outrage and abuse of process claims include any continuing bad faith conduct by the FTB during the pending protests.

Hyatt previously set forth a *prima facie* case for his intentional tort claims through the evidentiary support he submitted in successfully opposing the FTB’s summary judgment motion in 2000. A summary of the pre-complaint evidence supporting Hyatt’s fraud and outrage claims is set forth here to provide the necessary context to the post-complaint bad faith actions of the FTB that Hyatt asserts are within the scope of this case and for which discovery is sought.

A. Hyatt’s fraud claim thus far includes the FTB’s bad faith during the audit and then attempting to extort a settlement early in the protests.

Hyatt’s fraud claim, for which the Court already found there to be a *prima facie* case in denying summary judgment, is based on false promises made by the FTB to induce Hyatt’s cooperation with the audit: *e.g.*; (i) that the FTB would keep Hyatt’s information confidential, and (ii) that the FTB would conduct a fair, impartial, and unbiased review of his California tax liability. While the FTB’s motion focuses only on the first prong and Hyatt’s related invasion of privacy claims, the second prong is at issue here and most relevant for the discovery sought from the Protest Officer. Under this prong, as Hyatt argued and presented supporting evidence in defeating the FTB’s summary judgment motion, the FTB’s bad faith actions during and after the audits evidence its fraud, bad faith, and malice.

³² *Id.* at 11-12.

As Hyatt argued in opposing the FTB's motion for summary judgment on the fraud claim, the FTB's bad faith included not only breaching its promise of a fair, impartial, and unbiased audit, but also the first Protest Officer trying to extort a settlement from Hyatt by overtly threatening a more intrusive investigation and further disclosure and publicity of his private information. A brief summary of this claim (and the supporting evidence which the Court already found set forth a *prima facie* claim) is provided below to give context to the issue now before the Court: whether Hyatt may take discovery of the FTB's continuing bad faith conduct after the filing of the complaint in this action and then present such evidence at trial to support his intentional tort claims.

1. The FTB promised a fair, impartial, unbiased audit, induced Hyatt's cooperation, and then in bad faith proceeded to conduct a fraudulent one-sided, predetermined audit.

The FTB, in its Mission Statement, its Strategic Plan, and in communications with the public, holds itself out to taxpayers to be fair and impartial in its dealings with taxpayers. It professes not to guard the revenue, but to interpret the law evenly and fairly with neither a state nor a taxpayer point of view. FTB personnel have testified to this in depositions.³³ The FTB's first auditor, Mark Shayer, even testified that he promised to conduct a fair and unbiased audit.³⁴

But the FTB's third auditor, Sheila Cox, focused exclusively on information that could be construed as supporting the FTB's position. She completely ignored documentary evidence and witness statements directly contrary to the FTB's preordained conclusion.³⁵ She did not investigate the most relevant information. If she had, she would have had no choice but to conclude Hyatt was a Nevada resident from September 26, 1991 to the present.

The FTB conducted a biased investigation in which Cox acknowledged in deposition that she destroyed key evidence that supported Hyatt (*e.g.*, her contemporaneous handwritten

³³ Illia Depo., Vol. II, p. 303, attached hereto as Exhibit 10.

³⁴ Shayer Depo., Vol. I, pp. 474, 476, 482-83, attached hereto as Exhibit 11.

³⁵ Cowan (2000) Affidavit and Exhibit 14 thereto. The Cowan (2000) Affidavit is attached hereto as Exhibit 12. It was filed in this case, with exhibits, on March 22, 2000 as part of Hyatt's opposition to the FTB's Motion for Summary Judgment heard in April 2000. Exhibit 14 to the Cowan (2000) Affidavit is Cowan's June 20, 1996, protest letter regarding the 1991 audit, and this letter sets forth in detail these objections to the conduct of the 1991 audit and the treatment given to Hyatt's evidence by auditor Sheila Cox.

1 notes and computer records of bank account analysis).³⁶ Cox told her husband and others
2 during the Hyatt audits that she was going to “get the Jew bastard.”³⁷ After the audit concluded
3 and she had assessed Hyatt millions of dollars in trumped-up taxes and penalties, she called
4 Hyatt’s ex-wife and bragged about assessing Hyatt.³⁸ To co-workers, Cox called Hyatt’s Asian
5 business associate a “gook.”³⁹ Cox also called Hyatt’s former neighbor who had an arm injury a
6 one armed man and other former neighbors “ghouls”, and she said that Hyatt’s former
7 California home had a “dungeon.”⁴⁰ Cox was hardly a fair, impartial and unbiased auditor.

8 The FTB, primarily through Cox’s actions, disregarded, refused to investigate, ignored,
9 and “buried” the facts favorable to Hyatt that it uncovered during its invasive audit. For
10 example, the FTB simply ignored:

- 11 • the current neighbors in Nevada who supported Hyatt’s Nevada residency
12 claim;
- 13 • the former neighbors in California who told of Hyatt’s move to Nevada;
- 14 • the friends and business associates who knew of Hyatt’s move to Nevada;
- 15 • the adult son who knew of Hyatt’s move to Nevada;
- 16 • Nevada rent, utility, telephone, and insurance payments of Hyatt;
- 17 • Nevada voter registration and driver’s license of Hyatt;
- 18 • Nevada home purchase offers and escrow papers of Hyatt;
- 19 • Nevada religious, professional, and social affiliations of Hyatt;
- 20 • changes of address from California to Nevada address.⁴¹

21 The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages

22
23 ³⁶ Cox Depo., Vol. I, pp. 17, 174-175, 190, Vol. II, pp. 341, 342, 423-24, Vol. III, pp. 569, 605, 661, Vol. IV, pp. 861, 971, attached hereto as Exhibit 13.

24 ³⁷ Les Depo., Vol. I, p. 10, attached hereto as Exhibit 14.

25 ³⁸ Maystead Depo., Vol. I, pp. 182-84, attached hereto as Exhibit 15.

26 ³⁹ Les Depo., Vol. 1, p. 10, Vol. 2, p. 389, attached hereto as Exhibit 14.

27 ⁴⁰ Les Depo. Vol. 1, p. 25, Vol. 2, pp. 385-386, attached hereto as Exhibit 14.

28 ⁴¹ Cowan (2000) Affid. and Exhibit 14 attached thereto.

1 which supposedly detail the evidence in favor of its conclusion concerning Hyatt's residency, as
2 well as a basis for asserting a fraud penalty against Hyatt. Based on the depositions conducted,
3 Hyatt has learned that, in compiling such Narrative Reports, the FTB ignored substantial
4 evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt and
5 contrary to the FTB's preordained conclusion.⁴² Ms. Jovanovich, before she became the first
6 Protest Officer, assisted and guided the auditor, Sheila Cox, with fraud aspects of the 1991 audit
7 and Narrative Report.

8 In preparing its Narrative Reports, the FTB never spoke with or interviewed Hyatt nor
9 did it schedule the required closing conference for Hyatt and his tax representatives, but instead
10 prematurely closed the audits.⁴³ The FTB also ignored and failed to interview the following
11 individuals having information favorable to Hyatt: Grace Jeng, his long-time assistant; Helene
12 Schlindwein, his long-time friend; Dan Hyatt, his adult son; and Barry Lee, his long-time
13 business associate.⁴⁴ Instead, the FTB audited Miss Jeng and Barry Lee's company⁴⁵ to try and
14 intimidate them and separate them from Hyatt.

15 Instead of speaking with Hyatt's son, Dan, with whom Hyatt had a close ongoing
16 relationship, who loaned Hyatt his utility trailer for Hyatt's move to Las Vegas, and who visited
17 with Hyatt in Las Vegas shortly after the move to Las Vegas, the FTB interviewed and obtained
18 "affidavits" from Hyatt's bitter and long-time divorced ex-wife, his estranged daughter, and his
19 estranged brother. His ex-wife and estranged brother had forced Hyatt to defend a number of
20 frivolous, and on their part, unsuccessful litigations. Three alleged "affidavits" obtained by the
21 FTB from these estranged relatives were the cornerstone of its case and were prominently
22 featured in the FTB's Narrative Reports.⁴⁶ Yet, these "affidavits" were not even affidavits

23
24 ⁴² Cox Depo., Vol. V, pp. 1181, 1187-1188, attached hereto as Exhibit 13; Cowan (2000) Affid. and Exhibit 14 thereto.

25 ⁴³ Cox Depo., Vol. 1, pp. 27-28, attached hereto as Exhibit 13.

26 ⁴⁴ Cox Depo., Vol. I, 29, 168-169, 181, attached hereto as Exhibit 13.

27 ⁴⁵ Cox Depo., Vol. VI, p. 1460-61, Vol. VIII, p. 2021, attached hereto as Exhibit 13.

28 ⁴⁶ See Fraud Narrative, at H 00061, attached hereto as Exhibit 16.

1 because the auditor admitted to having signed a false jurat, where she had not sworn in the
2 affiants as the signed jurat alleged.⁴⁷

3 More importantly, the statements set forth in such "affidavits" were nothing more than
4 vague and general attacks on Hyatt and provided no specific evidence supporting the FTB's
5 conclusion, despite frequent references and significant reliance on the "affidavits" in the
6 Narrative Report and position letters. The only specific statements set forth in such "affidavits"
7 are by Hyatt's estranged daughter, yet she specifically wrote at the end of her statement that she
8 could not be sued or have recourse taken for her statement.⁴⁸ And this disavowal of her own
9 statement was ignored by the FTB in the Narrative Report, even though it casts doubt on
10 whether her statement was reliable and whether she would stand by that statement in a court of
11 law. Mr. Hyatt's daughter testified in deposition that she was estranged from her father since
12 well before the disputed period.⁴⁹ The FTB overlooked this bias and complete lack of personal
13 knowledge in its "key" witness. In other words, the cornerstone of the FTB's decision to assess
14 taxes and a penalty crumbles upon an even mild cross-examination.

15 **2. The \$10 million fraud penalty and the FTB's urging Hyatt to 16 settle.**

17 The FTB not only assessed Hyatt taxes for a period after which he had moved to Nevada
18 based on its trumped up investigation, it assessed Hyatt penalties for alleged fraud in regard to
19 his Nevada residency. The penalties amounted to an additional 75% of the alleged taxes.
20 Discovery has established that the FTB teaches its auditors to use the fraud penalty as a
21 "bargaining chip" to obtain "agreements" from the taxpayer to pay the assessed tax.⁵⁰ To make
22 its point, the FTB's penalties training manual has on its cover a menacing "skull and cross-
23 bones."⁵¹

24 ⁴⁷ Cox Depo., Vol. III, p. 756, lns. 18-25, attached hereto as Exhibit 13.

25 ⁴⁸ H 00302-07, attached hereto as Exhibit 17.

26 ⁴⁹ Beth Hyatt Depo., Vol. I, pp. 85-86, attached hereto as Exhibit 18.

27 ⁵⁰ Ford depo., Vol. I, p. 128-29, attached hereto as Exhibit 19.

28 ⁵¹ See H 08950, attached hereto as Exhibit 20.

Hyatt contends that the FTB instigated the audits of his tax returns to coerce a settlement from him and that Ms. Jovanovich, the first of four Protest Officers, boldly “suggested” to Hyatt’s representative that settling at the “protest stage” would avoid a more intrusive investigation and would avoid Hyatt’s personal and financial information being made public.⁵² Hyatt has now confirmed through deposition testimony that Ms. Jovanovich told Hyatt’s tax representative that if he did not settle at the outset of the protest stage, the privacy and confidentiality that he so valued would be lost.⁵³ In fact, the FTB’s breach of Hyatt’s privacy is claimed as the cause of the destruction of his patent Licensing Program that earned over \$350 million in less than four years and then went to zero forevermore, at precisely the same time that the FTB sent letters to Hyatt’s Japanese licensees. This issue is addressed in the Opposition to the FTB’s Motion for Partial Summary Judgment re Economic Damages, filed contemporaneously herewith.

Specifically, Protest Officer Jovanovich told Hyatt’s tax representative that it would be necessary for the FTB to engage in extensive additional requests for information from Hyatt, as that is its practice “in high profile, large dollar” residency audits. In fact, Ms. Jovanovich testified that she told Hyatt’s tax representative that in such cases, the FTB will conduct an in-depth investigation and exploration “of many unresolved facts and questions” related to Hyatt.⁵⁴

Ms. Jovanovich also testified that she understood Hyatt had a unique and special concern regarding his privacy.⁵⁵ She testified that this was a topic of discussion among FTB auditors, such that the residency unit of the FTB fully understood Hyatt’s unique need for privacy and confidentiality.⁵⁶ Nonetheless, she made the threats to Hyatt’s tax attorney regarding the dissemination of his private information.

Discovery of the post-complaint conduct of the Protest Officers, all four of them, is a

⁵² See First Amended Complaint, ¶ 56(g).

⁵³ Jovanovich depo., Vol. I, pp. 50-52, 168, 185-186, 231-232 attached hereto as Exhibit 21.

⁵⁴ See Exhibit 21; also, see Jovanovich’s notes of her conversations with Cowan, attached hereto as Exhibit 22.

⁵⁵ Jovanovich depo., Vol. 1, p. 126, lns. 4-25, attached hereto as Exhibit 21.

⁵⁶ Jovanovich depo., Vol. 1, p. 126, lns. 13-21, attached hereto as Exhibit 21.

necessary, and natural, extension of the discovery of the FTB's bad faith conduct.

B. Hyatt's outrage claim thus far includes the FTB's bad faith during the audit and then attempting to extort a settlement early in the protests.

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

Even when Hyatt's representative pointed out an undeniable FTB income error in calculating the amount of taxes assessed, the FTB refused to even consider the issue and deliberately left the erroneous assessment hanging over Hyatt's head to purportedly collect interest and increase the fear and intimidation imposed upon Hyatt.⁵⁷ The FTB's actions served not the goals of an honest investigation into Hyatt's residency, but the more base objectives of harassment, embarrassment, coercion, and intimidation. That conduct caused the effect the FTB sought: Hyatt's extreme emotional distress as manifested by his fear, grief, humiliation, embarrassment, anger and a strong sense of outrage that would be shared by any reasonable member of the community subjected to such oppressive tactics.⁵⁸

The FTB's conduct is all the more outrageous, given Hyatt's battle with cancer during the period of time on which the FTB was focusing its investigation, and the FTB's use of Hyatt's highly-recommended doctor and hospital facility as a California contact that the FTB contends suggests California residency.⁵⁹ But, Hyatt has a right guaranteed by the U.S. Constitution to travel from Nevada to California for the purpose of his surgery without having multiple millions of dollars in tax, plus a fraud penalty, imposed on him by the FTB for doing so. When a ruthless government agency like the FTB unleashes an unlawful and reprehensible attack on a citizen in order to bring him to his knees with his checkbook in hand, that is an outrage.

⁵⁷ Cowan (2000) Affid., ¶¶ 35-36, attached hereto as Exhibit 12.

⁵⁸ See, e.g., Hyatt (2000) Affid., ¶ 8, excerpts attached hereto as Exhibit 23. The "Hyatt (2000) Affid." is a document filed in this case on March 22, 2000 as part of Hyatt's opposition to the FTB's Motion for Summary Judgment heard in April 2000.

⁵⁹ See, e.g., Hyatt (2000) Affid., ¶ 190, attached hereto as Exhibit 23.

Whether the FTB's post-complaint conduct, including delay and refusal to decide the protests, further evidences the FTB's outrageous conduct is at issue in this case and certainly appropriate for discovery.

C. The FTB's related post-complaint continuing bad faith conduct is properly within the scope of this case, including the abuse of process claim.

Nevada is a notice pleading state.⁶⁰ The continuing post-complaint bad faith conduct asserted by Hyatt relative to the protests and the Protest Officers is within the scope of the claims pled by Hyatt, for which this Court has already found Hyatt has set forth a *prima facie* case. Moreover, a defendant's continuing bad faith misconduct after the filing of the complaint in a matter is an appropriate subject for discovery.⁶¹ For example, Hyatt's abuse of process claim dealt with the facts known to him at that time, i.e., the abuse of the FTB's demands for information and requests for information as disguised process with the stamp of governmental authority. Similarly, Hyatt has learned through discovery that the Protest Officers have used information from this litigation to fashion document requests, now being used to justify the shutting down of the protest process itself by blaming Hyatt for the delays. Again, this is clearly an issue framed by Hyatt's pleadings and a proper subject for discovery and evidence at trial.

While Hyatt believes it is not necessary, if the Court deems it necessary or appropriate,

⁶⁰ *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1348 (Nev. 1997); *Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 801 (1990.) ("Nevada is a notice-pleading jurisdiction and pleadings should be liberally construed to allow issues that are fairly noticed to the adverse party.")

⁶¹ *See, e.g., King v. E.F. Hutton & Co.*, 117 F.R.D. 2, 7 (D.D.C. 1987) ("The continuation of a course of conduct, involving false representations or other culpable wrongdoing after a complaint, may have evidentiary significance as to malice or reckless or wanton conduct . . ."); *see also Southwest Hide Co. v. Goldston*, 127 F.R.D. 481, 483-85 (D. Tex. 1989) ("There is no per se rule barring discovery regarding events which occurred after the date the pending action was filed. . . . 'the continuation of a course of conduct, involving false representations or other culpable wrongdoing after a complaint, may have evidentiary significance.'"). *See, also, Alford v. Harold's Club*, 99 Nev. 670, 675 (1983), where the Nevada Supreme Court noted that it may be error to not allow evidence of post-complaint acts where plaintiff alleged a continuing conspiracy. In an old Nevada divorce case, *Gardner v. Gardner*, 23 Nev. 207 (1896), our Supreme Court noted that "We are of the opinion that the evidence is not necessarily to be limited to the particular facts charged, but that evidence of other facts, whether before or after suit brought, which serves to give character to the acts of cruelty alleged and proved, is admissible." In the criminal context, *Perelman v. State*, 115 Nev. 190 (1999), found that the continuing nature of insurance fraud was adequately pled in the criminal complaint to put the defendant on notice of the charge to be defended, so evidence of continuing insurance fraud conduct fell within the scope of the charges. Similarly, other courts have allowed discovery or admitted into evidence post-complaint acts (*See, e.g., Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798 (2001) (sexual harassment); *LaSalvia v. United Dairywomen of Arizona*, 804 F.2d 1113 (9th Cir. 1986) (anticompetitive conduct can be a continuing violation under antitrust law)).

Hyatt can and will supplement his First Amended Complaint under NRCP 15(d) that expressly allows "supplementing" the pleadings to include transactions, occurrences, or events that have happened since the date of the pleading. Hyatt contends that this is not procedurally necessary as the FTB is well aware of what Hyatt asserts and seeks relative to the FTB's post-complaint bad faith conduct. Nonetheless, to the extent the Court finds that the post-complaint bad faith conduct of the Protest Officers is not within the "notice pleading" of Hyatt's First Amended Complaint, Hyatt requests leave to supplement his First Amended Complaint under NRCP 15(d).

5. There is mounting evidence of the FTB's continuing bad faith conduct during the post-complaint protests applicable to Hyatt's intentional tort claims.

A. There is evidence of, and Hyatt must be allowed to fully explore in discovery, the FTB's bad faith delay in deciding the protests.

Hyatt filed this action in January of 1998. As the FTB motion does not dispute, Hyatt asserted, and still asserts, various claims stemming from the FTB audits of Hyatt conducted from 1993 through 1996, as well as conduct of the FTB through the filing date of the complaint in the "protests" filed by Hyatt to challenge the results of the audits.⁶² Given the passage of time due in great part to the FTB's unsuccessful challenges to Hyatt's claims in the Nevada Supreme Court and the United States Supreme Court between 2000 and 2003, additional events have transpired in the protests that further support Hyatt's bad faith, intentional tort claims.

One post-complaint bad faith issue is the FTB's excessive delay in deciding the protests. It is more than **14 years** from Hyatt's move to Las Vegas in September 1991, more than **12 years** since the FTB commenced the first Hyatt audit in June 1993, more than **10 years** since the 1991 audit ended in 1995, more than **9 years** since Hyatt filed his 1991 tax-year protest in 1996, and more than **8 years** since Hyatt filed his 1992 tax-year protest in 1997. **Five years ago**, in 2000, the FTB Protest Officer conducted hearings in the protests, at which time Hyatt's tax representative appeared and presented oral argument.⁶³ Still there is no decision by the FTB. In

⁶² See, e.g., First Amended Complt., ¶ 20.

⁶³ E. Coffill letter March 7, 2002 (P 01416-01418), attached hereto as Exhibit 24.

1 the meantime, interest accrues at the rate of thousands of dollars a day on the preliminary
2 assessments made by the FTB in 1996 and 1997, respectively. The FTB holds this accrued
3 interest and, as threatened by Protest Officer Jovanovich, its continuing and intrusive requests
4 for information, over Hyatt's head like a "Sword of Damocles."

5 When Hyatt's tax representative Eric Coffill inquired in early 2002 as to the status of a
6 decision on the protests, he was informed that the protests were on "hold," but that the Protest
7 Officer had draft protest letters prepared and could and would complete a final determination for
8 the protests on a few weeks notice.⁶⁴ Mr. Coffill stated in his March 7, 2002 letter regarding a
9 February 20, 2002 telephone conversation:

10 You [George McLaughlin] informed me the protests were not being
11 worked on because of the pending Nevada litigation between Mr.
12 Hyatt and the FTB. While it was not clear from our conversation
13 exactly when this "hold" was put on the protests, I told you what Cody
14 [Cinnamon] had told me, i.e., that Cody had not charged time on the
15 protests since June 2001. You also informed me that you believe the
16 protests are "written up," and that you believed that the FTB could
17 issue proposed determination letters for 1991 and 1992 on relatively
18 short notice of several weeks once the case was activated.⁶⁵

19 Yet, the FTB attorneys in this case had consistently argued there is no credible evidence
20 of a "hold," essentially discounting the above exchange among Hyatt's tax counsel and the FTB
21 protest officer and her supervisor.⁶⁶

22 But in response to a ruling from the Discovery Commissioner, the FTB only recently
23 produced documents confirming the delay and the fact that the protests were put on "hold." E-
24 mails produced in recent months by the FTB verify with exact consistency what Mr. Coffill
25 confirmed in his letter. Ms. Cinnamon, the then and current fourth FTB Protest Officer on the
26 Hyatt protests, e-mailed to Mr. McLaughlin, her supervisor, on February 20, 2002 stating:

27 Eric Coffill called me and asked what was happening with the case. I
28 told Eric that I was instructed not to work on the case due to the
pending Nevada litigation. He wanted further information so I

25 ⁶⁴ *Id.*

26 ⁶⁵ *Id.*

27 ⁶⁶ *See, e.g.,* FTB counsel arguing during August 5, 2005 hearing that there is no evidence of a hold saying Mr.
28 Coffill's letter was the only evidence counsel had seen, August 5, 2005 hearing transcript, at 56:6-17, attached
hereto as Exhibit 25.

1 referred Eric to you. Eric said he would be calling you.⁶⁷

2 Mr. McLaughlin replied by asking Ms. Cinnamon to come see him.⁶⁸ The FTB also
3 recently produced an e-mail from one of its senior in-house counsel, Ben Miller, from less than
4 two months later, April 5, 2002, (which was one day after the Nevada Supreme Court's
5 unanimous decision in Hyatt's favor) stating "we should put things on hold with administrative
6 matters."⁶⁹

7 It is therefore patently clear that the FTB has put Hyatt's protests in the California tax
8 proceedings on hold pending a final determination in the Nevada tort case.⁷⁰ This is despite the
9 fact that in *February 1998*, a month after the case was filed, the FTB's supervising attorney,
10 Terry Collins, presented an affidavit to this Court declaring that the "FTB intends to continue
11 processing, and continues to process, Hyatt's Protests with the FTB's investigative procedure
12 set forth under California law for both tax years (1991 and 1992) despite his filing of this legal
13 action in Nevada."⁷¹

14 Hyatt wishes to take discovery, and the Discovery Commissioner has granted discovery,
15 on this delay issue. Specifically, the Discovery Commissioner recommended the following
16 regarding discovery relating to the delay in the protests:

17 Grant, but limited in general to any documents referring to why or the
18 purposes or the reasons or the facts which would clarify why the Hyatt
19 protests for 1991 and 1992 are not resolved. *In other words, anything*
20 *that indicates what the delay is in the Hyatt protests or why they*
21 *stalled.* The Discovery Commissioner finds that this limited amount
22 of information concerning the Hyatt protests, which are continuing,
23 would go to the tort claims of the Plaintiff and in regard to a
24 continuance of bad faith as has been alleged by the Plaintiff. *Any*
25 *documents that would shed light on why the Hyatt protests are not*
26 *resolved one way or another must be produced.* (August 5 transcript,

27 ⁶⁷ C. Cinnamon e-mail February 20, 2002 (P 11374), attached hereto as Exhibit 26.

28 ⁶⁸ *Id.*

⁶⁹ B. Miller e-mail April 5, 2002, attached hereto as Exhibit 27.

⁷⁰ The FTB even represented to the California Legislature in 2004 that it projects completion of the Hyatt protest by June 2005. See Report to Senate and Assembly Budget Committee, at 5-6, attached hereto as Exhibit 43. Not surprisingly, the FTB failed to meet that projection.

⁷¹ See T. Collins affidavit, para. 7 submitted with the FTB's Motion to Quash filed in 1998, attached hereto as Exhibit 28.

1 12:2 - 13:12, 14:25 - 15:12)⁷²

2 In that regard, the Discovery Commissioner again explained to FTB counsel during a
3 September 30, 2005 hearing that the protests were part of this case unless and until the District
4 Court rules otherwise:

5 Here's what my problem is. They [Plaintiff] are arguing, and they
6 want to argue, and they'll want to argue at trial that a part and parcel of
7 the persecution of Mr. Hyatt's by the FTB, as they would characterize
8 it, the Tax Board's abuse in regard to him, would be this failure to
9 reach a decision in the protest -- at the protest level for X number of
10 years, and however they will characterize it, whenever they want to
11 start counting, from when the audit started or when the first report was
12 made or whenever they want to say.

13 And they're going to be talking about years and years and years, and
14 they're going to be saying this is unprecedented and it's never
15 happened before. Your position is obviously no, that's not right. You
16 know, and we have all of these good reasons, but they're going to say,
17 well, they want to say that, and they want to produce this e-mail, and
18 they want to produce this memo, and they want to give us these lines,
19 but they don't want to let us talk to any of these witnesses because they
20 have privileged information and their attorneys, so they can't talk
21 about these procedures.

22 Now, to me, that is -- we have arrived at an unfair impasse here. I
23 think they're entitled to make this claim, because I think any
24 reasonable person would say, "I've never seen -- you've never given
25 me any documents -- you've never given me -- look, Mr.
26 Commissioner, you know, here's 50 other cases that took this long.
27 Here's their names and so forth. And if you want to check details on
28 them, you can see that many cases the last ten years or seven years or
eight years at this level, and it's not unusual"

I haven't gotten anything like that. They haven't gotten anything like
that. If they got something like that, I think that would be puncturing
their balloon and they wouldn't have much to say.

But, you know, I would think that -- I'm certainly not making a
decision, but that a judge would let them argue that as part of their
argument.⁷³

The Discovery Commissioner had previously warned that the delay in the protests would
lead to more discovery due to the FTB's own continuing actions in the protests:

And they're [the FTB] the ones who I see no reason why nothing has
happened there, no action. I see no good faith reason why it hasn't
happened.

⁷² August 5, 2005 DCRR, at 4 (emphasis added), attached hereto as Exhibit 29.

⁷³ September 30, 2005 hearing transcript, 29:16 - 31:6, attached hereto as Exhibit 30.

1 I mean we're not talking about forcing them to make some decision on
2 some multimillion dollar case in two weeks. We're talking about
years here that nothing has happened.

3 So, you know, that's -- you want to argue and talk about good faith all
4 the time, and its very difficult for me to swallow it, given what I see as
happening taking place by your client [the FTB].⁷⁴

5 Hyatt asserts that this delay by the FTB is in bad faith and further supports his fraud and
6 other intentional tort claims. The FTB continues to use the Nevada litigation as an excuse for
7 not issuing a Notice of Action (NOA) in the protests and formally affirming or reversing the
8 auditor, thereby maintaining the "Sword of Damocles" over Hyatt consisting of not only the
9 more than \$30 million in tax assessments, penalties, interest, but interest that continues to accrue
10 at the rate of thousands of dollars per day. If the auditor's decision is affirmed (in whole or in
11 part), then Hyatt would have (and would very much welcome) the opportunity to take his case to
12 the State Board of Equalization (and California Superior Court if necessary) in California as
13 explained in the FTB's Motion.

14 The FTB, on the other hand, blames Hyatt for the "delay." This, of course, is a genuine
15 issue as to a material fact, precluding summary judgment. Given the extraordinary time that has
16 lapsed during the protests and the dispute by the parties over the cause of the delay, the
17 Discovery Commissioner naturally granted discovery on this issue. Hyatt must be allowed to
18 fully pursue discovery on this issue to support his argument that the delay and refusal to decide
19 the protests supports Hyatt's intentional tort claims.

20 **B. In addition to delay and refusal to decide the protests, there is other post-**
21 **complaint conduct of the Protest Officer that must be explored in discovery**
22 **because it also evidences, Hyatt contends, bad faith by the FTB consisting of**
23 **its relentless pursuit and investigation of Hyatt.**

24 *Refusal to correct a \$24 million income error in the FTB's favor*

25 Hyatt contends that documents produced by the FTB late last year reveal that the current
26 Protest Officer is aware of an immense "error" by the auditor that, if corrected, would
27 substantially reduce the FTB's own proposed assessment of taxes and penalties. The FTB
28 Protest Officer nevertheless refuses to correct this error.

⁷⁴ May 4, 2005 hearing transcript, 69:9-19, attached hereto as Exhibit 31.

1 More specifically, Hyatt's tax attorney sent a detailed letter to the auditor showing the
2 income received during the 1992 disputed period, versus the income received later in the year,
3 and why the calculation error in favor of the FTB's assessment and against Hyatt should be
4 corrected.⁷⁵ The auditor refused to respond or correct the "error" even though she testified in
5 deposition that she read the letter and was aware of the discrepancy.⁷⁶ Yet, when a smaller
6 income error by the auditor in Hyatt's favor was discovered, it was immediately corrected to
7 increase the proposed assessment against Hyatt.⁷⁷

8 Relative to the Protest Officer, a document from the protest files recently produced in
9 this case indicates that the \$24 million income error was recognized by the Protest Officer, who
10 states in the document that the auditor (Sheila Cox) "pick[ed] up the aggregate annual receipts
11 from Philips," rather than just the receipts during the disputed period of January 1-April 2, 1992.
12 This is precisely the error that Hyatt's counsel identified in his July 17, 1997, letter, about which
13 Hyatt has been complaining without success.⁷⁸ Auditor Cox erroneously determined that the
14 "aggregate annual receipts from Philips" were all received on a single day, January 15, 1992,
15 rather than when they were actually received over the entire year through December, 1992. Of
16 course, January 15, 1992, fell within the disputed period, so the auditor included all of these
17 receipts in assessing tax and penalty, even though \$24 million of that income was actually
18 received *after* April 2, 1992, the date the FTB concedes that Mr. Hyatt was no longer a resident
19 of California and therefore did not owe California income tax on that income. But, instead of
20 correcting the error by amending the assessment, the Protest Officer asserts that the FTB may be
21 entitled to tax the \$24 million income error for another reason, as California source income,
22 again finding a way to expose Hyatt to the maximum tax and penalty liability.⁷⁹ The California
23 source income theory, however, had been considered and rejected by the FTB during the audit

24 ⁷⁵ E. Cowan letter, dated July 17, 1997 (H 02257-02259), attached hereto as Exhibit 32.

25 ⁷⁶ S. Cox Depo., Vol. 7, pp. 1680, 1695, attached hereto as Exhibit 13.

26 ⁷⁷ FTB 104119 (Ford's 1992 Review Notes), attached hereto as Exhibit 33.

27 ⁷⁸ P 00267, attached hereto as Exhibit 34.

28 ⁷⁹ *Id.*

1 itself, based on the conclusions of the FTB's own attorneys and source income specialists that
2 the FTB had no sourcing case against Hyatt.⁸⁰

3 As a result, despite the Protest Officer's knowledge of the significant income error and
4 the dramatic increase it causes in the FTB's proposed assessment, the Protest Officer refuses to
5 correct the error and instead suggests pursuing theories already rejected by the FTB to keep
6 from having to correct the error and lower the proposed assessment made by the auditor. Hyatt
7 is entitled to discovery to determine if this refusal to correct an acknowledged error (and shifting
8 to a different theory of liability in order to preserve the auditor's assessment) constitutes further
9 bad faith by the FTB in handling the protests. Hyatt will argue at trial that this evidences the
10 FTB's continuing bad faith in pursuing and investigating Hyatt. Hyatt must be allowed to take
11 discovery of this issue, or the FTB must be precluded from presenting any rebuttal evidence. In
12 either event, this "protest" issue is very much a part of this case

13 *Amnesty offer*

14 Last year, the FTB offered that Hyatt settle the tax case for both tax-years at issue by
15 paying the FTB over \$18 million (which includes in significant part the taxes and penalties on
16 the auditor's \$24 million income "error") and demanded that Hyatt **drop any and all litigation**
17 or suffer an additional 50% penalty on millions of dollars in interest that it has assessed him and
18 that continues to grow at the rate of thousands of dollars per day.⁸¹ Hyatt contends that this is
19 another attempt to extort a settlement, despite the FTB's lack of any legitimate claim, and
20 intends to so argue at trial. Hyatt should be allowed to pursue discovery relative to the FTB's
21 "offer" and the FTB's continuing delays in the protests.

22 *Publication of expected recovery from Hyatt*

23 The FTB recently publicly stated in a California forum that Hyatt's liability has now
24 risen to \$40 million,⁸² more than enough to compensate California for its legal expenses
25 incurred in this Nevada litigation (which includes in significant part the taxes, penalties, and

26 ⁸⁰ R. Gould Depo, Vol. I, pp. 62-66 attached hereto as Exhibit 35.

27 ⁸¹ See the Amnesty assessment H 025602 – 025606 attached hereto as Exhibit 36.

28 ⁸² See H 023077 – 023084 [H023081] attached hereto as Exhibit 37.

1 interest on the auditor's \$24 million income "error"). Thus, the FTB continues to harass and
2 distress Hyatt by breaching Hyatt's privacy (he is publicly labeled as a tax evader with very
3 large assessments outstanding). Hyatt contends that these improper public disclosures are part
4 and parcel of a plan to further pressure Hyatt in a bad faith attempt to undermine his case and
5 force a settlement. Discovery on this issue must therefore be allowed.

6 Hyatt must be allowed to fully pursue discovery on these issues to support his argument
7 of continuing bad faith by the FTB, or the FTB must be prevented from presenting evidence to
8 rebut Hyatt's facts showing that the delay and refusal to decide the protests furthers the
9 FTB's intentionally tortious conduct against Hyatt.

10 **6. There is no logical distinction between the audits and the protests, and**
11 **therefore no reason to limit the scope of this case and prevent discovery of**
12 **the FTB's post-complaint bad faith conduct in the protests.**

13 The FTB has argued that the reasons why the FTB has delayed for so long in deciding
14 the pending protests is not part of this case. The Discovery Commissioner disagreed, given the
15 unexplained delay and the fact that the protest is an extension of the audit. The Discovery
16 Commissioner explained this point in detail during the August 5, 2005 hearing:

17 In my view, and I believe I said before, that the audit -- the audit
18 process I have difficulty in separating the audit from the protest, and I
19 base that upon the fact that I don't find that the audit and the protest
20 are sufficiently different in nature that it's one of the bases for the
21 reason that Anna Jovanovich's actions as well now, when I've had you
22 produce this information concerning what's holding up the protest.

23 I agree with the plaintiffs and the case citations, which they have, plus
24 all the law that flows out of that, that we aren't [at] a true
25 administrative hearing at this time, or at least anything where there's a
26 -- any kind of impartial officer or anything.

27 You know, the protest officer and the auditor are in effect doing the
28 exact same thing. Its just they -- one person makes a determination,
and then you file a protest, and then the second person makes a
determination.

But the second person, you know, has been actively working as a part
of the initial audit and giving advice. So until we come to a new --
which apparently in California, and the way the process is set up,
would not come until the Board of Equalization review, you know,
we're still in the audit process.

That's the way I've got to view this case, and so when the argument is
made by the FTB that I'm setting certain parameters on discovery and
limiting it to the audit process of Hyatt, that's true in most instances,

1 because the bulk of the complaint certainly has to do with the initial
2 audit process and the intrusions, alleged intrusions, into the plaintiff's
life particularly in Nevada.

3 But as a part of the continuing audit process, I mean, there's been no
4 end to it. There's been no determination to, you know, this is our final
work on it, pay or appeal. You know, its still --

5 We're still in the investigative phase, as evidenced by the FTB's
6 current argument that the reasons for -- there's been no decision there
because they still haven't gotten information from Mr. Hyatt. I mean
7 that's part of the argument as to why we've been X number of years
finishing the "protest."

8 So that's why I feel as though if at any time during this case,
9 whenever, there had been a decision by part 2 of the FTB process that
says no, you owe this much, pay, you know, or appeal to the next, you
10 know step, which would in effect be encompassed in the
administrative hearing statute, and then -- or then on to court, you
11 know, I could then say to the FTB, you know, it's done now, and it's
over and, you know, you're off the hook, but I can't say that at this
time.

12 So when you're complaining about, no, the discovery is going on and
13 on, well, I am trying to fashion discovery parameters that would go to
their actions . . .⁸³

14 There is simply no logical distinction between the audit and the protest. The FTB
15 attempts to use this non-existent distinction to limit the scope of the case and cut off discovery.
16 Bad faith conduct by the FTB directed at Hyatt, whether in the audits or protests, and whether
17 pre-complaint or post-complaint, is at issue in this case and an appropriate subject of discovery.

18 **7. The FTB has also waived any claim that the protests are not within the**
19 **scope of this case.**

20 The FTB has already produced the protest files of the first Protest Officer, Ms.
21 Jovanovich, and what appears to be a substantial portion of the files of the second, third, and
22 fourth Protest Officers (more than 11,000 pages).⁸⁴ Ms. Jovanovich has been deposed for two
23 days, and additional days of her deposition are expected if she can ever be located (the FTB has
24 been unable to locate her for the past several years). Ms. Jovanovich has produced her

25
26 ⁸³ See August 5, 2005 hearing transcript, 50:20 - 53:2, attached hereto as Exhibit 38. The Discovery Commissioner
27 commented similarly early in this case. See November 9, 1999 hearing transcript, 21: 21-24, attached hereto as
Exhibit 39.

28 ⁸⁴ Documents produced or on a privilege log bated numbered P 00001 - P 11370.

1 handwritten notes regarding the Hyatt protest.⁸⁵ The FTB has even produced what it now
2 claims to be privileged memos of the subsequent Protest Officers, the protest manager, the
3 attorneys in this litigation who are communicating with the Protest Officer, and other FTB
4 attorneys, and the Discovery Commissioner has held that Hyatt is entitled to keep these protest
5 documents.⁸⁶ In short, the protests are part of this case. The FTB has therefore waived any
6 claim that the protests are not part of this case.

7 Hyatt would be immeasurably prejudiced if the Protest Officer, sifting and laundering
8 the "evidence" and materials produced by the auditor that wove a case against Hyatt out of
9 whole cloth, was immune from discovery of the files and work papers reflecting the extent to
10 which there is complicity between the FTB Protest Officers and the FTB litigation team. They
11 are both part of the FTB, and both have strong, abiding incentives to resurrect and rehabilitate
12 the FTB's discredited reputation concerning its treatment of Hyatt. If, indeed, there was a good
13 faith, impartial, *de novo* review by the Protest Officer, the FTB would at least have a basis to
14 argue a distinction between an audit and a protest and seek some limitation on discovery in the
15 protests. But there is no distinction, and, as a result, the FTB has no basis to argue that the
16 protests are not part of this case and should not be part of discovery.

17 **8. The quasi-judicative officer privilege and the so-called mental process**
18 **privilege argued by the FTB do not apply to the Protest Officer.**

19 As it has done unsuccessfully for years, the FTB again argues in this motion for the
20 applicability of "deliberative process" to protect its internal decision-making. Over all those
21 years of litigation in this case, in the Nevada Supreme Court and in the U.S. Supreme Court, the
22 FTB never mentioned any "quasi-judicial administrative official mental process privilege."
23 This so-called mental process privilege is just a trumped-up and warmed-over deliberative
24 process privilege that has been rejected by the Nevada Supreme Court in this case.

25 The quasi-administrative officer mental process privilege is not a statutorily recognized
26 privilege in Nevada or California. California law of privilege is limited to statutory privileges,

27 ⁸⁵ Jovanovich notes, attached hereto as Exhibit 22.

28 ⁸⁶ August 5, 2005 DCRR, at 11, attached hereto as Exhibit 29.

1 and courts have no authority to break new ground:

2 Evidence Code section 911 provides, in relevant part: "Except as
3 otherwise provided by statute: [¶] ... [¶] (b) No person has a privilege
4 to refuse to disclose any matter or to refuse to produce any writing,
5 object, or other thing." This section declares the California
6 Legislature's determination that "evidentiary privileges shall be
7 available only as defined by statute. [Citation.] Courts may not add to
8 the statutory privileges except as required by state or federal
9 constitutional law [citations], nor may courts imply unwritten
10 exceptions to existing statutory privileges. [Citations.]"⁸⁷

11 Nevada does not recognize such a privilege, so the FTB cannot establish its elements
12 here. The FTB cannot even establish the factual predicate for any quasi-judicial officers being
13 involved in the Hyatt protests at this time. For example, the four Protest Officers who have
14 worked on the Hyatt protests, Anna Jovanovich, Bob Dunn, Charlene Woodward, and Cody
15 Cinnamon, are or were FTB attorneys assigned to the protests as part of their case loads, which
16 also included advising auditors performing this and other audits. They are not independent,
17 unbiased judicial officers. Under FTB procedures for this portion of the audit investigation,
18 they do not have to be. Indeed, the FTB admits that the protest is not covered by the provisions
19 in the California Administrative Procedure Act governing adjudicatory hearings.⁸⁸ As a result
20 of this exemption, the Protest Officers are not administrative law judges and are not subject to
21 the Code of Judicial Ethics, as are all California administrative law judges.⁸⁹ Thus, Protest
22 Officers can communicate with and even report to the litigation lawyers who are Hyatt's
23 adversaries in this case, without running afoul of the Rules of Judicial Ethics. The FTB has
24 simply not shown that its Protest Officers act as quasi-judicial officers.

25 That the protest is not an adjudicative procedure accompanied by the due process rights
26 of agency adjudicatory proceedings is recognized in California statutes. The administrative
27 protest is investigative in nature. Thus, Government Code § 19044 provides that if a protest is
28

⁸⁷ *American Airlines, Inc. v. Superior Court*, 114 Cal. App. 4th 881, 887, 8 Cal.Rptr.3d 146, 150 (Cal. App. 2003).

⁸⁸ Rev. & Tax Code § 19044 ("(a) If a protest is filed, the Franchise Tax Board shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his or her protest, shall grant the taxpayer or his or her authorized representatives an oral hearing. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code *does not apply to a hearing under this subdivision.*") (emphasis added).

⁸⁹ Cal. Gov. Code § 11475.20.

1 filed, the FTB “shall reconsider the assessment of the deficiency” and shall grant an oral
2 hearing, if requested. A Law Revision Commission Report reflects that a 1995 amendment to
3 section 19044 (exempting FTB administrative protests from the administrative adjudication
4 provisions of the Administrative Procedure Act) was done “to make clear that the general
5 provisions of the Administrative Procedure Act do not apply to an oral deficiency assessment
6 protest hearing, which is investigative in nature.”⁹⁰ A taxpayer unable to resolve the issue at the
7 FTB level has available a true administrative hearing remedy before the State Board of
8 Equalization.⁹¹

9 The full text of the Law Revision Commission Comments to the 1995 amendment
10 follows:

11 “Section 19044 is amended to make clear that the general provisions
12 of the Administrative Procedure Act do not apply to an oral deficiency
13 assessment protest hearing, which is investigative and informal in
14 nature. *Cf.* Gov’t Code § 11415.50 (when adjudicative proceeding not
15 required). A taxpayer that is unable to resolve the issue at the
16 Franchise Tax Board level has available an administrative hearing
17 remedy before the State Board of Equalization. See Sections 19045-
18 19048. [25 Cal. L. Rev. Comm. Reports 711 (1995)]”

19 (Emphasis added.)

20 The statute referred to in the Law Revision Commission Comments, Gov’t Code §
21 11415.50, explains the situations, as here, in which an administrative procedure is so informal as
22 not to need the quasi-judicial status the FTB is now claiming for its protest:

23 “§ 11415.50. Procedure where adjudicative proceeding not required;
24 informal investigations.

25 “(a) An agency may provide any appropriate procedure for a decision
26 for which an adjudicative proceeding is *not* required.

27 (b) An adjudicative proceeding is *not* required for informal fact finding
28 or an informal investigatory hearing, or a decision to initiate or not to
initiate an investigation, prosecution, or other proceeding before the
agency, another agency, or a court, whether in response to an
application for an agency decision or otherwise.”⁹²

⁹⁰ Cal. Law Revision Com., 61 West’s Ann. Rev. & Tax. Code, (2003 Supp.) foll. § 19044 at 251.

⁹¹ *Id.*

⁹² *Id.*

1 Because California law does not require an adjudicative hearing for a protest (Gov't
2 Code § 19044), it follows that a protest must be an informal fact finding or an informal
3 investigatory hearing. Because it is not an adjudicative hearing, its Protest Officers are not
4 quasi-judicial officers. And since Protest Officers are not quasi-judicial officers, it stands to
5 reason that their statements cannot be deemed judicial determinations, but instead are
6 tantamount to further fact findings by an FTB auditor. Indeed, this court previously recognized
7 that statements made by the first Protest Officer, Ms. Jovanovich, constituted "business advice"
8 and as such was not the type of information that required any confidentiality:

9 I think the case of Miss Jovanovich is unusual in that she has
10 certainly played different roles in this litigation. I am wondering why
11 her -- how do you distinguish her advice from any kind of business
12 advice that an attorney would be providing to run any business? Here
13 it's the tax business, but how do you distinguish this from any other
14 kind of business advice that would be discoverable as opposed to
15 confidentiality attorney-client advice? I'm not sure that I see the
16 confidentiality requirement served by the memos and other
17 information supplied by Miss Jovanovich. She just seems to be a cog
18 in the audit process along with all of the other people as opposed to
19 running into some particular legal problem and then getting an opinion
20 and then going on with the audit by, you know, a distinct and separate
21 group of people. Here she seems to be an integral part of the
22 process.⁹³

23 Thus, the second, third, and fourth Protest Officers, similar to the first Protest Officer
24 Ms. Jovanovich, are also an "integral part of the process" of the FTB's "tax business" by
25 providing "business advice" to the FTB about the sustainability of a particular audit
26 investigation. As such, it does not merit the type of protections usually set aside for confidential
27 attorney-client advice.

28 Recently, the U.S. Supreme Court ordered the production of what the U.S. Tax Court, a
real adjudicatory agency, claimed were confidential drafts exempt from discovery,⁹⁴ and
rejected a claim that a special trial judge's findings could be concealed from a taxpayer, even
though the Tax Court defended its anomalous and secret procedures as merely protecting
preliminary drafts under *United States v. Morgan*.⁹⁵ The Court did so in part because "The

⁹³ See November 9, 1999 hearing transcript 47:24 - 48:16, attached hereto as Exhibit 39.

⁹⁴ *Ballard v. C.I.R.I.*, 125 S.Ct. 1270 (U.S. Mar. 7, 2005).

⁹⁵ 313 U.S. 409, 422 (1941)

special trial judge, who serves at the pleasure of the Tax Court, lacks the regular judges' independence and the prerogative to publish dissenting views." *Ballard v. C.I.R.*⁹⁶ It ruled in part because the novel, non-transparent practices of the Tax Court jeopardized taxpayer rights in a critical area:

Fraud cases, in particular, may involve critical credibility assessments, rendering the appraisals of the judge who presided at trial vital to the ultimate determination. In the present cases, for example, the Tax Court's decision repeatedly draws outcome-influencing conclusions regarding the credibility of Ballard, Kanter, and other witnesses. Absent access to the special trial judge's Rule 183(b) report in this and similar cases, the appellate court will be at a loss to determine (1) whether the credibility and other findings made in that report were accorded '[d]ue regard' and were 'presumed . . . correct' by the Tax Court judge, or (2) whether they were displaced without adherence to those standards.⁹⁷

This Court should refuse to recognize this new, unrecognized privilege. It provides no basis to grant this motion and thereby limit the scope of this case. The protests have always been part of this case. Continuing bad faith acts of the Protest Officers are evidence in support of Hyatt's intentional tort claims, for which discovery is appropriate and necessary.

9. There is no *res judicata* or *collateral estoppel* from the California subpoena enforcement proceeding.

The FTB is long on argument and short on — in fact completely deficient on — any factual and legal basis to assert *res judicata* or *collateral estoppel* as to Hyatt's assertion in support of his intentional tort claims that the FTB is in bad faith delaying, and in fact refusing to issue, a decision in the protests. To begin with, the California subpoena enforcement proceeding cited by the FTB took place in 2002. Based on timing alone, there could not have been any determination in that proceeding as to whether the FTB acted in bad faith in delaying and refusing to decide the protests from 2002 — when Hyatt first learned the protests had been placed on "hold"⁹⁸ — to the present.⁹⁹ This "hold" by the FTB is a focus of Hyatt's bad faith

⁹⁶ 125 S.Ct. 1270, 1273 (U.S. March 7, 2005).

⁹⁷ *Ballard v. C.I.R.*, 125 S.Ct. 1270, 1273.

⁹⁸ See discussion, *supra* at ____.

⁹⁹ In that regard, in 2000 the FTB Protest Officer conducted hearings in the protests at which time Hyatt's tax representative appeared and presented oral argument. (E. Coffill letter March 7, 2002 (P 01416-01418), attached

1 delay argument, and Hyatt was not even aware of the hold until 2002.¹⁰⁰

2 Most significantly, no claim (*res judicata*) nor any factual issue (*collateral estoppel*) was
3 decided against Hyatt in the California subpoena enforcement proceeding that is now at issue in
4 this proceeding. The California subpoena enforcement proceeding did not decide the issue of
5 whether the FTB acted in bad faith in delaying and refusing to issue a decision in the protests as
6 part of its continuing pursuit and investigation of Hyatt. The only issue decided in that
7 proceeding via motion practice, with no evidentiary hearing, was that five of the six requests in
8 the administrative subpoena issued by the FTB were enforceable.¹⁰¹ Hyatt argued that those
9 five requests sought information that was irrelevant to the protests,¹⁰² but the court rejected that
10 argument and it *did not even address* Hyatt's alternative argument that *the subpoena* was issued
11 in bad faith by the FTB.¹⁰³ In that regard, the bad faith issue was limited to whether the
12 subpoena was issued in bad faith, and as explained below, Hyatt's bad faith argument was based
13 on the lack of relevance of the requested materials. The California trial court merely rejected
14 Hyatt's argument finding the FTB had a wide scope of relevance for its investigation of
15 Hyatt.¹⁰⁴

16 The FTB's Motion baldly states that Hyatt argued in the subpoena enforcement
17 proceeding that "the FTB purposely abused the court's process and delayed resolution of the
18 1991 and 1992 [protests] to gain leverage in settlement of the Nevada litigation."¹⁰⁵ Curiously,
19 but not surprisingly, the FTB cites *nothing* to support its statement. The FTB then quotes, not
20 from Hyatt's opposition in the trial court to the FTB's motion to enforce the subpoena, but

21 hereto as Exhibit 24. No decision was ever entered, and only upon inquiring in early 2002 did Hyatt's tax attorney
22 learn of the "hold." *Id.*; see also C. Cinnamon e-mail February 20, 2002 (P 11374), attached hereto as Exhibit 26,
and B. Miller e-mail April 5, 2002, attached hereto as Exhibit 27.

23 ¹⁰⁰ *Id.*

24 ¹⁰¹ California Superior Court order, February 28, 2003, attached as Exhibit 40.

25 ¹⁰² Hyatt Opposition to FTB Motion to Enforce Subpoena in California, attached hereto as Exhibit 41.

26 ¹⁰³ *Id.*

27 ¹⁰⁴ California Superior Court order, February 28, 2003, attached hereto as Exhibit 40.

28 ¹⁰⁵ FTB Motion, at 14.

1 rather from a filing Hyatt made in the California Court of Appeal opposing the FTB's request to
2 dismiss Hyatt's appeal.¹⁰⁶ In that filing, Hyatt set forth in the "Statement of the Case" section of
3 the brief the history of the FTB's delay in deciding the protests.¹⁰⁷ But nowhere in that brief
4 does Hyatt request a finding or even present as an issue whether the FTB's delay in the protests
5 is part of its bad faith pursuit and investigation of Hyatt.¹⁰⁸ Indeed, reviewing courts do not
6 even make such factual findings.

7 Nonetheless, the FTB Motion quotes extensively from the California Court of Appeal,¹⁰⁹
8 not the trial court, and argues that the Court of Appeal's discussion of the lack of evidentiary
9 cites in support of Hyatt argument of bad faith issuance of the subpoena somehow creates
10 *collateral estoppel* in this case. But the FTB does not even attach, let alone quote or cite Hyatt's
11 brief in the Court of Appeal in which the FTB wrongly represents that Hyatt argued bad faith
12 delay in the protests. The FTB did not attached that particular filing by Hyatt because it does
13 not state or put at issue what the FTB now misrepresents to the Court was purportedly at issue in
14 the California subpoena enforcement proceeding. What Hyatt actually argued in that
15 proceeding to the California Court of Appeal was: (i) the requested material was irrelevant and
16 (ii) the lack of relevance and lack of explanation by the FTB regarding the need for the
17 documents demonstrates that the subpoena was issued improperly and in bad faith.¹¹⁰
18 Specifically, Hyatt argued the subpoena was issued in bad faith because:

19 Given the lack of relevance to the tax proceedings of the actual
20 documents at issue that were designated under the Nevada protective
21 order, an obvious inference is raised that the FTB is again attempting
22 to intimidate and coerce Hyatt by issuing the subpoena, and seeking
23 irrelevant documents (as the FTB threatened to do should Hyatt choose
24 not to settle) to demonstrate it can seek and obtain whatever
25 information it desires about him.¹¹¹

23 ¹⁰⁶ FTB Motion, at 15.

24 ¹⁰⁷ FTB Motion, Exhibit 21, at 6.

25 ¹⁰⁸ *Id.*

26 ¹⁰⁹ FTB Motion, at 16.

27 ¹¹⁰ Hyatt Opening Brief in the California Court of Appeal, July 2002, at 42, attached hereto as Exhibit 42.

28 ¹¹¹ *Id.*

1 In short, Hyatt's bad faith argument in the Court of Appeal was based on the lack of
2 relevance of the requested material sought in the subpoena. The Court of Appeal rejected
3 Hyatt's arguments on relevance and bad faith issuance, and further commented about the lack of
4 evidentiary cites in support of the bad faith argument (which language the FTB now claims
5 creates a *collateral estoppel*). But there is simply no finding in either the California trial court
6 or the Court of Appeal (which in any event would not make findings of fact) relative to the issue
7 of whether the FTB acted in bad faith in delaying and refusing to decide the pending protests,
8 particularly from the time the "hold" was put in place by the FTB in 2002 through the present.

9 In addition to lacking any actual facts showing some kind of finding of fact relative to
10 whether the FTB acted, and continues to act, in bad faith in delaying and refusing to decide the
11 protests, the FTB's argument is procedurally deficient. The very cases cited by the FTB relative
12 to *collateral estoppel* require that there be some issue of fact or an actual claim decided by the
13 prior court, which a litigant wants relitigated, in order for there to be *collateral estoppel* or *res*
14 *judicata*. In the cases cited by the FTB, and in contrast to the California subpoena enforcement
15 proceeding, there was an evidentiary hearing, findings of fact, a trial, or a judgment on an
16 identical claim in the prior proceedings, the results of which created the *collateral estoppel* or
17 *res judicata*.¹¹² None of those exist in this case.

18 In sum, the issue for which the FTB now seeks preclusion was not decided in the
19 California subpoena enforcement proceedings. The California subpoena enforcement
20 proceeding was not presented with, and did not decide, the issue of whether the FTB's delay and
21 refusal to decide the protests has been, and continues to be, carried out in bad faith by the FTB
22 as part of its continuing bad faith conduct directed at Hyatt. The FTB therefore has no basis to
23 assert *collateral estoppel* or *res judicata* on this issue.

24 \ \ \

25 ¹¹² See, e.g., *Paradise Palms v. Paradise Homes*, 89 Nev. 27, 30 (1973) (cited by the FTB, issue of fact adjudicated
26 in prior case); *Executive Management, Ltd. v. Ticor Title Insur. Co.*, 114 Nev. 823, 826-27 (1998) (cited by the
27 FTB, same claims in prior action decided on the merits); *LaForge v. University and Community College System of*
28 *Nevada*, 116 Nev. 415, 420 (2000) (cited by the FTB, finding lack of merit to claims in prior case); *Clint Hurt &*
Assoc., Inc. v. Silver State Oil and Gas Co., Inc., 111 Nev. 1086, 1087 (1995) (cited by the FTB, involving attempt
to set aside default); *Rosenstein v. Steele*, 103 Nev. 571, 572 (1987) (cited by the FTB, involving attempt to set
aside default)

1 **10. Conclusion.**

2 Hyatt's claims of bad faith conduct in support of his intentional tort claims have been
3 affirmed as viable and in need of resolution at trial as a result of this Court's prior denial of the
4 FTB's summary judgment motion, the Nevada Supreme Court's decision not to grant comity to
5 California and the FTB because a Nevada state agency is not immune to such claims, and the
6 United States Supreme Court's unanimous decision affirming the Nevada Supreme Court.
7 Hyatt's claims logically extend to the FTB's post-complaint continuing bad faith as carried out
8 by the series of FTB Protest Officers that have been assigned the matter but refused to issue a
9 decision in the protests, which are now eight and nine years old, respectively. Nothing in the
10 reviewing courts' respective decisions states or indicates otherwise. In fact, the Nevada
11 Supreme Court's decision makes clear that bad faith conduct by the FTB is very much at issue.

12 Moreover, there is no *collateral estoppel* or *res judicata* relative to the issue of whether
13 the FTB's delay and refusal to decide the protests has been, and continues to be, carried out in
14 bad faith by the FTB. The FTB's motion should therefore be denied.

15 Finally, the FTB does not dispute that the alleged bad faith conduct of the first Protest
16 Officer, Ms. Jovanovich, is and always has been at issue in, and within the scope of, this case.
17 There is no reason that the continuing bad faith conduct of the subsequent Protest Officers is
18 also not within the scope of this case and an appropriate subject for discovery. The FTB has

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1 also produced substantial documents from the Protest Officers, including many post-complaint
2 documents. The FTB's conduct during the protest phase of its investigation of Hyatt is and
3 always has been part of this case. Hyatt must be allowed to pursue in discovery all aspects of
4 the FTB's bad faith conduct in the protests, including but not limited to, the Protest Officer's
5 delay and refusal to decide the protests.

6 Dated this 23 day of November, 2005.

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EXHIBIT 52

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

GILBERT P. HYATT,)	
)	CASE NO. A382999
Plaintiff,)	
)	
vs.)	
)	DEPT. NO. X
CALIFORNIA STATE FRANCHISE)	
TAX BOARD,)	
)	
Defendants.)	Transcript of
_____)	Proceedings

BEFORE THE HONORABLE JESSIE WALSH DISTRICT COURT JUDGE

HEARING ON MOTIONS

MONDAY, JANUARY 23, 2006

COURT RECORDER:

VICTORIA BOYD
District Court

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

A382999 Hyatt v. California Franchise Board 1/23/06 Motions

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1 appropriate for the Court to consider it because I don't know
2 that the final -- that there is a final judgment by the court.
3 There are so many other matters pending.

4 MR. HUTCHISON: Oh, it --

5 THE COURT: There's another -- there's apparently
6 another motion for summary judgment as well.

7 MR. HUTCHISON: Yeah, we would like to have an
8 opportunity to brief it, Your Honor, so we'll -- we'll take
9 you up on that. Thank you.

10 THE COURT: All right.

11 Ms. Lundvall, the next motion?

12 MS. LUNDVALL: Thank you, Your Honor.

13 The next motion, Your Honor, is a motion whereby it
14 is strictly legal analysis that you're asked to apply.
15 Because there has been no suggestion in any way, shape, or
16 form in the opposition that somehow that the material facts
17 that we brought to your attention were disputed, and so
18 therefore it is strictly legal analysis.

19 And that legal analysis and those legal
20 determinations that you're gonna be required to make, turn on
21 what prior courts have done in this very case. Not only as
22 far as the case that's through the Nevada Supreme Court that
23 went -- as far as started here at the district court level,
24 went to Nevada Supreme Court, ultimately to the U.S. Supreme

A382999 Hyatt v. California Franchise Board 1/23/06 Motions

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RA002110

1 Court, but also what the California courts have done
2 concerning the identical argument that Mr. Hyatt is making.

3 And I'm prefacing my remarks with this reason. Mr.
4 Hutchison is suggesting that somehow because I'm a late
5 entrant to this that maybe I'm not as informed as what I
6 should be. With all due respect, all of the legal proceedings
7 in this case have been reduced to a record and that there have
8 been briefs, legal decisions, records of hearings, and those
9 are reviewable exactly as this Court will be asked to do. And
10 quite candidly, you and I come to this case about at the same
11 time, and so to the extent that there is the foundation to be
12 able to make those determinations based upon what the prior
13 courts have done.

14 So let me give you some background and set the stage
15 then for purposes of this motion. This motion once again come
16 about because of issues that have arisen during the course of
17 discovery. Up until recently, very recently, the case has
18 been confined to the audit that was conducted by the FTB
19 against Mr. Hyatt. As the Court well knows, at this point in
20 time that he had two tax years that were at issue, 1991 and
21 1992. Those tax years resulted in what they call notices of
22 proposed assessments. Those were final in 1996 and in 1997.

23 And so this case has been confined, up until
24 recently, to that particular time frame. As of late though,

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RA002111

1 Mr. Hyatt seeks to expand the scope of the case beyond the
2 audit into the protest or the appeal that is ongoing in the
3 State of California, and therefore why then we have been
4 required to bring this motion to the Court's attention.

5 Discovery Commissioner Biggar identified that he was
6 without jurisdiction to take out those types of claims, and
7 nearly implored the parties to bring a motion to this Court.

8 In fact, Mr. Hutchison, after the exchanges with
9 Discovery Commissioner Biggar, even stood up and said,
10 Discovery Commissioner, are you telling the FTB to bring a
11 motion? And the Discovery Commissioner says no, I'm not
12 telling anybody how to run their case, I'm just simply saying
13 I'm without jurisdiction to take this claim out of this case
14 and therefore -- not take this claim but take this argument
15 that you're not advancing out of this case and, therefore, if
16 you want that to be done, you have to bring it to the District
17 Court, and therefore, that's why we're here today.

18 When the FTB completed its audit of Mr. Hyatt, Mr.
19 Hyatt took two forms of action. Two legal proceedings in two
20 different states, invoking two different legal processes.
21 Both of those are still ongoing. And both of those are still
22 ongoing in part because of actions that have been taken by Mr.
23 Hyatt himself.

24 The first action that Mr. Hyatt took, the first

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RA002112

1 legal proceeding that he invoked was a protest of the results
2 of the audit and appeal. There is a statutory right that Mr.
3 Hyatt had within the administrative system, which is the
4 Franchise Tax Board, to seek an appeal then of the
5 determinations that were made as a result of the audit. He
6 filed that first level of appeal. There is a protest officer
7 that is assigned to judge then whether or not he's right or
8 the FTB is right.

9 Now if Mr. Hyatt does not like what the protest
10 officer does he can appeal that to the California Board of
11 Equalization. If he doesn't like those results he can go to
12 Superior Court, Court of Appeals, California Supreme Court,
13 and probably a writ to the U.S. Supreme Court. At each and
14 every one of those levels the FTB is going to get involved --
15 they're going to be involved. And what Mr. Hyatt through the
16 discovery process has asked now to do, is he says that protest
17 officer that is looking at my first level of appeal, I want to
18 take her deposition and find out what she's doing, and I want
19 to find out what her thought process is and I want to know as
20 far as what's going on concerning that protest.

21 In sum, if he takes an appeal, if you take his
22 argument to its logical conclusion, if he appeals to the
23 California Board of Equalization he suggests that that process
24 too could be folded into this case. And if he doesn't like

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RA002113

1 that, that the Superior Court process could be folded into
2 this case. If you take his argument at face value this case
3 will never end.

4 The second thing that Mr. Hyatt did after the
5 assessment, the notice of proposed assessments were made
6 against him in the 1997 time frame, is he filed this lawsuit.
7 And at every stage that has been analyzed in this case, the
8 courts have repeatedly described this case, the allegations of
9 his complaint, and the scope of this case as being limited to
10 the audit. Not the protest, not the appeals, but only the
11 audit.

12 Particularly I would direct your attention then to
13 Exhibit 2, which was the Nevada Supreme Court decision. In
14 that Nevada Supreme Court decision they characterize Mr.
15 Hyatt's case. And I quote, "the underlying tort action arises
16 out of FTB's audit of Hyatt". And if you go through the
17 balance of the opinion all of the references are to the audit
18 of Mr. Hyatt.

19 At Exhibit 12 in our brief, we brought to your
20 attention the decision that was issued by the U.S. Supreme
21 Court. The U.S. Supreme Court too characterize this case.
22 "Respondent filed suit against FTB, alleging that FTB
23 committed negligent and intentional torts during the course of
24 the audit." Not regarding the protest, not regarding any of

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1 his appeals, but the audit. And there's many other references
2 in that opinion as well.

3 At Exhibit 3 you will find the decisions of the
4 California Superior Court, as well as the decision of the
5 Court of Appeals who looked at this issue in the context of an
6 administrative subpoena. They too characterize this case, and
7 once again I quote. "Hyatt also commenced a tort action in
8 Nevada alleging that the residency audit was abusive,
9 coercive, and baseless." That the audit, not the protest, but
10 only the audit. That's how the California Courts refer to the
11 scope of this case.

12 But probably most importantly I'd like to direct the
13 Court's attention to how Mr. Hyatt characterizes the scope of
14 his case. And for that, Your Honor, I would ask you simply to
15 pick up the exhibits that were appended to Mr. Hyatt's
16 opposition. At tab 7 of Mr. Hyatt's opposition to our motion
17 for partial summary judgment, he gives to this Court -- may I
18 approach, Your Honor?

19 THE COURT: Sure.

20 MS. LUNDVALL: Let the record reflect I'm handing a
21 copy of Exhibit 7 to the Court. Exhibit 7 was appended to the
22 opposition brief submitted in opposition to our motion for
23 partial summary judgment.

24 If you take a look at how Mr. Hyatt characterizes

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RA002115

1 the scope of his case I think you can see -- as at least on my
2 page, I don't think I have any handwriting but I probably have
3 some highlight on there -- is Mr. Hyatt says this to the
4 Nevada Supreme Court. And I quote, "the District Court and
5 Discovery Commissioner have consistently limited the scope of
6 this case to a tort case, separate and apart from the
7 California Tax Protest." These are Mr. Hyatt's words. But
8 now he wants to expand this case and he now wants to include
9 the California Tax Protest then within the scope of the case.

10 Now I would point out to the Court that, in fact,
11 there is no dispute as to the material facts that we've
12 presented to the Court. I could go through each and every one
13 of them, but they are found in our brief, I believe at pages 4
14 through 6. But there was no opposition, there was no
15 contention in the opposition brief that somehow that those
16 material facts then were disputed. And so therefore, the
17 legal analysis in this motion turns on what the other courts
18 in this case have done.

19 And so I'm going to just briefly walk through what
20 the other courts in this case have one. I began once again by
21 focusing the Court's attentions on Mr. Hyatt's representation
22 to the Nevada Supreme Court. He says this case doesn't
23 involve the California Tax Protest and that the District Court
24 and the Discovery Commissioner had properly limited. That's

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RA002116

1 what his representation is to the Nevada Supreme Court.

2 If you analyze and sum up then what the decisions
3 were from the Nevada Supreme Court they said this. They
4 upheld Judge Saitta's ruling that said that the determination
5 of Mr. Hyatt's residency was an issue properly in front of the
6 California Administrative Process, and therefore, that cause
7 of action is out, that Dec relief cause of action is out.

8 The California Protest, what are they doing?
9 They're trying to determine whether or not Mr. Hyatt's
10 residency, that's the issue that's in front -- with the
11 California Tax Protest.

12 It also said this. The Nevada Supreme Court said
13 that they will not assert discretion -- assert jurisdiction
14 over the discretionary acts of an agency, a foreign or a
15 sovereign state's agency as long as it would similarly afford
16 that type of immunity then to its own agencies. The way I
17 look at this is kind of the Golden Rule. The Nevada Court
18 says I will do unto California the same as I will do unto
19 Nevada. If there is an agency here in Nevada that could be
20 subject to a suit, then, in fact, California cannot be --
21 cannot argue that they are not subject to suit either. In
22 other words, Nevada Courts are going to treat the California
23 agencies the same as the Nevada agencies.

24 And one of the things that I would offer to this

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RA002117

1 Court is this. There is nothing, no analysis within Mr.
2 Hyatt's brief that suggest that somehow that the Nevada Courts
3 would afford jurisdiction over this type of a case. When you
4 have a Nevada resident that is bringing a lawsuit against a
5 Nevada agency, based upon the appeal that was granted to that
6 Nevada agency, and to allow then discovery then into whoever
7 the hearing officer is that is making the decisions on the
8 appeal. There's no analysis for that whatsoever. Why,
9 because it doesn't exist.

10 And we have brought to the Court's attention then,
11 the Nevada Attorney General's opinions, and those are all
12 found, I believe, at tabs 23 through 27 of our brief, whereby
13 Nevada expressly, through those A.G. opinions, identifies the
14 fact that there is an absolute privilege that is afforded to a
15 quasi judicial officer. And what I mean by that is this. No
16 different than this Court has absolute immunity and there is
17 an absolute privilege to prevent anyone from seeking discovery
18 into what you do or what your thought processes are, anything
19 of that nature. There's also what they call a quasi judicial
20 officer privilege, and that is set forth and identified then
21 in those A.G.O. opinions.

22 Now Mr. Hyatt takes issue with the fact that he says
23 Nevada Supreme Court has never adopted that privilege.
24 They've never been asked to. There's no case that has come

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RA002118

1 before it, whereby that they have been asked to accept or
2 reject it. Specifically they have never rejected it. And
3 therefore under that Prescott decision that we cited to the
4 Court, the A.G.O. opinions then are persuasive.

5 Now one of the things that -- also the analysis from
6 Nevada Supreme Court says this, that if in fact that there is
7 no -- if in fact that the acts that are alleged are not what
8 they call discretionary acts taken by the state agency, for
9 which there is absolute immunity, then in fact, if those acts
10 are being taken in bad faith the Court would -- Nevada would
11 recognize such a cause of action.

12 So the issue becomes is whether or not that this
13 protest hearing officer in California, under the
14 administrative protest -- the protest process is doing their
15 discretionary acts. In other words, what they were hired to
16 do, and that being this, is to make decisions then on Mr.
17 Hyatt's protest, on his appeal. That's exactly what they're
18 doing over there. And so therefore, there should be absolute
19 immunity.

20 But even if there is not, the only way that such a
21 claim could even go forward in the State of Nevada is if there
22 is some bad faith that is being practiced by the state agency.
23 And so this brings us right into what the California Courts
24 have done in examining and looking at this identical argument.

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RA002119

1 And let me explain as far as why this Court is obligated then
2 to follow the decisions that have been made and that are now
3 final judgments in the State of California that said that the
4 protest is not being conducted in bad faith. And that's our
5 full faith and credit argument, that's our collateral estoppel
6 argument.

7 It all stems from the protective order that is in
8 place by the Discovery Commissioner in this particular case.
9 That protective order obligates -- it basically has a
10 foundation in the fact that the Discovery Commissioner did not
11 want this case to feed the protest that was ongoing in the
12 State of California. So if there was discovery that Mr. Hyatt
13 was compelled to turn over in this case, that it cannot be
14 shared with the protest hearing officer unless he either
15 consented or California complied then with the administrative
16 subpoena requirements that were separate and apart.

17 There was discovery that was turned over. Mr. Hyatt
18 would not consent here in Nevada for that evidence then to be
19 given to the California protest hearing officer. So
20 therefore, the FTB was obligated then to bring an
21 administrative subpoena. And that administrative subpoena was
22 -- in other words, Mr. Hyatt's response was, I'm not going to
23 comply with that. The FTB filed a suit then to compel
24 compliance with that administrative subpoena. And Mr. Hyatt

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RA002120

1 defended that suit by arguing that the California protest was
2 being conducted in bad faith. That's what his defense was.
3 And that is his exact issue that he is now presenting to this
4 Court, suggesting why he should be able to wrap his arms
5 around these appeals in California and drag them into this
6 suit in addition to the audit.

7 And I'm not gonna walk you -- I'm not gonna read
8 from his briefs, but I would ask the Court to do this. On
9 page 10 of our reply we set out verbatim what Mr. Hyatt's
10 arguments were in California. Those arguments are that
11 California was conducting its protest of Mr. Hyatt in bad
12 faith and that they were doing so in an effort to try to
13 coerce settlement from him and that they were delaying and
14 dragging their feet so as to coerce that settlement.

15 If you look at Exhibit 41 and if you look at Exhibit
16 42, that's where Mr. Hyatt's arguments made to the California
17 Courts, first to the Superior Court and then to the Court of
18 Appeals. And those courts had to decide that issue. In
19 particularly, we've cited to the Court then, the decision that
20 was being -- that was made by the California courts, and those
21 California courts said this. The protest was not being
22 conducted in bad faith, and therefore, Mr. Hyatt was obligated
23 to turn over those documents. And those decisions are now
24 final.

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1 And so the issue of whether or not that there's been
2 any bad faith as it relates to the protest has already been
3 decided. And under the law of this case that was established
4 in the U.S. Supreme Court, final judgments rendered by a Court
5 with authority over the subject matter, the full faith and
6 credit clause is exacting when it comes to those. In other
7 words, that this Court, because the California decision is a
8 final decision must follow it. That's under the full faith
9 and credit clause.

10 There's also a subsequent analysis and that's under
11 the collateral estoppel argument, and that is this. If I, in
12 one piece of litigation litigate an issue and consume court
13 time and consume court resources and there's been a decision
14 made on that issue, I can't then go to the second court, which
15 is you, and say I didn't like what they did over there so let
16 me try to see if I can't convince you of a contrary result.
17 The collateral estoppel document prevents that. And so under
18 two grounds then we ask the Court then to recognize the
19 California decision that says that the protest was not being
20 conducted -- was not being conducted in bad faith.

21 But I suppose the easiest point for me to make is
22 this. I would ask the Court to look at and to examine Mr.
23 Hyatt's own words, and his own words as we've identified in
24 his Exhibit 7, whereby this case is separate and apart from

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1 the California Tax Protest. And that's how this case should
2 stand. And he should not be able to expand the scope of this
3 case and somehow drag in that protest process into this case
4 and seek discovery of the protest hearing officer as well as
5 any of the other FTB representatives that are involved in that
6 protest.

7 And so therefore, Your Honor, we would ask the Court
8 then to grant our motion for partial summary judgment on that
9 particular issue.

10 Thank you.

11 THE COURT: All right. Thank you.

12 Mr. Hutchison.

13 MR. HUTCHISON: Your Honor, Mr. Bernhard will argue
14 this motion.

15 THE COURT: Okay, very well. Mr. Bernhard.

16 MR. BERNHARD: Good afternoon, Your Honor, and thank
17 you for allowing us to at least tag team Ms. Lundvall a little
18 bit. As you're obviously aware, the amount of work that has
19 gone into these proceedings today has been tremendous. And I
20 thank Ms. Lundvall for the courtesies accorded to us during
21 the course of this litigation as well. And I think, you know,
22 the points that we need to make here is that even after
23 hearing her presentation I'm still not sure just what she's
24 asking for in this motion.

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RA002123

1 The issue as I see it is, we have made allegations
2 in our complaint that lay out what we believe are intentional
3 torts for which the Nevada Supreme Court and the U.S. Supreme
4 Court has said we're entitled to go to trial.

5 Now the question becomes, what evidence are we
6 allowed to discover, and, second, what evidence are we allowed
7 to adduce at trial to prove these intentional torts?

8 And what's happened in the course of discovery is
9 that we have learned a lot about the Franchise Tax Board's
10 proceedings. And, in fact, the best that I can tell is that
11 the protest that we're talking about today is merely an
12 extension of the audit and it is not the separate independent
13 proceeding by a third party decision maker who is independent
14 and who will look at the evidence and give Mr. Hyatt a fair
15 and impartial hearing.

16 In fact, in this case in our complaint, we allege
17 that Anna Jovanovich [phonetic], who was the first protest
18 officer, made statements to Mr. Hyatt's lawyer to the effect
19 that most people who have high net worth and who have concerns
20 about their privacy settle these cases right now at the
21 protest level before there is a final audit assessment because
22 they don't want publicity. They don't want this to become a
23 public record because once it goes beyond me, the protest
24 officer, then it becomes a public record. And this is clearly

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1 plead in our complaint as one of the elements of our feeling
2 that extortion occurred here; that Mr. Hyatt was told, in
3 effect, give up your rights to challenge the merits of this
4 tentative tax assessment, the notice of proposed assessment
5 that's already been issued, and pay us money now to avoid
6 having all of this information disseminated to the public. We
7 believe that is evidence of an improper act, an intentional
8 tort that we're entitled to present to a jury.

9 Now Ms. Jovanovich, interestingly enough, at the
10 time that she made this statement she was the protest officer.
11 It's in our complaint, it's clearly a part of this case. She
12 was wearing that protest officer hat. Unbeknownst to us at
13 that time, a couple years earlier that same person was wearing
14 the hat of legal counsel to Ms. Cox, the auditor in the case.
15 She was advising Ms. Cox what she could and could not do in
16 this audit.

17 Then the Franchise Tax Board has this proceeding,
18 which they talk about as being separate and apart and
19 different from the audit, called the protest, where now Ms.
20 Jovanovich will take off that hat as legal advisor to the
21 auditor, put on the hat as decision maker in the protest, and
22 say to Mr. Hyatt, oh, gee, Mr. Hyatt, I think that Ms. Cox's
23 audit was perfectly appropriate. Now is that fair? I don't
24 know. Am I entitled to take that argument to a jury?

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1 Absolutely.

2 What happened next? When Ms. Jovanovich ceased to
3 be the protest hearing officer and Bob Dunn was appointed
4 protest hearing officer. That's the same Mr. Dunn that you
5 see now, not in the courtroom today, but he's been in front of
6 Commissioner Biggar, he's been actively involved in the
7 depositions now as legal counsel to the Franchise Tax Board.
8 Again, where is the independence? Where is the fairness? Is
9 this some sort of evidentiary support for our claim that there
10 have been intentional torts committed against Mr. Hyatt
11 because of the way these hats are juggled between attorneys
12 who advise auditors, auditors who reach decision on a
13 tentative basis, and then protest officers who are the same
14 people who decide whether or not that was a valid decision by
15 the auditor.

16 These are all elements that are clearly alleged in
17 the complaint that we've submitted to the Court. And we've
18 been doing a lot of discovery on what actually is going on
19 with respect to the protest.

20 Very early in the case Terry Collins, who was the
21 counsel for the FTB submitted an affidavit to this Court way
22 back in 1998. And he said in that affidavit under oath to
23 this Court, "this litigation in Nevada will not effect the
24 protest. We will proceed and make that decision." That

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RA002126

1 protest is still sitting today. 2006, eight years later, no
2 decision has been made.

3 When we argued in front of Commissioner Biggar for
4 the right to take discovery concerning the protest process,
5 which again is not separate and independent from the audit,
6 Commissioner Biggar told the FTB flat out, if you don't want
7 discovery of the protest, if you don't want Mr. Hyatt to look
8 at what's gone on in the protest for the last eight years then
9 decide it. It's perfectly within your power and control to
10 make a decision. The FTB argued, well, we still need more
11 documents from Mr. Hyatt, he's holding it up. Commissioner
12 Biggar correctly said, well, you as an administrative agency
13 can simply make a decision and say because the taxpayer was
14 not forthcoming and did not produce evidence, here's our
15 decision. Commissioner Biggar said, give Mr. Hyatt a chance
16 to go to the next level where there really will be an
17 independent decision maker. Don't hold him in this limbo.
18 Don't hold him in this administrative process, which is an
19 extension of the audit and not different from the audit,
20 because in fact, it has the same effect that we've alleged in
21 our complaint.

22 Interest is accruing at thousands and thousands of
23 dollars a day on this proposed assessment. Just as Anna
24 Jovanovich presented an alternative to Mr. Hyatt, give up your

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1 legal rights to challenge the tax itself and pay us some money
2 to keep it quiet. Now they're continuing to accrue massive
3 amounts of money, hanging that over Mr. Hyatt's head simply by
4 not making a decision on the protest.

5 So the first issue in my mind is whether or not the
6 particular allegations of what's happening in the protest is
7 encompassed within the four corners of our complaint. Clearly
8 the answer is yes. The rule then is, that we're entitled to
9 do discovery. Find out what relevant evidence there is with
10 respect to that process, and that's exactly what Commissioner
11 Biggar ordered. He said we could take discovery of the
12 protest process. And he was looking at the same arguments the
13 FTB is making here, which also are before you today in the
14 challenge to his DCRR. And he said, again, you have control,
15 FTB, over whether or not you want to produce that discovery.
16 If you want to decide the case and let Mr. Hyatt go forward
17 and pursue his rights, fine, go ahead and do that. But this
18 particular aspect of the case is not a new claim, it's an
19 extension of the same things that occurred prior to filing the
20 complaint.

21 So the complaint was filed in January of 1998.
22 Since that time we have discovered a few things. One is a
23 memo from counsel to the Franchise Tax Board the day after the
24 Nevada Supreme Court said Mr. Hyatt was entitled to go to

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1 trial on his intentional tort claims. That memo, from
2 Franchise Tax Board counsel says, maybe we should put the
3 protest on hold. In other words, let's not decide it, let's
4 keep it open, again as a sword of Damocles over Mr. Hyatt.
5 Now since it looks like we're gonna have to defend in Nevada,
6 which we thought we were not gonna have to do, we need
7 leverage. Let's hold that leverage over Mr. Hyatt. Let's go
8 ahead and not decide the protest.

9 This is despite the fact that Mr. Hyatt's attorney
10 in the protest was told by the protest officer and the protest
11 officer's supervisor that a decision was imminent, it was
12 forthcoming. All Mr. Hyatt has ever wanted is for the FTB to
13 take this out of the audit process and put him in front of a
14 third party independent decision maker where he can present
15 his case on the merits of the tax claim.

16 So contrary to what Ms. Lundvall argues in her
17 pleadings and her brief, we're not litigating the protest in
18 this case. What we're saying is, that events after the filing
19 of the complaint are evidence discoverable to support the
20 underlying intentional torts. And that's not a novel concept.

21 Again, analogies are never perfect, but in a
22 discrimination case if a person files a complaint and there's
23 retaliation against that person after filing the complaint, is
24 that retaliation a subject of discovery? Absolutely. It's a

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1 proper subject of discovery, and that's what Commissioner
2 Biggar has ordered here. We can examine the protest process
3 as part of the allegations that this is a continuation of the
4 same facts that we have alleged, which Nevada Supreme Court
5 says we're entitled to go to trial on relating to these
6 intentional torts.

7 So I submit the issues have to be separated. Is it
8 within the complaint? Yes. Are we entitled to discovery?
9 Yes. And the third question, is it going to be admissible
10 evidence at trial? That question is not yet before you. And
11 that is the proper subject of a motion in limine if the FTB
12 chooses to bring it. And say, wait a minute, we don't think
13 post complaint actions should be admitted as part of a
14 continuing tort. We will oppose that motion and argue, yes,
15 it should be admitted. But this summary judgment motion is
16 simply premature. The context is wrong. There is no claim,
17 there is no separate claim that the protest is something that
18 we're trying to control. We're not trying to decide
19 California's tax proceeding. All we're saying is carry it
20 out, do it, finish it, make a decision, give us an impartial
21 decision maker. Don't hold us up with everybody changing hats
22 at different times in the course of your administrative
23 protest when all you have right now is a notice of proposed
24 assessment that cannot be adjudicated by an independent third

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1 party.

2 So when Ms. Lundvall talks about the avenues of
3 appeal where we can take this to the Board of Equalization, we
4 can take it to California Superior Court, we can take it to
5 the Court of Appeals, we can take it to the California Supreme
6 Court, all of that is true once the protest officer lets go.
7 And the Franchise Tax Board, the defendant in this case, has
8 held onto the case and has prevented the protest hearing
9 officer in making a decision. So we think we're entitled to
10 discovery of the facts behind what the Franchise Tax Board has
11 done in the protest.

12 So I think, at minimum, the Court should deny the
13 motion without prejudice today. Let the Franchise Tax Board
14 bring it up at the time closer to trial in the form of a
15 motion in limine and we'll argue whether or not the evidence
16 that we discover, under Commissioner Biggar's order, should be
17 admitted as evidence at trial.

18 This argument about a quasi judicial privilege, as
19 I've said, the protest hearing officer process is not an
20 independent judicial decision maker. The way that the Hyatt
21 case has operated and the way many other protests operate is
22 there are attorneys who advise the Franchise Tax Board during
23 the course of audits. They have a case load. They are then
24 assigned cases to handle as a protest officer. So they may

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1 come in in the morning at 8 o'clock and be a Franchise Tax
2 Board attorney advising an auditor while an audit is in
3 progress. At 9 o'clock they take that hat off and put on a
4 hat of a protest officer and rule on or study the validity of
5 the work of another auditor. And in this case it's even more
6 egregious because the same attorney who advised the auditor in
7 this case was then told to put on the hat as a protest hearing
8 officer and make a decision whether or not that auditor did
9 the correct thing, relying on the advise of the protest
10 hearing officer. That's the dilemma we face. We think we're
11 entitled to discover how this happens and what the process
12 actually is, and then it's up to the Court, closer to trial,
13 to decide whether or not that evidence comes in as evidence.

14 A couple quick comments about the California
15 subpoena process. The allegation in California was that the
16 issuance of the subpoena was in bad faith, not that the
17 protest was in bad faith. There is no collateral estoppel.
18 That's not the law of the case. That was not presented to the
19 California Court. California Trial Court did not even make a
20 decision, did not make a ruling on bad faith. The issue in
21 the trial court in California was relevance.

22 We've already had discovery of protest hearing
23 officer events. The FTB has taken discovery of Mr. Hyatt and
24 his people and asked about things that have happened during

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1 the protest. Commissioner Biggar allowed us, and I'll just
2 hold up for the Court the protest hearing officer event log
3 where there have been substantial redactions and these
4 redactions, of course, have already been excluded by
5 Commissioner Biggar. But we're entitled to take discovery on
6 the things that are not redacted. We're entitled to ask the
7 hearing officer about these things. And Commissioner Biggar
8 did an appropriate weighing of the concerns of the Franchise
9 Tax Board with respect to this process and Mr. Hyatt's rights,
10 as a resident of Nevada, to have his intentional torts fully
11 litigated. So we should be entitled to discover that
12 information.

13 I think, Your Honor, with that there are a couple
14 other points I could raise but the briefing covers all of
15 these. I think the proper course on this particular motion is
16 to deny it without prejudice, let us do the discovery, affirm
17 and uphold Commissioner Biggar's learned detailed studied
18 ruling which says we're entitled to discovery of the protest
19 process based on these allegations and let us go forward,
20 bring the case and bring the issue to you at the time of trial
21 in the context of a motion in limine.

22 Thank you.

23 THE COURT: Thank you, Mr. Bernhard.

24 Ms. Lundvall

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1 MS. LUNDVALL: Very briefly, Your Honor.

2 Mr. Bernhard suggested he doesn't know what I want.
3 Let me try to make myself as clear as possible.

4 I do not want the California tax protest process to
5 be within the scope of this case. That's what our motion for
6 summary judgment asks this Court to do. That's as simple as I
7 can make it.

8 Second, on one had Mr. Bernhard argues that Nevada
9 Courts aren't trying to tell the California protest officer
10 what to do or how to run their process. But then in the next
11 breath what he tells you is Discovery Commissioner Biggar said
12 you don't want to have this discovery, decide the case, make a
13 ruling. Who cares if you don't have all the information that
14 you've asked for from Mr. Hyatt. Who cares if he hasn't given
15 you that, just make a decision and just move on. If that
16 isn't telling the protest hearing officer what to do, then I
17 don't know what is.

18 It's basically, you know, making a threat, either
19 make a decision, California, or else I'm going to subject you
20 then to discovery. It'd be like Mr. Hyatt suggesting to this
21 Court, make a decision or else I'm going to subject you to
22 discovery. That's exactly what their argument is.

23 And so what they are doing then is trying to reach
24 into the discretionary acts of the State of California. And

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1 Nevada Supreme Court in its decision said, we are going to
2 treat California no different than we treat ourselves. Those
3 are discretionary acts in Nevada and therefore they should be
4 considered to be discretionary acts in California as well.

5 Next, Mr. Hyatt contends that somehow that he's in
6 -- that he feels like he's in jail because that the protest
7 hearing officer is not making a decision. Well, if so, why
8 doesn't he turn over the documentation that she's been asking
9 for? That's point number one. He has the keys to his own
10 jail cell as he describes it.

11 Point number two, though, is under California law.
12 If Mr. Hyatt doesn't like being within the California
13 administrative protest process, he can get out himself. There
14 is a provision whereby what you do is you pay the tax and you
15 file a suit then in Superior Court and claim your refund.
16 That gets him out just like that.

17 So if, in fact, that he doesn't want the process to
18 continue, he has the keys then to that own process by which to
19 turn it over. In fact, two sets of keys. Give them the
20 information or go ahead, pay the claim, and then -- pay the
21 assessed tax and then file a claim for a refund.

22 The next point that was made by Mr. Bernhard is
23 this. The issues in the California case that were decided
24 were different than the issues that are in front of you. The

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1 only thing I can do, rather than reading and quoting at length
2 from both their arguments as well as the decisions, is ask
3 this Court to take a look at the briefs that were filed by Mr.
4 Hyatt as well as the decisions that were issued by the
5 California courts.

6 Mr. Hyatt argued, and at page 12 in our brief we set
7 it forth as far as where you can find his oppositions, where
8 you can find his briefs to the California Supreme Court and
9 where you can find those decisions. That in fact, it was the
10 California tax protest process that was being conducted in bad
11 faith. And the California courts said, no, it is not. And
12 that is the decision then that this Court is obligated then to
13 embrace and therefore, not to look behind that decision by
14 allowing the protest, the California tax protest to be folded
15 into this case.

16 And lastly, Your Honor, I -- I guess one more point
17 as far as before I turn to my last point, and that is this.
18 During the course of discovery in this case Mr. Hyatt himself
19 has taken the position, you can't learn anything what I'm
20 doing over there in the California tax protest. That's not
21 part of this case. In other words, on one hand he wants to
22 make it part of this case by seeking discovery against the
23 FTB, but he doesn't want to do the same thing himself.

24 And so to the extent that we are simply asking this

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1 Court to recognize what the Nevada Supreme Court, the U.S.
2 Supreme Court, and the California Courts have said, this case
3 is limited to the audit, not the California tax protest which
4 is a separate administrative appeal. It's a right that is set
5 forth in California law, available to Mr. Hyatt. No different
6 than he has appeal rights to the Board of Equalization, no
7 different than he has appeal rights to the Superior Court, and
8 all the way through.

9 And so therefore, Your Honor, we would ask for just
10 a simple decision that says this. The scope of this case does
11 not include the California tax protest.

12 Thank you, Your Honor.

13 THE COURT: Thank you, counsel.

14 There are several issues that I want to address
15 because I want to make as clear a record as I can.

16 First of all, defendant is correct in stating that
17 this Court should neither decide the residency status of the
18 plaintiff nor the tax liabilities that plaintiff may or may
19 not have. However, it has been decided that the plaintiff may
20 maintain claims for intentional torts in this case.

21 The bad faith acts of the protest officers are
22 completely relevant to the plaintiff's claims of bad faith on
23 the part of the defendant. Plaintiff should be allowed to
24 argue and produce evidence of defendant's alleged continued

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1 bad faith in this case.

2 This Court is not persuaded with respect to the
3 collateral estoppel argument. The issue that was raised in
4 the California courts dealt with bad faith and improper
5 purpose. However, those issues were confined in those
6 hearings to bad faith and improper purpose of the issuing of
7 the subpoena. It did not deal with defendant's alleged bad
8 faith as a whole.

9 This Court's view of the quasi judicial privilege is
10 that it does not apply in this particular case for the very
11 reasons that counsel argued. It seems that the hearing
12 officers are performing more than investigatory function, much
13 like that of the auditors than a judicial function.

14 It appears to the Court that there is a genuine
15 issue of material fact with respect to plaintiff's bad faith
16 delay claim. To that extent, the Court is inclined, for the
17 reasons enumerated already, the Court is inclined to deny
18 defendant's motion for summary judgment regarding the ongoing
19 California administrative process.

20 That brings us to defendant's objections to
21 Discovery Commissioner's report and recommendations.

22 MS. LUNDVALL: Your Honor, one point of
23 clarification. I would assume that if, in fact, that the
24 Court is finding that any allegations of bad faith engaged in

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1 by the protest hearing officer as being relevant, is that also
2 the Court then would find is relevant Mr. Hyatt's activities
3 in the protest and therefore, that we've got both issues then
4 in front of the Court, within the scope of this case.

5 THE COURT: What are you getting at, Ms. Lundvall?

6 MS. LUNDVALL: What I'm getting at is this, is that
7 whatever actions that Mr. Hyatt is taking in the State of
8 California as it relates to protest, that too should be open
9 to discovery. At this point in time Mr. Hyatt is drawing a
10 very strict line of demarcation and says, no, you can't learn
11 what I'm doing regarding the protest. You can't discover and
12 seek admissible evidence in this case as to what I'm doing, I
13 can only learn what you're doing. And so therefore, I want to
14 make sure that we got reciprocal obligations.

15 THE COURT: Mr. Bernhard?

16 MR. BERNHARD: Very simple, Your Honor. The
17 Franchise Tax Board and the protest process knows what's being
18 done there. They already know that. We have not raised an
19 objection except on established privileges unrelated here,
20 like attorney/client, accountant/client, attorney work
21 product. They still can't get into that unless they bring a
22 motion to compel, and that's not before you today.

23 So I think the information they already have on the
24 protest is a matter of record with what we have filed with the

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1 protest officer. That's already there. They have that. They
2 know what we've done, what we've filed. There's no reason to
3 expand the ruling in this case on a matter that wasn't briefed
4 and wasn't before you in their motion. They didn't ask for
5 that in their motion. If they want to bring that as a
6 separate motion, let them do so and we'll brief it.

7 MS. LUNDVALL: If, in fact, that Mr. Bernhard wants
8 briefing on the issue, we're happy to provide it. But
9 basically my argument is the sauce good for the goose is good
10 for the gander. If in fact that he wants discovery into our
11 actions in the California tax protest, then we too are
12 entitled to seek discovery from Mr. Hyatt. And right now
13 there is an artificial wall that has been imposed by the
14 Discovery Commissioner with the protective order in this case.

15 And so therefore, even though that they want to
16 suggest, well, they already know that information, well, in
17 fact that we don't know that information because of the wall
18 that has been erected between the litigation folks at the FTB
19 and the folks that are handling then the California tax
20 protest. And so to the extent that what I want to do then is
21 to be able to seek that same discovery from Mr. Hyatt, in
22 other words, what's he doing in the California tax protest, no
23 different than what we're doing.

24 And where I'm going to is this. If in fact that Mr.

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1 Hyatt is intentionally not turning over information to the
2 California tax protest hearing officer, because he knows that
3 it will delay, she can't make a decision. Then in fact, what
4 he's doing is he's trying to create then this delay himself
5 and he is responsible for the delay. And so therefore, that
6 artificiality that he wants to throw back at us, should also
7 be the subject of discovery.

8 THE COURT: Are you suggesting that he's acting in
9 bad faith?

10 MS. LUNDVALL: In the California tax protest? Yes,
11 Your Honor.

12 MR. BERNHARD: Let them file a motion, Your Honor.
13 We're happy to dispute that. The protective order was
14 something that was developed after lengthy Discovery
15 Commissioner hearings way back in 1998 and 1999. To throw
16 it out, based on an off the cuff comment like that from
17 counsel, would undo all that work. So if they file a motion
18 and they brief it, they make an allegation, they provide
19 evidence of that, we'll respond to it. The protective order
20 has worked well in setting up that wall for both sides and
21 we've both respected it. It shouldn't be thrown out now,
22 unless we have proper briefing and the Court decides it should
23 be modified.

24 THE COURT: I'm inclined to agree with -- to agree

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1 at this juncture with that assessment, Ms. Lundvall. You may
2 have some valid points, you may want to brief them, I'll be
3 happy to take a look at it. I'm not inclined to expand the
4 ruling at this point in time. I tried to tailor it as
5 specifically as I could and as appropriately as I could.

6 MS. LUNDVALL: Thank you, Your Honor.

7 MR. BERNHARD: Your Honor, with respect to Discovery
8 Commissioner report and recommendations for the hearing on
9 August 5th, 2005, that's the recommendations that's related to
10 the protest hearing as officer [sic] motion. The fact that
11 you've denied their summary judgment motion that means that
12 his report and recommendations should govern the protest
13 hearing officer discovery going forward. That's, I think, all
14 we need to submit on that motion.

15 THE COURT: All right. I'm inclined to agree with
16 that.

17 Ms. Lundvall?

18 MS. LUNDVALL: Your Honor, at this point I'm gonna
19 defer to Mr. Bradshaw concerning the objections then, that are
20 in front of the Court.

21 THE COURT: Mr. Bradshaw?

22 MR. BRADSHAW: Your Honor, your rulings on the two
23 dispositive motions rendered the objections largely moot. A
24 good many of them had to do with discovery and to Mr. Hyatt's

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1 economic damages that you've ruled on by allowing Mr. Hyatt to
2 proceed as to the protest activities. That renders that
3 objection to the Discovery Commissioner's ruling moot.

4 The issue being there, that Mr. Hyatt would have
5 discovery of the FTB's documents and testimony from its
6 witnesses. He too has documents and files relevant to the
7 protest and witnesses that are handling that administrative
8 proceedings, so I guess the issue is that then that the
9 parties will have discovery on his claims in that regard. So
10 we have nothing to add as far as the objections, given Your
11 Honor's rulings on the dispositive motions.

12 THE COURT: Okay. Then for the clerk's purposes
13 those objections to the Discovery Commissioner's report and
14 recommendations are essentially moot as a result of the
15 Court's previous rulings.

16 MR. HUTCHISON: And that's true for both of the
17 objections, Your Honor, is that correct?

18 THE COURT: Yes.

19 Ms. Lundvall, I'll ask you to draft the proposed
20 orders for the Court's signatures. Please run them past Mr.
21 Hutchison, Mr. Bernhard, whoever else you need to run them
22 past before you submit them to me for my signature.

23 MS. LUNDVALL: Thank you, Your Honor.

24 MR. HUTCHISON: Thank you, Your Honor.

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MR. BERNHARD: Thank you, Your Honor.

THE COURT: Well, I have some documents I think, Ms.
Lundvall, that should be returned to you.,

MS. LUNDVALL: Thank you, Your Honor.

THE COURT: Thank you.

PROCEEDINGS CONCLUDED AT 4:12 P.M.

* * * * *

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.

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Kari Riley
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1/29/06
DATE

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EXHIBIT 53

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7
 8 **DISTRICT COURT**
 9 **FOR CLARK COUNTY, NEVADA**

10 GILBERT P. HYATT,

11 Plaintiff,

12 v.

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

16 Defendant.

Case No.: A 382999

Dept. No.: X

17 **NOTICE OF ENTRY OF ORDER DENYING**
 18 **PARTIAL SUMMARY JUDGMENT RE:**
 19 **THE CALIFORNIA ADMINISTRATIVE**
 20 **PROTEST PROCESS**

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

24 PLEASE TAKE NOTICE that an Order Denying Partial Summary Judgment Re: The
 25 California Administrative Protest Process was entered in the above-entitled matter on the 14th day
 26 of March, 2006, a copy of which is attached hereto.

27 DATED this 14th day of March, 2006.

28 McDONALD CARANO WILSON LLP

By:

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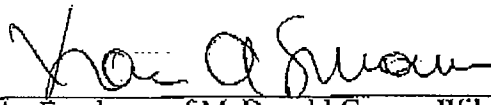
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and on this 14th day of March, 2006, I caused a true and correct copy of the foregoing Notice of Entry of Order Denying Partial Summary Judgment Re: The California Administrative Protest Process to be served by via facsimile and U.S. Mail to the following:

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DISTRICT COURT**CLARK COUNTY, NEVADA**

* * * *

GILBERT P. HYATT,

Plaintiff,

vs.

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

Defendants.

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

**ORDER DENYING PARTIAL
 SUMMARY JUDGMENT RE: THE
 CALIFORNIA ADMINISTRATIVE
 PROTEST PROCESS**

*Filed Under Seal By Order of the Discovery
 Commissioner Dated February 22, 1999*

Hearing Date: January 23, 2006
 Hearing Time: 1:30 pm
 Dept. X:

Defendant California Franchise Tax Board's Motion for Partial Summary Judgment Re: The California Administrative Protest Process having come before the Court on the 23rd day of January 2006, the Defendant being represented by Pat Lundvall and James W. Bradshaw, and the Plaintiff being present and represented by Mark Hutchison, Peter Bernhard and Donald Kula, and the Court having considered the Defendant's motion, the Plaintiff's opposition, the Defendant's reply, as well as the oral arguments of counsel, and GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant California Franchise Tax Board's Motion for Partial Summary Judgment Re: The California Administrative Protest Process is DENIED because Defendant's alleged continued bad faith is relevant to the

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FILED
 MAR 14 11 50 AM '06
Shirley S. Thompson
 CLERK

RA002150

1 intentional torts pled, collateral estoppel does not apply to the California court's final judgments, and
2 the quasi-judicial officer privilege does not apply.

3 Dated this 8th day of March, 2006.

4
5 Jessie Walsh
6 DISTRICT COURT JUDGE

7 Submitted this 6th day of March, 2006 by:

8 McDONALD CARANO WILSON LLP

9
10
11 By [Signature]

12 THOMAS R. C. WILSON, ESQ.

13 Nevada State Bar # 1568

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EXHIBIT 54



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FILED

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Spilley
CLERK

**DISTRICT COURT
CLARK COUNTY, NEVADA**

GILBERT P. HYATT,

Plaintiffs,

v.

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

Defendants.

Case No.: A382999

Dept. No.: X

**PLAINTIFF GILBERT P. HYATT'S
MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT**

Date of Hearing:

Time of Hearing:

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

Plaintiff Gilbert P. Hyatt, by and through his attorneys of record, respectfully moves this Court for an order granting him leave to file a Second Amended Complaint in this case. A true and correct copy of the proposed Second Amended Complaint is attached hereto as Exhibit 1.

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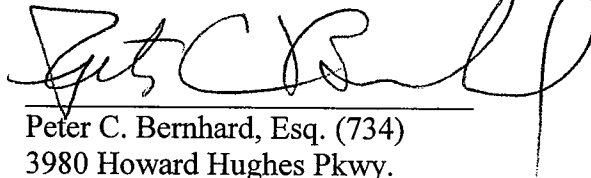
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1 This motion is based on NRCP Rule 15(a) and NRCP Rule 9(g), on the points and
2 authorities attached hereto, on previous orders entered by the Court, on all other papers and
3 pleadings on file herein, and on any argument that may be presented at the hearing on this
4 motion.

5 Dated this 24 day of March, 2006.

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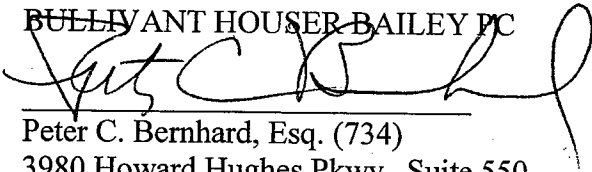
19 *Attorneys for Plaintiff Gilbert P. Hyatt*

NOTICE OF MOTION

TO: FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, DEFENDANT; and
TO: McDONALD CARANO WILSON LLP, its attorneys.

NOTICE IS HEREBY GIVEN that Plaintiff will bring the foregoing **PLAINTIFF**
GILBERT P. HYATT'S MOTION FOR LEAVE TO FILE SECOND AMENDED
COMPLAINT will come on for hearing on the 17 day of April, 2006, at the hour of
9 o'clock a.m., before District Court Department X, or as soon thereafter as counsel can be
heard.

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POINTS AND AUTHORITIES

1. Introduction.

Hyatt seeks leave to file the Second Amended Complaint for the purpose of (i) making explicit his claim for recovery of attorneys' fees and accountants' fees as special damages, (ii) conforming Hyatt's operative pleading to this Court's denial of the FTB's Motion for Partial Summary Judgment re Protest Process in which the Court found the continuing bad faith tortious conduct of the FTB to be relevant and at issue in this case, and (iii) adding based on the discovery conducted to date a breach of confidentiality claim that is closely related to and relies

1 on the same facts and evidence as Plaintiff's invasion of privacy claims, but is now set out
2 clearly as a separate tort.

3 These amendments, relatively minor in nature,¹ are nonetheless necessary and
4 appropriate to further frame this matter for trial, brought in good faith, and will not delay this
5 matter nor prejudice the FTB.

6 **2. Argument.**

7 NRCP 15(a) governs amendments to pleadings and provides in pertinent part:

8
9 **(a) Amendments.** A party may amend his pleading once as a matter
10 of course at any time before a responsive pleading is served or, if the
11 pleading is one to which no responsive pleading is permitted and the
12 action has not been placed upon the trial calendar, he may so amend it at
13 any time within 20 days after it is served. Otherwise a party may amend
14 his pleading only by leave of court or by written consent of the adverse
15 party; *and leave shall be freely given when justice so requires. . . .*²

16 Four factors are commonly considered when deciding whether to allow a plaintiff to
17 amend a complaint: (1) whether amending the complaint is futile, (2) whether plaintiff acts in
18 bad faith, (3) whether the amendment will cause undue delay, and (4) whether the amendment
19 will prejudice the opposing party. *Ritzer vs. Gerovicap Pharm. Corp.*, 162 FRD 642, 644 (D.
20 Nev. 1995) (same). Here, applying the above four factors, justice requires that Hyatt be given
21 leave to file his Second Amended Complaint in this case.

22 **A. Special damages.**

23 As to special damages, Hyatt has always sought in this litigation recovery of the
24 attorneys' fees and accountants' fees he has incurred and continues to incur in defending the
25 FTB's bad faith audits and the FTB's continuing bad faith protests. If not for the FTB's bad
26 faith during the audits, and now continuing through the pending protests, Hyatt would not have
27 incurred any (or at least most) of these professional fees. Hyatt's First Amended Complaint
28

27 ¹ A black-lined copy of Plaintiff's Proposed Second Amended Complaint, compared against the current First
28 Amended Complaint, is attached hereto as Exhibit 2, for ease of reference in seeing the changes between the two
pleadings.

² See *Weiler v. Rose*, 80 Nev. 380, 395 P.2d 323 (1964)(applying NRCP 15(a)).

1 filed in 1998 does request recovery of attorneys' fees. But in 2001, the Nevada Supreme Court
2 ruled in *Sandy Valley Associates, v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948 (2001),
3 that when recovery of attorneys' fees are sought as special damages, as Hyatt seeks in this case,
4 the plaintiff must explicitly plead them as special damages. Hyatt seeks leave to file the Second
5 Amended Complaint to conform his pleading with *Sandy Valley*.

6 The amendments Hyatt seeks as set forth in his proposed Second Amended Complaint
7 relative to special damages are not futile. The operative pleading in this case is Hyatt's First
8 Amended Complaint filed in 1998. The *Sandy Valley* decision referenced above was issued in
9 2001. This case was stayed pending Nevada Supreme Court review between June of 2000
10 through April of 2002, and then again from October of 2002 through May of 2003 pending
11 United States Supreme Court Review. The amendment that Hyatt now seeks is to conform his
12 pleading to the ruling from *Sandy Valley*. Far from futile, the amendment is necessary. For the
13 same reason, Hyatt's request for leave is not made in bad faith, but rather is legally required as
14 his operative pleading predates the *Sandy Valley* decision and could not have anticipated that
15 ruling, through no fault of Hyatt.

16 Additionally, the requested amendment will not cause delay and in no way prejudices
17 the FTB. Hyatt's First Amended Complaint requests recovery of attorneys' fees.³ Moreover, in
18 responding to the FTB's Interrogatory No. 4 seeking a description of Hyatt's damages, Hyatt
19 has consistently responded since 2000 that he was seeking recovery of attorneys' fees, although
20 the amount could not be calculated until completion of this case.⁴ In that regard, the District
21 Court recently ruled that the FTB's bad faith conduct at issue in this case includes any
22 continuing bad faith in the protests still pending in California.⁵ Hyatt's damages from the
23 attorneys' fees and accountants' fees incurred in defending the FTB's bad faith conduct
24 therefore continue to accrue to this day, and will continue to accrue through the trial date set for
25

26 ³ See First Amended Complaint, Prayer for Relief.

27 ⁴ Hyatt's Supplemental and Second Supplemental Response to FTB Interrogatory No. 4, April 3, 2000 and May 5, 2000.

28 ⁵ Order Denying the FTB Partial Summary Judgment re Ongoing California Administrative Protest Process, attached hereto as Exhibit 3.

1 August 15, 2006. A final calculation of these damages cannot therefore be specified until the
2 trial in this matter.

3 The FTB nonetheless already has notice of the fees Hyatt has incurred in defending the
4 FTB's bad faith acts in the audits and protests. Specifically, in a DCRR signed February 2,
5 2004, the Discovery Commissioner ruled that Hyatt must produce copies of attorneys' bills he
6 will claim as damages. In July 2004, Hyatt produced copies of the attorneys' bills⁶ and
7 accountants' bills⁷ he incurred in defending the audits and early protests which ran from 1993
8 through 1997. Additionally, in light of the District Court's ruling as described above
9 confirming that the FTB's bad faith acts continuing through the still pending protest are at issue
10 in this case, Hyatt is producing to the FTB a supplemental production of invoices for
11 professional fees he had incurred in defending the FTB's bad faith protests from 1998 through
12 2005 and for which he seeks recovery as special damages in this case.

13 In sum, Hyatt moves at this time to formally amend his pleading so that it conforms to
14 the *Sandy Valley* decision that post-dates the filing of Hyatt's First Amended Complaint. He
15 also seeks the amendment so that there is no confusion or ambiguity concerning his request for
16 attorneys' fees as one aspect of his remaining damage claims in light of the District Court's
17 decision dismissing his claim for economic damages stemming from his patent licensing
18 program in Japan. Hyatt's requested amendment therefore is necessary, timely and in no way
19 prejudices the FTB.

20 **B. Continuing bad faith allegations.**

21 This case was originally filed in January of 1998. As was extensively briefed by Hyatt
22 in opposing the FTB's Motion for Partial Summary Judgment re Protest Process, since 1998 —
23 eight years ago — the FTB has simply refused to proceed with the "Protests" in the California
24 tax proceedings. Hyatt asserts, among other things, that the FTB is delaying those proceedings
25 in bad faith and continues the bad faith asserted against the FTB regarding the audits conducted
26 between 1993 and 1997. The FTB, on the other hand, denies it has acted in bad faith during the

27 _____
28 ⁶ Notice of Supplemental Rule 16.1 Production No. 38, July 15, 2004.

⁷ Notice of Supplemental Rule 16.1 Production No. 37, July 15, 2004.

1 Protests and blames Hyatt for the delays. Obviously, the cause of the delay is very much in
2 dispute.⁸ The FTB also argues that the issue was beyond the scope of this case. The Court ruled
3 in denying the FTB's partial summary judgment motion that any continuing bad faith by the
4 FTB in the Protests is relevant to and at issue in this case.⁹

5 Because Hyatt is seeking to amend to add the allegations of Special Damages, he has inserted in
6 the Second Amended Complaint short references to the continuing nature of the FTB's bad
7 faith, thereby conforming the pleading to the Court ruling in denying the FTB's Motion for
8 Partial Summary Judgment re Protest Process. This is to avoid any argument by the FTB that
9 by amending his pleading Hyatt waived or failed to make any allegations of continuing bad faith
10 by the FTB. These amendments will in no way delay this case and certainly do not prejudice
11 the FTB given the Court's prior ruling and the fact that the parties have conducted extensive
12 discovery concerning the Protest and the delay, in that a decision has still not been issued by the
13 FTB Protest Officer.

14 C. Breach of confidentiality.

15 Discovery has established, and the evidence at trial will show, that (i) the FTB had, and
16 still has, a duty of confidence and loyalty to keep confidential and not disclose to third parties
17 personal and confidential information from and concerning Hyatt that the FTB obtained due to
18 its position as the auditor of Hyatt's state income tax return and (ii) the FTB breached its duty
19 not to disclose this personal and confidential information to third parties.¹⁰ As set forth briefly
20 below, these facts constitute the elements of a breach of confidentiality claim. Instead of
21 seeking to amend to proof at trial under NRCP 15 upon the presentation of evidence establishing
22 the above elements, Hyatt seeks to amend at this time.

23
24 ⁸ As a matter of judicial economy, Hyatt has not attached his opposition nor the FTB's motion and reply that set
25 forth each side's arguments in more detail. These documents are already in the Court's file, and moreover the
26 Court has already ruled that the disputed issue concerning the delays in the Protest is part of this case. While the
FTB may attempt to re-debate these issues in its opposition to this motion, such attempt would be highly improper.
Given the Court's previous ruling, Hyatt will not address this issue further unless requested by the Court.

27 ⁹ District Court Order entered March 14, 2006 denying the FTB's Motion for Partial Summary Judgment re Protest
Process and relevant portions of transcript from January 23, 2006 hearing attached hereto as Exhibit 3.

28 ¹⁰ The FTB cannot, and Hyatt believes the FTB does not, dispute the first point relative to the FTB's duty of
confidentiality. The FTB does dispute the second point relative to breach of the duty by disclosures to third party.

1 A breach of confidentiality claim is related to but slightly different from the traditional
2 forms of invasion of privacy (e.g., intrusion upon seclusion, publicity given to private facts,
3 false light), as it is also derived from the principles of constructive fraud. As set forth below, it
4 is essentially a hybrid of the two. As also set forth below, the Nevada Supreme Court has
5 specifically adopted this tort.¹¹

6 Here, Hyatt has pled from the outset the traditional forms of invasion of privacy as well
7 as a fraud claim that includes, in part, the FTB's representations to not disclose Hyatt's personal
8 and confidential information, reliance by Hyatt, and resulting damages incurred by Hyatt. Hyatt
9 expects, based on discovery conducted to date, to prove all of the elements of each of these
10 claims, and such proof will also satisfy the elements for the hybrid breach of confidentiality
11 claim. This cause of action emerged after the traditional forms of invasion of privacy to
12 compensate victims of disclosure of personal and confidential information by a party in whom
13 confidence has been reposed, due to the nature of that party's position, to keep such information
14 confidential.

15 The now traditional forms of invasion of privacy claims developed early in the
16 Twentieth Century after Justice Brandeis' now famous law review article¹² and are now set forth
17 in the Restatement (Second) of Torts.¹³ They are also clearly part of Nevada common law.¹⁴
18 But the breach of confidence tort specifically protects individuals from breaches of confidence
19 that result from relationships that are necessary in modern society and compel an individual to
20 reveal personal and confidential information, including involuntary relationships in which such
21 disclosures are mandated, such as by state taxing authorities. The basis for and the necessary
22 elements of this tort, as well as how it differs from invasion of privacy, are best summarized in
23 1982 *Columbia Law Review* Note:

24
25
26 ¹¹ *Perry v. Jordan*, 111 Nev. 943, 946-47 (1995).

27 ¹² Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

28 ¹³ Restatement (Second) of Torts, § 652A *et seq.*

¹⁴ See, e.g., *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615 (1995).

1 Every member of society engages in relationships of trust and confidence. We
2 turn to doctors, lawyers, counselors, teachers, bankers, accountants, and others
3 for assistance in matters beyond our individual knowledge or capacities. [FN
4 omitted] Relationships of this kind require us to lower our defenses and permit
5 some intrusion into our personal lives. . . . *Such self-exposure is not always*
6 *voluntary. To function in modern society, for example, we must file tax returns*
7 *and write checks, and those who process these documents incidentally have*
8 *access to details of our private lives.* [FN omitted]

9 ...

10 These two elements--the assurance of secrecy and the reliance it evokes--are the
11 essential ingredients of what can be termed a "confidential relationship." [FN
12 omitted] The giver of information places himself in a vulnerable position in
13 reliance on the assurance of secrecy and thus has a legitimate expectation of
14 confidentiality. The receiver of the information, by implicitly holding out the
15 assurance associated with his occupation, invites the reliance and thus has an
16 obligation not to disappoint the giver's expectation. . . .

17 ...

18 Cases granting recovery for breach of confidence share similar basic elements.
19 Though the type of relationship varies from case to case, the relationship in each
20 case carries an implicit assurance of confidentiality that the defendant held out
21 and then violated. . . .

22 ...

23 ... [E]ven hypersensitive people should have a right to be secure in their
24 confidential relationships. The privacy standard [*i.e.*, invasion of privacy claims]
25 would not protect such persons from disclosures of objectively innocuous
26 information that happens to be very distressing to them. Yet the same reliance on
27 the assurance of confidentiality is present here: knowing that disclosure of the
28 information would be distressing to him, the hypersensitive individual would not
have revealed it without the expectation of confidentiality. [FN omitted]

...

1 ... [T]he tort can be defined in general terms as the unconsented, unprivileged
2 disclosure to a third party of nonpublic information that the defendant has
3 learned within a confidential relationship. [FN omitted] "Unconsented" means
4 simply the absence of explicit or implicit permission to disclose the specific
information to a particular audience.¹⁵

5 The Nevada Supreme Court specifically recognized this tort in a 1995 case, *Perry v. Jordan*:

6
7 Perry argues that no Nevada authority, or authority from any other jurisdiction,
8 recognizes an independent claim for breach of a confidential relationship. We
9 disagree. In *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 529 30 (1982), this
court stated that

10 [c]onstructive fraud is the breach of some legal or equitable duty
11 which, irrespective of moral guilt, the law declares fraudulent
12 because of its tendency to deceive others or to violate confidence.
Constructive fraud is characterized by a breach of duty arising out
13 of a fiduciary or confidential relationship. A "confidential or
14 fiduciary relationship" exists when one reposes a special
confidence in another so that the latter, in equity and good
conscience, is bound to act in good faith and with due regard to
the interests of the one reposing the confidence.

15 (Citations omitted.) Recently this court indicated that "[t]he duty to speak does
16 not necessarily depend on the existence of a fiduciary relationship. ' * * * It may
17 arise in any situation where one party imposes confidence in the other because of
that person's position, and the other party knows of this confidence. * * * ' "
18 *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 635, 855 P.2d 549, 553
19 (1993) (quoting *Central States Stamping Co. v. Terminal Equipment Co.*, 727
20 F.2d 1405, 1409 (6th Cir.1984) (*emphasis added*).

21 Persuasive authority suggests that a confidential relationship may arise by reason
22 of kinship or professional, business, or social relationships between the parties.

23 ¹⁵ Alan Vickers, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1427-28, 1434, 1441,
24 1455 (1982). See also *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580 (D.C. 1985) ("It arises from the
25 limited duty that attaches to 'nonpersonal relationships customarily understood to carry an obligation of
confidence.' [citation omitted] That limited duty conveys a standard that is more strict than the reasonable man
26 test and provides fair warning to potential defendants that 'for so palpable a wrong, the law provides a remedy.'
[citation omitted]. The object of the cause of action based on the breach of confidentiality is not to fulfill
27 expectations, but to compensate the resulting injuries. [citation omitted]. And in contrast to the tort of invasion of
privacy, which is subject to traditional privileges (such as public safety, fraud, crime, self defense, and interest of a
28 third person), the First Amendment and the public's right to know, the public right to know privilege of this tort is
more restrictive than the broad public interest exception to the common law right to privacy. A defendant is not
released from an obligation of confidence merely because the information learned constitutes a matter of legitimate
public interest. [citation omitted]").

1 *See In re Guardianship of Chandos*, 18 Ariz.App. 583, 585, 504 P.2d 524, 526
2 (1972). Such a relationship "exists when one party gains the confidence of the
3 other and purports to act or advise with the other's interests in mind; it may exist
4 although there is no fiduciary relationship; it is particularly likely to exist when
5 there is a family relationship or one of friendship." *Kudokas v. Balkus*, 26
6 Cal.App.3d 744, 103 Cal.Rptr. 318, 321 (1972). When a confidential
7 relationship exists, the person in whom the special trust is placed owes a duty to
8 the other party similar to the duty of a fiduciary, requiring the person to act in
9 good faith and with due regard to the interests of the other party. *See Hamberg v.*
10 *Barsky*, 355 Pa. 462, 50 A.2d 345, 347 (1947). We conclude that the record
11 contains ample evidence of the existence and breach of just such a relationship
12 between Perry and Jordan.¹⁶

13 While termed here by Hyatt and in other authority cited above "breach of
14 confidentiality" and described in *Perry* by the Nevada Supreme Court as "breach of confidential
15 relationship," as one court explained the name of the tort is unimportant: "What label we affix to
16 this wrong is unimportant . . . "It is generally accepted that 'There is no necessity whatever that
17 a tort must have a name. New and nameless torts are being recognized constantly'. (Prosser,
18 Torts [2d ed.], p 3.) *What is important is that there must be the infliction of intentional harm,*
19 *resulting in damage, without legal excuses or justification. . . .*" [citations omitted]"¹⁷ Similar to
20 invasion of privacy claims, when the breach of confidentiality is intentional and made in made
21 faith, as alleged here by Hyatt, punitive damages can be awarded.¹⁸

22 In the Second Amended Complaint, Hyatt has expressly pled a separate claim for breach
23 of confidentiality against the FTB.¹⁹ Specifically, he has pled the nature of the confidential
24 relationship, the assurances of confidentiality made by the FTB before and during the subject
25 audits, the confidence and trust he reposed in the FTB based on those representations resulting
26 in the production to the FTB of personal and confidential information, and then the breach of
27 confidentially by the FTB resulting in damages to Hyatt. Given its close relationship to, but
28

¹⁶ *Perry v. Jordan*, 111 Nev. 943, 946-47 (1995).

¹⁷ *Doe v. Roe*, 93 Misc. 2d 201, 213 (NY 1977)(emphasis added and citations omitted).

¹⁸ *Id.*, at 216-17; *see also* Vickers, 82 Colum. L. Rev. at 1446.

¹⁹ *See* Eighth Claim for Relief in Plaintiff's Proposed Second Amended Complaint, attached hereto as Exhibit 1.

1 separateness from, Hyatt's traditional invasion of privacy claims and fraud claim, and the
2 similarity in the evidence need to prove such claim, good cause exists to grant Hyatt leave to
3 amend to add a breach of confidentiality claim.

4 Indeed, from the outset of this case Hyatt has pled the elements of this claim and pursued
5 evidence of them through discovery, even though not separately stated by name. The FTB
6 cannot in good faith assert it has not been aware since the outset of this case that Hyatt asserts
7 the FTB had an obligation to not disclose to third parties Hyatt's personal and confidential
8 information and that the FTB has violated such obligation by making such disclosures to third
9 parties. Indeed, these allegations are rampant in Hyatt's First Amended Complaint.

10 Hyatt intends to rely at trial on the discovery conducted to date, and evidence so induced
11 from that discovery, to establish his breach of confidentiality claim. The FTB needs no
12 additional discovery to defend this claim, but in fact will have until May 31, 2006 to conduct
13 any additional discovery it believes is necessary. The FTB will not therefore be prejudiced by
14 this claim, nor will it delay this case.

15 3. Conclusion.

16 Justice requires that the Court grant leave to Hyatt to file his proposed Second Amended
17 Complaint and thereby conform his pleading, and specifically his request for attorneys' fees as
18 special damages, to the holding in *Sandy Valley*. Justice also requires that the Court grant leave
19 to Hyatt to file his proposed Second Amended Complaint and thereby conform his pleading to
20 the Court's recent ruling that any bad faith by the FTB in the continuing Protests is relevant to
21 and at issue in this case. Finally, justice requires that the Court also grant leave to Hyatt to file
22 his proposed Second Amended Complaint and add his breach of confidentiality claim that is
23 supported by the same evidence as his pending invasion of privacy claims and fraud claims.

24 ///

25 ///

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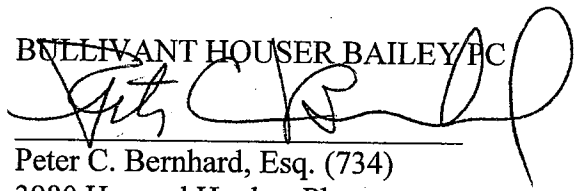
28

1 Hyatt therefore respectfully requests that the Court grant this motion and grant Hyatt leave to
2 file his proposed Second Amended Complaint.

3 Dated this 27 day of March, 2006.

4
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of BULLIVANT HOUSER
BAILEY PC and that on this 24th day of March, 2006, I caused the above and foregoing
document entitled **PLAINTIFF GILBERT P. HYATT'S MOTION FOR LEAVE TO
FILE SECOND AMENDED COMPLAINT** to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed
envelope upon which first class postage was prepaid in Las Vegas Nevada;
and/or
- ☒ Pursuant to EDCR 7.26, to be sent via facsimile; and/or
- ☒ to be hand-delivered;

to the attorney(s) listed below at the address and/or facsimile number indicated below:

via facsimile: (775) 788-2020

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McDonald Carano Wilson LLP
100 West Liberty Street
10th Floor
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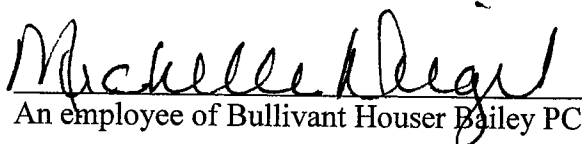

An employee of Bullivant Houser Bailey PC

Exhibit 1

RA002167

COMP

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DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiffs,

v.

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

Defendants.

Case No.: A382999
Dept. No.: X

PROPOSED

SECOND AMENDED COMPLAINT

Jury Trial Demanded

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

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

1 Plaintiff, Gilbert P. Hyatt, in this Second Amended Complaint, complains against
2 defendants, and each of them, as follows:

3 PARTIES

4 1. Plaintiff resides in Clark County, Nevada and has done so since September 26,
5 1991.

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

11 3. The identity and capacities of the defendants designated as Does 1 through 100
12 are so designated by plaintiff because of his intent by this complaint to include as named
13 defendants every individual or entity who, in concert with the FTB as an employee,
14 representative, agent or independent contractor, committed the tortious acts described in this
15 complaint. The true names and capacities of these Doe defendants are presently known only to
16 the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants
17 who are designated by fictitious names only until plaintiff is able, through discovery, to obtain
18 their true identities and capacities; upon ascertaining the true names and capacities of these Doe
19 defendants, plaintiff shall promptly amend this complaint to properly name them by their actual
20 identities and capacities. For pleading purposes, whenever this complaint refers to
21 "defendants," it shall refer to these Doe defendants, whether individuals, corporations or other
22 forms of associations or entities, until their true names are added by amendment along with
23 particularized facts concerning their conduct in the commission of the tortious acts alleged
24 herein.

25 4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in
26 acting or omitting to act as alleged, acted or omitted to act within the course and scope of their
27 employment or agency, and in furtherance of their employer's or principal's business, whether
28

1 the employer or principal be the FTB or some other governmental agency or employer or
2 principal whose identity is not yet known; and that FTB and defendants were otherwise
3 responsible and liable for the acts and omissions alleged herein.

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

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

14 SUMMARY OF CLAIMS

15 7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 et seq. to
16 confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and
17 continuing to the present and, correspondingly, his non-residency during said period in
18 California (FIRST CAUSE OF ACTION) — *re-pled in this Second Amended Complaint to*
19 *preserve plaintiff's right to appeal the District Court's April 3, 1999 ruling dismissing this*
20 *cause of action; this cause of action is therefore no longer at issue in the District Court;* (2)
21 recovery of compensatory and punitive damages against the FTB and the defendants for
22 invasion of plaintiff's right of privacy, including and in particular his informational privacy as
23 well as the FTB's failure to abide by the confidential relationship created by the FTB's request
24 for and receipt of Hyatt's highly personal and confidential information, resulting from their still
25 ongoing investigation in Nevada of plaintiff's residency, domicile and place of abode and
26 causing (a) an unreasonable intrusion upon plaintiff's seclusion (SECOND CAUSE OF
27 ACTION); (b) an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION);
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1 (c) casting plaintiff in a false light (FOURTH CAUSE OF ACTION); (3) recovery of
2 compensatory and punitive damages against the FTB and the defendants for their outrageous
3 conduct in regard to their continuing investigation in Nevada of plaintiff's residency, domicile
4 and place of abode, including but not limited to the FTB's failure to abide by the confidential
5 relationship created by the FTB's request for and receipt of Hyatt's highly personal and
6 confidential information (FIFTH CAUSE OF ACTION); (4) recovery of compensatory and
7 punitive damages against the FTB and defendants for an abuse of process (SIXTH CAUSE OF
8 ACTION); (5) recovery of compensatory and punitive damages against the FTB and defendants
9 for fraud, including but not limited to the FTB's failure to abide by the confidential relationship
10 created by the FTB's request for and receipt of Hyatt's highly personal and confidential
11 information (SEVENTH CAUSE OF ACTION); and (6) recovery of compensatory and punitive
12 damages against the FTB and defendants for breach of confidentiality in regard to the FTB's
13 breach of its duty not to disclose Hyatt's personal and confidential information (EIGHTH
14 CAUSE OF ACTION). The claims specified in this paragraph constitute EIGHT separate
15 causes of action as hereinafter set forth in this complaint.

16 FACTUAL BACKGROUND

17 Plaintiff's Residency in Nevada

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

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

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

20 The FTB and Defendants' Investigation of Plaintiff in Nevada

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

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

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

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

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

1 recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the
2 outrageous means of the bogus subpoenas.

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

12 Assessment for 1991

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

21 17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide
22 resident of Nevada should not be forced into a California forum to seek relief from the bad faith,
23 unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident.
24 Plaintiff avers that liability for the bad faith actions of the FTB during the audits and continuing
25 until the present in the still ongoing California tax proceedings should be determined in Nevada,
26 the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on
27 plaintiff. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that
28

1 plaintiff remained a California resident until he purchased and closed escrow on a new home in
2 Las Vegas on April 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a
3 way — any way — to effectively assess additional income taxes against plaintiff after he
4 changed his residency from California to Nevada is based on governmental bad faith and greed
5 arising from the FTB's eventual awareness of the financial success plaintiff has realized since
6 leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date
7 of Nevada residency accepted by the FTB with respect to the 1991 Report was not supported by
8 the information gathered by the FTB's during its audits of plaintiff and was accepted by the
9 FTB in bad faith as it was over six months after plaintiff moved to Nevada with the intent to
10 stay and began, he thought, to enjoy all the privileges and advantages of residency in his new
11 state.

12 The FTB's Continuing Pursuit of Plaintiff in Nevada

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

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

22 20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992
23 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes
24 over such assessments by the FTB always settle at this stage as taxpayers do not want to risk
25 their personal financial information being made public. Plaintiff understood this statement to be
26 a strong suggestion by the FTB that he settle the dispute by payment of some portion of the
27 assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not
28

1 been a resident of California since his move to Nevada on September 26, 1991, and it remains
2 clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties"
3 from him that he does not legally or morally owe.

4 21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed
5 Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff
6 became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of
7 Proposed Assessment that "We [the FTB] consider you to be a resident of this state [California]
8 through April 2, 1992," such notice proceeded to assess California state income taxes on
9 plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff state
10 income taxes for 1992 in an amount five times greater than that for 1991, assessed plaintiff a
11 penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada
12 resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the
13 equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of
14 California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was fourteen
15 times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was
16 "a California resident for the entire year." Without explanation the FTB ignored its earlier
17 finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3,
18 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada
19 resident.

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

24 23. Plaintiff is informed and believes, and therefore alleges, that the FTB may
25 continue to assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996
26 and beyond since the FTB has now disregarded its own conclusion regarding plaintiff's
27 residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount
28 of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It

1 appears from its actions concerning plaintiff, that the FTB has embraced a new theory of
2 liability that in effect declares "once a California resident always a California resident" as long
3 as the victim continues to generate significant amounts of income. Thus, the FTB has raised an
4 invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing
5 jurisdiction of the FTB.

6 The FTB's Motive

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

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

25 Jurisdiction

26 26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-
27 arm" statute, NRS 14.065 et seq., because of the FTB's tortious extraterritorial contacts and
28

1 investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to
2 undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for
3 maintaining that plaintiff continued his residency in California during the period September 26,
4 1991 to December 31, 1991 and beyond.

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

10 FIRST CAUSE OF ACTION

11 (For Declaratory Relief)

12 28. Plaintiff realleges and incorporates herein by reference each and every allegation
13 contained in paragraphs 1 through 27 above, as though set forth herein verbatim. *This cause of*
14 *action is re-pled in this Second Amended Complaint to preserve plaintiff's right to appeal the*
15 *District Court's April 3, 1999 ruling dismissing this cause of action. This cause of action is*
16 *therefore no longer at issue in the District Court.*

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

24 a) Domicile.

25 Domicile is determined by the individual's physical presence in California with intent to stay or
26 if absent temporarily from California an intent to return. Such intent is determined by the acts
27 and conduct of the individual such as: (1) where the individual is registered to vote and votes;
28

1 (2) location of the individual's permanent home; (3) comparative size of homes maintained by
2 the individual in different states; (4) where the individual files federal income tax returns; (5)
3 comparative time spent by the individual in different states; (6) cancellation of the individual's
4 California homeowner's property tax exemption; (7) obtaining a driver's license from another
5 state; (8) registering a car in another state; (9) joining religious, business and/or social
6 organizations in another state; and (10) establishment of a successful business in another state
7 by an individual who is self employed.
8

9 (b) Temporary or Transitory Purpose.

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

24 30. The FTB's assessment of taxes and a penalty for 1991 is based on the FTB's
25 conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3,
26 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such
27 a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which
28

1 contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and
2 precedents require it to consider. Such facts include, but are not limited to, the following: (1)
3 plaintiff sold his California home on October 1, 1991; (2) plaintiff rented an apartment in Las
4 Vegas on or about October 7, 1991 and, after a brief period of necessary travel to the east coast,
5 took possession of said apartment on or about October 22, 1991 and maintained his residence
6 there until April of 1992; (3) plaintiff registered to vote, obtained a Nevada driver's license
7 (relinquishing his California driver's license to the Nevada Department of Motor Vehicles), and
8 joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his
9 California home owner's exemption effective October 1, 1991; (5) plaintiff began actively
10 searching for a house to buy in Las Vegas, commencing in early October 1991, and submitted
11 numerous offers on houses in Las Vegas beginning in December 1991; (6) one of plaintiff's
12 offers to purchase a home in Las Vegas was accepted in March of 1992 and escrow on the
13 transaction closed on April 3, 1992; and (7) plaintiff's new home in Las Vegas was substantially
14 larger than the home in Southern California, which he sold in October of 1991.

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

27 32. Plaintiff therefore requests judgment of this Court declaring and confirming
28 plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from

1 September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial
2 investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada
3 residents without approval from a Nevada court or governmental agency, as alleged above, to be
4 without authority and violative of Nevada's sovereignty and territorial integrity.

5 SECOND CAUSE OF ACTION

6 (For Invasion of Privacy — Unreasonable Intrusion Upon The
7 Seclusion of Another, including Intrusion Upon Informational
8 Privacy)

9
10 33. Plaintiff realleges and incorporates herein by reference each and every allegation
11 contained in paragraphs 1 through 32, above, as though set forth herein verbatim.

12 34. Plaintiff is informed and believes, and therefore alleges, that neighbors,
13 businesses, government officials and others within Nevada with whom plaintiff has had and
14 would reasonably expect in the future to have social or business interactions, were approached
15 and questioned by the FTB and defendants who disclosed or implied that plaintiff was under
16 investigation in California, and otherwise acted in such a manner as to cause doubts to arise
17 concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation
18 in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential
19 information with the understanding that it would remain confidential, thereby creating a
20 confidential relationship in which the FTB was required not to disclose Hyatt's highly personal
21 and confidential information. The FTB even noted in its own internal documentation that
22 plaintiff had a significant concern in regard to the protection of his privacy in turning over such
23 information. At the time this occurred, plaintiff was still hopeful that the FTB was actually
24 operating in good faith, a proposition that, as noted throughout this complaint, proved to be
25 utterly false.

26 35. Plaintiff is informed and believes, and therefore alleges, that the FTB and
27 defendants nevertheless violated plaintiff's right to privacy in regard to such information by
28 revealing it to third parties and otherwise conducting an investigation in Nevada, and continuing

1 to conduct such an investigation, through which the FTB and defendants revealed to third
2 parties personal and confidential information, which plaintiff had every right to expect would
3 not be revealed to such parties.

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

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

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

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

Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

40. Plaintiff was drawn into the FTB's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad-faith attempt to extort money from plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) tortious actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

41. Plaintiff was forced to disclose his private documents and information with the FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently of his hard-earned personal property and right not to have his privacy invaded by the publication of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means available, to wit: the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

42. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues

1 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
2 behavior.

3 43. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
4 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
5 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
6 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
7 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,
8 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
9 thereof to be proved according to the evidence at trial.

10 THIRD CAUSE OF ACTION

11 (For Invasion of Privacy — Unreasonable Publicity Given To
12 Private Facts, Including Publicity Given to Matters Protected

13 Under the Concept of Informational Privacy)

14 44. Plaintiff realleges and incorporates herein by reference each and every allegation
15 contained in paragraphs 1 through 43, above, as though set forth herein verbatim.

16 45. As set forth above, plaintiff revealed to the FTB highly personal and confidential
17 information at the request of the FTB as an ostensible part of its audit and investigation into
18 plaintiff's residency during the disputed time periods, thereby creating a confidential
19 relationship in which the FTB was required not to disclose Hyatt's highly personal and
20 confidential information. Plaintiff had a reasonable expectation that said information would be
21 kept confidential and not revealed to third parties and the FTB and defendants knew and
22 understood that said information was to be kept confidential and not revealed to third parties.
23

24 46. The FTB and defendants, without necessity or justification, nevertheless
25 disclosed to third parties, and continue to disclose to third parties, in Nevada certain of
26 plaintiff's personal and confidential information which had been cooperatively disclosed to the
27 FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and
28

1 investigative efforts, or which the FTB had acquired via other means but was required by its
2 own rules and regulations or state law not to disclose to third parties.

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

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

12 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

13 49. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
14 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
15 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
16 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
17 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
18 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
19 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
20 significant financial and reputational destruction. The threatened (and consummated) tortious
21 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
22 publicity of private facts that were expressly extracted from plaintiff under false promises of
23 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
24 detriment.

25 50. Plaintiff was forced to disclose his private documents and information with the
26 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
27 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
28

1 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
2 of his hard-earned personal property and right not to have his privacy invaded by the publication
3 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
4 available, to wit: the employment of teams of legal and professional experts to vigorously
5 defend himself in the audits and the continuing California tax proceedings.

6 51. It was highly foreseeable to the FTB that, absent the success of its scheme to
7 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
8 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
9 alternative was to vigorously defend himself in the audits and the continuing California tax
10 proceedings. This required the employment of a team of attorneys and other experts. The
11 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
12 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
13 behavior.

14 52. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
15 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
16 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
17 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
18 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,
19 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
20 thereof to be proved according to the evidence at trial.

21 FOURTH CAUSE OF ACTION

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

23 53. Plaintiff realleges and incorporates herein by reference each and every allegation
24 contained in paragraphs 1 through 52, above, as if set forth herein verbatim.

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

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

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

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

22 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

23 58. Plaintiff was drawn into the FTB's audit without choice and as an innocent
24 party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be
25 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
26 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
27 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
28

1 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
2 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
3 significant financial and reputational destruction. The threatened (and consummated) tortious
4 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
5 publicity of private facts that were expressly extracted from plaintiff under false promises of
6 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
7 detriment.

8 59. Plaintiff was forced to disclose his private documents and information with the
9 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
10 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
11 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
12 of his hard-earned personal property and right not to have his privacy invaded by the publication
13 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
14 available, to wit: the employment of teams of legal and professional experts to vigorously
15 defend himself in the audits and the continuing California tax proceedings.

16 60. It was highly foreseeable to the FTB that, absent the success of its scheme to
17 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
18 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
19 alternative was to vigorously defend himself in the audits and the continuing California tax
20 proceedings. This required the employment of a team of attorneys and other experts. The
21 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
22 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
23 behavior.

24 61. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
25 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
26 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
27 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
28 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,

1 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
2 thereof to be proved according to the evidence at trial.

3 FIFTH CAUSE OF ACTION

4 (For the Tort of Outrage)

5 62. Plaintiff realleges and incorporates herein by reference each and every allegation
6 contained in paragraphs 1 through 61, above, as if set forth herein verbatim.

7 63. The clandestine and reprehensible manner in which the FTB and defendants
8 carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of
9 authority from the State of California, but without permission from the State of Nevada, and the
10 FTB and defendants' clear intent to continue to investigate and assess plaintiff staggeringly high
11 California state income taxes, interest, and penalties for the entire year of 1992 — and possibly
12 continuing into future years — despite the FTB's own finding that plaintiff was a Nevada
13 resident at least as of April of 1992, was, and continues to be, extreme, oppressive and
14 outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California,
15 disdaining and abandoning all reason in its reprehensible, all-out effort to extort significant
16 amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes,
17 and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for
18 the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of
19 which was, and continue to be, to so harass, annoy, embarrass, and intimidate plaintiff, and to
20 cause him such severe emotional distress and worry as to coerce him into paying significant
21 sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the
22 disputed periods. As a result of such extremely outrageous and oppressive conduct on the part
23 of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment,
24 anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel
25 if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful
26 and determined adversaries.

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

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

9 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

10 66. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
11 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
12 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
13 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
14 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
15 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
16 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
17 significant financial and reputational destruction. The threatened (and consummated) tortious
18 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
19 publicity of private facts that were expressly extracted from plaintiff under false promises of
20 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
21 detriment.

22 67. Plaintiff was forced to disclose his private documents and information with the
23 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
24 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
25 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
26 of his hard-earned personal property and right not to have his privacy invaded by the publication
27 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
28

1 available, to wit: the employment of teams of legal and professional experts to vigorously
2 defend himself in the audits and the continuing California tax proceedings.

3 68. It was highly foreseeable to the FTB that, absent the success of its scheme to
4 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
5 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
6 alternative was to vigorously defend himself in the audits and the continuing California tax
7 proceedings. This required the employment of a team of attorneys and other experts. The
8 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
9 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
10 behavior.

11 69. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
12 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
13 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
14 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
15 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,
16 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
17 thereof to be proved according to the evidence at trial.

18 SIXTH CAUSE OF ACTION

19 (For Abuse of Process)

20 70. Plaintiff realleges and incorporates herein by reference each and every allegation
21 contained in paragraphs 1 through 69, above, as if set forth herein verbatim.

22 71. Despite plaintiff's ongoing effort, both personally and through his professional
23 representatives, to reasonably provide the FTB with every form of information it requested in
24 order to convince the FTB that plaintiff has been a bona fide resident of the State of Nevada
25 since September 26, 1991, the FTB has willfully sought to extort vast sums of money from
26 plaintiff through administrative proceedings unrelated to the legitimate taxing purposes for
27 which the FTB is empowered to act as an agency of the government of the State of California;
28

1 said administrative proceedings have been lawlessly and abusively directed into the State of
2 Nevada through means of administrative "quasi-subpoenas" that have been unlawfully utilized
3 in the attempt to extort money from plaintiff as aforesaid.

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

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

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

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

1 the pressure and anxiety felt by plaintiff as intended by the FTB in furtherance of its unlawful
2 scheme;

3 (d) Although the FTB was allegedly investigating plaintiff for the audit years 1991 and
4 1992, such audits were and are a "sham" asserted for the purposes of attempting to extort non-
5 owed monies from plaintiff, as demonstrated by the fact that several of the "Demands" indicated
6 that they were issued to secure information (about plaintiff) "for investigation, audit or
7 collection purposes pertaining to the above-named taxpayer for the years indicated," and then
8 proceeded to demand information pertaining to the years 1993, 1994, and 1995 "to present;"

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

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

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

1 highly confidential financial information concerning plaintiff if he refused to settle, another
2 deceptive and improper abuse of the proceedings instigated by the FTB to coerce settlement by
3 plaintiff;

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

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

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

1 aforesaid "Demands" were being sent to Nevada residents, professional persons and businesses,
2 and in hiding from the recipients of the "Demands" the fact that despite their stated support in
3 California law, the documents had no such support and were deceitful and bogus documents;
4 and

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

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

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

22 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

23 75. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
24 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
25 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
26 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
27 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
28

1 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
2 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
3 significant financial and reputational destruction. The threatened (and consummated) tortious
4 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
5 publicity of private facts that were expressly extracted from plaintiff under false promises of
6 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
7 detriment.

8 76. Plaintiff was forced to disclose his private documents and information with the
9 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
10 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
11 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
12 of his hard-earned personal property and right not to have his privacy invaded by the publication
13 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
14 available, to wit: the employment of teams of legal and professional experts to vigorously
15 defend himself in the audits and the continuing California tax proceedings.

16 77. It was highly foreseeable to the FTB that, absent the success of its scheme to
17 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
18 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
19 alternative was to vigorously defend himself in the audits and the continuing California tax
20 proceedings. This required the employment of a team of attorneys and other experts. The
21 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
22 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
23 behavior.

24 78. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
25 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
26 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
27 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
28 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,

1 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
2 thereof to be proved according to the evidence at trial.

3 SEVENTH CAUSE OF ACTION

4 (For Fraud)

5 79. Plaintiff realleges and incorporates herein by reference each and every allegation
6 contained in paragraphs 1 through 78, above, as if set forth herein verbatim.

7 80. Plaintiff, who prior to September 26, 1991 had been a long-standing resident and
8 taxpayer of the State of California, placed trust and confidence in the bona fides of the FTB as
9 the taxing authority of the State of California when the FTB first contacted him on or about June
10 1993 regarding the 1991 audit of his California tax obligation; by the time of this first contact,
11 plaintiff had become a recognized and prominent force in the computer electronics industry, and
12 he was vitally interested in maintaining both his personal and business security, as well as the
13 integrity of his reputation as a highly successful inventor and owner and licensor of significantly
14 valuable patents.

15 81. During the course of seeking information and documents relating to the 1991
16 "audit," and repeatedly thereafter, the FTB absolutely promised to (i) conduct an unbiased, good
17 faith audit and (ii) maintain in the strictest of confidence, various aspects of plaintiff's
18 circumstances, including, but not limited to, his personal home address and his business and
19 financial transactions and status; and plaintiff's professional representatives took special
20 measures to maintain the confidentiality of plaintiff's affairs, including and especially obtaining
21 solemn commitments from FTB agents to maintain in the strictest of confidence (assured by
22 supposedly secure arrangements) all of plaintiff's confidential information and documents; and
23 the said confidential information and documents were given to the FTB in return for its solemn
24 guarantees and assurances of confidentiality, as aforesaid, thereby creating a confidential
25 relationship in which the FTB was required not to disclose Hyatt's highly personal and
26 confidential information.
27
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1 82. Despite the aforesaid assurances and representations of (i) an unbiased, good
2 faith audit and (ii) confidentiality by the FTB, said assurances and representations were false,
3 and the FTB knew they were false or believed they were false, or were without a sufficient basis
4 for making said assurances and representations. Even as the FTB and its agents were continuing
5 to provide assurances of confidentiality to plaintiff and his professional representatives, and
6 without notice to either, Sheila Cox and the FTB were in the process of sending the bogus
7 "DEMAND[S] TO FURNISH INFORMATION" to the utility companies in Las Vegas which
8 demonstrated that the aforesaid assurances and representations were false, as the FTB revealed
9 plaintiff's personal home address in Las Vegas, thus making this highly sensitive and
10 confidential information essentially available to the world through access to the databases
11 maintained by the utility companies. Specific representative indices of the FTB's fraud include:

12 (a) In a letter by Eugene Cowan, Esq., a tax attorney representing plaintiff, dated
13 November 1, 1993 and addressed to and received by Mr. Marc Shayer of the FTB, Mr. Cowan
14 indicated that he was enclosing a copy of plaintiff's escrow instructions concerning the purchase
15 of his Las Vegas residence, and that "[p]er our discussion, the address of the Las Vegas home
16 has been deleted." Mr. Cowan ended his letter with the following sentence: "As we discussed,
17 the enclosed materials are highly confidential and we do appreciate your utmost care in
18 maintaining their confidentiality." This letter is contained within the files of the FTB, and the
19 FTB noted in its chronological list of items, the receipt of the aforesaid escrow instructions with
20 "Address deleted;"

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

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

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

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

13 (iv) On February 28, 1995, Eugene Cowan, Esq. sent a letter to Sheila Cox of
14 the FTB enclosing copies of various documents. He then stated: "As previously discussed with
15 you and other Franchise Tax Board auditors, all correspondence and materials furnished to the
16 Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you
17 will retain these materials in locked facilities with limited access[;]" and

18 (v) 8/31/95 - In a letter sent to Eugene Cowan, Esq. by Sheila Cox on
19 8/31/95 regarding the 1991 audit, Cox stated: "The FTB acknowledges that the taxpayer is a
20 private person who puts a significant effort into protecting his privacy[;]"

21 (c) Despite the meeting Sheila Cox had with Mr. Cowan on February 23, 1995, and Mr.
22 Cowan's expression of plaintiff's concern for his privacy, and the explanation by Cox of the
23 FTB's stringent Security and Disclosure policy (the violation of which may subject the
24 offending FTB employee to criminal sanctions or termination); and despite Mr. Cowan's letter
25 to Sheila Cox of February 28, 1995, discussing the highly confidential nature of "all
26 correspondence and materials furnished to the Franchise Tax Board" and his and plaintiff's
27 "understanding that you will retain these materials in locked facilities with limited access"
28 (thereby again underscoring the understanding that all information and documents provided to

1 the FTB would be confidential, including plaintiff's personal residence address), Sheila Cox
2 sent a "DEMAND TO FURNISH INFORMATION" to the Las Vegas utility companies
3 including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water
4 District, providing each such company with the plaintiff's personal home address, thereby
5 demonstrating disdain for plaintiff, his privacy concerns and the FTB's assurances of
6 confidentiality.

7 83. Plaintiff further alleges that from the very beginning of the FTB's notification to
8 plaintiff and his professional representatives of its intention to audit his 1991 California taxes,
9 express and implied assurances and representations were made to plaintiff through his
10 representatives, that the audit was to be an objective, unbiased, and good faith inquiry into the
11 status of his 1991 tax obligation; and that upon information and belief, based on the FTB's
12 subsequent actions, the aforesaid representations were untrue, as the FTB and certain of its
13 agents were determined to share in the highly successful produce of plaintiff's painstaking labor
14 through means of truth-defying extortion. Indications of this aspect of the fraud perpetrated by
15 the FTB include:

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

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

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

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

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

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

3 85. Plaintiff, reasonably relying on the truthfulness of the aforesaid assurances and
4 representations by the FTB and its agents, and having no reason to believe that an agency of the
5 State of California would misrepresent its commitments and assurances, did agree both
6 personally and through his authorized professional representatives to cooperate with the FTB
7 and provide it with his highly sensitive and confidential information and documents; in fact,
8 plaintiff relied on the false representations and assurances of the FTB and its agents to his
9 extreme detriment.

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

15 87. The aforesaid misrepresentations by the FTB and its agents were fraudulent,
16 oppressive and malicious. Plaintiff is therefore entitled to an award of exemplary or punitive
17 damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

18 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

19 88. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
20 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
21 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
22 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
23 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
24 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
25 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
26 significant financial and reputational destruction. The threatened (and consummated) tortious
27 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
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1 publicity of private facts that were expressly extracted from plaintiff under false promises of
2 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
3 detriment.

4 89. Plaintiff was forced to disclose his private documents and information with the
5 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a
6 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing
7 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently
8 of his hard-earned personal property and right not to have his privacy invaded by the publication
9 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means
10 available, to wit: the employment of teams of legal and professional experts to vigorously
11 defend himself in the audits and the continuing California tax proceedings.

12 90. It was highly foreseeable to the FTB that, absent the success of its scheme to
13 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction
14 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only
15 alternative was to vigorously defend himself in the audits and the continuing California tax
16 proceedings. This required the employment of a team of attorneys and other experts. The
17 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues
18 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious
19 behavior.

20 91. Plaintiff's incurrence of attorneys' fees and other professional fees are highly
21 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in
22 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by
23 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend
24 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,
25 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
26 thereof to be proved according to the evidence at trial.
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EIGHTH CAUSE OF ACTION

(For Breach of Confidentiality — Including Informational
Privacy)

92. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 91, above, as though set forth herein verbatim.

93. As represented in its own manuals and policies, to obtain voluntary compliance by a taxpayer to produce information requested of the taxpayer during audits, the FTB seeks to gain the trust and confidence of the taxpayer by promising confidentiality and fairness. Moreover, in its position as an auditor, the FTB does gain, both voluntarily and by compulsion if necessary, possession of personal and confidential information concerning the taxpayer that a taxpayer would reasonably expect to be kept confidential and not disclosed to third parties. As a result, a confidential relationship exists between the FTB and the taxpayer during an audit, and continues to exist so long as the FTB maintains possession of the personal and confidential information, that places a duty of loyalty on the FTB to not disclose the highly personal and confidential information it obtains concerning the taxpayer.

94. As described above, in return and in response to the FTB's representations of confidentiality and fairness during the audits, plaintiff did reveal to the FTB highly personal and confidential information at the request of the FTB as an ostensible part of its audits and investigation into plaintiff's residency during the disputed time periods. The FTB, in its position as an auditor, also acquired personal and confidential information concerning plaintiff via other means. Based on its duty of loyalty and confidentiality in its role as auditor, the FTB was required to act in good faith and with due regard to plaintiff's interests of confidentiality and thereby not disclose to third parties plaintiff's personal and confidential information. The FTB, without necessity or justification, nevertheless breached its duty of loyalty and confidentiality by making disclosures to third parties, and continuing to make disclosures to third parties, of plaintiff's personal and confidential information that the FTB had a duty not to disclose.

1 95. As a result of such extremely outrageous and oppressive conduct on the part of
2 the FTB, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a
3 strong sense of outrage that any honest and reasonably sensitive person would feel upon breach
4 of confidentiality by a party in whom trust and confidence has been imposed based on that
5 party's position.

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

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

14 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

15 98. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
16 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
17 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
18 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
19 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
20 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
21 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
22 significant financial and reputational destruction. The threatened (and consummated) tortious
23 actions included the outrageously intrusive invasion of his privacy and breach of confidentiality,
24 as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under
25 false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his
26 extreme and permanent detriment.