

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

**FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA**

**Appellant**

**v.**

**GILBERT P. HYATT**

**Respondent**

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

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**APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P.  
HYATT - VOLUME 10 OF 17**

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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

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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 1<sup>st</sup> day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 10 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;

upon the following person(s):

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      /s/ Kaylee Conradi        
An employee of HUTCHISON & STEFFEN, PLLC

1           99. Plaintiff was forced to disclose his private documents and information with the  
2 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a  
3 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing  
4 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently  
5 of his hard-earned personal property and right not to have his privacy invaded by the publication  
6 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means  
7 available, to wit: the employment of teams of legal and professional experts to vigorously  
8 defend himself in the audits and the continuing California tax proceedings.

9           100. It was highly foreseeable to the FTB that, absent the success of its scheme to  
10 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction  
11 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only  
12 alternative was to vigorously defend himself in the audits and the continuing California tax  
13 proceedings. This required the employment of a team of attorneys and other experts. The  
14 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues  
15 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious  
16 behavior.

17           101. Plaintiff's incurrence of attorneys' fees and other professional fees are highly  
18 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in  
19 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by  
20 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend  
21 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,  
22 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount  
23 thereof to be proved according to the evidence at trial.  
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1 WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants  
2 as follows:

3 FIRST CAUSE OF ACTION

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

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

12 3. For costs of suit; and

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

14 SECOND CAUSE OF ACTION

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

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

18 3. For costs of suit;

19 4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

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

21 THIRD CAUSE OF ACTION

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

24 2. For costs of suit;

25 3. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

26 4. For such other and further relief as the Court deems just and proper.  
27  
28

FOURTH CAUSE OF ACTION

- For actual and consequential damages in a total amount in excess of \$10,000;
- For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;
- For costs of suit;
- For provable attorneys' fees as special damages pursuant to NRCP 9(g); and
- For such other and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of \$10,000;
2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;
3. For costs of suit;
4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and
5. For such other and further relief as the Court deems just and proper.

SIXTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of \$10,000;
2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;
3. For costs of suit;
4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and
5. For such other and further relief as the Court deems just and proper.

SEVENTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of \$10,000;
2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;
3. For costs of suit;
4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

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

**EIGHTH CAUSE OF ACTION**

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

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

3. For costs of suit;

4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

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

Dated this \_\_\_\_ day of March, 2006.

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Exhibit 2

RA002210

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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

FIRSTSECOND 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  
2 Plaintiff, Gilbert P. Hyatt, in this ~~First~~Second Amended Complaint, complains against  
3 defendants, and each of them, as follows:

4  
5 PARTIES

6 1. ——— 1. Plaintiff resides in Clark County, Nevada and has done so since  
7 September 26, 1991.

8 2. ——— 2. Defendant Franchise Tax Board of the State of California (hereinafter  
9 “FTB”) is a governmental agency of the State of California with its principal office located in  
10 Sacramento, California, and a district office located in Los Angeles, California. The FTB’s  
11 function is to ensure the collection of state income taxes from California residents and from  
12 income earned in California by non-residents.

13 3. ——— 3. The identity and capacities of the defendants designated as Does 1  
14 through 100 are so designated by plaintiff because of his intent by this complaint to include as  
15 named defendants every individual or entity who, in concert with the FTB as an employee,  
16 representative, agent or independent contractor, committed the tortious acts described in this  
17 complaint. The true names and capacities of these Doe defendants are presently known only to  
18 the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants  
19 who are designated by fictitious names only until plaintiff is able, through discovery, to obtain  
20 their true identities and capacities; upon ascertaining the true names and capacities of these Doe  
21 defendants, plaintiff shall promptly amend this complaint to properly name them by their actual  
22 identities and capacities. For pleading purposes, whenever this complaint refers to  
23 “defendants,” it shall refer to these Doe defendants, whether individuals, corporations or other  
24 forms of associations or entities, until their true names are added by amendment along with  
25 particularized facts concerning their conduct in the commission of the tortious acts alleged  
26 herein.

27 4. ——— 4. Plaintiff is informed and believes, and on that basis alleges, that  
28 defendants, in acting or omitting to act as alleged, acted or omitted to act within the course and



scope of their employment or agency, and in furtherance of their employer's or principal's business, whether the employer or principal be the FTB or some other governmental agency or employer or principal whose identity is not yet known; and that FTB and defendants were otherwise responsible and liable for the acts and omissions alleged herein.

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

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

#### SUMMARY OF CLAIMS

7. ——— 7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 et seq. to confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and continuing to the present and, correspondingly, his non-residency during said period in California (FIRST CAUSE OF ACTION) — re-pled in this Second Amended Complaint to preserve plaintiff's right to appeal the District Court's April 3, 1999 ruling dismissing this cause of action; this cause of action is therefore no longer at issue in the District Court; (2) recovery of compensatory and punitive damages against the FTB and the defendants for invasion of plaintiff's right of privacy resulting from their, including and in particular his informational privacy as well as the FTB's failure to abide by the confidential relationship created by the FTB's request for and receipt of Hyatt's highly personal and confidential information, resulting from their still ongoing investigation in Nevada of plaintiff's residency, domicile and place of abode and causing (a) an unreasonable intrusion upon plaintiff's seclusion

(SECOND CAUSE OF ACTION); (b) an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION); (c) casting plaintiff in a false light (FOURTH CAUSE OF ACTION); (3) recovery of compensatory and punitive damages against the FTB and the defendants for their outrageous conduct in regard to their continuing investigation in Nevada of plaintiff's residency, domicile and place of abode, including but not limited to the FTB's failure to abide by the confidential relationship created by the FTB's request for and receipt of Hyatt's highly personal and confidential information (FIFTH CAUSE OF ACTION); (4) recovery of compensatory and punitive damages against the FTB and defendants for an abuse of process (SIXTH CAUSE OF ACTION); (5) recovery of compensatory and punitive damages against the FTB and defendants for fraud, including but not limited to the FTB's failure to abide by the confidential relationship created by the FTB's request for and receipt of Hyatt's highly personal and confidential information (SEVENTH CAUSE OF ACTION); and (6) ~~for~~ recovery of compensatory and punitive damages against the FTB and defendants for ~~negligent misrepresentation~~ breach of confidentiality in regard to the FTB's breach of its duty not to disclose Hyatt's personal and confidential information (EIGHTH CAUSE OF ACTION). The claims specified in this paragraph constitute EIGHT separate causes of action as hereinafter set forth in this complaint.

## FACTUAL BACKGROUND

### Plaintiff's Residency in Nevada

8. ——— ~~8.~~ Plaintiff moved to the State of Nevada, County of Clark, and established full-time residency here on September 26, 1991 and has remained a full-time, permanent resident since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is a highly successful inventor. Specifically, plaintiff has been granted numerous important patents for a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the creation and development of his inventions and greatly values his privacy both in his personal life and business affairs. After certain of his important inventions were granted patents in 1990, plaintiff began receiving a great deal of

1 unwanted and unsolicited publicity, notoriety and attention. To greater protect his privacy, to  
2 enjoy the social, recreational, and financial advantages Nevada has to offer, and to generally  
3 enhance the quality of his life and environment, plaintiff relocated to Nevada on September 26,  
4 1991. This move took place after much consideration and almost an entire year of planning.

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

22 The FTB and Defendants' Investigation of Plaintiff in Nevada

23 10. ————~~10.~~ Because plaintiff was a resident of California for part of 1991,  
24 plaintiff filed a Part- Year state income tax return with the State of California for 1991 (the  
25 "1991 Return"). Said return reflects plaintiff's payment of state income taxes to California for  
26 income earned during the period of January 1 through September 26, 1991.

1        11.        ~~11.~~ In or about June of 1993 — 21 months after plaintiff moved to  
2 Nevada — for reasons that have never been specified, but are otherwise apparent, the FTB  
3 began an audit of the 1991 Return. In or about July of 1993, as part of its audit, the FTB began  
4 to investigate plaintiff by making or causing to be made numerous and continuous contacts  
5 directed at Nevada. Initially, the FTB sent requests to Nevada government agencies for  
6 information concerning plaintiff — a paper foray that continued for the next several years.

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

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

23        14.        ~~14.~~ Subsequent to the documentary and “hands on” forays into Nevada  
24 by the FTB and defendants, the FTB also sent correspondence, rather than “quasi-subpoenas,”  
25 to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other government officials  
26 and agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is  
27 further informed and believes, and therefore alleges, that the FTB intentionally sent  
28 unauthorized “quasi-subpoenas” (i.e., “Demand to Furnish Information”) to private individuals

1 and businesses in a successful attempt to coerce their cooperation through deception and the  
2 pretense of an authoritative demand, while on the other hand, sending respectful letter requests  
3 for information to Nevada governmental agencies and officials who undoubtedly would have  
4 recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the  
5 outrageous means of the bogus subpoenas.

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

15 Assessment for 1991

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

25 17. ——— ~~17.~~ Plaintiff, who demonstrably is and was at all times pertinent hereto, a  
26 bona fide resident of Nevada should not be forced into a California forum to seek relief from the  
27 bad faith, unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada  
28

resident. Plaintiff avers that ~~the manufactured issue of his residency in Nevada for the period of~~  
~~September 26 through December 31 of 1991~~ liability for the bad faith actions of the FTB during  
the audits and continuing until the present in the still ongoing California tax proceedings should  
be determined in Nevada, the state of plaintiff's residence. The FTB is in effect attempting to  
impose an "exit tax" on plaintiff ~~by coercing him into administrative procedures and possible~~  
~~future court action in California~~. The FTB has arbitrarily, maliciously and without support in  
law or fact, asserted that plaintiff remained a California resident until he purchased and closed  
escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTB's prolonged and  
monumental efforts to find a way — any way — to effectively assess additional income taxes  
against plaintiff after he changed his residency from California to Nevada is based on  
governmental bad faith and greed arising from the FTB's eventual awareness of the financial  
success plaintiff has realized since leaving California and becoming a bona fide resident of the  
State of Nevada. The aforesaid date of Nevada residency accepted by the FTB with respect to  
the 1991 Report is was not supported by the information gathered by the FTB's during its audits  
of plaintiff and was accepted by the FTB in bad faith as it was over six months after plaintiff  
moved to Nevada with the intent to stay and began, he thought, to enjoy all the privileges and  
advantages of residency in his new state.

#### The FTB's Continuing Pursuit of Plaintiff in Nevada

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

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

1           20.       ~~20.~~ Prior to the FTB sending the formal Notice of Proposed Assessment  
2 for the 1992 tax year, a representative of the FTB stated to one of plaintiff's representatives that  
3 disputes over such assessments by the FTB always settle at this stage as taxpayers do not want  
4 to risk their personal financial information being made public. Plaintiff understood this  
5 statement to be a strong suggestion by the FTB that he settle the dispute by payment of some  
6 portion of the assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as  
7 he has not been a resident of California since his move to Nevada on September 26, 1991, and it  
8 remains clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and  
9 penalties" from him that he does not legally or morally owe.

10           21.       ~~21.~~ On or about August 14, 1997, plaintiff received a formal Notice of  
11 Proposed Assessment for 1992. Despite the FTB's earlier written statements and findings that  
12 plaintiff became a Nevada resident at least as of April 3, 1992 and its statement in such Notice  
13 of Proposed Assessment that "We [the FTB] consider you to be a resident of this state  
14 [California] through April 2, 1992," such notice proceeded to assess California state income  
15 taxes on plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff  
16 state income taxes for 1992 in an amount five times greater than that for 1991, assessed plaintiff  
17 a penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada  
18 resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the  
19 equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of  
20 California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was fourteen  
21 times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was  
22 "a California resident for the entire year." Without explanation the FTB ignored its earlier  
23 finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3,  
24 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada  
25 resident.

26           22.       ~~22.~~ Plaintiff is informed and believes, and therefore alleges, that the FTB  
27 intends to engage in a repeat of the "hands on," extraterritorial investigations directed at  
28

1 plaintiff within the State of Nevada in an effort to conjure up a colorable basis for justifying its  
2 frivolous, extortionate Noticed of Proposed Assessment for the 1992 tax year.

3 23. ——— ~~23.~~ Plaintiff is informed and believes, and therefore alleges, that the FTB  
4 may continue to assess plaintiff California state income taxes for the years 1993, 1994, 1995,  
5 1996 and beyond since the FTB has now disregarded its own conclusion regarding plaintiff's  
6 residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount  
7 of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It  
8 appears from its actions concerning plaintiff, that the FTB has embraced a new theory of  
9 liability that in effect declares "once a California resident always a California resident" as long  
10 as the victim continues to generate significant amounts of income. Thus, the FTB has raised an  
11 invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing  
12 jurisdiction of the FTB.

#### 13 The FTB's Motive

14 24. ——— ~~24.~~ Plaintiff is informed and believes, and therefore alleges, that the FTB  
15 has no credible, admissible evidence that plaintiff was a California resident at anytime after  
16 September of 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The  
17 FTB has acknowledged in its own reports that plaintiff sold his California home on October 1,  
18 1991, that plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and  
19 that plaintiff purchased a home in Las Vegas in April 1992.

20 25. ——— ~~25.~~ Plaintiff is informed and believes, and therefore alleges, that the  
21 assessments by the FTB against plaintiff for 1991 and 1992 result from the fact that almost two  
22 years after plaintiff moved from California to Nevada an FTB investigator read a magazine  
23 article about plaintiff's wealth and the FTB thereafter launched its investigation in the hope of  
24 extracting a significant settlement from plaintiff. Plaintiff is further informed and believes, and  
25 therefore alleges, that the FTB has acted in bad faith and assessed a fraud penalty against  
26 plaintiff for the 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff  
27 for the entire 1992 tax year and a fraud penalty for the same year to intimidate plaintiff and  
28



1 coerce him into paying some significant amount of tax for income earned after September 26,  
2 1991, despite its awareness that plaintiff actually became a Nevada resident at that time.  
3 Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing his hard-earned wealth  
4 despite having no lawful basis for doing so, constitutes malice and oppression.

5 Jurisdiction

6 26. ——— ~~26.~~ This Court has personal jurisdiction over the FTB pursuant to  
7 Nevada's "long-arm" statute, NRS 14.065 et seq., because of the FTB's tortious extraterritorial  
8 contacts and investigatory conduct within the State of Nevada ostensibly as part of its auditing  
9 efforts to undermine plaintiff's status as a Nevada resident, but in reality to create a colorable  
10 basis for maintaining that plaintiff continued his residency in California during the period  
11 September 26, 1991 to December 31, 1991 and beyond.

12 27. ——— ~~27.~~ Plaintiff is informed and believes, and therefore alleges, that the FTB  
13 has a pattern and practice of entering into Nevada to investigate Nevada residents who were  
14 formerly residents of California, and then assessing such residents California state income taxes  
15 for time periods subsequent to the date when such individuals moved to and established  
16 residency in Nevada.

17 FIRST CAUSE OF ACTION

18 (For Declaratory Relief)

19 28. ——— ~~28.~~ Plaintiff realleges and incorporates herein by reference each and  
20 every allegation contained in paragraphs 1 through 27 above, as though set forth herein  
21 verbatim. This cause of action is re-pled in this Second Amended Complaint to preserve  
22 plaintiff's right to appeal the District Court's April 3, 1999 ruling dismissing this cause of  
23 action. This cause of action is therefore no longer at issue in the District Court.

24 29. ——— ~~29.~~ Pursuant to California law, in determining whether an individual was  
25 a resident of California for a certain time period thereby making such individual's income  
26 subject to California state income tax during such period, the individual must have been  
27 domiciled in California during such period for "other than a temporary or transitory purpose."  
28

1 See Cal. Rev. & Tax Code § 17014. The FTB's own regulations and precedents require that it  
2 apply certain factors in determining an individual's domicile and/or whether the individual's  
3 presence in California (or outside of California) was more than temporary or transitory.

4 ———(a) Domicile.

5 Domicile is determined by the individual's physical presence in California with intent to stay or  
6 if absent temporarily from California an intent to return. Such intent is determined by the acts  
7 and conduct of the individual such as: (1) where the individual is registered to vote and votes;  
8 (2) location of the individual's permanent home; (3) comparative size of homes maintained by  
9 the individual in different states; (4) where the individual files federal income tax returns; (5)  
10 comparative time spent by the individual in different states; (6) cancellation of the individual's  
11 California homeowner's property tax exemption; (7) obtaining a driver's license from another  
12 state; (8) registering a car in another state; (9) joining religious, business and/or social  
13 organizations in another state; and (10) establishment of a successful business in another state  
14 by an individual who is self employed.  
15

16 (b) Temporary or Transitory Purpose.

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

1 state; (10) joining religious, business and/or social organizations in another state; and (11)  
2 where the individual is registered to vote and votes.

3  
4 30. ——— ~~30.~~ The FTB's assessment of taxes and a penalty for 1991 is based on the  
5 FTB's conclusion in the first instance that plaintiff did not become a resident of Nevada until  
6 April 3, 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In  
7 coming to such a conclusion, the FTB discounted or refused to consider a multitude of  
8 evidentiary facts which contradicted the FTB's conclusion, and were the type of facts the FTB's  
9 own regulations and precedents require it to consider. Such facts include, but are not limited to,  
10 the following: (1) plaintiff sold his California home on October 1, 1991; (2) plaintiff rented an  
11 apartment in Las Vegas on or about October 7, 1991 and, after a brief period of necessary travel  
12 to the east coast, took possession of said apartment on or about October 22, 1991 and  
13 maintained his residence there until April of 1992; (3) plaintiff registered to vote, obtained a  
14 Nevada driver's license (relinquishing his California driver's license to the Nevada Department  
15 of Motor Vehicles), and joined a Las Vegas religious organization in November of 1991; (4)  
16 plaintiff terminated his California home owner's exemption effective October 1, 1991; (5)  
17 plaintiff began actively searching for a house to buy in Las Vegas, commencing in early  
18 October 1991, and submitted numerous offers on houses in Las Vegas beginning in December  
19 1991; (6) one of plaintiff's offers to purchase a home in Las Vegas was accepted in March of  
20 1992 and escrow on the transaction closed on April 3, 1992; and (7) plaintiff's new home in Las  
21 Vegas was substantially larger than the home in Southern California, which he sold in October  
22 of 1991.

23 31. ——— ~~31.~~ An actual controversy exists as to whether plaintiff was a full-time  
24 resident of Nevada — not California — commencing on September 26, 1991 through December  
25 31, 1991 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that  
26 under either Nevada or California law, or both, he was a full-time, bona fide resident of Nevada  
27 throughout the referenced periods and down to the present, and that the FTB ignored its own  
28 regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to

1 impose a tax obligation on plaintiff during the contested periods. Plaintiff also contends that the  
2 FTB had no authority to conduct an extraterritorial investigation of plaintiff in Nevada and no  
3 authority to propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking  
4 to coerce the cooperation of said Nevada residents and businesses through an unlawful and  
5 tortious deception, to reveal information about plaintiff. Plaintiff is informed and believes, and  
6 therefore alleges, that the FTB contends in all respects to the contrary.

7 32. ——— ~~32.~~ Plaintiff therefore requests judgment of this Court declaring and  
8 confirming plaintiff's status as a full-time, bona fide resident of the State of Nevada effective  
9 from September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial  
10 investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada  
11 residents without approval from a Nevada court or governmental agency, as alleged above, to be  
12 without authority and violative of Nevada's sovereignty and territorial integrity.

#### 13 SECOND CAUSE OF ACTION

#### 14 (For Invasion of Privacy — Unreasonable Intrusion Upon The 15 Seclusion of Another, including Intrusion Upon Informational 16 Privacy)

17 33. ~~(For Invasion of Privacy — Unreasonable Intrusion Upon The Seclusion~~  
18 ~~of Another)~~ ——— 33. Plaintiff realleges and incorporates herein by reference each and  
19 every allegation contained in paragraphs 1 through 27, and 29 through 31, 32, above, as though  
20 set forth herein verbatim.

21 34. ——— 34. Plaintiff is informed and believes, and therefore alleges, that  
22 neighbors, businesses, government officials and others within Nevada with whom plaintiff has  
23 had and would reasonably expect in the future to have social or business interactions, were  
24 approached and questioned by the FTB and defendants who disclosed or implied that plaintiff  
25 was under investigation in California, and otherwise acted in such a manner as to cause doubts  
26 to arise concerning plaintiff's integrity and moral character. Moreover, as part of the  
27 audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly personal  
28

1 and confidential information with the understanding that it would remain confidential, thereby  
2 creating a confidential relationship in which the FTB was required not to disclose Hyatt's highly  
3 personal and confidential information. The FTB even noted in its own internal documentation  
4 that plaintiff had a significant concern in regard to the protection of his privacy in turning over  
5 such information. At the time this occurred, plaintiff was still hopeful that the FTB was actually  
6 operating in good faith, a proposition that, as noted throughout this complaint, proved to be  
7 utterly false.

8 35. ——— ~~35.~~ Plaintiff is informed and believes, and therefore alleges, that the FTB  
9 and defendants nevertheless violated plaintiff's right to privacy in regard to such information by  
10 revealing it to third parties and otherwise conducting an investigation in Nevada, and continuing  
11 to conduct such an investigation, through which the FTB and defendants revealed to third  
12 parties personal and confidential information, which plaintiff had every right to expect would  
13 not be revealed to such parties.

14 36. ——— ~~36.~~ Plaintiff is informed and believes, and therefore alleges, that the FTB  
15 and defendants' extensive probing and investigation of plaintiff, including their actions both  
16 occurring within Nevada and directed to Nevada from California, were performed, and continue  
17 to be performed, with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such  
18 that he would eventually enter into a settlement with the FTB concerning his residency during  
19 the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB  
20 and defendants did in fact, and continues to, harass, annoy, vex and embarrass Hyatt, and  
21 syphon his time and energies from the productive work in which he is engaged.

22 37. ——— ~~37.~~ Plaintiff is informed and believes, and therefore alleges, that the FTB  
23 and defendants through their investigative actions, and in particular the manner in which they  
24 were carried out in Nevada, intentionally intruded, and continues to intentionally intrude, into  
25 the solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The  
26 intrusion by the FTB and defendants was such that any reasonable person, including plaintiff,  
27 would find highly offensive.

1        38.        ~~38.~~ As a direct, proximate, and foreseeable result of the FTB and  
2 defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and  
3 consequential damages in a total amount in excess of \$10,000.

4        39.        ~~39.~~ Plaintiff is informed and believes, and therefore alleges, that said  
5 invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion  
6 was despicable conduct by the FTB and defendants entered into with a willful and conscious  
7 disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is  
8 therefore entitled to an award of punitive damages against the FTB and defendants in an amount  
9 sufficient to satisfy the purposes for which such damages are awarded.

10                    Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

11        40.        Plaintiff was drawn into the FTB's audit without choice and as an innocent party.  
12 As such, plaintiff had every right to expect that the FTB's demand for an audit would be  
13 processed in good faith, according to the law and the facts. Instead, he was subjected to, and  
14 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from  
15 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and  
16 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud  
17 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer  
18 significant financial and reputational destruction. The threatened (and consummated) tortious  
19 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the  
20 publicity of private facts that were expressly extracted from plaintiff under false promises of  
21 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent  
22 detriment.

23        41.        Plaintiff was forced to disclose his private documents and information with the  
24 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a  
25 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing  
26 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently  
27 of his hard-earned personal property and right not to have his privacy invaded by the publication  
28

1 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means  
2 available, to wit: the employment of teams of legal and professional experts to vigorously  
3 defend himself in the audits and the continuing California tax proceedings.

4 42. It was highly foreseeable to the FTB that, absent the success of its scheme to  
5 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction  
6 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only  
7 alternative was to vigorously defend himself in the audits and the continuing California tax  
8 proceedings. This required the employment of a team of attorneys and other experts. The  
9 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues  
10 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious  
11 behavior.

12 43. Plaintiff's incurrence of attorneys' fees and other professional fees are highly  
13 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in  
14 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by  
15 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend  
16 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,  
17 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount  
18 thereof to be proved according to the evidence at trial.

### 19 THIRD CAUSE OF ACTION

20 (For Invasion of Privacy — Unreasonable Publicity Given

21 To Private Facts), Including Publicity Given to Matters Protected

22 Under the Concept of Informational Privacy)

23 44. ——— 40. Plaintiff realleges and incorporates herein by reference each and  
24 every allegation contained in paragraphs 1 through 27, 29 through 31, and 34 through 37, 43,  
25 above, as though set forth herein verbatim.

26 45. ——— 41. As set forth above, plaintiff revealed to the FTB highly personal and  
27 confidential information at the request of the FTB as an ostensible part of its audit and  
28

1 investigation into plaintiff's residency during the disputed time periods, thereby creating a  
2 confidential relationship in which the FTB was required not to disclose Hyatt's highly personal  
3 and confidential information. Plaintiff had a reasonable expectation that said information would  
4 be kept confidential and not revealed to third parties and the FTB and defendants knew and  
5 understood that said information was to be kept confidential and not revealed to third parties.

6 46. ——— ~~42.~~ The FTB and defendants, without necessity or justification,  
7 nevertheless disclosed to third parties, and continue to disclose to third parties, in Nevada  
8 certain of plaintiff's personal and confidential information which had been cooperatively  
9 disclosed to the FTB by plaintiff only for the purposes of facilitating the FTB's legitimate  
10 auditing and investigative efforts, or which the FTB had acquired via other means but was  
11 required by its own rules and regulations or state law not to disclose to third parties.

12 47. ——— ~~43.~~ As a direct, proximate, and foreseeable result of the FTB's  
13 aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential  
14 damages in a total amount in excess of \$10,000.

15 48. ——— ~~44.~~ Plaintiff is informed and believes, and therefore alleges, that said  
16 invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion  
17 constituted despicable conduct by the FTB and defendants entered into with a willful and  
18 conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of  
19 punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such  
20 damages are awarded.

21 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

22 49. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.  
23 As such, plaintiff had every right to expect that the FTB's demand for an audit would be  
24 processed in good faith, according to the law and the facts. Instead, he was subjected to, and  
25 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from  
26 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and  
27 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud  
28



1 penalty” assessments designed to force plaintiff to yield to a major compromise or suffer  
2 significant financial and reputational destruction. The threatened (and consummated) tortious  
3 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the  
4 publicity of private facts that were expressly extracted from plaintiff under false promises of  
5 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent  
6 detriment.

7 50. Plaintiff was forced to disclose his private documents and information with the  
8 FTB under the duress of the FTB’s unquestioned powers, but did so with the expectancy of a  
9 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing  
10 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently  
11 of his hard-earned personal property and right not to have his privacy invaded by the publication  
12 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means  
13 available, to wit: the employment of teams of legal and professional experts to vigorously  
14 defend himself in the audits and the continuing California tax proceedings.

15 51. It was highly foreseeable to the FTB that, absent the success of its scheme to  
16 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction  
17 of his privacy and the imposition of huge “fraud” penalties, as aforesaid, plaintiff’s only  
18 alternative was to vigorously defend himself in the audits and the continuing California tax  
19 proceedings. This required the employment of a team of attorneys and other experts. The  
20 resulting attorneys’ fees and other professional fees which plaintiff has incurred, and continues  
21 to incur, were proximately and directly caused and necessitated by the FTB’s course of tortious  
22 behavior.

23 52. Plaintiff’s incurrence of attorneys’ fees and other professional fees are highly  
24 foreseeable damages resulting directly from the FTB’s tortious conduct against plaintiff in  
25 pursuit of unlawful objectives. Plaintiff’s alternatives were to do nothing and be vanquished by  
26 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend  
27 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,  
28

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 FOURTH CAUSE OF ACTION

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

6 53. ~~45.~~ Plaintiff realleges and incorporates herein by reference each and every  
7 allegation contained in paragraphs 1 through 27, ~~29 through 31, 34 through 37, and 41 and~~  
8 ~~42, 52,~~ above, as if set forth herein verbatim.

9 54. ~~46.~~ By conducting interviews and interrogations of Nevada residents and  
10 by issuing unauthorized "Demands to Furnish Information" as part of their investigation in  
11 Nevada of plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by  
12 stating or insinuating to said Nevada residents that plaintiff was under investigation in  
13 California, thereby falsely portraying plaintiff as having engaged in illegal and immoral  
14 conduct, and decidedly casting plaintiff's character in a false light.

15 55. ~~47.~~ The FTB and defendants' conduct in publicizing its investigation of  
16 plaintiff cast plaintiff in a false light in the public eye, thereby adversely compromising the  
17 attitude of those who know or would, in reasonable likelihood, come to know Gil Hyatt because  
18 of the nature and scope of his work. Such publicity of the investigation was offensive and  
19 objectionable to plaintiff and was carried out for other than honorable, lawful, or reasonable  
20 purposes. Said conduct by the FTB and the defendants was calculated to harm, vex, annoy and  
21 intimidate plaintiff, and was not only offensive and embarrassing to plaintiff, but would have  
22 been equally so to any reasonable person of ordinary sensibilities similarly situated, as the  
23 conduct could only serve to damage plaintiff's reputation.

24 56. ~~48.~~ As a direct, proximate, and foreseeable result of the FTB and  
25 defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and  
26 consequential damages in a total amount in excess of \$10,000.

1           57.       ~~49.~~ Plaintiff is informed and believes, and therefore alleges, that said  
2 invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of  
3 privacy was despicable conduct by the FTB and defendants, entered into with a willful and  
4 conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of  
5 exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such  
6 damages are awarded.

7                   Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

8           58.       Plaintiff was drawn into the FTB's audit without choice and as an innocent  
9 party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be  
10 processed in good faith, according to the law and the facts. Instead, he was subjected to, and  
11 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from  
12 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and  
13 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud  
14 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer  
15 significant financial and reputational destruction. The threatened (and consummated) tortious  
16 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the  
17 publicity of private facts that were expressly extracted from plaintiff under false promises of  
18 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent  
19 detriment.

20           59.       Plaintiff was forced to disclose his private documents and information with the  
21 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a  
22 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing  
23 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently  
24 of his hard-earned personal property and right not to have his privacy invaded by the publication  
25 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means  
26 available, to wit: the employment of teams of legal and professional experts to vigorously  
27 defend himself in the audits and the continuing California tax proceedings.  
28

60. 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 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

61. Plaintiff's incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims, as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount thereof to be proved according to the evidence at trial.

#### FIFTH CAUSE OF ACTION

(For the Tort of Outrage)

62. ~~50.~~ Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, ~~29 through 31, 34 through 37, 41 and 42, and 46 and 47,~~ 61, above, as if set forth herein verbatim.

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

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

14 64. ——— ~~52.~~ As a direct, proximate, and foreseeable result of the FTB and  
15 defendants' aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered  
16 actual and consequential damages in a total amount in excess of \$10,000.

17 65. ——— ~~53.~~ Plaintiff is informed and believes, and therefore alleges, that said  
18 extreme, unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that  
19 it was despicable conduct by the FTB and defendants, entered into with a willful and conscious  
20 disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive  
21 damages in 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 66. 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 67. 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 68. 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 69. 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 SIXTH CAUSE OF ACTION

4 (For Abuse of Process)

5 70. ——— ~~54.~~ Plaintiff realleges and incorporates herein by reference each and  
6 every allegation contained in paragraphs 1 through 27, ~~29 through 31, 34 through 37, 41 and 42,~~  
7 ~~46 and 47, and 51 and 53,~~ 69, above, as if set forth herein verbatim.

8 71. ——— ~~55.~~ Despite plaintiff's ongoing effort, both personally and through his  
9 professional representatives, to reasonably provide the FTB with every form of information it  
10 requested in order to convince the FTB that plaintiff has been a bona fide resident of the State of  
11 Nevada since September 26, 1991, the FTB has willfully sought to extort vast sums of money  
12 from plaintiff through administrative proceedings unrelated to the legitimate taxing purposes for  
13 which the FTB is empowered to act as an agency of the government of the State of California;  
14 said administrative proceedings have been lawlessly and abusively directed into the State of  
15 Nevada through means of administrative "quasi-subpoenas" that have been unlawfully utilized  
16 in the attempt to extort money from plaintiff as aforesaid.

17 72. ——— ~~56.~~ The FTB, without authorization from any Nevada court or  
18 governmental agency, directed facially authoritative "DEMAND[S] TO FURNISH  
19 INFORMATION," also referred to herein by plaintiff as "quasi-subpoenas," to various Nevada  
20 residents, professionals and businesses, *requiring* specific information about plaintiff. The  
21 aforesaid "Demands" constituted an actionable abuse of process with respect to plaintiff for the  
22 following reasons:

23 (a) Despite the fact that each such "Demand" was without force of law, they  
24 were specifically represented to be "Authorized by California Revenue & Taxation Code  
25 Section 19504 (formerly 19254 (a) and 26423 (a)[I])," sent out by the State of California,  
26 Franchise Tax Board on behalf of "The People of the State of California" to each specific  
27 recipient, and were prominently identified as relating to "*In the Matter of: Gilbert P. Hyatt;*"  
28

1 Plaintiff was also identified by his social security number, and in certain instances by his actual  
2 home address in violation of express promises of confidentiality by the FTB; although the  
3 aforesaid "Demands" were not directed to plaintiff, the perversion of administrative process  
4 which they represented was motivated by the intent to make plaintiff both the target and the  
5 victim of the illicit documents;

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

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

18 (d) Although the FTB was allegedly investigating plaintiff for the audit years  
19 1991 and 1992, such audits were and are a "sham" asserted for the purposes of attempting to  
20 extort non-owed monies from plaintiff, as demonstrated by the fact that several of the  
21 "Demands" indicated that they were issued to secure information (about plaintiff) "for  
22 investigation, audit or collection purposes pertaining to the above-named taxpayer for the years  
23 indicated," and then proceeded to demand information pertaining to the years 1993, 1994, and  
24 1995 "to present;"

25 (e) Sheila Cox, a tax auditor for the FTB who has invested hundreds of hours in  
26 attempting to gain unlawful access to plaintiff's wallet through means of extortion, was the  
27 "Authorized Representative" who issued these abusive, deceptive and outrageous "Demands,"  
28 and each of the "Demands" or quasi-subpoenas constituted legal or administrative process



1 targeting plaintiff that was not proper in the regular conduct of the FTB's administrative  
2 proceedings against plaintiff;

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

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

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

27 (i) The FTB and Sheila Cox knew that they had no authority to issue  
28 "DEMAND[S] TO FURNISH INFORMATION" to any Nevada resident, business or entity,

1 and that it was a gross abuse of Section 19504 of the California Revenue and Taxation Code,  
2 under which the aforesaid "Demands" were purportedly authorized; that the aforesaid section of  
3 the California Revenue and Taxation Code contains no provision that remotely purports to  
4 empower or authorize the FTB to issue such facially coercive documents to residents and  
5 citizens of Nevada in Nevada; and despite knowing that it was highly improper and unlawful to  
6 attempt to deceive Nevada citizens and businesses into believing that they were under a  
7 compulsion to respond to the "Demands" under pain of some type of punitive consequences,  
8 Sheila Cox and the FTB nevertheless deliberately and calculatingly abused the process  
9 authorized by the aforesaid section of the California Revenue and Taxation Code in order to  
10 promote their attempts to extort money from plaintiff;

11 (j) From the outset, the determination by Sheila Cox and the FTB to utilize the  
12 "DEMAND[S] TO FURNISH INFORMATION" in Nevada, constituted a deliberate, unlawful,  
13 and despicable decision to embark on a course of concealment in the effort to produce material,  
14 information, pressure and sources of distortion that would culminate in a combination of  
15 sufficient strength and adversity to force plaintiff to yield to the FTB's extortionate demands for  
16 money; and the course of concealment consisted of concealing from plaintiff the fact that the  
17 aforesaid "Demands" were being sent to Nevada residents, professional persons and businesses,  
18 and in hiding from the recipients of the "Demands" the fact that despite their stated support in  
19 California law, the documents had no such support and were deceitful and bogus documents;  
20 and

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

25 73. ———~~57.~~ As a direct, proximate and foreseeable result of the FTB and  
26 defendants' intentional and malicious abuse of the administrative processes, which the FTB  
27 initiated and unrelentingly pursued against plaintiff, as aforesaid, plaintiff has suffered actual  
28

1 and consequential damages, including but not limited to fear, anxiety, mental and emotional  
2 distress in an amount in excess of \$10,000.

3 74. ~~58.~~ Plaintiff is informed and reasonably believes, and therefore alleges,  
4 that said abuse of the administrative processes initiated and pursued against plaintiff was willful,  
5 intentional, malicious and oppressive in that it represented a deliberate effort to unlawfully  
6 extort substantial sums of money from plaintiff that could not be remotely justified by any  
7 honorable effort within the purview of the powers conferred upon the FTB by the State of  
8 California relating to all aspects of taxation, including the powers of investigation, assessment  
9 and collection. Plaintiff is therefore entitled to an award of exemplary or punitive damages in  
10 an amount sufficient to satisfy the purposes for which such damages are awarded.

11 Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

12 75. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.  
13 As such, plaintiff had every right to expect that the FTB's demand for an audit would be  
14 processed in good faith, according to the law and the facts. Instead, he was subjected to, and  
15 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from  
16 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and  
17 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud  
18 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer  
19 significant financial and reputational destruction. The threatened (and consummated) tortious  
20 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the  
21 publicity of private facts that were expressly extracted from plaintiff under false promises of  
22 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent  
23 detriment.

24 76. Plaintiff was forced to disclose his private documents and information with the  
25 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a  
26 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing  
27 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently  
28

1 of his hard-earned personal property and right not to have his privacy invaded by the publication  
2 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means  
3 available, to wit: the employment of teams of legal and professional experts to vigorously  
4 defend himself in the audits and the continuing California tax proceedings.

5 77. It was highly foreseeable to the FTB that, absent the success of its scheme to  
6 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction  
7 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only  
8 alternative was to vigorously defend himself in the audits and the continuing California tax  
9 proceedings. This required the employment of a team of attorneys and other experts. The  
10 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues  
11 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious  
12 behavior.

13 78. Plaintiff's incurrence of attorneys' fees and other professional fees are highly  
14 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in  
15 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by  
16 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend  
17 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,  
18 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount  
19 thereof to be proved according to the evidence at trial.

#### 20 SEVENTH CAUSE OF ACTION

21 (For Fraud)

22 79. ——— 59. Plaintiff realleges and incorporates herein by reference each and  
23 every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42,  
24 46 and 47, 51 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter  
25 paragraph, 78, above, as if set forth herein verbatim.

26 80. ——— 60. Plaintiff, who prior to September 26, 1991 had been a long-standing  
27 resident and taxpayer of the State of California, placed trust and confidence in the bona fides of  
28

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

7 81. ——— ~~61.~~ During the course of seeking information and documents relating to  
8 the 1991 “audit,” and repeatedly thereafter, the FTB absolutely promised to (i) conduct an  
9 unbiased, good faith audit and (ii) maintain in the strictest of confidence, various aspects of  
10 plaintiff’s circumstances, including, but not limited to, his personal home address and his  
11 business and financial transactions and status; and plaintiff’s professional representatives took  
12 special measures to maintain the confidentiality of plaintiff’s affairs, including and especially  
13 obtaining solemn commitments from FTB agents to maintain in the strictest of confidence  
14 (assured by supposedly secure arrangements) all of plaintiff’s confidential information and  
15 documents; and the said confidential information and documents were given to the FTB in  
16 return for its solemn guarantees and assurances of confidentiality, as aforesaid, thereby creating  
17 a confidential relationship in which the FTB was required not to disclose Hyatt’s highly  
18 personal and confidential information.

19 82. ——— ~~62.~~ Despite the aforesaid assurances and representations of (i) an  
20 unbiased, good faith audit and (ii) confidentiality by the FTB, said assurances and  
21 representations were false, and the FTB knew they were false or believed they were false, or  
22 were without a sufficient basis for making said assurances and representations. Even as the  
23 FTB and its agents were continuing to provide assurances of confidentiality to plaintiff and his  
24 professional representatives, and without notice to either, Sheila Cox and the FTB were in the  
25 process of sending the bogus “DEMAND[S] TO FURNISH INFORMATION” to the utility  
26 companies in Las Vegas which demonstrated that the aforesaid assurances and representations  
27 were false, as the FTB revealed plaintiff’s personal home address in Las Vegas, thus making  
28 this highly sensitive and confidential information essentially available to the world through

1 access to the databases maintained by the utility companies. Specific representative indices of  
2 the FTB's fraud include:

3 (a) In a letter by Eugene Cowan, Esq., a tax attorney representing plaintiff, dated  
4 November 1, 1993 and addressed to and received by Mr. Marc Shayer of the FTB, Mr. Cowan  
5 indicated that he was enclosing a copy of plaintiff's escrow instructions concerning the purchase  
6 of his Las Vegas residence, and that "[p]er our discussion, the address of the Las Vegas home  
7 has been deleted." Mr. Cowan ended his letter with the following sentence: "As we discussed,  
8 the enclosed materials are highly confidential and we do appreciate your utmost care in  
9 maintaining their confidentiality." This letter is contained within the files of the FTB, and the  
10 FTB noted in its chronological list of items, the receipt of the aforesaid escrow instructions with  
11 "Address deleted;"

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

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

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

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

1 position in the computer electronics industry;

2 (iv) On February 28, 1995, Eugene Cowan, Esq. sent a letter to Sheila Cox of  
3 the FTB enclosing copies of various documents. He then stated: "As previously discussed with  
4 you and other Franchise Tax Board auditors, all correspondence and materials furnished to the  
5 Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you  
6 will retain these materials in locked facilities with limited access[;]" and

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

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

24 83. ——— ~~63.~~ Plaintiff further alleges that from the very beginning of the FTB's  
25 notification to plaintiff and his professional representatives of its intention to audit his 1991  
26 California taxes, express and implied assurances and representations were made to plaintiff  
27 through his representatives, that the audit was to be an objective, unbiased, and good faith  
28 inquiry into the status of his 1991 tax obligation; and that upon information and belief, based on

1 the FTB's subsequent actions, the aforesaid representations were untrue, as the FTB and certain  
2 of its agents were determined to share in the highly successful produce of plaintiff's painstaking  
3 labor through means of truth-defying extortion. Indications of this aspect of the fraud  
4 perpetrated by the FTB include:

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

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

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

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

26 (e) The FTB's gamesmanship, illustrated in part, above, constituted an ongoing  
27 misrepresentation of a bona fide audit of plaintiff's 1991 tax year, a factor compounded  
28 egregiously by the quasi-subpoenas sent to Nevada residents, professionals and businesses



1 without prior notice to plaintiff, and concerning which a number of such official documents  
2 indicated that plaintiff was being investigated from January 1995 to the present, all with the  
3 intent of defrauding plaintiff into believing that he would owe an enormous tax obligation to the  
4 State of California.

5 84. ——— ~~64.~~ The FTB and its agents intended to induce plaintiff and his  
6 professional representatives to act in reliance on the aforesaid false assurances and  
7 representations in order to acquire highly sensitive and confidential information from plaintiff  
8 and his professional representatives, and place plaintiff in a position where he would be  
9 vulnerable to the FTB's plans to extort large sums of money from him. The FTB was keenly  
10 aware of the importance plaintiff assigned to his privacy because of the danger of industrial  
11 espionage and other hazards involving the extreme need for security in plaintiff's work and  
12 place of residence. The FTB also knew that it would not be able to obtain (at least without the  
13 uncertain prospects of judicial intervention) the desired information and documents with which  
14 to develop colorable, ostensible tax assessments and penalties against plaintiff, without  
15 providing plaintiff and his professional representatives with solemn commitments of secure  
16 confidentiality.

17 85. ——— ~~65.~~ Plaintiff, reasonably relying on the truthfulness of the aforesaid  
18 assurances and representations by the FTB and its agents, and having no reason to believe that  
19 an agency of the State of California would misrepresent its commitments and assurances, did  
20 agree both personally and through his authorized professional representatives to cooperate with  
21 the FTB and provide it with his highly sensitive and confidential information and documents; in  
22 fact, plaintiff relied on the false representations and assurances of the FTB and its agents to his  
23 extreme detriment.

24 86. ——— ~~66.~~ Plaintiff's reasonable reliance on the misrepresentations of the FTB  
25 and its agents, as aforesaid, resulted in great damage to plaintiff, including damage of an extent  
26 and nature to be revealed only to the Court *in camera*, plus actual and consequential damages,  
27 including but not limited to fear, anxiety, mental and emotional distress, in a total amount in  
28 excess of \$10,000.

1        87.        ———67. The aforesaid misrepresentations by the FTB and its agents were  
2 fraudulent, oppressive and malicious. Plaintiff is therefore entitled to an award of exemplary or  
3 punitive damages in an amount sufficient to satisfy the purposes for which such damages are  
4 awarded.

5                    Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

6        88.        Plaintiff was drawn into the FTB's audit without choice and as an innocent party.  
7 As such, plaintiff had every right to expect that the FTB's demand for an audit would be  
8 processed in good faith, according to the law and the facts. Instead, he was subjected to, and  
9 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from  
10 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and  
11 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud  
12 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer  
13 significant financial and reputational destruction. The threatened (and consummated) tortious  
14 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the  
15 publicity of private facts that were expressly extracted from plaintiff under false promises of  
16 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent  
17 detriment.

18        89.        Plaintiff was forced to disclose his private documents and information with the  
19 FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a  
20 forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing  
21 plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently  
22 of his hard-earned personal property and right not to have his privacy invaded by the publication  
23 of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means  
24 available, to wit: the employment of teams of legal and professional experts to vigorously  
25 defend himself in the audits and the continuing California tax proceedings.

26        90.        It was highly foreseeable to the FTB that, absent the success of its scheme to  
27 unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction  
28

1 of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only  
2 alternative was to vigorously defend himself in the audits and the continuing California tax  
3 proceedings. This required the employment of a team of attorneys and other experts. The  
4 resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues  
5 to incur, were proximately and directly caused and necessitated by the FTB's course of tortious  
6 behavior.

7 91. Plaintiff's incurrence of attorneys' fees and other professional fees are highly  
8 foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in  
9 pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by  
10 the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend  
11 himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,  
12 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount  
13 thereof to be proved according to the evidence at trial.

#### 14 EIGHTH CAUSE OF ACTION

15 (For Negligent Misrepresentation)

16 (For Breach of Confidentiality — Including Informational  
17 Privacy)

18 92. ——— 68. Plaintiff realleges and incorporates herein by reference each and  
19 every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42,  
20 46 and 47, 51 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter  
21 paragraph, and 60 through 65, above, as if 91, above, as though set forth herein verbatim.

22 ——— 69. The FTB, in providing plaintiff and his professional representatives assurances of  
23 strict confidentiality with respect to the sensitive and highly confidential information and  
24 documents it sought to obtain from plaintiff concerning, allegedly, its 1991 tax year audit of  
25 plaintiff, as detailed above, owed a duty to plaintiff to inform him that the FTB, through its  
26 agents, may not have been able to maintain, or otherwise would not maintain, the strict  
27  
28

1 confidentiality it had promised plaintiff in order to secure confidential information and  
2 documentation from him.

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

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

16 93. As represented in its own manuals and policies, to obtain voluntary compliance  
17 by a taxpayer to produce information requested of the taxpayer during audits, the FTB seeks to  
18 gain the trust and confidence of the taxpayer by promising confidentiality and fairness.  
19 Moreover, in its position as an auditor, the FTB does gain, both voluntarily and by compulsion  
20 if necessary, possession of personal and confidential information concerning the taxpayer that a  
21 taxpayer would reasonably expect to be kept confidential and not disclosed to third parties. As a  
22 result, a confidential relationship exists between the FTB and the taxpayer during an audit, and  
23 continues to exist so long as the FTB maintains possession of the personal and confidential  
24 information, that places a duty of loyalty on the FTB to not disclose the highly personal and  
25 confidential information it obtains concerning the taxpayer.  
26  
27  
28

1        94. As described above, in return and in response to the FTB's representations of  
2 confidentiality and fairness during the audits, plaintiff did reveal to the FTB highly personal and  
3 confidential information at the request of the FTB as an ostensible part of its audits and  
4 investigation into plaintiff's residency during the disputed time periods. The FTB, in its  
5 position as an auditor, also acquired personal and confidential information concerning plaintiff  
6 via other means. Based on its duty of loyalty and confidentiality in its role as auditor, the FTB  
7 was required to act in good faith and with due regard to plaintiff's interests of confidentiality  
8 and thereby not disclose to third parties plaintiff's personal and confidential information. The  
9 FTB, without necessity or justification, nevertheless breached its duty of loyalty and  
10 confidentiality by making disclosures to third parties, and continuing to make disclosures to  
11 third parties, of plaintiff's personal and confidential information that the FTB had a duty not to  
12 disclose.

13        95. As a result of such extremely outrageous and oppressive conduct on the part of  
14 the FTB, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a  
15 strong sense of outrage that any honest and reasonably sensitive person would feel upon breach  
16 of confidentiality by a party in whom trust and confidence has been imposed based on that  
17 party's position.

18        96. ———72. As a direct, proximate, and foreseeable result of the FTB's  
19 breach of aforementioned invasion of duty to plaintiff, as alleged above's privacy, plaintiff has  
20 sustained great damage, including damage of an extent and nature to be revealed only to the  
21 Court in camera, plus suffered actual and consequential damages, including but not limited to  
22 fear, anxiety, mental and emotional distress, in a total amount in excess of \$10,000.

23        97. Plaintiff is informed and believes, and therefore alleges, that said breach of  
24 confidentiality by the FTB was intentional, malicious, and oppressive in that such breach  
25 constituted despicable conduct by the FTB entered into with a willful and conscious disregard of  
26 the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary  
27 damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

28        Claim for Attorneys' Fees as Special Damages Pursuant to NRCP 9 (g)

1       98. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.  
2       As such, plaintiff had every right to expect that the FTB's demand for an audit would be  
3       processed in good faith, according to the law and the facts. Instead, he was subjected to, and  
4       continues to be subjected to, a determined and malicious bad-faith attempt to extort money from  
5       plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and  
6       oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud  
7       penalty" assessments designed to force plaintiff to yield to a major compromise or suffer  
8       significant financial and reputational destruction. The threatened (and consummated) tortious  
9       actions included the outrageously intrusive invasion of his privacy and breach of confidentiality,  
10       as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under  
11       false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his  
12       extreme and permanent detriment.

13       99. Plaintiff was forced to disclose his private documents and information with the  
14       FTB under the duress of the FTB's unquestioned powers, but did so with the expectancy of a  
15       forthright, lawful audit. Instead, plaintiff became the intended victim of the FTB, thus forcing  
16       plaintiff to either: (1) succumb to tortious acts that would unlawfully deprive him permanently  
17       of his hard-earned personal property and right not to have his privacy invaded by the publication  
18       of his confidential, private facts as aforesaid; or (2) fight the FTB through the only means  
19       available, to wit: the employment of teams of legal and professional experts to vigorously  
20       defend himself in the audits and the continuing California tax proceedings.

21       100. It was highly foreseeable to the FTB that, absent the success of its scheme to  
22       unlawfully deprive plaintiff of his property through such acts of intimidation as the destruction  
23       of his privacy and the imposition of huge "fraud" penalties, as aforesaid, plaintiff's only  
24       alternative was to vigorously defend himself in the audits and the continuing California tax  
25       proceedings. This required the employment of a team of attorneys and other experts. The  
26       resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues  
27       to incur, were proximately and directly caused and necessitated by the FTB's course of tortious  
28       behavior.

101. Plaintiff's incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be vanquished by the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims, as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount thereof to be proved according to the evidence at trial.

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

#### FIRST CAUSE OF ACTION

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

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

3. ——— 3. For costs of suit; ~~4. For reasonable attorneys' fees;~~ and

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

#### SECOND CAUSE OF ACTION

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

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

3. ——— 3. For costs of suit;

1       ~~4.~~       ~~4.~~ For ~~reasonable~~provable attorneys' fees as special damages pursuant to  
2       NRCP 9(g); and

3       ~~5.~~       ~~5.~~ For such other and further relief as the Court deems just and proper.

4                               THIRD CAUSE OF ACTION

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

6       ~~1.~~       ~~2.~~ For punitive damages in an amount sufficient to satisfy the purposes  
7 for which such damages are awarded;

8       ~~2.~~       ~~3.~~ For costs of suit;

9       ~~3.~~       ~~4.~~ For ~~reasonable~~provable attorneys' fees as special damages pursuant to  
10 NRCP 9(g); and

11       ~~4.~~       ~~5.~~ For such other and further relief as the Court deems just and proper.

12                               FOURTH CAUSE OF ACTION

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

14       ~~2.~~ For punitive damages in an amount sufficient to satisfy the purposes for which such  
15 damages are awarded;

16       ~~3.~~ For costs of suit;

17       ~~4.~~ For ~~reasonable~~provable attorneys' fees as special damages pursuant to NRCP 9(g);  
18 and

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

20                               FIFTH CAUSE OF ACTION

21       ~~1.~~       ~~1.~~ For actual and consequential damages in a total amount in excess of  
22 \$10,000;

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

25       ~~3.~~       ~~3.~~ For costs of suit;

26       ~~4.~~       ~~4.~~ For ~~reasonable~~provable attorneys' fees as special damages pursuant to  
27 NRCP 9(g); and  
28



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

### SIXTH CAUSE OF ACTION

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

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

3. ——— 3. For costs of suit;

4. ——— 4. For reasonable provable attorneys' fees as special damages pursuant to NRCP 9(g); and

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

### SEVENTH CAUSE OF ACTION

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

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

3. ——— 3. For costs of suit;

4. ——— 4. For reasonable provable attorneys' fees as special damages pursuant to NRCP 9(g); and

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

### EIGHTH CAUSE OF ACTION

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

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

3. ——— 2. For costs of suit;

——— 3. For reasonable attorneys' fees; and

4. For provable attorneys' fees as special damages pursuant to NRCP 9(g); and

1        5.        ———4. For such other and further relief as the Court deems just and proper.

2 ~~DATED~~Dated this \_\_\_\_\_ day of ~~June 1998~~March, 2006.

HUTCHISON & STEFFEN, LLC

By: \_\_\_\_\_

~~Thomas L. Steffen~~

Mark A. Hutchison

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**(702) 650-6565**

*Attorneys for Plaintiff Gilbert P.*

Hyatt

Exhibit 3

RA002255

1 **ORDR**

2 THOMAS R. C. WILSON, ESQ.  
3 Nevada State Bar # 1568  
4 JAMES W. BRADSHAW, ESQ.  
5 Nevada State Bar # 1638  
6 JEFFREY A. SILVESTRI, ESQ.  
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10 P.O. Box 2670  
11 Reno, Nevada 89505-2670  
12 Telephone No. (775) 788-2000  
13 Attorneys for Defendant Franchise Tax Board

FILED

MAR 14 11 50 AM '06

*Shirley A. Ruggiana*  
CLERK

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.

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

**ORDER DENYING PARTIAL  
SUMMARY JUDGMENT RE: THE  
CALIFORNIA ADMINISTRATIVE  
PROTEST PROCESS**

17 Defendants.

*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:

20 Defendant California Franchise Tax Board's Motion for Partial Summary Judgment Re: The  
21 California Administrative Protest Process having come before the Court on the 23<sup>rd</sup> day of January  
22 2006, the Defendant being represented by Pat Lundvall and James W. Bradshaw, and the Plaintiff being  
23 present and represented by Mark Hutchison, Peter Bernhard and Donald Kula, and the Court having  
24 considered the Defendant's motion, the Plaintiff's opposition, the Defendant's reply, as well as the oral  
25 arguments of counsel, and GOOD CAUSE APPEARING,

26 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant California  
27 Franchise Tax Board's Motion for Partial Summary Judgment Re: The California Administrative  
28 Protest Process is DENIED because Defendant's alleged continued bad faith is relevant to the

RA002256

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 8<sup>th</sup> day of March, 2006.

4  
5 Jessie Walsh  
6 DISTRICT COURT JUDGE

7 Submitted this 6<sup>th</sup> day of March, 2006 by:

8  
9 McDONALD CARANO WILSON LLP

10  
11 By [Signature]

12 THOMAS R. C. WILSON, ESQ.

13 Nevada State Bar # 1568

14 JAMES W. BRADSHAW, ESQ.

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23  
24 Attorneys for Defendant Franchise Tax Board  
25 of the State of California  
26  
27  
28

# **EXHIBIT 55**

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**OPP**  
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Attorneys for Defendant Franchise Tax Board of the State of California

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

\* \* \* \*

GILBERT P. HYATT,  
  
Plaintiff,

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

vs.

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

**FTB'S PARTIAL OPPOSITION TO  
HYATT'S MOTION FOR LEAVE TO  
FILE SECOND AMENDED COMPLAINT**  
  
**Hearing Date: April 17, 2006**  
**Hearing Time: 9:00 a.m.**

Defendant Franchise Tax Board of the State of California ("FTB") partially opposes Plaintiff Gilbert P. Hyatt's ("Hyatt") Motion for Leave to File Second Amended Complaint. Specifically, Hyatt's request for leave to amend his complaint to include newly minted claims for attorneys fees as special damages, and a claim for breach of confidential relationship should be denied as futile, untimely, brought in bad faith and would be extremely prejudicial to FTB. If the Court grants Hyatt's request for leave at this late stage then the trial date scheduled to begin August 15, 2006 will be jeopardized. Hyatt has offered no reason, let alone a good reason, why he has not sought leave to amend his complaint before now, even though he admits to have known of these newly minted claims even before his original complaint was filed in 1998 (the breach of confidential relationship claim) and in 2001 (the attorneys fees as special damages claim). Also, Hyatt should not be permitted to amend his complaint in ways not mentioned in his motion for leave since those proposed amendments too are

1 futile, untimely, brought in bad faith and would be extremely prejudicial to FTB.<sup>1</sup> And finally, Hyatt  
2 must strike his claim for declaratory relief as this claim has been dismissed and all appellate rights with  
3 respect this claim have been exhausted.

4 This opposition is based upon the following memorandum of points and authorities, attached  
5 exhibits, as well as all matters properly of record and any oral argument the Court might allow.

6 Dated this 7<sup>th</sup> day of April, 2006.

7 McDONALD CARANO WILSON LLP

8  
9 By

JAMES W. BRADSHAW (NSBN 1638)  
PAT LUNDVALL (NSBN 3761)  
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Attorneys for Defendant Franchise Tax Board  
of the State of California

## POINTS AND AUTHORITIES

### I. INTRODUCTION

18 At the last moment, nearly after the close of discovery, Hyatt filed the instant motion to amend  
19 again his complaint in order to assert two newly minted claims of relief and to significantly alter other  
20 of his claims even though his motion for leave does not mention these other changes. Hyatt seeks leave  
21 to amend his complaint to add claims for attorneys fees as special damages under each of his intentional  
22 tort causes of action even though Nevada's Supreme Court has never allowed such damages under the  
23 claims pled. These intentional tort claims, i.e. invasion of privacy, false light, intentional infliction of

24  
25  
26 <sup>1</sup>To conform to the Court's Order Denying FTB's Motion for Partial Summary Judgment Re:  
27 California Administrative Protest Process, FTB does not oppose Hyatt's amendment found at the  
28 following place in his redlined proposed second amended complaint: p. 8 l n. 1-3. A highlighted copy  
of Hyatt's proposed redlined second amended complaint is attached at Exhibit 1. The highlights  
reflect the proposed amendment that FTB does not oppose.



1 emotional distress, abuse of process and intentional misrepresentation, have been repeatedly analyzed  
2 by our Supreme Court and they have never yielded attorneys fees as “special damages.” Second, Hyatt  
3 seeks leave to include a claim for “breach of a confidential relationship” even though Hyatt has not pled  
4 the essential elements required by Nevada’s Supreme Court, and many courts have found as a matter  
5 of law that such a claim cannot exist between a taxpayer and a taxing agency. In addition, even though  
6 not mentioned in his motion for leave, Hyatt’s proposed second amended complaint contains material  
7 amendments to his invasion of privacy claims which will transmute those claims into something  
8 different from what FTB has spent over eight years defending against.

9       These requests to amend his complaint are futile, untimely, made in bad faith, and will severely  
10 prejudice FTB if permitted. Neither of the new claims proposed are legally cognizable and each would  
11 be dismissed via a motion to dismiss. Hyatt’s attempts to transmute his invasion of privacy claims into  
12 one sounding as California’s claim for violations of its Information Practices Act are legally deficient  
13 and have been the subject of earlier motion practice by FTB. Furthermore, these claims have been  
14 available to Hyatt for many years, and yet he waited until nearly the close of discovery and only four  
15 months before trial to request leave to include these claims, which is simply too late. Percipient witness  
16 discovery has closed, the period for exchanging documents and expert witness disclosure has long  
17 since passed, and there is no time to conduct written discovery on these claims. Accordingly, the FTB  
18 will be unable to properly defend itself against these claims.

19       In further bad faith fashion, Hyatt’s proposed second amended complaint seeks changes that  
20 are not even discussed in his motion; those proposed changes significantly alter the claims that FTB  
21 has defended against for over eight years now. Finally, although Hyatt moves to amend the complaint  
22 to include new claims for relief, he refuses to amend his complaint to remove claims that have since  
23 been dismissed by this Court. Specifically, Hyatt’s proposed second amended complaint continues to  
24 plead a claim for “declaratory relief” to determine the date of termination of Hyatt’s California  
25 residency and the authority of the FTB to audit in Nevada. That claim for declaratory relief was  
26 dismissed long ago and the order dismissing this claim was appealed all the way to the United States  
27 Supreme Court.  
28

1 In sum, Hyatt should only be permitted to partially amend his complaint to include his claim  
2 for alleged bad faith delay in the protest process in order to conform to the Court's decision on FTB's  
3 Motion for Partial Summary Judgment re: California Administrative Protest Process.<sup>2</sup>

4 II. LEGAL ARGUMENT

5 FTB acknowledges that NRCP 15(a) provides that leave to amend should "be freely given when  
6 justice so requires." When leave is sought, however, the Court must decide whether "justice so  
7 requires." The liberal policy of freely granting leave to amend

8 does not mean the absence of all restraint. Were that the intention of  
9 [NRCP 15(a)], leave of court would not be required. The requirement  
10 of judicial approval suggests that there are instances where leave should  
11 not be granted.

12 Ennes v. Mori, 80 Nev. 237, 242, 391 P.2d 737, 740 (1964) (quoting Schick v. Finch, 8 F.R.D. 639,  
13 640 (S.D.N.Y. 1944). Leave to amend a complaint should be denied if the amendment would cause  
14 undue delay, is made in bad faith or with a dilatory motive, would create undue prejudice to opposing  
15 party, or if the amendment would be futile. See Forman v. Davis, 371 U.S. 178, 182 (1962).

16 <sup>2</sup>FTB's non-opposition to the inclusion of the continuing bad faith claims for delay in the protest  
17 process in the proposed second amended complaint is based upon the Court's earlier decision denying  
18 FTB's Motion for Partial Summary Judgment re: Protest Process. See Order Denying Partial Summary  
19 Judgment Re: The California Administrative Protest Process, filed 03/14/06. This non-opposition,  
20 which only pertains to p. 81, lns. 1-3 (see Ex. 1), to should not be construed as a waiver of the FTB's  
21 continuing objection to the inclusion of that claim in this litigation. To the contrary, California  
22 strongly and loudly objects to subjecting its ongoing tax process to trial. Plaintiff's discovery into this  
23 matter, done over California's objections, has conclusively proven there is no bad faith delay in the  
24 protest process. In fact, that discovery has revealed that Plaintiff himself, using mechanisms  
25 sanctioned by the Nevada court, has delayed and interfered with California's ongoing administrative  
26 tax process. In prior motions, Plaintiff has falsely stated that the United States Supreme Court has  
27 sanctioned this jurisdiction. In fact, the United States Supreme Court ruled very narrowly ruled that  
28 California's statutory immunity was not automatically applied in Nevada under the United States  
Constitution's Full Faith and Credit clause. See Franchise Tax Board v. Hyatt, 538 U.S. 488, 499  
(2003). In fact, the United States Supreme Court SPECIFICALLY refused to consider whether this  
lawsuit violated California's sovereign immunity, and that issue is still an open question. California  
feels that this lawsuit, if it encompasses a probe into an ongoing tax process, is a violation of  
California's sovereign immunity. Therefore, California objects to discovery and trial into its  
administrative protest process, and reserves the right to commence any action of any nature in its  
defense.

1 A. Hyatt's Request For Leave To Plead Claims For Breach of Confidential Relationship,  
2 Attorneys Fees as Special Damages, and California Information Practice Act Must Be  
3 Denied As Futile.

4 Before the Court grants Hyatt's motion for leave to amend pursuant to NRCP 15(a), the Court  
5 must first determine "if justice so requires." Justice would not require leave to amend when the  
6 proposed amendment would be futile. "Futility of amendment can, by itself, justify the denial of a  
7 motion for leave to amend." Bonin v. Calderon, 59 F.3d 815, 845 (9<sup>th</sup> Cir. 1995). Futility occurs when  
8 the proposed amendment is frivolous or **attempts to advance a claim that is legally insufficient.**  
9 Allum v. Valley Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993)("It is not an abuse of  
10 discretion to deny leave to amend when any proposed amendment would be futile."); see also, 6 Wright  
11 Miller & Kane, Federal Practice and Procedure: Civil 2d §1487 at p. 637 and 643. **Likewise, if the**  
12 **amendment could not withstand a motion to dismiss, then the amendment should be denied as**  
13 **futile. Id.; see also, Forman v. Davis, 371 U.S. 178, 182 (1962) (futility of the proposed amendment**  
14 **mandates denial of a motion for leave to amend). Hyatt's request for leave to amend to include two**  
15 **newly minted claims and resurrect an old claim must be denied because each claim is legally**  
16 **insufficient and cannot withstand a motion to dismiss. Each is analyzed below.**

17 1. Breach of Confidential Relationship

18 The proposed claim of breach of confidential relationship is not legally cognizable in this  
19 context and would not withstand a motion to dismiss. There are two necessary elements that must be  
20 established in order to pursue a claim for breach of confidential relationship: (1) a special, confidential  
21 relationship must exist between the parties such that the parties owe a duty to one another, and (2) that  
22 duty must be breached. Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335 (1995).

23 Hyatt's claim fails on motion to dismiss standards because as a matter law no special,  
24 confidential relation, akin to a fiduciary relationship, could exist or ever did exist between FTB and  
25 Hyatt, and one is not so alleged in the proposed second amended complaint as required under Nevada  
26 law. A special or confidential relationship will **only** arise "by reason of kinship or professional,  
27 business or social relationships between the parties." Id. (citation omitted.) The Perry court was very  
28

1 explicit in explaining when such a “special” relationship would be present to impose liability for this  
2 tort.

3 A confidential relationship may arise by reason of kinship or professional, business,  
4 or social relationships between the parties. **Such a relationship exists when one**  
5 **party gains the confidence of the other and purports to act or advise with the**  
6 **other's interests in mind**; it may exist although there is no fiduciary relationship; it  
7 is particularly likely to exist when **there is a family relationship or one of**  
8 **friendship**. When a confidential relationship exists, the person in whom the special  
9 trust is placed owes **a duty to the other party similar to the duty of a fiduciary**,  
10 requiring the person to act in good faith and with due regard to the interests of the  
11 other party.

12 Perry, 111 Nev. at 947 (internal citations and quotations omitted). The Perry court was equally explicit  
13 in describing two basic requirements that must be alleged and established in order to create the “special  
14 relationship” mandatory to establish this tort: First, a special confidential relationship will only exist  
15 in cases where the relationship is akin to the fiduciary relationship such as the relationships between  
16 attorney/clients, partners, family members or long time relations. Id. Second, one party must gain the  
17 confidence of the other and **purport to act and advise the other party, with the other party's**  
18 **interests in mind**. Id. See also Yerington Ford, Inc. v. General Motors Acceptance Corp., 359  
19 F.Supp.2d 1075, 1093 (D.Nev. 2004) (interpreting Perry v. Jordan, finding no proof that defendant  
20 purported to act on behalf of plaintiff and therefore claim dismissed on summary judgment); In re  
21 Sunshine Suites, Inc., 56 Fed. Appx. 776, 778-79 (9<sup>th</sup> Cir. 2003) (interpreting Perry v. Jordan, holding  
22 that no evidence alleged or offered that defendant purported to act on behalf of plaintiff, therefore claim  
23 dismissed on motion for summary judgment).

24 The Perry case itself is the perfect illustration of the type of relationship that must be present  
25 between the parties before a legally cognizable “confidential relationship” can arise sufficient for  
26 purposes of liability under this tort. In Perry, plaintiff purchased a clothing store from defendant. 111  
27 Nev. at 945. Plaintiff was uneducated, while defendant was a very educated and experienced  
28 businesswoman. Id. Plaintiff and defendant had been long time close, personal friends and neighbors.  
Plaintiff described the relationship by stating that the defendant was “like a sister” to her. Id. At the time  
of the purchase of the store, due to this very close, personal relationship defendant was aware of several  
key facts: (1) plaintiff was inexperienced in business; (2) she was purchasing the store to provide for

1 her daughters; and (3) plaintiff and the daughters would be unable to run the store due to their  
2 inexperience. Id. After the sale, based upon the above, plaintiff and defendant entered into a  
3 management contract. Id. at 946. The contract allowed for a very high salary to defendant. Defendant  
4 quit managing the store before the management contract ended and left plaintiff with no resources or  
5 ability to run the store on her own. In the end, it was clear that the price for the sale of the business was  
6 highly inflated and that defendant had clearly taken advantage of plaintiff's inexperience and lack of  
7 business fortitude in order to obtain a very high monthly salary.

8 The Plaintiff in Perry sued defendant on several theories. Id. The jury returned a verdict in favor  
9 of Plaintiff for breach of confidential relationship. Id. The Nevada Supreme Court upheld the verdict  
10 on this claim stating that there was ample evidence in the record that established the necessary "special  
11 relationship" between the parties based upon the fact that the parties were long time close friends,  
12 neighbors, and "like sister[s]". Id. at 946-47. Second, **it was clear to the Nevada Supreme Court that**  
13 **the defendant was purporting to act on behalf of plaintiff and in plaintiffs best interest both**  
14 **under the terms of the management contract and also with respect to the very sale of the business.**  
15 Id. Therefore, the Nevada Supreme Court upheld the finding of liability in that case. Id.

16 It is obvious that no such personal, familial, or other type of relationship akin to a fiduciary  
17 relationship even existed between FTB and Hyatt as was present in the Perry case. Nor is such a  
18 relationship alleged in Hyatt's proposed second amended complaint. Neither FTB nor its employees  
19 had any type of personal or family relationship that would give rise to the required special relationship  
20 under this tort. Neither FTB nor its employees ever acted as agents for Hyatt, attorneys for Hyatt,  
21 accountants for Hyatt, partners of Hyatt, or trustees of Hyatt. There is no question that the FTB's  
22 primary relationship when conducting tax audits, and therefore its duty, is owed to State of California,  
23 not individual taxpayers.

24 Second, Hyatt has alleged no facts in the proposed second amended complaint that the FTB ever  
25 "purported to act or advise" Hyatt with Hyatt's "best interest in mind." See Perry, 111 Nev. at 946-47;  
26 Yerington, 359 F.Supp. at 1093; In re Sunshine Suites, Inc., 56 Fed. Appx. at 778-79. There is not one  
27 single factual allegation contained in the proposed second amended complaint which supports this  
28 prong of the "special relationship" element necessary to survive a motion to dismiss. (See Proposed

1 Second Amended Complaint, pp. 37-40). There is no allegation that the FTB gave Hyatt any advice,  
2 there is no allegation that the FTB was working on behalf of Hyatt, and there is no allegation that the  
3 FTB was acting on behalf of Hyatt with only “his interests in mind.” Rather, the duties owed by the  
4 FTB and its employees are not to act in the best interest of the taxpayer, as required by this tort, but  
5 rather to act in the best interest of the State of California. Therefore, neither of the necessary  
6 components to establish a legally cognizable “confidential relationship” between Hyatt and the FTB  
7 can be established.

8 Furthermore, Hyatt provided no authority to support application of this common law tort by a  
9 citizen upon a governmental agency. To the contrary, **there is ample authority that such a**  
10 **relationship cannot exist between a governmental agency and a private citizen.** See Johnson v.  
11 Sawyer, 760 F.Supp. 1216, 1233 (S.D. Tex. 1991). The Johnson case is extremely analogous to this  
12 case at bar. In Johnson, the plaintiff brought civil action against employees of the IRS for issuing press  
13 releases concerning taxpayer’s plea bargain for tax related charges. Plaintiff alleged a claim of breach  
14 of confidential relationship by the IRS employees. The court rejected this claim, holding specifically  
15 that the type of special relationship necessary for liability under this tort **could not as a matter of law**  
16 **apply between a citizen and the government agency.** *Id.* This aspect of the decision was upheld on  
17 appeal. See e.g., Johnson v. Sawyer, 47 F.3d 716, 726 (5<sup>th</sup> Cir. 1995) (*en banc*).

18 Moreover, there is ample authority that holds that no fiduciary relationship or fiduciary-type  
19 relationship can exist between a government agency and a private citizen. Schaut v. First Fed. Savings  
20 & Loan Assoc. of Chicago, 560 F.Supp. 245 (D.C. Ill. 1983) (IRS investigator whose duty it was to  
21 investigate tax liabilities did not have any fiduciary relationship with taxpayer, thus claim dismissed  
22 for failure to state a claim); Purdy v. Fleming, 655 N.W.2d 424, 431 (S.D. 2002) (fiduciary relationship  
23 did not exist between employees of Department of Social Services and mother of murdered, abused  
24 child because employees duty was to state to investigate child abuse and no special relationship between  
25 the parties); Goel v. United States Dept. of Justice, 2003 WL 22471945 \*1-2 (S.D.N.Y Oct. 30, 2003)  
26 (no fiduciary relationship between INS and citizen, where INS allegedly assured confidentiality to  
27 informant) (unpublished disposition); Aguilar v. United States, 1999 WL 1067841 \*6 (D. Conn. Nov.  
28 8, 1999) (United States government owes no fiduciary duties to citizen) (unpublished disposition). To

1 the best FTB can determine, no court has ever recognized such a common law tort between a citizen  
2 and a governmental agency.

3 Thus, since a governmental agency owes no duty akin to a fiduciary duty to a private citizen and  
4 as there is no allegation to support either of the necessary prongs required by Perry to establish that a  
5 legally cognizable "confidential relationship" existed between Hyatt and the FTB, Hyatt's proposed  
6 claim of breach of confidential relationship cannot proceed as a matter of law. Such a claim would not  
7 survive a motion to dismiss. Therefore, permitting this amendment would be futile.

8 2. Attorneys Fees as Special Damages.

9 In requesting leave to amend to include attorneys fees as special damages, Hyatt relies upon  
10 Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc., 117 Nev. 948, 35 P.3d 964 (2001).  
11 However, Hyatt's claims of special damages are not cognizable under Sandy Valley. It is important to  
12 note upfront that Hyatt seeks attorneys fees as special damages under his intentional tort claims for  
13 intentional invasion of privacy (two forms), false light, intentional infliction of emotional distress  
14 (labeled by Hyatt with the California moniker "outrage"), abuse of process, and intentional  
15 misrepresentation. Nevada's Supreme Court has repeatedly analyzed each of these common law  
16 intentional torts, and has never permitted attorneys fees as special damages under such intentional torts.

17 The Sandy Valley decision is very clear: attorneys fees as special damages will only be  
18 recoverable in the most rare of circumstances. 117 Nev. at 957. Those rare circumstances are an  
19 exception to the American Rule, firmly embraced by Nevada, which requires each party to bear their  
20 own attorneys fees. Sandy Valley clearly limits the types of claims when the rare exception to the  
21 American Rule will apply. Specifically Sandy Valley clarifies that:

22 Attorney fees may be an element of damages in cases when a plaintiff becomes  
23 involved in **third-party legal dispute** as the result of a breach of contract or tortious  
24 conduct by the defendant. . . . This type of action could arise from claims against title  
insurance or bonds and breaches of duty to defend clauses in insurance or indemnity  
actions . . .

25 Attorney fees may also be awarded as damages in those cases in which a party  
26 incurred fees in recovering real or personal property acquired through the wrongful  
27 conduct of the defendant or in clarifying or removing a cloud upon the title to  
property. Finally, actions for declaratory or injunctive relief . . . necessitated by the  
28 opposing party's bad faith conduct.

1 Id. at 957-58.

2 Hyatt's claims do not fall into any one of these categories. Hyatt is not defending or prosecuting  
3 a third party action, rather he is a first party plaintiff seeking to recover attorneys fees that are based  
4 upon the alleged intentional tortious conduct by the FTB. Hyatt did not institute this case to recover  
5 personal or real property or to remove a cloud upon the title to property. Finally, this is not a declaratory  
6 or injunctive relief action. As such, Hyatt's claim for attorneys fees as special damages fail as a matter  
7 of law. Therefore, these amendments should each be denied as futile.

8 3. Other Proposed Changes Not Mentioned In Hyatt's Motion for Leave, But Found  
9 Within Hyatt's Proposed Second Amended Complaint.

10 Hyatt's motion for leave only mentions two, new proposed claims. However, given the changes  
11 found in his proposed second amended complaint, in fact Hyatt seeks leave to add a claim for breach  
12 of informational privacy. This claim is little more than an attempt by Hyatt to re-package a claim under  
13 California's Information Practices Act, which provides a statutory remedy in California for certain types  
14 of disclosures of confidential information, but under a different name sounding in common law. CAL.  
15 CIV. CODE § 1798 *et. seq.* Hyatt has repeatedly stated on the record that he is not pleading such a claim  
16 in this case. (Ex.2, 6/20/2005, Tr. Hearing FTB's Motion to Dismiss or Summary Judgment re:  
17 Statutory Information Privacy, pp. 9, 17) (Hyatt's counsel, "I will repeat myself. The Information  
18 Practices Act is not being pursued at this time.") Moreover, he is, in fact, precluded from making such  
19 a claim because of jurisdictional problems and the statute of limitations has long since run. (Ex. 3,  
20 FTB's Motion to Dismiss or Partial Summary Judgment re: Statutory Claims (IPA) filed 5/13/2005;  
21 Ex. 4, 7/12/2005 Order Motion to Dismiss or Summary Judgment re: Statutory Claims). Hyatt should  
22 not be permitted to repackage this IPA claim under a different name in order to get around these  
23 obvious deficiencies. Nor can Hyatt plead common law claims for relief when there was a statutory  
24 provision which provides a remedy. Cf. Sands Regent v. Valgardson, 105 Nev. 436 (1989) ( where there  
25 is statutory remedy, one cannot use common law claims to side step statutory remedy requirements);  
26 Hustler v. Falwell, 485 U.S. 46 (1988) (claim of libel repackaged as claim of intentional infliction of  
27 emotional distress did not change necessary "actual malice" standard). Therefore, this amendment must  
28 be rejected.



1 B. Leave to Amend Must Be Denied Because of Hyatt's Inexcusable Delay In Requesting  
2 These Amendments.

3 Leave to amend should not be granted and is properly and uniformly denied when the moving  
4 party inexcusably seeks to amend after undue delay. Jordan v. County of Los Angeles, 669 F.2d 1311,  
5 1324 (9<sup>th</sup> Cir. 1982), reversed and vacated on other grounds, County of Los Angeles v. Jordan, 459 U.S.  
6 810 (1982).

7 It is clear that lack of diligence is reason enough for refusing to permit amendment.  
8 So holding is Wheeler v. West India S.S. Co., 205 F.2d 354 (2d Cir. 1953), a  
9 decision concurred in by the draftsmen of the Federal Rules. Where there has been  
such lack of diligence the burden is on the party seeking to amend to show that the  
delay [is excusable] . . . Leave will be denied unless he shows some valid reason for  
his neglect and delay.

10 Freeman v. Continental Gin Co., 381 F.2d 459, 469 (5<sup>th</sup> Cir. 1967) (internal quotations and citations  
11 omitted). It is Hyatt's burden to establish that the delay in requesting these amendments is due to  
12 excusable neglect. Freeman, 381 F.2d at 469.

13 Hyatt has utterly failed to meet this burden and therefore these amendments should be denied.  
14 In fact, Hyatt has provided absolutely no explanation as to why it took over eight years before he sought  
15 to amend his complaint to include the breach of confidential relationship claim and over three years  
16 before he sought to include the attorneys fees as special damages claim.

17 As to the breach of confidential relationship claim, Hyatt's motion is absolutely devoid of any  
18 explanation as to why he failed to plead this claim in his original complaint filed in January 1998 or in  
19 his amended complaint filed in June 1998. (See Ex. 5, Complaint filed 1/6/98; Ex. 6, Amended  
20 Complaint filed on 6/12/98). Perry v. Jordan, the very case which Hyatt relies upon as the basis for this  
21 claim, was decided in July 1995, **three years before Hyatt initiated this lawsuit**. It should be recalled  
22 that the purpose of NRCP 15(a) is to allow parties to assert matters that were unknown or unclear at  
23 the time the original pleading was drafted. See 6 Wright & Miller, Federal Practice and Procedure §  
24 1473 (1971). Given that the very case Hyatt now relies upon for the basis of this claim was decided  
25 years before he filed his original pleading in this case, Hyatt can hardly argue that this claim was  
26 unknown or unclear to him at that time. The very claims that Hyatt alleged in 1998 were based, in part,  
27 upon the FTB's release of Hyatt's purported confidential information. Therefore, Hyatt was aware of  
28 the so-called factual allegations that supported this claim at the time he filed his original pleading and

1 the law in Nevada was clear on this point. Given his failure to provide any basis for this delay, much  
2 less a good faith basis, Hyatt has completely failed to meet his burden to show excusable neglect for  
3 the delay in requesting this amendment.

4 As to the attorneys fees as special damages claim, Hyatt's explanation for the delay in amending  
5 these claims is essentially that: (1) the requirement of pleading special damages was not required at the  
6 time he filed his complaint in 1998; (2) the Sandy Valley decision instituting this "pleading  
7 requirement" was not decided until 2001; and (3) this case was stayed for periods of time between 2000  
8 and 2003 while this case was on appeal. (See Hyatt's Motion for Leave To Amend, p. 5).

9 Hyatt is correct that the Sandy Valley decision, which establishes the pleading requirement for  
10 attorneys fees as special damages, was not decided until 2001. Hyatt is also correct that at the time  
11 Sandy Valley was decided, this case was on appeal to the Nevada Supreme Court and later to the United  
12 States Supreme Court.<sup>3</sup> Accordingly, Hyatt is correct that he could not have properly pled these  
13 attorneys fees as special damages in accordance with Sandy Valley at the time he filed the original  
14 complaint or while this case was on appeal and stayed.

15 **Hyatt, however, fails to provide the most critical facts. Why didn't he move to amend to**  
16 **include these claims since 2003 when this case was remanded?** The appeals in this case concluded  
17 when the United States Supreme Court issued its opinion on April 23, 2003 and this case was remanded  
18 shortly thereafter. Therefore, the Sandy Valley case was decided two years **before** this case was  
19 remanded.

20 Hyatt's motion absolutely fails to provide any explanation or basis for why Hyatt delayed in  
21 requesting this amendment for the last three years (i.e., from the time of the remand to today). The  
22 failure to plead these claims at the time this case was remanded, two years after the Sandy Valley case  
23 was decided, and the failure to request leave to amend for an additional three years after that, is the  
24 \_\_\_\_\_

25 <sup>3</sup>The fact that Hyatt's allowed intentional tort claims have been previously scrutinized by both  
26 Nevada's Supreme Court and the U.S. Supreme Court should not be ignored. That scrutiny analyzed  
27 the important jurisdictional limits that Nevada courts have – and do not have – over FTB, a sister state  
28 agency. If leave to amend is granted, then that jurisdictional and constitutional scrutiny must be  
conducted all over again. A circumstance that will most seriously jeopardize the August 2006 trial  
date.

1 definition of a lack of diligence. Thus, Hyatt has again utterly failed to meet his burden to demonstrate  
2 excusable neglect in moving to amend. Freeman, 381 F.2d at 469. This is but another reason to deny  
3 leave to amend.

4 Given Hyatt's inexcusable delay in seeking to amend his complaint until only four months  
5 before trial on two claims that he knew he could have asserted long ago is reason enough to deny  
6 Hyatt's request for leave. See Connell v. Carl's Air Conditioning, 97 Nev. 436, 634 P.2d 673  
7 (1981); Freeman, 381 F.2d at 469.

8 C. Leave To Amend Should Be Denied Because These Amendments Would Severely  
9 Prejudice FTB.

10 "Undue prejudice to the opposing party by virtue of allowance of [an] amendment" is a valid  
11 and sufficient reason to deny leave to amend. See Adamson v. Bowker, 85 Nev. 115, 121, 450 P.2d  
12 796 (1969); Morgan v. Humboldt County School District, 623 F.Supp. 440, 441 (D.Nev. 1985). Such  
13 undue prejudice arises when an amendment

14 [p]ut[s] the opposing party to the added burden of further discovery, preparation, and  
15 expense, thereby prejudicing his right to a speedy and inexpensive trial on the merits.

16 Wright & Miller, Federal Practice and Procedure: Civil 2d §1488, p. 674.

17 One of the most important considerations in determining whether or not a request for  
18 amendment is prejudicial is the degree to which the amendment will delay disposition of the action –  
19 this is especially true "[when] discovery had already been completed and [non-movant] had already  
20 filed a motion for summary judgment." Krumme v. WestPoint Stevens Inc., 143 F.3d 71, 88 (2d Cir.  
21 1998) (internal citations omitted). For example, the Second Circuit Court of Appeals affirmed the denial  
22 by the trial court of a request for leave to amend because the request was made over two and a half years  
23 after the commencement of the action and only three months before trial was set to begin. Zahra v.  
24 Town of Southold, 48 F.3d 674, 686 (2d Cir. 1995). Zahra is particularly analogous to this case as  
25 discovery has nearly closed, these amendments have been requested over eight years after the filing of  
26 the original complaint, and trial is set to begin in only four months.

27 As such, each and every factor relevant to finding "prejudice" is present in this case. Discovery  
28 has nearly closed, several motions for summary judgment have been filed (in fact one such motion is

1 currently pending before the Court), the proposed amendments will require additional preparation and  
2 expense to FTB, the amendments were requested over eight years after the original complaint was filed,  
3 and finally trial is only four months away. If these claims are to be properly tried, FTB would need to  
4 employ expert witnesses and to conduct additional discovery which has not been conducted. The time  
5 to do so, however, has long since passed. Thus, the most critical factor in finding prejudice is clearly  
6 present: these amendments have a high likelihood of delaying the final disposition of this case due to  
7 the need for additional discovery and preparation. Krumme, 143 F.3d at 88.

8 In spite of all of this, Hyatt boldly claims that no “prejudice” will befall the FTB in allowing  
9 these amendments. See Hyatt’s Motion for Leave to Amend, p. 5. Nothing could be further from the  
10 truth. No formal discovery has occurred with respect to either of these two amendments as neither claim  
11 has been a part of this litigation. In fact, Exhibit Seven, attached hereto, highlights all of the issues  
12 included in the proposed second amended complaint that would require additional discovery in order  
13 for FTB to properly prepare and defend there new claims.

14 As already noted, discovery has nearly closed in this case. The final deadline for exchanging  
15 documents expired on July 1, 2005. (See Ex. 8, Order filed 10/10/05). All percipient witness  
16 depositions have been held. Exchange of expert witness information has already been cutoff. In fact,  
17 the only aspect of discovery still open at this time is merely third party witness and expert depositions.  
18 The discovery cut-off for those depositions is set for May 31, 2006. (See Ex. 9, Order filed 12/29/2004  
19 setting discovery cut-off at May 15, 2006. This date was recently extended fifteen days by Discovery  
20 Commissioner Biggar in order to conclude expert depositions. Ex. 10, 3/9/2006 Tr. Discovery  
21 Commissioner’s Hearing, p. 40-44).

22 Contrary to Hyatt’s assertions, there has been no discovery on Hyatt’s claim for breach of  
23 confidential relationship or the required elements of this claim – particularly what facts Hyatt asserts  
24 to support the “special relationship” element.

25 Contrary to Hyatt’s assertions, discovery would have to be reopened in order for the FTB to  
26 properly defend against these claims, particularly the attorneys fees as special damages claim.  
27 Undeniably expert witness disclosure deadlines would have to be extended. Certain depositions would  
28

1 have to be re-opened. This is exactly the type of “prejudice” that mandates denial of a request for leave  
2 to amend. 6 Wright & Miller, Federal Practice and Procedure: Civil 2d §1488, p. 674.

3 Hyatt would necessarily have to produce additional documents in order to support these new  
4 claims. In fact, with these proposed amendments, Hyatt is attempting to re-open discovery on his own.  
5 Hyatt offered additional documents as of March 27, 2006, long past the discovery cutoff for document  
6 exchange, in order to prove up these claims. (Ex. 11, Copies of 3/27/2006 Hyatt document production).  
7 And these very documents were redacted by Hyatt to delete the very information FTB would need to  
8 defend against his claims for attorneys fees! (Id.) Furthermore, it would be necessary for an expert to  
9 be retained by both Hyatt and the FTB to testify as to the reasonableness of the fees claimed and sought  
10 by Hyatt. However, the deadline for the exchange of experts has already passed.

11 Although Hyatt alleges that his claim for attorneys fees has always been a part of this litigation,  
12 discovery has not been permitted in to this claim to allow the FTB to properly defend these claims.  
13 Hyatt has repeatedly refused to provide the necessary information concerning attorney’s compensation,  
14 invoices, and other information necessary for FTB to defend itself. ( See Ex. 11, Copies of 3/27/2006  
15 Hyatt, which are examples of the types of information provided to FTB to prove attorneys fees). Rather,  
16 Hyatt has evaded direct questions and interrogatories concerning the total amounts of fees that are  
17 claimed or provided incomplete evidence of the fees claimed, and also has denied all discovery into the  
18 purposes such attorneys fees were incurred. For example, Hyatt claimed that his “attorney’s fees [could]  
19 not be calculated until the conclusion of this matter” in his responses to interrogatories. (Ex. 12,  
20 Hyatt’s Objections and Second Supplemental Responses to Defendant’s First Set of interrogatories, p.  
21 12).

22 Furthermore, the documentary information recently produced by Hyatt to support these claims  
23 does not provide any proof of the types of tasks worked on by Hyatt’s professionals, when these tasks  
24 were completed, or whether the tasks were necessitated by the FTB. ( See Ex. 11, Hyatt’s Summary of  
25 Attorney’s Fees Reports). Rather, all that Hyatt has provided are summaries of the amount of time  
26 spent and the cost. (Id.) There is no conceivable way that any expert retained by the FTB could attest  
27 to the reasonableness or unreasonableness of these fees.  
28

1 Therefore, in order for the FTB to have the opportunity to properly defend against these  
2 additional claims, it would require the re-opening of discovery as well as additional preparation and  
3 expense to the FTB. Re-opening discovery will only further delay this trial.

4 "At some point in every litigation the issues for trial must be finally delineated." Jamison v.  
5 McCurrie, 388 F.Supp. 990, 993 (N.D. Ill. 1975). That time has come. It is time for the FTB to get its  
6 opportunity to defend itself before a jury. This case is set for trial in August 2006 and discovery has cut  
7 off. Summary judgment motions have already been filed and are currently pending before this Court.  
8 Requiring the FTB to either choose between being improperly prepared to defend itself at trial or  
9 requiring the FTB to proceed through the additional discovery, expense and preparation (and likely  
10 further delay of this trial) are both extremely prejudicial alternatives to the FTB, which mandate  
11 denying the request for leave to amend the complaint. 6 Wright & Miller, Federal Practice and  
12 Procedure: Civil 2d §1488, p. 674.

13 D. Hyatt's Re-Pled Claim For Declaratory Relief Must Be Stricken.

14 Bizarrely, in the proposed second amended complaint, Hyatt re-pleads the declaratory relief  
15 claim that was dismissed by order of this Court on April 16, 1999. Hyatt claims that he has re-pled this  
16 claim "to preserve plaintiff's right to appeal the district court's April 3, 1999 ruling dismissing this  
17 cause of action." However, this Order has already been appealed. It was the subject of the writ to the  
18 United States Supreme Court and was further upheld by the highest court of this country. See Franchise  
19 Tax Board v. Hyatt, 538 U.S. 488, 499 (2003).

20 The question becomes who else does Hyatt intend to appeal this order to exactly? Accordingly,  
21 Hyatt's improperly re-pled declaratory relief claim should be struck from the proposed second amended  
22 complaint.

23 III. CONCLUSION

24 Other than as set forth in Exhibit 1, Hyatt's request for leave to amend his complaint should be  
25 denied. These amendments are futile because they are legally insufficient and could not withstand a  
26 motion to dismiss. The requested amendments are untimely and Hyatt has completely failed to meet  
27 his burden to show excusable neglect in requesting these amendments. These amendments are highly  
28

1 prejudicial to the FTB as they would require additional discovery, preparation, and time when discovery  
2 has nearly closed and trial is set to begin in less than four months. Therefore, Hyatt's motion for leave  
3 to amend in order to file a second amended complaint should be partially denied as to these requested  
4 amendments.

5 Dated this 7<sup>th</sup> day of April, 2006.

6 McDONALD CARANO WILSON LLP

7  
8 By

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13 Attorneys for Defendant Franchise Tax Board  
14 of the State of California

**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 PARTIAL OPPOSITION TO HYATT'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** on this 7<sup>th</sup> day of April, 2006 by hand delivery upon the following:

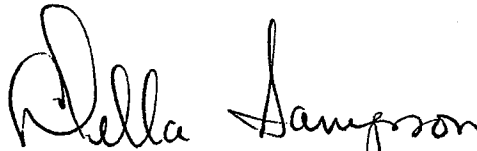
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Bullivant Houser Bailey PC  
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I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served true and correct copies of the foregoing **FTB'S PARTIAL OPPOSITION TO HYATT'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** on this 7<sup>th</sup> day of April, 2006 by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

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**COURTESY COPY:**  
The Honorable Jessie Walsh  
Regional Justice Center  
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An Employee of McDonald Carano Wilson LLP



# **EXHIBIT 56**

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10 *Attorneys for Plaintiff Gilbert P. Hyatt*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 GILBERT P. HYATT,

14 Plaintiffs,

15 v.

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

18 Defendants.

Case No.: A382999

Dept. No.: X

**PLAINTIFF GILBERT P. HYATT'S REPLY  
IN SUPPORT OF HIS MOTION FOR  
LEAVE TO FILE SECOND AMENDED  
COMPLAINT**

**Date of Hearing: April 17, 2006**

**Time of Hearing: 9:00 a.m.**

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

**FILED**

**APR 10 3 56 PM '06**

*Shelley B. Houser*  
**CLERK**

1 Plaintiff Gilbert P. Hyatt files this Reply in support of his Motion for Leave to File  
2 Second Amended Complaint and in response to Defendant Franchise Tax Board of California's  
3 (the "FTB") Opposition.

4 **1. Introduction.**

5 Hyatt does not present in his Second Amended Complaint newly minted claims. The  
6 claims and amendments relating thereto are well known to the FTB and/or based on the same  
7 facts and circumstances that have been the subject of this case.

8 As set forth in detail below, Hyatt claims are not futile. The FTB misstates and perhaps  
9 misunderstands the breach of confidentiality claim. By seeking and obtaining, through the  
10 FTB's position as tax assessor, and promising to keep confidential, non-public information from  
11 Hyatt, the FTB did have a confidential relationship that required the FTB not to breach its  
12 obligations of confidentiality. This claim does not require, and Hyatt does not assert, a formal,  
13 traditional fiduciary relationship. But the FTB did owe Hyatt an obligation to act in his interests  
14 relative to keeping his non-public information confidential, based on its express promises, and it  
15 is this obligation that creates the confidential relationship that the tort requires. The FTB  
16 breached this obligation and thereby breached its duty of confidentiality. As also detailed  
17 below, Hyatt has more than adequately pled facts demonstrating the confidential relationship  
18 created by the FTB's position and its own promises. Lastly, contrary to FTB misstatements, the  
19 case law does not prohibit this claim against a government agency.

20 As also set forth in more detail below, the FTB has been well aware of Hyatt's request  
21 for recovery of attorneys' fees as special damages. This claim is not for Hyatt's fees in this  
22 case. It is for the fees he incurred in the bad faith audits and protests. As such, he is not seeking  
23 a reasonable award of fees in this case, but recovery of out-of-pocket hard damages. Hyatt has  
24 sought leave to make this explicit, although not even absolutely necessary under *Sandy Valley*,  
25 which indicates such an amendment may even be made at trial. Most significantly, the FTB has  
26 known Hyatt would seek fees as damages, as the Court even acknowledged in a recent hearing.  
27  
28

1 There is simply no surprise or prejudice to the FTB in adding the claim of attorneys'  
2 fees for damages.

3 Lastly, the FTB's meek opposition to Hyatt's request to add references to "informational  
4 privacy" defies logic. As detailed below, informational privacy is an aspect of Hyatt's common  
5 law invasion of privacy claims. It has been litigated since early in this case, and in no way is a  
6 claim under California statutory law as the FTB continues to erroneously argue. None of  
7 Hyatt's requested amendments in any way alter the substance of the case to be tried. They are  
8 closely related to pending claims and require no new discovery nor in any way implicate the  
9 scheduled trial date. Moreover, the FTB has remaining scheduled deposition dates with Hyatt  
10 and his tax professionals, to the extent it wants to take specific discovery relating to these  
11 amendments.

12 Hyatt therefore respectfully requests that the Court grant this motion and grant Hyatt  
13 leave to file his Second Amended Complaint.

14 **2. Granting Hyatt leave to amend to add his breach of confidentiality claim**  
15 **is not futile.**

16 **A. Contrary to the FTB's erroneous description of and assertions about the**  
17 **tort, a special relationship regarding confidentiality does exist between**  
18 **the FTB and Hyatt.**

19 The FTB's Opposition attempts to convey that the "special relationship" upon which a  
20 breach of confidentiality claim is based is limited to voluntary, fiduciary-based relationships in  
21 which a fiduciary duty is owed by one of the parties. The types of special relationships that  
22 apply to the tort are nowhere near as limited as suggested by the FTB. Indeed, the relationship  
23 that creates the duty of confidentiality may be involuntary and certainly may exist where there is  
24 no fiduciary relationship. The actual duty imposed on a party, on the other hand, is quite limited  
25 as it pertains only to keeping confidential the information that the party is obligated not to  
26 disclose.

27 Here, the FTB need not act in Hyatt's interests relative to its determination as to whether  
28 Hyatt owes taxes, and certainly has no fiduciary duty to Hyatt in that context. But the FTB does

1 have a special relationship with Hyatt relative to the non-public information from and  
2 concerning Hyatt that it acquired in its special position as tax assessor, and it owes Hyatt a duty  
3 not to publicly disclose such information and must act in Hyatt interests in protecting and not  
4 disclosing the non-public information. These simple facts impose the duty of confidentiality on  
5 the FTB.

6 The existence of a fiduciary duty may create a special relationship under the breach of  
7 confidentiality tort, but — as the Nevada Supreme Court explained in *Perry v. Jordan* — so do  
8 other circumstances in “any situation where one party [Hyatt] imposes confidence in the other  
9 [the FTB] because of that person’s position, and the other party [the FTB] knows of this  
10 confidence.”<sup>1</sup>

11 Contrary to the FTB’s Opposition, *Perry* did not limit the types of circumstances in  
12 which a special relationship creating a duty of confidentiality may arise, but rather gave  
13 examples. The FTB even quoted the Nevada Supreme Court’s language in *Perry*, saying “[a]  
14 confidential relationship *may arise* . . .”, that prefaces the examples given by the Court.<sup>2</sup> Yet,  
15 the FTB then argues such relationship “will only exist” in traditional fiduciary relationships  
16 “such as . . . attorney/clients, partners, family members or long-time relations.”<sup>3</sup>

17 *Perry* even explicitly states that “[the special relationship] may exist although there is no  
18 fiduciary relationship”<sup>4</sup> and then explains that “When a confidential relationship exists, the  
19 person in whom the special trust is placed owes a duty to the other party *similar to the duty of a*  
20 *fiduciary*, requiring the person to act in good faith and with due regard to the interests of the  
21 other party.”<sup>5</sup> As set forth below, this is precisely what the parties have been litigating over  
22 since the outset of the case. The FTB requested and received confidential, non-public  
23 information from and concerning Hyatt after promising and assuring Hyatt it would keep such  
24

25 <sup>1</sup> *Perry v. Jordan*, 111 Nev. 943, 946 (1995).

26 <sup>2</sup> FTB Opposition, at 6.

27 <sup>3</sup> *Id.*

28 <sup>4</sup> *Perry*, 111 Nev. at 947.

<sup>5</sup> *Id.*

1 information confidential, but instead it then threatened to and did disclose his confidential  
2 information.

3 Indeed, one of the cases cited in Plaintiff's Opposition, *Yerington v. General Motors*  
4 *Acceptance Corp.*<sup>6</sup> decided only in 2004, explicitly explains Nevada law relative to confidential  
5 relationships — which is generally consistent with the law of other states — in that they do not  
6 rise to the level of fiduciary relationships. The most concise description by the Court in  
7 *Yerington* was as follows:

8 **Nevada has recognized the existence of confidential relationships not rising**  
9 **to the level of fiduciary relationships, yet still giving rise to legally**  
10 **enforceable duties.** The leading case on constructive fraud is *Perry v. Jordan*.  
11 In *Perry*, the court stated that a confidential relationship "exists when one party  
12 gains the confidence of the other and purports to act or advise with the other's  
13 interests in mind." A confidential relationship may arise "where one party  
14 imposes confidence **in the other because of that person's position, and the**  
15 **other party knows of this confidence.**"<sup>7</sup>

16 *Yerington* also demonstrated that, like fiduciary relationships, a confidential relationship  
17 can exist in certain circumstances where the parties are otherwise adversarial. In addition, the  
18 existence of such a relationship is a question of fact for the jury.

19 "... **"A confidential relation exists between two persons, whether their**  
20 **relations be such as are technically fiduciary or merely informal, whenever**  
21 **one trusts in and relies on the other. The question in such case is always**  
22 **whether or not trust is reposed."** ... Whether such a relationship exists  
23 appears to be a question of fact. "[T]he existence of a special relationship is a  
24 factual question[;] ... all of the facts must be considered in order to determine if  
25 the relationship was created." However, the question for the Court is whether,  
26 under the circumstances of this case, a reasonable jury could conclude that a  
27 *reasonable person* would impart special confidence in the other party and  
28 whether that other party would *reasonably* know of this confidence.

29 ... **Confidential relationships not rising to the level of fiduciary**  
30 **relationships, yet still giving rise to legally enforceable duties,** have been  
31 found between a purchaser and the seller/lender of property where the  
32 seller/lender failed to disclose a known flooding problem, ... **In another case**  
33 **between a purchaser and a seller of real property,** the Nevada Supreme Court  
34 declined to find a fiduciary relationship, but **remanded the case for further**  
35 **fact-finding as to whether a relationship of "special confidence"** would still  
36 support a claim for constructive fraud.<sup>8</sup>

37 <sup>6</sup> *Yerington Ford Inc. v. General Motors Acceptance Corp.*, 359 F. Supp. 1075 (D. NV 2004).

38 <sup>7</sup> *Id.*, 359 F. Supp. at 1093 (internal citations omitted and bold emphasis added).

<sup>8</sup> *Id.*, 359 F. Supp. at 1088 (internal citations omitted and bold emphasis added).

1           Yerington also cites cases outside Nevada that discuss under what circumstances a  
2 special relationship may exist, but for which a fiduciary duty does not ordinarily exist. One  
3 such case involved a creditor and debtor, for which no such duty typically exists, but was found  
4 to exist in that case based on the creditor having "specially agreed" to undertake a particular  
5 duty. "The court found that the bank owed a fiduciary duty not to jeopardize the estate's funds  
6 because **it had specifically agreed** to the conservatorship restrictions when it opened the  
7 account."<sup>9</sup>

8           The FTB simply misstates and erroneously argues *Perry* and *Yerington*.<sup>10</sup> The breach of  
9 confidentiality tort is not a breach of fiduciary duty claim by another name. Indeed, as *Perry*  
10 indicates, the tort is most closely associated with a constructive fraud claim. Nonetheless, after  
11 correctly stating that the tort requires "(1) a special, confidential relationship must exist between  
12 the parties that the parties owe a duty to one another, and (2) that duty must be breached," the  
13 FTB's nonetheless ultimately argues and cites cases holding that a government agency does not  
14 owe a fiduciary duty in the contexts of the various cases that are cited. Those cases are not on  
15 point. They do not involve one party obtaining non-public information from the other party  
16 under the expectation or explicit promise of confidentiality. None of them, in particular  
17 *Johnson v. Sawyer*,<sup>11</sup> involve a party using its position and promises of confidentiality to gain  
18 possession of the other party's non-public information and then publicly disclosing and  
19 threatening in bad faith to further disclose such information. Nor do any of them hold, as the  
20 FTB erroneously asserts, that no such relationship can exist between a government agency and a  
21 private citizen.<sup>12</sup>

22  
23 <sup>9</sup> *Id.*, 359 F. Supp. at 1090 (bold emphasis added).

24 <sup>10</sup> The FTB's Opposition also cites *In re Sunshine Suites, Inc.*, 56 Fed.Appx. 776 (9<sup>th</sup> Cir 2003), but this case has no  
application here other than its citation and quotation to *Perry*.

25 <sup>11</sup> *Johnson v. Sawyer*, 760 F. Supp. 1216 (S.D. TX 1991), reversed and remanded, 47 F. 3d 716 (5<sup>th</sup> Cir 1995).

26 <sup>12</sup> *Johnson* merely concludes in a one paragraph analysis that the tort requires that "one party justifiably trusts and  
27 relies on -- that is places his trust and confidence in -- another" and it has not seen any case law in the private  
28 citizen/government context and therefore leaves "such an extension to some enterprising jurist of the future." 760  
F. Supp. at 1233. Also, the court in *Johnson* is under the apparent misimpression that a fiduciary duty must exist  
for there to be a confidential relationship, as that appears to be the basis of its decision. In any event, this claim was  
an after-thought in the *Johnson* case as the trial court still awarded over \$10,000,000 against the IRS on other  
claims stemming from disclosures about the taxpayer. The award was ultimately reversed by the Fifth Circuit, as

The FTB also completely ignores the substantial authorities cited in Hyatt's moving papers that demonstrate the evolution of the tort and its current application by courts. The FTB does not and cannot rebut the existence of the tort and its universal application when confidence is reposed in one who then receives non-public information under the expectation and even legal requirement that the information be kept confidential, only then for that trust and confidence to be violated by disclosure of the non-public information. In sum:

Relationships of this kind require us to lower our defenses and permit some intrusion into our personal lives. . . . *Such self-exposure is not always voluntary. To function in modern society, for example, we must file tax returns and write checks, and those who process these documents incidentally have access to details of our private lives.* [FN omitted]

...

These two elements--the assurance of secrecy and the reliance it evokes--are the essential ingredients of what can be termed a "confidential relationship." [FN omitted] The giver of information places himself in a vulnerable position in reliance on the assurance of secrecy and thus has a legitimate expectation of confidentiality. The receiver of the information, by implicitly holding out the assurance associated with his occupation, invites the reliance and thus has an obligation not to disappoint the giver's expectation. . . .

...

Cases granting recovery for breach of confidence share similar basic elements. Though the type of relationship varies from case to case, the relationship in each case carries an implicit assurance of confidentiality that the defendant held out and then violated. . . .<sup>13</sup>

Hyatt has pled such facts since the outset of this case. Having sought and obtained Hyatt's non-public information, and the FTB was required to act in Hyatt's best interests relative to keeping the information confidential.

**B. Hyatt has more than adequately pled this special relationship created by the FTB's position, its promises of confidentiality, and its resulting receipt of Hyatt's non-public information.**

The FTB's other attack on Hyatt's breach of confidentiality claims relative to futility is

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the disclosure at issue consisted of a truthful press release concerning the taxpayer's plea bargain to a criminal offense. 47 F. 3d at 737-38.

<sup>13</sup> Alan Vickers, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1427-28, 1434, 1441, 1455 (1982). Hyatt attaches a copy of this Law Review Note as Exhibit 1, demonstrating the wide acceptance and understanding of the tort even in 1982.



1 that Hyatt has not purportedly pled facts constituting a special relationship relative to the FTB's  
2 duty of confidentiality. Nothing could be further from the truth. The Second Amended  
3 Complaint, as was the First Amended Complaint, is replete with allegations of the FTB  
4 promising confidentiality and a good faith audit in order to obtain Hyatt's cooperation in the  
5 audit and ultimately the production of his non-public information.<sup>14</sup>

6 Beyond the allegations, the evidence already gathered, and therefore the reason for this  
7 request to amend, is overwhelming relative to the confidence Hyatt reposed in the FTB in  
8 providing his non-public information with the expectation it would be kept confidential. Most  
9 recently, this evidence was summarized in the expert report of Hyatt's privacy expert, Professor  
10 Daniel Solove. His report, quoted below, summarizes the evidence of the FTB's successful  
11 efforts to gain Hyatt's confidence concerning the releasing and production of non-public  
12 information. Putting aside the testimony taken to date relative to such conduct by the FTB, the  
13 FTB's own documents provide overwhelming evidence that it sought and obtained a special  
14 relationship concerning confidentiality in order to voluntarily receive Hyatt's non-public  
15 information. This evidence, in sum, was outlined by Professor Solove and relied on by him in  
16 his report:

17 "In his deposition, Hyatt states:

18 Q. Okay. Did the FTB promise you any protection, other than  
19 what's required by law concerning your privacy?

20 A. The FTB promised me unconditionally that it would protect my  
21 privacy.

22 Q. Do you believe it undertook in your case special obligations in  
23 addition to what the law requires?

24 A. Yes. In addition to the promise – In addition to what the law  
25 requires, it made additional promises in its initial contact letter or  
26 letters, and then the auditors and also made additional promises of  
27 confidentiality.

28 Q. By those additional promises, what obligation was added on to  
the FTB's obligations required by law?

A. Well, for example, in the contact letter, the initial Notice of

<sup>14</sup> See, e.g., proposed Second Complaint, ¶¶ 81-84, including subparts.

1           Audit, the FTB promised me not only would it abide by the  
2           California Privacy – I’m getting tired. You have to bear with me.

3           Q. Take your time.

4           A. Informational Practices Act, and the Federal Privacy Act, but  
5           that it would also disclose my information only to certain  
6           government agencies, such as the IRS.

7           Hyatt also stated in his deposition: “I think that the promises that the auditors  
8           made to my tax representatives were -- included those that were required by law,  
9           but that went much further and were unconditional statements that they would  
10          preserve the confidentiality of the documents that they wanted me to submit to  
11          them.”

12          ...

13          Second, whenever Hyatt or his agents submitted information to the FTB, they  
14          sought assurances of confidentiality and clearly expressed that the information  
15          and documents conveyed to the FTB were to remain confidential. Frequently,  
16          FTB officials provided acknowledgment that they understood Hyatt’s strong  
17          desire for confidentiality and assurances that Hyatt’s information would remain  
18          confidential. For example, in a 1997 memo from Eugene Cowan (Hyatt’s  
19          accountant) memorializing conversations with Anna Jovanovich of the FTB, he  
20          stated:

21               Ms. Jovanovich asked if we would supply her with certain  
22               agreements that the FTB had previously reviewed and had copied  
23               excerpts from. She reiterated. her understanding that Mr. Hyatt  
24               was extremely concerned over the confidential nature of his  
25               agreements and his case in total.

26          Additionally, in letters from Eugene Cowan to the FTB, transmitting Hyatt’s  
27          licensing agreements with various companies, Cowan stated: “Copies of these  
28          agreements are being sent to you under your assurance that the agreements will  
29          be kept confidential and secure.”

30          In a June 25, 1998 memo to his file, Cowan wrote: “From the outset of the audit  
31          conducted by the FTB on the taxpayer’s 1991 and 1992 taxable year, we have  
32          informed the FTB of the taxpayer’s need and desire to keep the materials  
33          furnished as part of the audit private and confidential.” In that memo, Cowan  
34          provided a “chronology of the written and oral contacts that I have had with the  
35          FTB concerning the taxpayer’s desire for confidentiality and/or privacy.”  
36          According to Cowan’s recollections of his conversations with FTB officials in  
37          the chronology, on September 13, 1993, “Mr. Shayer explained that FTB  
38          personnel was required to maintain the confidentiality of a taxpayer records, Mr.  
39          Shayer assured me that the taxpayer’s file would be maintained in a. locked  
40          cabinet and that only the FTB personnel working on the case would have access  
41          to the file.” On September 29, 1993, “I [Cowan] reiterated to Mr. Shayer the  
42          sensitive, confidential nature of the documentation, Mr. Shayer assured me that  
43          the confidentiality of the documents would be maintained.” Cowan references a  
44          conversation he had with Mr. Soriano “regarding the taxpayer’s desire to keep  
45          his home address private and confidential.” On February 23, 1995, Cox made a  
46          visit to Cowan’s offices to review Hyatt’s documents. According to Cowan’s  
47          description of the visit: “I told Ms, Cox that the taxpayer is very concerned for  
48          his privacy and tried to maintain a very low profile in Nevada. Ms. Cox assured

1 me that everyone in the FTB was subject to the security and disclosure policy of  
2 the FTB the violation of which would cause an FTB employee to lose his job or  
3 worse." Throughout the memo, Cowan writes about numerous oral and written  
4 communications with FTB officials, including Mr. Soriano and Ms. Cox, in  
5 which Cowan repeatedly stated that Hyatt expected confidentiality and privacy,  
6 and the FTB officials assured him that they would maintain confidentiality.

7 In a August 29, 1995 letter to the FTB, Cowan states that "Mr. Hyatt has been  
8 careful to protect his privacy as a result of past harassment and disruption of his  
9 work." Cowan further writes:

10 As part of maintaining his private profile, Mr. Hyatt has imposed  
11 on friends and colleagues to serve as trustees or as nominal  
12 addressees for Mr. Hyatt's personal residence and related items  
13 (such as voting address, utilities, etc.) in Las Vegas. Mr. Hyatt  
14 also uses Post Office boxes for his correspondence to maintain  
15 privacy. Mr. Hyatt does not want his name publicly associated  
16 with his residence. Of course, Mr. Hyatt uses Las Vegas business  
17 cards and has had extensive business correspondence and contacts  
18 using his Las Vegas address and phone number in 1991 and 1992  
19 (and to the present). But, as mentioned above, to protect against  
20 undesirable contacts, he has tried to insulate his name from  
21 readily-accessible public records.

22 In a response letter, Cox writes: "The FTB acknowledges that the taxpayer is a  
23 private person who puts a significant effort into protecting his privacy. . . . Your  
24 letter states that the taxpayer does not want his name publicly associated with his  
25 residence."

26 In Cowan's deposition testimony, he stated that "Mr. Shayer [of the FTB] and I  
27 discussed keeping Mr. Hyatt's documents confidential and keeping them locked  
28 in a cabinet, I think, he described, and allowing as few as possible – basically,  
those folks who needed to know at the FTB to be able to review that." In another  
parts of his deposition, Cowan states that he discussed the importance of  
protecting Hyatt's confidentiality with the FTB officials.

Third, beyond explicit promises of confidentiality, the documents also indicate  
that the FTB had duties of confidentiality by virtue of the nature of its  
relationship with Hyatt, its special position of power, its own rules and  
procedures, and its other obligations under the laws and constitution of  
California. In particular, the FTB's Disclosure Education Training Manual  
emphatically calls for keeping personal information confidential. Throughout  
this booklet, on nearly every page, the slogan "If in doubt, don't disclose"  
appears. Moreover, the Manual states that "[t]he primary types and sources of  
confidential information received by FTB include: tax information received from  
individuals such as: an individual's name, social security number, addresses,  
exemptions, or filing status." On that page are four text graphics with the words  
"CONFIDENTIAL," "TOP SECRET," "NEED TO KNOW," and  
"CLASSIFIED."

The FTB's duty of confidentiality is also established by statements it makes to  
taxpayers. A document entitled *California Taxpayers Bill of Rights – 1988: A  
Guide for Taxpayers* states:

### Your Rights to Confidentiality

We keep confidential the information that you provide to us on your state tax returns, in letters and during any meetings with our auditors or other representatives. We share confidential information, only as required by law, with other government agencies such as the Internal Revenue Service and other state and local tax agencies.

If, however, you are no longer married or living with your spouse and you filed a joint return with an amount due, upon written request, we can tell you whether we have tried to collect from your spouse, the general nature of the collection activities, and the amount we have collected.

On documents requesting information from Hyatt, a Privacy Notice appears describing the privacy rights established in the California Information Practices Act of 1977.

In a letter to Hyatt dated June 17, 1993, the FTB provided Hyatt with a questionnaire for use in the FTB's investigation. That questionnaire contained provisions about the FTB's responsibilities:

Your tax return has been selected for audit by the California Franchise Tax Board (FTB).

What should you expect from a Franchise Tax Board audit?

- Courteous treatment by FTB employees
- Clear and concise requests for information from the auditor assigned to your case
- Confidential treatment of any personal and financial information that you provide to us
- Completion of the audit within a reasonable amount of time.

The promise of confidentiality is broad and clear: "Confidential treatment of *any* personal and financial information that you provide to us." In the Privacy Notice (FTB 1131), the FTB states:

We may give the information you furnish us to the United States Internal Revenue Service, the proper official of any state imposing an income tax or a tax measured by income, the Multistate Tax Commission and to California government agencies and officials, as provided by law. If you owe any monies, we may disclose the amount due to employers, financial institutions, County Recorders, vacation trust funds, process agents and other payers.

This language is consistent with the language in the document entitled *California Taxpayers Bill of Rights - 1988: A Guide for Taxpayers*. It is my opinion that these documents make explicit promises of confidentiality. They strongly and repeatedly state the general rule that any information that a taxpayer furnishes to the FTB is to be kept confidential. The documents state that there are exceptions to this general rule, and they delineate these exceptions. Nowhere in the documents does the FTB state that it will disclose personal information to third parties such as doctors, newspapers, dating services, and others.

1 It is worth noting that the FTB Privacy Notice (FTB 1131, revised 5-89/6-91)  
2 attached to the forms sent to Hyatt differs from the latest version of the FTB  
3 Privacy Notice (FTB 1131, revised 08-2004). In particular, the section on  
4 information disclosure has been re-written.

5 The FTB Privacy Notice provided to Hyatt is quoted above. The 08-2004  
6 version of the FTB Privacy Notice states:

7 **Information Disclosure**

8 We may disclose your tax information to:

- 9
- 10 • The Internal Revenue Service.
  - 11 • Other states' income tax officials.
  - 12 • The Multistate Tax Commission.
  - 13 • Appropriate Californian government agencies and officials.
  - 14 • Third parties when necessary to determine or collect your tax  
15 liabilities.

16 Similar to the Privacy Notice provided to Hyatt, the 2004 version mentions that  
17 information may be disclosed to the IRS, other states' tax officials, the Multistate  
18 Tax Commission, and appropriate California government agencies and officials.  
19 However, there is an addition at the end of the 2004 version: "Third parties when  
20 necessary to determine or collect you tax liabilities." This does not appear in the  
21 Privacy Notices Hyatt received.

22 The FTB's 2004 Privacy Notice at least mentions the possibility that information  
23 will be provided to third parties "when necessary." As discussed above, even  
24 were this the notice that Hyatt received, it is my opinion that many of the FTB's  
25 disclosures of Hyatt's personal information lack any apparent justification. But  
26 Hyatt received the older Privacy Notice, which enumerated the entities and  
27 officials that might receive his personal information. Nowhere in the notice  
28 Hyatt received are third parties mentioned.

The very purpose of a Privacy Notice is to inform the taxpayer of the limited  
exceptions to the strong rule of confidentiality that the FTB is to follow.  
Accordingly, the FTB clearly breached the confidentiality it promised in its  
Privacy Notice. To the extent it had the practice of disclosing information to  
third parties under any circumstances, then its Privacy Notice was misleading  
and inaccurate.

The documents reveal that Hyatt, through his agents, read and relied upon that  
Privacy Notice. For example, Eugene Cowan stated in his deposition:

Q. Now, are you aware that at the time that was standard  
operating procedure – whether or not that was standard operating  
procedure of the FTB to send out Demands to Furnish Information  
from third parties without first requesting it from the taxpayer?

1 A. No, I wasn't aware. I was aware that on the audit forms and  
2 letters that the Franchise Tax Board sends to you is the promise of  
3 following the Information Practices Act and all the requirements  
4 that are imposed on the Franchise Tax Board in doing so."<sup>15</sup>

5 Hyatt has therefore pled, and has substantial evidence of, a special relationship between  
6 him and the FTB relative to keeping his non-public information imparted to the FTB  
7 confidential. The FTB did have, and does have, an obligation to act in Hyatt's interest, as well  
8 as its own, in keeping the information confidential. In that regard, the FTB has recently  
9 emphasized in its briefing the fact that it relies on voluntary compliance by taxpayers to  
10 cooperate in audits and thereby produce the information sought by the FTB. Taxpayers thereby  
11 repose their trust in the FTB to keep the produced information confidential. A special  
12 relationship thereby is created that requires the FTB to keep this information confidential.

13 The FTB cannot deny this very basic symbiotic relationship and the duty of  
14 confidentiality it undertakes towards a taxpayer in seeking, even insisting upon, voluntary  
15 compliance by a taxpayer relative to the taxpayer's production of requested information. The  
16 FTB benefits by receiving the information it needs, and the taxpayer benefits — at least so long  
17 as the FTB does not breach its duty of confidentiality — by avoiding having the FTB approach  
18 third parties for the requested information and by avoiding lengthy, costly and public battles via  
19 subpoena enforcement, among other things. The byproduct is a confidential relationship that the  
20 FTB must not violate.

21 As a result, allowing Hyatt to amend and add his breach of confidentiality claim will not  
22 be a nullity. At the very least, Hyatt's claim that a special relationship was created by the above  
23 facts is a question of fact for the jury.

24 **3. Granting Hyatt leave to amend to add his allegations of attorneys' fees as  
25 special damages is not futile.**

26 The FTB argues that attorneys' fees as special damages are not recoverable under  
27

28 <sup>15</sup> D. Solove's Expert Witness Report, served on FTB counsel on March 31, 2006, at 13-18 (footnotes omitted for ease of editing) but can be reviewed in hardcopy of Professor Solove's report attached hereto as Exhibit 2.

1 Hyatt's intentional tort claims.<sup>16</sup> To be clear, Hyatt is not seeking his attorneys' fees for  
2 prosecuting his intentional tort claims in this action. This is as spelled out more explicitly in the  
3 Second Amended Complaint, as Hyatt is seeking as damages his attorneys' fees and  
4 accountant's fees in defending the FTB's bad faith audits and now protest proceedings. As  
5 such, this form of damages is recoverable as highly foreseeable and no different than a personal  
6 injury plaintiff seeking recovery of his doctor bills. Hyatt has sought leave to amend, citing  
7 *Sandy Valley Associates v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948 (2001), only to  
8 ensure there is no technical objection that because this element of Hyatt's damages from the  
9 FTB's bad faith conduct in the audits and protests are attorneys' fees, they need to be pled with  
10 specificity under *Sandy Valley*. In this sense, Hyatt and the FTB are talking two different  
11 languages as the FTB does not even address Hyatt's clear pronouncement as to the attorneys'  
12 fees he is seeking. Hyatt's Second Amended Complaint states, in regard to each tort claim for  
13 which Hyatt's professional fees from the audits and protests are sought as damages:

14  
15 It was highly foreseeable to the FTB that, absent the success of its scheme to  
16 unlawfully deprive plaintiff of his property through such acts of intimidation as  
17 the destruction of his privacy and the imposition of huge "fraud" penalties, as  
18 aforesaid, plaintiff's only alternative was to vigorously defend himself in the  
19 audits and the continuing California tax proceedings. This required the  
20 employment of a team of attorneys and other experts. The resulting attorneys'  
21 fees and other professional fees which plaintiff has incurred, and continues to  
22 incur, were proximately and directly caused and necessitated by the FTB's  
23 course of tortious behavior.

24 As such, arguably, *Sandy Valley* is not implicated and Hyatt need not even specially  
25 plead the subject attorneys' fees as Hyatt is not seeking his attorneys' fees from this case.  
26 Nonetheless, out of an abundance of caution and to avoid any argument that the claim for these  
27 attorneys' fees incurred as part of Hyatt's damages in the audits and protest must be so pled,  
28 Hyatt seeks to amend as stated in his Second Amended Complaint.

Moreover, the FTB has known since at least July of 2004 when Hyatt first produced the  
attorneys' bills and accountant's bills from the audits and early protests that these were the fees

<sup>16</sup> For one such claim, "outrage" or intentional infliction of emotional distress, the FTB wrongly describes the term "outrage" as a California moniker. It is nothing of the sort. The tort has traditionally carried this name in Nevada.

1 he was seeking in this case. As discussed in Hyatt's moving papers, Hyatt produced these in  
2 response to the Discovery Commissioner's ruling filed February 2, 2004 that required he  
3 produce copies of the attorneys' bills he seeks to recover in this action. Neither at that time, nor  
4 since, has Hyatt produced his litigation bills from this case. The FTB certainly has not been  
5 confused, nor could it be prejudiced by Hyatt seeking recovery of his attorneys' fees from the  
6 audits and protests, given the FTB has had them for almost two years.

7 Most significantly, Hyatt's request to amend to add the subject allegations asserting the  
8 attorneys' fees as special damages is not futile. Having been incurred in another proceeding, the  
9 very proceeding at which the bad faith conduct at issue in this case occurred, they were  
10 eminently foreseeable and recoverable as an element of Hyatt's damages from the bad faith  
11 intentional torts alleged. In that regard, *Sandy Valley* holds that "when attorneys' fees are  
12 considered as an element of damages, they must be the natural and proximate consequence of  
13 the injurious conduct."<sup>17</sup> This precisely describes the attorneys' fees sought here by Hyatt in the  
14 Second Amended Complaint.

15 Because Hyatt does not seek recovery of his attorneys' fees from this tort case, the  
16 FTB's discussion of whether this case fits within one of the types of cases described in *Sandy*  
17 *Valley* for which fees incurred in that specific case are recoverable as special damages has no  
18 real application here. Hyatt does not seek recovery of his fees in this case, at least in part  
19 because he chooses not to produce his litigation bills and thereby waive any privilege and work  
20 product protection contained therein.

21 As this Court is aware from the FTB's recent objection to an order made by the  
22 Discovery Commissioner regarding what witness compensation information Hyatt must  
23 produce, Hyatt opposes production of his litigation bills. If, however, the FTB were successful  
24 in compelling Hyatt to produce such bills, Hyatt would have a viable claim for recovery of them  
25 as special damages under *Sandy Valley* which specifies that recovery of attorneys' fees as  
26 damages is permissible for actions that "were necessitated by the opposing party's bad faith  
27  
28

---

<sup>17</sup> *Sandy Valley Associates, v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948, 957 (2001)



1 conduct.”<sup>18</sup> That is precisely this case. While the opinion prefaces this basis for actions for  
2 declaratory or injunctive relief, there is no logical reason it would also not apply in this case  
3 where the FTB’s bad faith intentional acts are specifically at issue and which Hyatt seeks to  
4 remedy. But again, barring any order compelling Hyatt to produce his litigation bills from this  
5 case, Hyatt is not seeking recovery of his attorneys’ fees in this case.

6  
7 **4. Granting Hyatt leave to amend to add references to “informational**  
8 **privacy” is not futile and merely conforms the pleading to the claims being**  
9 **litigated in this case as demonstrated by the parties’ consistent briefing to**  
10 **this Court and the Nevada Supreme Court.**

11 The FTB objects to Hyatt’s references in the Second Amended Complaint to  
12 “informational privacy.” Despite litigating Hyatt’s informational privacy rights as part of  
13 Hyatt’s invasion of privacy claims for as many years as this case has been pending, the FTB still  
14 does not understand that “informational privacy” is a term that describes particular modern  
15 privacy rights that have developed as part of the common law for invasion of privacy. As it did  
16 last year in bringing its failed and unnecessary partial summary judgment motion re Hyatt’s  
17 non-existent “IPA” claims, the FTB confuses “informational privacy” with California’s  
18 Information Practices Act. While that act codifies in California significant aspects of  
19 informational privacy, common law informational privacy is at issue in this case and has been  
20 from early on.<sup>19</sup> Hyatt is not asserting a statutory claim under the IPA. He is asserting common  
21 law invasion of privacy claims, which include his informational privacy.<sup>20</sup>

22 Hyatt’s Opposition to the FTB’s Partial Summary Judgment re IPA claims detailed the  
23 above distinction and how Hyatt’s common law claims differ from and were not statutory IPA  
24 claims. In sum, Hyatt argued there:

25 <sup>18</sup> *Id.*, 117 Nev. at 958.

26 <sup>19</sup> For example, Hyatt’s Opposition to the FTB’s Summary Judgment Motion in 2000 set forth in detail Hyatt’s  
27 informational privacy claims and how they are part of and establish Hyatt’s invasion of privacy claims. This was  
28 summarized in Hyatt’s Opposition to the FTB’s Partial Summary Judgment Motion re IPA Claims, at 14 – 19, a  
copy of which is attached hereto as Exhibit 3.

<sup>20</sup> Another summary of the law relative to informational privacy and its common law origin is set forth in D.  
Solove’s Expert Witness Report at 3 - 9, attached hereto as Exhibit 2.

Hyatt has pled, presented evidence of, and otherwise developed and presented a *prima facie* case for various prongs of Nevada's common law invasion of privacy tort, including violation of informational privacy. These are common law claims. As set forth above, the legal sufficiency, pleading sufficiency, and evidentiary sufficiency of these claims — at least relative to a summary judgment — has been established by the rulings by this Court and the Nevada Supreme Court. The FTB's reference to and discussion of a statutory IPA claim is disingenuous as Hyatt has not asserted such a claim. To the extent the FTB's motion is a disguised attack on Hyatt's common law invasion of privacy claims, and particularly the informational privacy aspect of those claims, the FTB is seeking an end-run around prior rulings of this Court and the Nevada Supreme Court.

To be clear, and as the FTB knows and should have referenced in its motion, Hyatt has presented and is pursuing a common law claim for informational privacy as part of his invasion of privacy tort. Hyatt has extensively briefed this issue in the proceedings described above demonstrating the development of the common law for informational privacy as a now accepted part of the invasion of privacy tort. In opposing the FTB's summary judgment motion, Hyatt explained . . . his informational invasion of privacy claim.<sup>21</sup>

Hyatt further explained how "informational privacy" fits into his common law invasion of privacy claims by quoting his summary judgment opposition from 2000 in his Opposition to the FTB's IPA motion last year:

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

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

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

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

<sup>21</sup> Hyatt's Opposition to FTB's Partial Summary Judgment Motion re IPA claims, at 14 - 16, attached hereto (without exhibits) as Exhibit 3.

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

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

Other cases concluded that certain citizens — such as Gil Hyatt — have a particular need or desire to keep their address confidential. *National Association of Retired Federal Employees v. Horner*, held that "[i]n our society, individuals generally have a large measure of control over the disclosure of their own identities and whereabouts. That people expect to be able to exercise that control is 'evidenced by . . . unlisted telephone numbers by which subscribers may avoid publication of an address in public directory, and postal boxes, which permit the receipt of mail without disclosing the location of one's residence.'" Moreover, the court could have had Gil Hyatt in mind when it noted that it is public knowledge that when one gains wealth, "that individual may become a target for those who would like to secure a share of that sum by means scrupulous or otherwise."

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

Hyatt also explicitly presented his common law informational privacy claim to the Nevada Supreme Court as part of Hyatt's petition for rehearing. There, Hyatt explained:

This claim [invasion of privacy by illegal disclosure of private facts] is really two: the more recently emerged invasion of informational/constitutional privacy and the more traditional branch of disclosure of private facts. Each claim involves the

1 disclosure of private facts for which an expectation of privacy had  
2 been created and for which a reasonable person would find  
3 offensive – particularly informational/constitutional privacy under  
4 which disclosure of private, personal information gathered by the  
5 government is *per se* unlawful.

6 Again, both this Court and the Nevada Supreme Court have rejected the FTB's  
7 attempts to dismiss this and Hyatt's other intentional tort claims finding genuine  
8 issues of fact in dispute. Common law informational privacy, as a prong of  
9 Hyatt's asserted invasion of privacy tort, is very much a part of this case. But  
10 Hyatt asserts no IPA claim.<sup>22</sup>

11 The FTB's citation to *Sands Regent v. Valgardson*<sup>23</sup> has no application here. First, as  
12 described above, Hyatt's claims for invasion of privacy include violations of his "informational  
13 privacy" and are fully recognized under Nevada's common law and the common law throughout  
14 the country. These claims are not in place of, or in lieu of, or to avoid a claim under the IPA,  
15 which is a California statutory remedy. Hyatt seeks no relief under the IPA in this Nevada  
16 action, despite the FTB's desire to inject it into this case as a direct claim. As was detailed in  
17 Hyatt's Opposition to the FTB's IPA motion, the IPA has relevance here because it puts  
18 restraints on the FTB's conduct and the FTB's disregard of such restraints, as well as its  
19 disregard of other internal operating procedures, and is evidence of the FTB's bad faith and  
20 intent to "get" Hyatt at all costs.<sup>24</sup> But Hyatt seeks no recovery in this action for such IPA  
21 violations by the FTB.

22 As a result, Hyatt's inclusion of the term "informational privacy" in the Second  
23 Amended Complaint in conjunction with his common law claims is entirely appropriate and  
24 certainly not futile. Indeed, Hyatt included such references to avoid any claim later by the FTB  
25 that the informational privacy aspect of his invasion of privacy claims has not been pled. Again,  
26 the terms were inserted out of an abundance of caution. Given that Hyatt is amending the  
27 complaint, it makes sense to reference what discovery has revealed is a significant component of  
28 his invasion of privacy claims. It certainly is not a nullity.

<sup>22</sup> *Id.*, at 17 - 19 (internal footnotes omitted, *see* copy attached hereto (without exhibits) as Exhibit 3 for internal footnote cites).

<sup>23</sup> *Sands Regent v. Valgardson*, 105 Nev. 436 (1989).

<sup>24</sup> Hyatt's Opposition to FTB's Partial Summary Judgment Motion re IPA claims, at 6, attached hereto (without exhibits) as Exhibit 3.

1 **5. There has not been inexcusable delay by Hyatt, nor will the FTB be**  
2 **prejudiced nor the trial date affected by the amendments.**

3 There has not been undue delay by Hyatt for the same reasons as addressed below  
4 demonstrating these amendments in no way prejudice the FTB. Moreover, while the FTB cites  
5 to certain federal cases and the Wright, Miller & Kane *Federal Practice and Procedure* treatise  
6 in arguing undue delay,<sup>25</sup> the great weight of authority as cited in that same treatise is that delay,  
7 even unjustified delay, alone is not sufficient to deny a request for leave to amend.<sup>26</sup> Leave can  
8 and is granted throughout the various stages of the proceedings including “when the case is on  
9 the trial calendar and has been set for a hearing . . . , at the beginning, during, and at the close of  
10 trial[.]”<sup>27</sup> Delay is also less a factor where the claims sought to be added are “closely related” to  
11 the pending claims.<sup>28</sup>

12 Here, Hyatt’s requested amendments are closely related to the pending claims and/or  
13 have been known to the FTB for a great deal of time. Moreover, The FTB still has two days of  
14 deposition to take of Hyatt (on April 26 and 27), as well as two days of deposition to take of  
15 Hyatt’s tax attorney during the audits, Mr. Cowan (to be scheduled for mid May) and at least  
16 one more day of Hyatt’s accountant during the audits and protests, Mr. Kern (to be scheduled).  
17 The FTB cannot, and will not, be prejudiced by these amendments.

18 **A. The FTB knows of and is not prejudiced by Hyatt’s request to amend to add**  
19 **attorneys’ fees as special damages.**

20 Regarding the amendments directed at adding the attorneys’ fees as special damages, as  
21 addressed in Hyatt’s moving papers, the FTB has had most of the bills for which Hyatt seeks  
22 recovery for almost two years. Specifically, in a DCRR signed February 2, 2004, the Discovery  
23 Commissioner ruled that Hyatt must produce copies of attorneys’ bills he will claim as damages.  
24 In July 2004, Hyatt produced copies of the attorneys’ bills (Mr. Cowan’s) and accountants’ bills

25 FTB Opposition, at 11.

26 6 Wright, Miller & Kane, *Federal Practice and Procedure* § 1488, at 569 (“In most cases, delay alone is not  
sufficient reason for denying leave.”), citing *Carmona v. Toledo*, 215 F3d 124 (1<sup>st</sup> Cir. 2000); *Moore v. City of*  
27 *Paducah*, 790 F.2d 557, 559 (6<sup>th</sup> Cir 1985)(unjustified delay alone not a basis to deny request for leave to amend).

27 6 Wright, Miller & Kane, § 1488, at 655.

28 See, e.g., *C-B Kenworth, Inc. v. General Motors Corp.*, 129 FRD 13 (D. ME 1990).

1 (Mr. Kern's) Hyatt incurred in defending the audits and early protests which ran from 1993  
2 through 1997. Now, in light of the District Court's ruling only *earlier this year* confirming that  
3 the FTB's bad faith acts continuing through the still pending protests are at issue in this case,  
4 Hyatt produced to the FTB a supplemental production of invoices for professional fees incurred  
5 in defending the FTB's bad faith protests from 1998 through 2005. This includes more of Mr.  
6 Cowan's bills and that of Hyatt's current lead attorney in the protests, Mr. Coffill.

7 The FTB was in possession of Mr. Cowan's and Mr. Kern's bills for the 1993 through  
8 1997 time period when it took each of their depositions earlier this year for multiple days  
9 knowing Hyatt was seeking recovery of such amounts, and again has additional deposition time  
10 with each of them and Mr. Hyatt. Nor can the FTB complain regarding expert witnesses. It  
11 knew, and has known, that Hyatt seeks recovery of fees for bills produced. Hyatt has so argued  
12 to the Discovery Commissioner in opposing production of his litigation bills in this case and  
13 seeking to limit production to those from the audits and protests that he has produced.

14 Even the District Court judge who has presided over only a few hearings in this case  
15 stated during the March 22, 2006 hearing that she was aware that Hyatt was seeking an award of  
16 attorneys' fees as special damages in stating that Hyatt needed to make sure the FTB was aware  
17 of the number.<sup>29</sup> Indeed, there was discussion among the Court and counsel on this issue  
18 starting at page 21 of the March 22, 2006 transcript in which FTB counsel Mr. Bradshaw,  
19 acknowledges that Hyatt was seeking attorneys' fees in this case: "And I can't believe during the  
20 course of this litigation, asking for an award of attorneys' fees as he has . . .," and the Court then  
21 confirms that Hyatt is seeking to recover attorneys' fees as damages:

22 COURT: I thought the defendant's argument with respect to attorneys' fees in  
23 the way of damages was particularly compelling, and I would imagine that  
24 potentially, Mr. Bernhard, you'd be seeking damages in the way of attorneys'  
fees; right?

25 MR. BERNHARD: That is correct.

26 . . .

27  
28 <sup>29</sup> March 22, 2006 District Court hearing transcript, at 21:17 - 22:14, attached hereto as Exhibit 4.

1 MR. BERNHARD: Yes. To the extent that these are attorneys or accountants  
2 whose fees are being sought as part of our substantive causes of action, yes. And  
we understand that we have to produce those, and we have.

3 The other issue I would make in our opposition that you're allowing us to file, we  
4 have provided detailed information concerning those amounts at least through the  
year 1997. And to the extent we're going on further toward the protest through  
5 trial, then, yes, we will produce these statements and amounts for those particular  
items, and that does avoid the privilege issues that we were concerned about  
6 before Commissioner Biggar.

7 COURT: Defense couldn't expect to be blindsided on the issues of damages  
without being provided those specific numbers. That would be the Court's  
8 view.<sup>30</sup>

9 The FTB cannot now feign it is less knowledgeable than the Court relative to Hyatt's  
10 claims and asserted damages. Moreover, as discussed above, the fees Hyatt seeks as damages  
are not an award for the case at hand, based on contract or statutory provisions which typically  
11 allow only "reasonable" fees for which expert testimony is sometimes employed. Rather, Hyatt  
12 seeks recovery of hard damages incurred in a different proceeding, again akin to recovery of  
13 doctor's bills incurred by a plaintiff in a personal injury tort action. Hyatt seeks his actual out-  
14 of-pocket damages, not a reasonable attorney fee award.

15 Lastly relative to Hyatt's amendment for attorneys' fees as special damages, *Sandy*  
16 *Valley* cites *Summa Corp. v. Greenspun*<sup>31</sup> in explaining that attorneys' fees can be recovered as  
17 special damages even where they are never pled so long as evidence of the damages are  
18 presented and litigated at trial, suggesting that where not pled but presented at trial, leave to  
19 amend at trial under NRCP 15(b) may be appropriate.<sup>32</sup>

20 **B. The FTB is not prejudiced by Hyatt's request to amend to add his breach of**  
21 **confidentiality claim or references to informational privacy.**

22 This claim is so closely related to Hyatt's other claims that the FTB cannot possibly be  
23 prejudiced by its inclusion. As detailed above, the special relationship is established by the very  
24 same facts and evidence that Hyatt has presented from early in this case relative to the FTB  
25 request and receipt of Hyatt's non-public information and promises to keep such confidential.

26  
27 <sup>30</sup> *Id.*, at 21:17 - 22:14.

28 <sup>31</sup> *Summa Corp. v. Greenspun*, 96 Nev. 247 (1980).

<sup>32</sup> *Sandy Valley*, 117 Nev. at 959.

1 Again, the FTB has two more days of deposition of Hyatt to the extent it wants to further inquire  
2 as to such evidence. There is no possible way that adding this claim prejudices the FTB or in  
3 any way threatens to disrupt the scheduled trial. The only prejudice the FTB even claims is its  
4 purported need to take discovery concerning the special relationship.<sup>33</sup> Again, it really needs no  
5 more, but as noted above, it has already inquired at Hyatt's deposition about the confidential  
6 relationship, and it will have the opportunity to depose Hyatt on this issue again, if it so chooses.

7 The FTB makes no explicit claim that it would be prejudiced by including the references  
8 to "informational privacy" in the Second Amended Complaint. It cannot in good faith make any  
9 such claim. Informational privacy as part of Hyatt's invasion of privacy claims has been  
10 litigated since early in this case, including briefing the Nevada Supreme Court, as the above  
11 quoted excerpts from prior briefing dating from 2000 explicitly show. The FTB has had every  
12 opportunity to take discovery relating to informational privacy as it is included within Hyatt's  
13 invasion of privacy claims. Again, the FTB will have further opportunity to so inquire in the  
14 remaining two days of Hyatt's deposition. The FTB has also scheduled for May 10 the  
15 deposition of Hyatt's privacy expert, Professor Solove.

16  
17 **6. Hyatt properly preserved his right to appeal his dismissed declaratory relief claim.**

18 The FTB wrongly asserts that Hyatt's right to appeal the Court's dismissal of his  
19 declaratory relief claim from 1999 has expired. The FTB's jurisdictional writ petition filed in  
20 2000 challenging the Court's denial of summary judgment that year, and the Nevada Supreme  
21 Court's consideration of the writ, in no way affects Hyatt's right to appeal the Court's 1999  
22 order after entry of judgment in this matter. Hyatt sought no relief in the writ proceedings  
23 before the Nevada Supreme Court, nor was he required to do so. The previous granting of  
24 summary judgment dismissing the declaratory relief claim has never been appealed by Hyatt. It  
25 is the FTB that is making a "bizarre" argument in suggesting to the contrary. Hyatt therefore  
26 properly maintains his verbatim declaratory relief claim in his proposed Second Amended  
27

28 <sup>33</sup> FTB Opposition, at 14:22-24.



1 Complaint, while noting that it is not presently in the case for the upcoming trial.

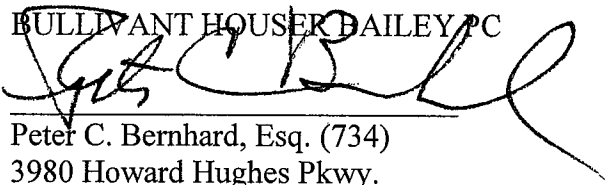
2  
3 **7. Conclusion.**

4 The amendments Hyatt seeks in his Second Amended Complaint are not futile. They all  
5 relate to viable claims or recoverable damages. Moreover, they are all closely related to claims  
6 already pending. Hyatt has not unduly delayed and these amendments relate to issues that have  
7 long been in this case and addressed by Hyatt in briefing and/or discovery. In short, they add no  
8 substantive issue to this case, but do ensure Hyatt can seek at trial recovery under all viable  
9 theories, and for all appropriate damages, for the events at issue in this case: the FTB's bad faith  
10 conduct during the audits and protests concerning Hyatt. For these same reasons, there will be  
11 no, and cannot be any, prejudice to the FTB if these amendments are allowed by the Court. To  
12 the contrary, Hyatt would be prejudiced if the amendments were not allowed. Hyatt therefore  
13 respectfully requests that the Court grant leave for Hyatt to file his Second Amended Complaint.

14 Dated this 10<sup>th</sup> day of April, 2006.

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16 Mark A. Hutchison, Esq. (4639)  
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25 Las Vegas, Nevada 89109  
26 (702) 650-6565

27 *Attorneys for Plaintiff Gilbert P. Hyatt*  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of BULLIVANT HOUSER BAILEY PC and that on this 10<sup>th</sup> day of April, 2006, I caused the above and foregoing document entitled **PLAINTIFF GILBERT P. HYATT'S REPLY IN SUPPORT OF HIS 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
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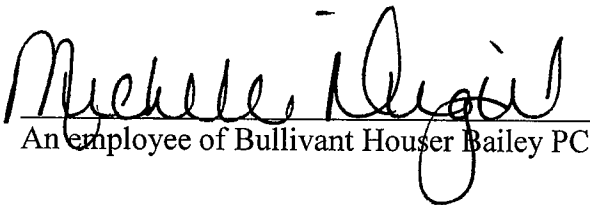
to the attorney(s) listed below at the address and/or facsimile number indicated below:

**via facsimile: (775) 788-2020**

James A. Bradshaw, Esq.  
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An employee of Bullivant Houser Bailey PC

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Exhibit 1

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C

Columbia Law Review

November, 1982

## Note

**\*1426 BREACH OF CONFIDENCE: AN EMERGING TORT**Alan B. Vickery

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When a patient discusses intimate feelings with a psychiatrist or a taxpayer gives financial records to an accountant, there is ordinarily an expectation that such matters will be held in strict confidence. Yet the courts are just beginning to formulate an adequate common law remedy for unconsented disclosures of personal information in breach of confidence. [FN1] Traditionally plaintiffs and courts in this country have resorted to invasion of privacy, breach of contract, or implied statutory causes of action to prevent or compensate unwanted disclosures of this kind. These traditional theories of liability may offer legal redress for some disclosures in breach of confidence, but they do not adequately recognize the distinct interests present in a confidential relationship, and their doctrinal principles and limitations make them ill-suited to enforcement of confidences. Though still in rudimentary form, a breach of confidence tort appears to be emerging from the case law to provide a basis of recovery where existing law is deficient.

This Note attempts to identify the present contours of the emerging breach of confidence tort and to propose a general rule for applying such a tort to situations that have not yet appeared in the cases. The Note begins by describing the nature of the wrong involved when a confidence is broken, by surveying the relationships for which the case law has found civil liability, and by identifying the distinct interests at stake in confidential relationships. The Note then examines the traditional theories of liability that have been utilized in this area, points out their inadequacies, and goes on to identify evidence of an emerging independent common law tort of breach of confidence in response to those inadequacies. Part II of the Note examines the scope of the new tort. It analyzes three possible approaches for identifying relationships that ought to support a legal duty of confidentiality. It concludes that the basis for imposing liability should be disclosure of information revealed in the course of a nonpersonal relationship of a sort customarily understood to carry an obligation of confidentiality. This standard would extend breach of confidence protection beyond the limitations of existing case law, but would respect practical and constitutional considerations that have influenced the development of law in this area. Finally, the Note identifies privileges and limitations that, regardless of the standard adopted, must apply because of countervailing public interests and first amendment considerations.



**\*1427 I. CIVIL LIABILITY FOR BREACH OF CONFIDENCE**

**A. Nature of the Wrong**

Every member of society engages in relationships of trust and confidence. We turn to doctors, lawyers, counselors, teachers, bankers, accountants, and others for assistance in matters beyond our individual knowledge or capacities. [FN2] Relationships of this kind require us to lower our defenses and permit some intrusion into our personal lives. Specialists who advise us must have access to complete information for their advice to be effective. A person who lacks training in a specialty cannot separate relevant information from irrelevant, so all must be revealed. [FN3] Such self-exposure is not always voluntary. To function in modern society, for example, we must file tax returns and write checks, and those who process these documents incidentally have access to details of our private lives. [FN4]

To foster candor and cooperation within such relationships, those who advise or assist us ordinarily hold forth an assurance of secrecy. The source of this assurance is usually customary practice and common understanding, though professional codes of ethics [FN5] or statutes [FN6] mandate confidentiality in \*1428 certain relationships. Whether formalized or not, the assurance of secrecy is vital to the success of the relationship. We rely on it initially in forming the relationship, and thereafter in revealing what we would otherwise hold back.

These two elements--the assurance of secrecy and the reliance it evokes--are the essential ingredients of what can be termed a "confidential relationship." [FN7] The giver of information places himself in a vulnerable position in reliance on the assurance of secrecy and thus has a legitimate expectation of confidentiality. The receiver of the information, by implicitly holding out the assurance associated with his occupation, invites the reliance and thus has an obligation not to disappoint the giver's expectation. Most would agree that revealing to a third party any private information learned within the relationship constitutes a moral wrong. In certain contexts, courts have increasingly shown a willingness to attach legal consequences to such breaches of confidence. These instances suggest the development of a general principle of liability for breach of confidence.

**B. The Case Law**

The starting point for considering the development of a rule imposing liability for breach of confidence is an examination of the factual situations in which courts have granted recovery for breaches of confidence. Liability is most clearly established in two lines of cases, one involving physicians and the other involving banks; but the fact that courts have imposed liability in a number of other cases involving other kinds of relationships suggests a broader trend.

The 1977 New York case of *Doe v. Roe* [FN8] is a leading example of the physician line of cases, in which a doctor communicates to a third party information about the diagnosis or treatment of a patient. *Doe* involved a book of case studies that a psychiatrist and her psychologist husband published for popular as well as scientific consumption. The book contained verbatim disclosures of a former patient's descriptions of her thoughts, emotions, \*1429 and intimate fantasies, as well as biographical details. The patient was a university professor, whom friends, colleagues, and students were able to identify from the material in the book. The court held that this disclosure was an actionable breach of confidence. [FN9]

Courts in many physician cases have recognized liability for disclosures to a more limited audience. In *Berry v. Moench*, [FN10] for example, publicity was less widespread than in *Doe*, but the injury was nonetheless evident. Parents, distraught over their daughter's plans to marry plaintiff, asked their family doctor to investigate plaintiff's background. The doctor contacted the defendant, a psychiatrist who had treated plaintiff seven years earlier. Defendant's response disclosed the details of plaintiff's therapy, which included electric shock treatment, and advised the daughter to "run." [FN11] Often these limited-\*1430 audience cases involve improper disclosures to insurance companies resisting patient claims. [FN12]

The second established line of cases involves a breach of the obligation of confidence owed by a bank to its depositors and customers. The case of first impression in this country was *Peterson v. Idaho First National Bank*, [FN13] which relied in large part on the reasoning of an influential English case on the subject, *Tournier v. National Provincial & Union Bank*. [FN14] In *Peterson* an officer of plaintiff's employer had asked the manager of the local

bank to advise him of any information he learned about any of the company's employees that might reflect badly on the company. The manager subsequently wrote the officer to let him know that plaintiff's finances were deteriorating and that the bank had returned many of his checks for lack of funds. [FN15] The Idaho Supreme Court upheld the complaint on a theory of breach of the bank's duty of confidence, [FN16] which had caused plaintiff personal embarrassment and loss \*1431 of reputation. [FN17] After Peterson, liability for a bank's disclosure causing primarily financial loss was recognized in Milohnich v. First National Bank. [FN18]

Thus far physician and bank cases have predominated in the breach of confidence area. No readily apparent explanation exists for the low incidence of cases involving breaches of other confidential relationships, such as lawyer-client, counselor-advisee, priest-penitent, accountant-client, school-student, or employer-employee. [FN19] In principle, the rationale for imposing liability on \*1432 doctors and bankers would apply equally well to these other relationships. Perhaps doctors and bankers simply break their confidence more frequently. [FN20] It is more likely that recovery is usually granted for breaches of other kinds of confidential relationships on different theories of liability, in which the confidence, as such, is not a crucial element and thus has not received much attention. [FN21]

Nevertheless, physician and bank cases do not constitute the entire body of breach-of-confidence case law. Enough instances exist recognizing liability for breaches of other confidential relationships to conclude that the actionable duty of confidence is not peculiar to a few distinctive traditional relationships. In Blair v. Union Free School District No. 6, Hauppauge [FN22] a school allegedly released embarrassing information concerning a student, which information the parents had given to the school in confidence. The court found that the school-student-family relationship "is certainly a special or confidential relationship." [FN23] Cases have also upheld breach of confidence claims directed at \*1433 other institutions. In Munzer v. Blaisdell, [FN24] where the superintendent of a mental institution divulged the contents of a patient's record to a third party without the patient's consent, the court found an implicit common law remedy in a state statute prohibiting disclosure of information imparted to officials of such institutions for purposes of care and treatment. [FN25] In several recent cases, courts have considered claims by clients against their former attorneys for allegedly using confidential information obtained within the attorney-client relationship in subsequent litigation against the clients, but each held that plaintiff failed on the facts. [FN26]

These cases demonstrate that precedent exists for attaching legal consequences to the breach of a variety of confidential relationships. Though the \*1434 cases could be explained narrowly as ad hoc decisions, close examination will reveal that they embody a common legal principle. [FN27]

### C. Interests Invaded

Cases granting recovery for breach of confidence share similar basic elements. Though the type of relationship varies from case to case, the relationship in each case carries an implicit assurance of confidentiality that the defendant held out and then violated. The courts in these cases invoke disparate theories of liability, but the individual and societal interests calling for a legal remedy are essentially the same.

A disclosure to a third person in breach of confidence invades two distinct interests of the wronged individual: first, his general interest in the security of the confidential relationship and his corresponding expectation of secrecy; and second, his specific interest in avoiding whatever injuries will result from circulation of the information. The first interest is important because the expectation of secrecy prompts the communication of embarrassing information in the first place. [FN28] If it is disappointed, the wronged party is likely to remain silent in circumstances that would otherwise call for frankness, in both the relationship violated and possibly in other confidential relationships essential to the person's welfare and prosperity. Even a limited disclosure of relatively innocuous information may destroy the individual's sense of security and deter future candor. [FN29]

\*1435 The extent of invasion of the second interest depends on the content of the disclosure and the nature of the audience. The more intimate or embarrassing the information, the more damaging the disclosure probably will be. The wronged party may suffer ridicule, loss of business or professional reputation, or deterioration of personal relationships. Though injury often flows from widespread publication of disclosed information, the greatest injury may well be caused by disclosure to a single person, such as an employer or a spouse. [FN30]

The breach of confidential relationships also jeopardizes societal interests. Beyond a general interest in promoting justice between individuals when the conduct of one has injured another, society has specific interests in assuring that certain types of confidential relationships are respected. For example, the physical and mental health of individuals is a fundamental societal concern. Because confidentiality promotes the full disclosure necessary to effective medical treatment, society has an interest in fostering doctor-patient confidences. Similarly, enforcement of lawyer-client confidences advances society's interest in having its members fully apprised of their legal rights and obligations. Indeed, the law of testimonial privilege demonstrates the value society has placed on maintaining the confidentiality of certain traditional relationships, such as husband-wife, priest-penitent, and lawyer-client, despite the strong countervailing interest in seeking truth in the administration of justice. [FN31]

Even in the absence of testimonial privilege, society has a strong interest in promoting certain confidential relationships. [FN32] For example, society may wish to assure the personal development of individuals by guaranteeing the security of confidential discussions with counselors, career advisors, and teachers, though none of these relationships traditionally has enjoyed a testimonial privilege. [FN33] Society also has an interest in promoting relationships beneficial to commerce. Thus it may seek to protect the confidentiality of \*1436 bank records [FN34] and accountant files. [FN35] Similarly, maintenance of the confidentiality of certain government records encourages individuals to cooperate with government, and to take advantage of services to which they are entitled. [FN36]

In granting recovery for breach of confidence in a variety of relationships, courts have been protecting the individual and societal interests common to these relationships. The psychiatrist in *Doe v. Roe* [FN37] and allegedly the bank in *Peterson v. Idaho First National Bank* [FN38] and the school in *Blair v. Union Free School District No. 6, Hauppauge* [FN39] each frustrated the plaintiff's justified reliance on an assurance of confidentiality and injured the plaintiff by disclosure of embarrassing personal information. Though the societal interests invaded were not identical in each case, they were of the same general kind. Societal interests in promoting psychiatric care, banking relations, and education were furthered by lending legal force to the assurance of confidentiality implicit in each relationship.

The parallel factual patterns and the common interests in these cases embody a common legal principle, one that should be explicitly recognized. Granted, not all confidential relationships warrant legal enforcement. One court aptly stated, "A cause of action can not lie each time someone succumbs to the temptation to break a confidence and whisper a juicy rumor." [FN40] In some areas individuals must take their chances in choosing their confidants. As in the case of a broken social engagement, society leaves enforcement to honor and morality. [FN41] The cases do indicate, however, that a growing number of confidential relationships warrant legal enforcement. Recognition that a common legal principle underlies these cases will permit the development of a rational theory of liability, distinguishing between those confidences that should be enforced and those that should be left to individual decision.

#### \*1437 D. Inadequacy of Traditional Bases of Liability

Faced with situations involving a disclosure of personal information in breach of confidence, some courts have explicitly recognized a breach of confidence tort. [FN42] Most courts, however, have resorted to a confused tangle of legal theories, including invasion of privacy, [FN43] implied term of contract, [FN44] implied private cause of action in statute, [FN45] and tortious breach of confidence, [FN46] to make out a cause of action in such situations. The confusion has arisen because some courts addressing the breach of confidence problem have focused on the nature of the injury involved, while other courts have focused on the conduct giving rise to the injury. Courts focusing on the nature of the injury--damage to reputation, embarrassment, and related harm caused by communication of personal information to third persons--have tended to base liability on the common law tort of invasion of privacy by publicity, \*1438 especially when the content of the disclosure is embarrassing or sensational. [FN47] Courts focusing on the conduct involved--breach of an obligation of confidence--have tended to analyze the facts in contract terms or to search for a statute prohibiting such conduct; they typically have sought out sources of public policy from which to justify implying a term of contract or a private statutory cause of action. [FN48]

It is not uncommon for a court to try both approaches, reviewing a number of causes of action. The court in *Horne v. Patton*, [FN49] for example, found three independent bases of liability: invasion of privacy, breach of implied

term of contract, and breach of confidence. In many such cases, multiple bases will be appropriate because a breach of confidence involves elements of both a harmful disclosure and a broken relation. None of these traditional bases of liability is fully adequate, however, to deal with breaches of confidence.

1. Invasion of Privacy. Since the turn of the century, [FN50] a separate body of tort law has developed to protect an individual's right to privacy. The Restatement (Second) of Torts, following Dean Prosser, recognizes four distinct branches of the tort: "intrusion upon seclusion," "appropriation of name or likeness," "publicity given to private life," and "publicity placing person in false light." [FN51] Though any of these might provide a basis of recovery when a breach of confidence is the principal wrong, [FN52] courts have usually resorted to \*1439 the unwanted publicity branch of privacy [FN53] in such cases. The unwanted publicity tort, however, presents problems when applied to breaches of confidence.

a. Different Interests. The unwanted publicity branch of privacy is inadequate in theory to redress a breach of confidence because the privacy tort protects interests that only partially overlap with the interests present in a confidential relationship. Prosser identified the interest implicated in publicity cases as "reputation, with the same overtones of mental distress that are present in libel and slander." [FN54] The interests present in confidentiality cases are (1) the expectation of confidentiality arising from the assurance of secrecy and the reliance thereon; and (2) freedom from circulation of damaging information. The first of the confidentiality interests is not protected at all by the privacy action, and the second interest is protected only partially because of the doctrinal limitations of the privacy action.

b. Doctrinal Limitations. The unwanted publicity branch of privacy imposes liability for injuries caused by one who (1) "gives publicity to a matter concerning the private life of another," (2) which would be "highly offensive to a reasonable person," and (3) which "is not of legitimate concern to the public." [FN55] These qualifications are fundamental to the tort. Circulation to a small group, though injurious, is not enough; the matter must be spread before the public, as by a newspaper advertisement. [FN56] Ordinary gossip about \*1440 such matters as one's comings and goings or one's late night visitors may be annoying to a normal person or very upsetting to an unusually sensitive person, but will not support liability. [FN57] Finally, the public's interest in knowing about public events and public figures prevents liability for publicity concerning matters that, though highly offensive, are nevertheless of legitimate public concern. [FN58]

These doctrinal limits correspond to common law and constitutional recognition of the value of unhindered expression and dissemination of information, as well as a recognition of the human propensity to gossip and a fear of encouraging meritless claims. They strike a balance between these considerations and the individual's privacy interest. While the same considerations shape liability for breach of confidence, [FN59] a different balance must be struck. Privacy is a right against the public at large. Its doctrinal limits narrowly circumscribe the zone of proscribed conduct in order to prevent hindrance of public expression. In contrast, a right to confidentiality exists against a specific person, who, by virtue of his relationship to the confider, has notice of the duty to preserve the secrecy of clearly identifiable information. Privacy's doctrinal limits are thus unnecessary in breach-of-confidence situations, and should not bar recovery to plaintiffs deserving of a remedy.

\*1441 The "Highly Offensive" standard is a major limitation on the privacy action. In the words of the Restatement (Second), successful recovery under the unwanted publicity branch of privacy turns on whether "the matter publicized is of a kind that . . . would be highly offensive to a reasonable person." [FN60] This standard is not consistent with the duty attaching to a confidential relationship. It focuses on the content, rather than the source, of the information. When assurance of confidence evokes candor, the resulting revelation should be protected without regard to the objective degree of its offensiveness. As one court stated, referring to a physician's breach of confidence, "The unauthorized revelation of medical secrets, or any confidential communication given in the course of treatment, is tortious conduct which may be the basis for an action in damages." [FN61]

In addition, even hypersensitive people should have a right to be secure in their confidential relationships. The privacy standard would not protect such persons from disclosures of objectively innocuous information that happens to be very distressing to them. Yet the same reliance on the assurance of confidentiality is present here: knowing that disclosure of the information would be distressing to him, the hypersensitive individual would not have revealed it without the expectation of confidentiality. [FN62]

\*1442 The "Publicity" requirement is a second major limitation on the privacy action. No claim for invasion of privacy by publication of private matters is made out unless the offensive disclosure is spread before the public at large. [FN63] Though sometimes this requirement is stretched to find liability in a compelling case, it is ordinarily enforced strictly. [FN64]

Especially when information is confined to a confidential relationship, one can imagine many cases where the greatest injury results from disclosure to a single person, such as a spouse, [FN65] or to a small group, such as an insurance company resisting a claim. [FN66] A confidential relationship is breached if unauthorized disclosure is made to only one person not a party to the confidence, but the right of privacy does not cover such a case. [FN67]

Finally, the "Legitimate Public Interest" and "Public Figures" doctrines are additional major limitations on the privacy action. At common law, the countervailing interest of the public right to know accounts for the doctrinal requirement that the information disclosed not be of legitimate public interest to be actionable. [FN68] *Cox Broadcasting Corp. v. Cohn* [FN69] raised this limitation on \*1443 the right of privacy to the constitutional level. [FN70] The tragic case of *Sidis v. F-R Publishing Corp.* [FN71] is a good illustration of the principle. It involved a famous child prodigy who in adulthood led an unremarkable life. He had developed an obsession with obscurity and lived by doing menial jobs. The intimate details of his now private life were given "ruthless exposure" in a magazine article, [FN72] and this exposure contributed to his early death. [FN73] Nevertheless, recovery was denied because his activities were deemed of legitimate public interest.

The scope of the legitimate public interest in information is difficult to determine. [FN74] Public figures enjoy less protection from exposure of details of their private lives than do private figures. [FN75] Individuals may become public figures involuntarily for a time because of events beyond their control. [FN76] Some public figures, like Presidents, are so important that virtually all aspects of their lives are open to publicity, whereas other figures, such as accident victims, retain protection for private aspects of their lives unrelated to the event. [FN77] The test is ultimately rooted in public mores and common decency. [FN78]

Many things disclosed to a doctor, lawyer, accountant, or bank are legitimately newsworthy, but should this strip the individual of his expectation of confidentiality? *Sidis* would surely have been a different case if the author of the magazine exposé had been his psychiatrist. Subject to limited exceptions, private figures should not lose their right of secrecy when the content of their confidential revelations is also of legitimate public interest. Public figures, because of their relative lack of privacy, have at least as great, if not \*1444 greater, need to be secure in their confidential relationships as private individuals. [FN79]

2. Implied Term of Contract. Other courts have turned to implied contract as a basis of recovery, because confidential and contractual obligations are often present in the same relationship. [FN80] The doctrine of implied-in-fact contract means that promises are inferred from the conduct of the parties and common usages, practices, and understandings at the time of contracting. [FN81] Thus, some courts imposing liability for breach of confidence have looked to licensing statutes, professional codes of ethics, and other sources of public policy for evidence of a pervasive understanding of confidentiality with respect to the particular relationship involved. Based on this understanding, these courts have found an implied promise at the time of contracting not to divulge information to third parties. [FN82] Such a finding is probably justified with regard to most confidential relationships, but finding a contractual promise is not the problem. Rather, contract law itself, like tortious invasion of privacy, is inadequate, theoretically and practically, to protect confidences.

a. Contract v. Tort. In theory, contract law enforces the expectations of parties settled in a bargained-for exchange. Tort law compensates injuries suffered at the hands of another. [FN83] The obligations of the former arise from consent of the parties; the obligations of the latter are imposed by law irrespective of consent. The duty present in a confidential relationship and the \*1445 injury suffered when that duty is violated are characteristic of the duties and injuries associated with tort law and are foreign to contract law. When personal information is at issue, obligations of confidence arise out of the common notions of decency and social policy fostering the particular relationship, not out of bargained-for terms. Banks and doctors, for example, do not ordinarily offer lower rates if a customer or patient does not insist on confidentiality. A contract, however, does frequently establish the relationship on which tort law imposes a duty of confidence. [FN84]

The theoretical difference between contract and tort becomes especially important when there is no contract in which to imply an obligation of confidentiality. *Quarles v. Sutherland* [FN85] is a good example. A customer was examined by a store's doctor after she fell in the store. The doctor later sent a letter to her attorney describing the diagnosis and treatment with a copy to the store's attorney. The court held that the doctor owed no duty to the woman, citing, among other things, the absence of contract. [FN86]

Another distinction between contract and tort with important theoretical and practical implications is the difference in the measure of damages. The objective of contract damages is to supply the injured party with the benefit he could have reasonably anticipated receiving had the other party performed in full. [FN87] Damages are limited by the principle of *Hadley v. Baxendale* [FN88] to those which "may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." [FN89] When a client hires an accountant or a customer opens a bank account, the parties contemplate accounting services or banking services in return for fees or service charges. The possibility that embarrassing information might come to light by virtue of the accountant's or bank's indiscretion is unlikely to have occurred to either party.

Tort damages make the injured party whole by compensating whatever injuries flow directly from the wrongdoer's breach of duty. They are limited only by the doctrine of proximate causation, which has a much broader scope than the "contemplation" principle of *Hadley v. Baxendale*. [FN90] The MacDonald court recognized this problem and granted recovery in tort:

\*1446 If plaintiff's recovery were limited to an action for breach of contract, . . . the patient would generally be limited to economic loss flowing directly from the breach . . . and would thus be precluded from recovering for mental distress, loss of his employment, and the deterioration of his marriage. [FN91]

As the above quotation suggests, two other limitations on contract damages, related to the *Hadley v. Baxendale* doctrine, have special significance to breach of confidence. First, damages for mental distress are not normally granted for breach of contract. [FN92] This, however, is the major injury in many breach of confidence cases. The Restatement (Second) of Contracts indicates an exception to the rule when "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result," but its illustrations suggest that the exception is narrow. [FN93] While a contract for psychiatric counseling might fall within the exception, a bank-deposit contract probably would not. Thus, in general, contract is a dubious basis for compensating emotional injuries. The cases purporting to find liability in implied contract have, surprisingly, completely ignored this limitation in finding damages awardable for mental distress. [FN94]

Second, punitive damages are not available in breach of contract cases, according to the Restatement (Second), "unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." [FN95] In *Doe v. Roe* [FN96] the court talked at length in terms of implied contract, but later considered whether punitive damages were recoverable. It decided that they were not, on the ground that only "stupidity," rather than malice or evil intent, had been shown, but the court implied that punitive damages would have been available had there been evil intent. [FN97] This suggests that the Doe court, despite its confusion, relied on tort rather than contract.

b. Practical Limitations. In addition to the practical limitations on damages discussed above, a contract action may also be subject to various contract defenses not assertable against a tort victim, such as the statute of frauds, the parol evidence rule, incapacity, bankruptcy, uncertainty, and lack of consideration. [FN98] There may also be a shorter statute of limitations or differing elements of proof required. Implied-in-fact contract calls for extensive proof of the conduct and understandings of the parties at the time of contracting, while a \*1447 tort duty of confidentiality can be inferred directly from sources of public policy, custom, and judicial reasoning. Thus the concurring judge in *Milohnich v. First National Bank*, [FN99] for example, felt that while the necessary facts to make out an implied contractual agreement were neither alleged nor proved, the facts alleged did constitute a tort.

3. Implied Statutory Cause of Action. Opinions in breach of confidence cases often discuss relevant statutes at length, though they do not always indicate clearly whether a private cause of action is being implied in the statute, or the statutory policy is being used as a source for common law reasoning or as a basis for implying a term of contract. [FN100] In some situations there may actually be a statute providing expressly for a civil damages action to enforce confidentiality, [FN101] but more commonly the statute directed to the particular relationship simply relies on

administrative disciplinary action, such as the loss of a license to engage in a regulated profession or business. [FN102] There are two immediate practical problems that must be met in a given case: a statute prohibiting breach of the precise confidential relationship must exist, [FN103] and it must be directed at or imputable to the particular defendant. [FN104]

The theoretical problems posed by statutes are different from those presented by privacy and contract theories because no general analysis of interests can be made. The interests involved depend entirely on the particular statute and the legislature's purpose in enacting it. There is, however, one common difficulty posed when a court attempts to imply a statutory cause of action: it must undertake the uncertain business of trying to determine what the legislature intended or would have intended had it thought of the situation at bar. [FN105]

Several courts have placed much weight on the presence or absence of a statute providing for a testimonial privilege. The possibility for confusion resulting from this approach is great. The court in *Horne v. Patton* [FN106] aptly \*1448 stated that "whether or not testimony may be barred at trial does not necessarily control the issue of liability for unauthorized extra-judicial disclosures." [FN107] In formulating testimonial privileges, courts and legislatures are balancing the truth-seeking interest of judicial administration against countervailing interests in not compelling testimony. The reason for a privilege may be to encourage candor in a confidential relationship. Such a privilege can be taken as an expression of public policy that might favor development of a common law remedy, but it seems wrong simply to imply a damages cause of action in a privilege statute. That statute was not designed to apply outside of the judicial context. [FN108] Moreover, when using a statute as a source of public policy, care should be taken to ensure that the reasons for the privilege are relevant to the issue in question. If the purpose of a privilege is to avoid unreliable testimony, [FN109] such a privilege would be of no use in considering liability for a breach of confidence outside of court. Most importantly, the absence of a formal privilege does not mean there should not be an actionable duty of confidence creating liability for extrajudicial disclosures. It simply means that the high judicial interest in seeking truth outweighs the interest in the confidentiality of the particular relationship. [FN110] Outside of court, that high judicial interest is not a factor, and thus the interest in upholding the confidence may be substantial enough to warrant legal liability for breach.

#### E. Emerging Common Law Tort

1. Stretched Doctrine and Muddled Opinions. Despite the inadequacy of traditional bases of liability in protecting confidential relationships, courts often have stretched these theories to find liability for a breach of confidence. Sometimes doctrinal principles and limitations simply have been ignored. In *Suburban Trust Co. v. Waller*, [FN111] for example, liability was found for breach of contract, yet damages were awarded for a false arrest "proximately caused" by defendant bank's wrongful disclosure--a recovery that could not be justified under a contract measure of damages. [FN112] The *Doe v. Roe* court purported to base recovery on contract, but it held the psychiatrist's husband, who was not party to the contract, liable as "a willing, indeed avid, coviolator \*1449 of the patient's rights." [FN113] Since there was no finding that the husband "induced" the breach of confidence nor any discussion of tortious interference with contract, the husband could not properly have been held liable except as a joint tortfeasor who participated in the tortious conduct of the psychiatrist. [FN114]

Some courts, acknowledging what they are actually doing, have expressly granted recovery in tort for breach of a confidential relationship. A New York court in *MacDonald v. Clinger*, [FN115] after reviewing various traditional bases of liability and finding them insufficient, held that "the physician-patient relationship contemplates an additional duty springing from but extraneous to the contract and the breach of such duty is actionable in tort." [FN116] The Alabama Supreme Court in *Horne v. Patton*, [FN117] faced with an unconsented disclosure by a physician to his patient's employer, considered separate counts for breach of a confidential relationship, invasion of privacy, and breach of implied term of contract, and found that each would support a damage action. [FN118]

Most often, courts have either been unclear or have muddled the bases of recovery, but when the opinions are analyzed closely, liability appears to sound in tort. The Utah Supreme Court in *Berry v. Moench* [FN119] found a cause of action based on the public policy behind an evidentiary exclusion statute \*1450 without identifying the nature of that cause of action. In *Blair v. Union Free School District No. 6, Hauppauge*, [FN120] the court rejected several tort theories, including intentional infliction of mental distress, but then held that at trial the "special or confidential relationship," in light of the information revealed, might justify a finding of "extreme and outrageous

conduct." This latter phrase sounds like one used in a claim for intentional infliction of mental distress, but the court did not attempt to reconcile the language with its earlier summary rejection of that cause of action as personal to the student and not available to her parents. [FN121] Both the *Doe v. Roe* [FN122] and *Hammonds v. Aetna Casualty & Surety Co.* [FN123] courts, which based recovery on implied contract or statutory cause of action, slipped in words to the effect that the conduct was tortious, but did not elaborate further. *Peterson v. Idaho First National Bank* [FN124] presents the same problem, though more subtly. The opinion speaks primarily in terms of implied contract and mentions agency law briefly, but its characterization of the duty suggests a more fundamental obligation, violation of which would sound in tort:

It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolable secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors. [FN125]

The appeal arose on a motion to dismiss and the opinion, beyond reciting plaintiff's allegation that he was "greatly damaged," [FN126] does not indicate what damages were sought. The facts, however, suggest that compensation was sought for injury to reputation and emotional distress or perhaps loss of employment--damages typical of tort rather than contract or agency claims.

Taken as a whole, the cases, under the guise of various legal theories-- sometimes legitimately invoked, but often stretched beyond reasonable bounds-- suggest the emergence of a new tort of breach of confidence. [FN127] The \*1451 tort is still rudimentary and its contours are not well articulated, but a strong case can be made for recognizing a distinct tort to cover broken confidences. First, the duty of confidentiality, where it exists, generally arises out of broadly applicable societal norms and public policy concerning the kind of relationship at issue. It does not arise out of specific agreement or particularized circumstances. Moreover, the object of the law when this duty is violated is compensation for the resulting injuries, not fulfillment of expectation. Therefore, liability should be grounded in tort law. Second, a separate tort focused directly on the broken confidence should be recognized because it would address squarely the individual and societal interests at stake in a confidential relationship. With such a tort available, courts confronted with a compelling case of breach of confidence will not be left to manipulate haphazardly the remedies offered by theories of liability developed for other wrongs. Explicit recognition of the new tort would have the additional advantage of making possible open debate about the tort's proper scope. The tort could be rationally extended so as to cover breaches of relationships similar in principle to those for which the courts are now finding some means to impose liability.

If recognized, the proposed tort would be judge-made. There is no reason why courts should be reluctant to take this step. The vitality of the common law lies in its ability to adapt and evolve without waiting for the legislature to act. [FN128] As one court aptly stated when considering a breach of confidence:

This is not the first time, nor will it be the last, that a court, confronted with a unique situation, must, after an unsuccessful search for binding precedent on point, repair to the dictates of public policy to do justice between litigants at the bar of justice. [FN129]

\*1452 Indeed, the extensive discussion in the cases of statutes, ethical canons, disciplinary rules and customary usages as sources of public policy, ostensibly to imply a term of contract or a private statutory cause of action, can be interpreted as a thinly veiled development of the common law. [FN130]

2. Historical and English Precedent. Courts are not left to public policy alone. Historical and comparative precedent exist for the emerging tort. Breach of confidence as a distinct basis for relief was first recognized in the 1849 English case *Prince Albert v. Strange*, [FN131] in which royal etchings had been surreptitiously copied by a printer and a catalogue of them prepared. The display or use of the copies by third parties into whose possession they had come could be enjoined on a property theory, but the catalogue posed a more difficult question. Although Lord Cottenham held that the property right in the etchings would permit an injunction to reach the catalogue, he also articulated an alternative breach of confidence basis: "But this case by no means depends solely on the question of property, for a breach of trust, confidence, or contract would of itself entitle the Plaintiff to injunction." [FN132] \*1453 The 1894 case *Corliss v. E.W. Walker Co.* [FN133] was one of the first American cases to mention breach of confidence. The wife of a deceased inventor wanted to enjoin publication of his picture in a book. The court stated in dictum:

When a person engages a photographer to take his picture, agreeing to pay so much for the copies which he



desires, the transaction assumes the form of a contract; and it is a breach of contract, as well as a violation of confidence, for the photographer to make additional copies from the negative. The negative may belong to the photographer, but the right to print additional copies is the right of the customer. [FN134]

The court denied relief, however, because the defendants, innocent purchasers of the photographs, were not parties to the confidence binding the photographer and had no notice of the wrongful conduct. [FN135] The court also found an implied waiver based on the prior publication of the deceased's likeness without objection during his lifetime.

In England, which has never adopted the common law action for invasion of privacy recognized widely in this country, the breach of confidence tort has become the basis of an extensive body of law. [FN136] It has been applied to protect such diverse confidential relationships as banker-customer, [FN137] accountant-client, [FN138] husband-wife, [FN139] attorney-client, [FN140] and Cabinet minister-Cabinet. [FN141] It is also widely used to protect trade secrets and confidential commercial information. [FN142] The action developed as an equitable doctrine, [FN143] but its doctrinal principles have become somewhat confused. [FN144] The British Law Commission \*1454 has recommended to Parliament that the existing equitable principles and legal rules governing breach of confidence be supplanted by a statutory reformulation of the action as a tort with a single set of principles applicable to all kinds of confidences and a broad range of legal and equitable remedies. [FN145]

The law of breach of confidence in the United States, at least with respect to personal information, has not enjoyed a similar development. The action for breach of confidence appears to have died out in its infancy. While Warren and Brandeis in their famous article launching the right of privacy mentioned breach of confidence as one of the devices commonly used to grant recovery for invasion of privacy, few subsequent cases in this country mentioned breach of confidence until twenty years ago. [FN146] One can only speculate \*1455 as to the reason for this period of dormancy. It may be that breaches of confidences of a personal nature were handled by resort to the new right of privacy, the birth and explosive growth of which corresponds with the period of dormancy in breach of confidence. [FN147] It is telling that England has relied heavily on confidence law in place of the privacy action to protect privacy interests. [FN148]

In any case, the tort is by no means novel, nor would recognition of it be a radical departure from existing law. Furthermore, given the strong moral obligation present in a confidential relation and the willingness of courts to impute liability by bending other legal theories, recognition of the tort would not be unfair to potential defendants. It is difficult to imagine any situation in which a defendant could claim to have relied on the absence of such a tort.

## II. ELEMENTS OF THE TORT AND LIMITATIONS

Having recognized that tortious breach of confidence has entered the case law as a distinct basis of liability, the next step is to determine its contours. A working definition is necessary in order to determine the scope of the tort. The cases discussed in Part I suggest that the tort can be defined in general terms as the unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship. [FN149] "Unconsented" means simply the absence of explicit or implicit permission to disclose the specific information to a particular audience. Defining the two other elements of this definition--a confidential relationship and an unprivileged disclosure--call for more exploration.

### \*1456 A. Duty of Confidence

Determining what kinds of relationships should carry a legal duty of confidence requires a balancing of the individual and societal interests favoring enforcement of the confidentiality against the countervailing public interests in safety and education, practical considerations about the human propensity to gossip, and the constitutional guarantees of free speech and the public's right to know. Courts have imposed liability in certain specific contexts, including doctor-patient, depositor-bank, committed patient-institution, and student's parents-school, but have not stated a general rule. Three possible approaches to a general rule will be examined.

1. General Duty. A duty of confidentiality could arise whenever personal information is received from another in confidence. [FN150] This approach would not require an established relationship between confider and receiver, but

merely a communication in circumstances from which a reasonable person would conclude that confidentiality is expected. [FN151] Such a rule of liability governs in trade secret law and common law copyright, two areas of law in which breach of confidence is a central element. [FN152] Anyone in whom "confidence is reposed" is liable for unprivileged disclosure or use of a trade secret or an unpublished literary work. [FN153] The duty is generally applicable and does not require an ongoing or close relationship; [FN154] it is sufficient that the disclosure be made in confidence and that the person receiving the information have \*1457 reasonable notice of that fact and not object. [FN155] In these cases, "protection is afforded only by a general duty of good faith and . . . liability rests upon breach of this duty." [FN156]

The English law of confidence imposes a general duty for personal information as well as for other kinds. Although some question remains as to the precise contours of the rule of liability, the following statement in *Coco v. A.N. Clark (Engineers) Ltd.* is representative:

It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. [FN157]

The Law Commission in its proposed reformulation of the action as a statutory tort would retain the general duty approach, but would adjust the test to require that the recipient accept the obligation:

[A]n obligation of confidence should come into existence where the recipient has expressly given an undertaking to the giver of the information to keep confidential that information, . . . or where such an undertaking is . . . to be inferred from the relationship between the giver and the recipient or from the latter's conduct. [FN158]

The adjustment would protect the unwilling recipient of unsolicited confidential information; [FN159] otherwise, the standard remains an ad hoc reasonable-person test. [FN160]

The general-duty approach has some appeal as a rule for all breach-of-confidence cases in this country, regardless of the type of information involved. A confider's expectation of confidentiality would be protected whenever a reasonable person similarly situated would have the same expectation--excepting, of course, the situation of the aggressive confider and the unwilling recipient, which is not likely to be common in the area of personal information. Courts would not be forced to make detailed inquiries \*1458 into the nature of the relationship in a particular case; they would have to determine only whether an assurance of confidentiality was reasonably understood.

Though a comprehensive breach of confidence rule would promote simplicity and symmetry, the general duty approach presents problems when the information conveyed is personal. A general duty rule is appropriate for trade secrets because they are seldom conveyed casually, and, more importantly, because the nature of the information itself gives the potential defendant adequate warning that the information should not be publicized. The same cannot be said of all personal information disclosed to others in confidence. Personal information is a mainstay of daily conversation, often conveyed casually with slight expectation that the recipient will actually keep it secret. [FN161] No general assumption can be made about the solemnity with which confidentiality is demanded before personal information is confided. Such assurances are commonly forgotten, and the information mixes with one's random thoughts and finds its way into one's conversation with little hesitation or reflection.

Attaching a legal duty to every confidence received with knowledge of its confidential nature demands too much. Human weakness--the temptations to "whisper a juicy rumor" [FN162]--cannot in every case be remedied by bringing the force of the state's judicial machinery to bear upon the idle gossiper. It would not be consistent with the notion of a free society for the state to intrude so deeply into individual decisionmaking with respect to one's casual relationships absent a compelling reason to do so. In addition, first amendment rights to speak freely would be chilled because of the possibility that one might accidentally convey to others something previously learned in confidence. Trade secrets, by contrast, constitute a narrow class of information readily distinguishable from daily conversation. The nature of the information would give ample warning, so there would be no tendency to chill protected conversation.

The English cases and the Law Commission Report do not raise these problems squarely, but they might be handled in two ways under current English law. First, a court could simply find that no reasonable expectation of

confidence arises during a casual conversation. Second, there is a broad and flexible public policy limitation on breach of confidence liability. [FN163] A plaintiff carries the burden of making an affirmative showing that the public interest in enforcing the particular confidence outweighs the public interest in disclosure. [FN164] While the doctrine is aimed primarily at the content of the \*1459 disclosure, it could possibly be invoked to deny recovery on the grounds of avoiding a general chilling of speech. Although these devices are awkward, the general-duty approach for personal confidential information appears to result from the absence of a right-of-privacy action. In its place a substitute with general application is needed, a role which breach of confidence has assumed. [FN165] There is no similar need in this country because the right of privacy is well developed; thus a less awkward and more concrete approach should be adopted.

2. "Fiduciary" Relationships. Some cases suggest that a disclosure of personal information is actionable if it constitutes a breach of trust or of a fiduciary relationship. [FN166] Williston defines a fiduciary relationship as a situation "where one person reposes special confidence in another, or where a special duty exists on the part of one person to protect the interests of another, or when there is a reposing of faith, confidence, and trust, and the placing of reliance by one person on the judgment and advise of the other." [FN167]

This definition--which is as precise as any other--simply begs the question of how much "faith, confidence, and trust" must exist before a relationship arises to the stature of fiduciary duty. It does not indicate precisely what kinds of relationships should carry a legally enforceable duty of confidentiality.

Some courts, cautious in approach, have used language that would impose liability only in the context of relationships that carry with them traditional fiduciary obligations, such as those of trustees, guardians, and attorneys. Though the fiduciary approach avoids the overbreadth problem of a general duty approach, such a rule would be too conservative. While doctors would probably be covered, some courts have found, for example, that bankers are not fiduciaries, but are subject nonetheless to a duty of confidentiality. [FN168] Such a rule would probably not encompass the acts of a photographer \*1460 or school official, yet cases exist imposing liability on such actors. It may well be that cases involving relationships of these kinds will ultimately prove to be aberrant, but as a matter of policy they seem to be rightly decided. In principle, the same reasons why assurances of confidentiality by trustees and lawyers should be enforced apply to many relationships that do not rise to the same strict fiduciary level; the same reliance on the assurance of confidentiality is present in each case.

3. Limited Duty. The duty for breach of confidence need not be drawn so broadly as to encompass all confidences under a general duty, nor so narrowly as to impose a duty only in the context of traditional fiduciary relationships. A "limited duty" approach is possible. The following proposal is suggested as a workable limited-duty rule which would embody a proper balancing of the various interests at stake: an actionable duty of confidentiality should attach to nonpersonal relationships customarily understood to carry an obligation of confidence. This proposal reflects several important considerations, which will be examined separately.

First, the essential characteristic of a limited duty approach is the requirement of a pre-existing confidential relationship rather than merely a communication in confidence. This requirement alleviates most of the practical and constitutional difficulties of a general duty approach because the greater solemnity of the relationship signifies that revelations within it are not fair game for gossip, tends to set apart the information involved from a potential defendant's general knowledge, and provides fair warning of one's duty. The likelihood, therefore, of chilling communication of unprotected information is much smaller.

Second, the "nonpersonal" requirement removes personal relationships from the ambit of liability without going so far as to require the presence of a contract, or a statute on point. The law of confidence should not intrude into the realm of family and personal relationships, [FN169] even though damaging information is often revealed in the course of such relationships. While the overbreadth problem of the general duty approach could be avoided by requiring the presence of a bona fide confidential relationship, for example husband-wife or confessor-confidant, special problems would be raised. These include a potentially difficult evidentiary determination of whether a confidential relationship existed at all, whether the information was learned within it or independently, and whether or not there was consent. Hurt feelings might lead to false claims that are difficult to disprove. In contrast, nonpersonal relationships, such as client-accountant, ordinarily present easier factual determinations because safe presumptions can be made about the probable ground rules of the relationships, and because corroborating evidence

is more likely to exist. Additionally, there is the problem of government intrusion into personal and family affairs. Many ethical and moral duties are better left to \*1461 individual conscience. Privacy law with its "highly offensive" threshold provides ample protection for personal relations. [FN170]

Third, the term "customarily" is used to convey a standard stricter than a mere reasonable person test. [FN171] The requirement that a relationship be of a kind customarily thought to carry a duty of confidentiality provides fair warning to potential defendants of their duty, thus staying clear of the practical and first amendment difficulties of a general duty approach. [FN172] This standard would protect confidential information warranting protection without encouraging error on the side of caution. Another advantage of the "customarily" standard is that it avoids detailed factual inquiries in each case as to the presence or absence of a confidential relationship based on the conduct of the parties. The nonpersonal requirement, without more, avoids some of the evidentiary difficulties present in the personal or family context, but the absence of a requirement that the relationship be of a sort customarily understood to carry an obligation of confidence would often force a court to judge plaintiff's word against defendant's. The reason is that a noncustomary or equivocal situation permitting a plausible claim of confidentiality will tend not to have witnesses or corroborating evidence. If it did, there would be no secrecy to preserve. The court would have a hard time deciding what assurances were given or implied. Perhaps plaintiff relied on a gesture or a facial expression as an agreement by defendant to maintain secrecy. The "customarily" standard would avoid this uncertainty. Once the existence of a particular relationship--such as doctor-patient, teacher-student, or accountant-client--is proved, then the determination of whether a duty of confidence exists turns on whether there is a definite pattern of confidentiality with respect to relationships of that kind, not on the particular facts of the particular case. If no such pattern exists, the plaintiff will have to rely on a legal theory other than breach of confidence, or go remediless.

The proposed rule would clearly cover doctors and lawyers. It would also cover a school's disclosure of a student's record or evaluations. These are all situations in which we clearly expect confidentiality, and liability should attach. The proposed rule would not cover a school's disclosure of information not customarily considered confidential, such as attendance. The rule would thus avoid interference with the normal operations and practices of institutions such as schools. The rule would not cover the facts of a case like *Virgil v. Time, Inc.*, [FN173] which involved a daring body surfer who agreed to be interviewed by *Sports Illustrated* but later withdrew his consent to publication of the information he disclosed during the interview. Even if the reporter had agreed prior to the interview to give the surfer such an option, there would be no legal duty of confidentiality because interviews with the press are not \*1462 customarily meant to be kept secret. Though it may be wrong and injurious for a reporter to reveal the identity of a confidential source or to disclose more than agreed, tortious breach of confidence is not an appropriate remedy in such a case. The contrary rule would present a potential first amendment problem, and the need for a potentially "chilling" factual determination of exactly what assurances the journalist gave. On the other hand, relationships such as accountant-client, which have not yet appeared in the cases but which warrant legal enforcement, would be covered.

#### B. Limitations

While nonpersonal, customarily confidential relationships should normally carry a legal duty, there exist special situations in which a higher duty will justify breach of the confidence, or in which the first amendment will bar imposition of liability. Allowance can be made for such situations by a scheme of privileges. Many of these privileges will resemble the privileges of privacy law. For the same reason, however, that privacy doctrines are inadequate to protect confidences, the privileges developed for privacy will be unsuitable here. The different values and obligations involved in a confidential relationship necessarily yield a different balance of the countervailing interests that account for privileges.

Apart from the American breach-of-confidence cases in which privilege to disclose is at issue, cases which will be discussed below, the precedent of privilege in this area of the law is established in English law. The opinion of *Bankes, L.J.*, in *Tournier v. National Provincial and Union Bank*, [FN174] for example, set forth the understanding at that time of the breach-of-confidence privileges applicable to bankers: "(a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; and (d) where the disclosure is made by the express or implied consent of the customer." [FN175] These are illustrative of the sorts of privileges that might be anticipated in American law.

More recently, the Law Commission expressed its opinion that an equivalent of the doctrine of absolute privilege present in defamation law-- which excuses, for example, false statements made in judicial proceedings-- exists or should exist in breach-of-confidence law. [FN176] In contrast, despite an asserted lack of direct authority, the Law Commission does not believe the defamation doctrine of qualified privilege is useful or extant in breach-of-confidence law. [FN177] Under analogous circumstances it believes either the information disclosed is not subject to an obligation of confidence [FN178] or, of greater significance, \*1463 the protection contemplated by qualified privilege "is provided in breach of confidence by the more far-reaching requirement that information cannot be protected unless, on a balance of the interests involved, the public interest requires its protection." [FN179] Indeed, once a defendant by way of affirmative defense legitimately puts in issue the question of public interest, the plaintiff assumes the burden of persuasion in showing that the public interest favors confidentiality. [FN180]

One consequence of this public-interest element to the English breach-of-confidence action is that virtually all the American privileges discussed below are not present, as such, in English law. When disclosures are made in breach of confidence, for example, to expose iniquity [FN181] or information related to pressing public issues, [FN182] a plaintiff in England would lack an essential element of the cause of action. There are two explanations for this doctrine: first, the equitable origin and nature of the English action; [FN183] and second, the potentially sweeping liability the English general duty of confidentiality would threaten absent the public-interest doctrine. [FN184] Because the American duty of confidentiality is a limited one, [FN185] there is no similar need for a general exception to guard against overbreadth. Accordingly, in the limited circumstances where the duty arises, the privileges excusing violations of the duty can be narrowly circumscribed. In substance the law is the same-- equivalent facts generally yield the same result in both countries--but where an English court would engage in ad hoc balancing to excuse a defendant's conduct, an American court would find either no duty or an applicable pre-existing privilege. [FN186] Unless otherwise indicated, the following discussion is confined to American law.

1. Traditional Privileges. A number of situations may arise in which sound public policy determines that the interests served by enforcing a confidence are outweighed by other more compelling interests. The breach-of-\*1464 confidence tort will have privileges analogous to the traditional privacy privileges, but with some significant differences. [FN187] This Note will not explore these privileges in exhaustive detail, largely because there are so few cases that a definitive treatment is impossible. But it will sketch out some of the more important ones and suggest some critical variations and problems. As more cases are decided, the courts undoubtedly will refine and develop these privileges further.

a. Public Safety. One of the earliest cases to raise breach of confidence in its modern form excused defendant's conduct as privileged. In *Simonsen v. Swenson* [FN188] a transient consulted a local doctor, who advised him that he probably had a venereal disease but that further tests were required. The doctor warned that the disease might spread to others, and advised plaintiff to leave the local hotel. When plaintiff failed to do so, the doctor notified the hotel owner that he thought plaintiff had a contagious disease and that the owner should disinfect his sheets. Plaintiff was publicly ejected from the hotel. Another physician was subsequently unable to prove the disease, but confirmed that the first doctor had reasonable grounds for suspicion.

The privilege can be generalized from physicians to cover all confidential relationships in which one party learns of a danger to the public health or safety. The only question would concern the seriousness and probability of occurrence required before a privilege arises. As in *Simonsen*, courts are likely to require simply that defendant exercise reasonable judgment. [FN189]

b. Fraud and Crime. The courts have had little difficulty finding a privilege where a confidence is broken in order to disclose fraud [FN190] or crime. [FN191] A more difficult problem arises when one party to a confidence merely suspects crime by the other. In *Suburban Trust Co. v. Waller*, [FN192] plaintiff, after cashing his federal tax refund check with the Treasury Department, deposited at his bank the sequential \$50 and \$100 bills he received. The bank notified local police and provided a photograph of the plaintiff, whom a witness to an earlier robbery tentatively identified. The court held the bank liable in damages for the subsequent false arrest on a theory of breach of \*1465 confidence. It rejected the English rule giving a bank discretion in certain circumstances to break a confidence, [FN193] indicating that a bank could do so only on consent or legal compulsion. [FN194] The court stated that the English rule

would permit a bank to decide what is or is not in the public interest to disclose, and what is or is not in the best

interest of the bank to disclose. That vast area of discretion . . . transmogrifies confidentiality to the point that it bears little, if any, resemblance to its original meaning. [FN195]

The court was probably correct in finding the American cases granting exceptions to the obligation of confidence to be more restrictive than the English cases, [FN196] but its language is too sweeping. It would prevent a bank from reporting actual notice of fraud by a depositor. [FN197] The decision is better explained on the ground that the bank did not have a reasonable basis for its suspicion. Indeed, the court's decision seems to have been influenced by the fact that plaintiff first tried to cash his tax refund check with the bank, which refused. [FN198]

In general, persons should be able to act on reasonable suspicions, keeping in mind the special caution that would be exercised by a reasonable person subject to the obligation of confidentiality. Moreover, the standard may vary depending on the kind of relationship, for no other reason than that a reasonable psychiatrist, for example, might be expected to be much more cautious before breaking confidence than a reasonable accountant.

c. Self-interest. The cases suggest that the self-interest privilege is fairly limited in scope. A party may be permitted to breach a confidence to the extent necessary to defend himself against charges of incompetence, protect himself against fraud, or perhaps to collect fees, but strict limits have been imposed by some courts.

Hammonds v. Aetna Casualty & Surety Co., [FN199] for example, held that a doctor fearing a malpractice claim is not privileged to discuss the facts of a patient's case with his lawyer or insurance company until after the patient has expressly indicated an intention to sue. [FN200] The reason for this strictness is undoubtedly a perception that a person who customarily holds out an assurance of confidentiality partially waives the right to promote his or her own \*1466 interests over the interests of the person who justifiably relies on that assurance. Without such a waiver, confidential relationships would offer little security. They would succumb to a myriad of individual interests of the assuring party.

d. Interest of Third Person. The interest-of-third-person privilege has many pitfalls. In Peterson v. Idaho First National Bank [FN201] the court held that a bank would be liable for volunteering information to a depositor's employer which might well bring that employer bad publicity. In Horne v. Patton [FN202] plaintiff's doctor advised plaintiff's employer that plaintiff suffered from a longstanding nervous condition. The case was presented on demurrer. The dissenting judge felt that there could be no cause of action because there was no averment of general circulation of the information, of frivolous disclosure, or of gossip. [FN203] The majority, however, believed that a compelling interest of the employer would have to be proved at trial to justify a privilege:

Certainly, there are many ailments about which a patient might consult his private physician which have no bearing or effect on one's employment. If the defendant doctor in the instant case had a legitimate reason for making this disclosure under the particular facts of this case, then this is a matter of defense. [FN204]

The court in Berry v. Moench, [FN205] where a prospective spouse was involved, seemed to be more receptive to the possibility of privilege. Defendant had advised the parents of plaintiff's fiancée, by way of their family doctor, about his past treatment of plaintiff for severe psychiatric problems. The court agreed that the interest of the fiancée made out a qualified privilege, but remanded to determine whether defendant had abused the privilege by communicating with persons other than the daughter. In providing guidance on these issues, the court indicated that the privilege exists only "if the recipient has the type of interest in the matter, and the publisher stands in such a relation to him, that it would reasonably be considered the duty of the publisher to give the information." [FN206] Proposing that the privilege to disclose is coextensive with the duty to disclose, the court indicated a narrow interest-of-third-person privilege when a confidential relationship exists.

2. The First Amendment and the Public Right to Know. In addition to the situations in which sound public policy calls for a privilege, there may be other situations in which first amendment considerations prohibit imposition of civil liability for breaches of confidences. [FN207] Thus first amendment values not only play a role in determining which relationships should carry an actionable duty of confidentiality in the first place, but also influence the \*1467 determination of which communications from persons otherwise subject to an obligation of confidence will be privileged because of the high public interest in knowing the information contained in the communication. For example, the public has a compelling interest in knowing about the fitness of candidates for high public office. One might imagine circumstances in which a presidential candidate's doctor would be privileged to make certain

disclosures over the candidate's objections. In addition, the public has a right to know about the activities of the government. It would be disturbing if President Nixon could have invoked obligations of confidence to keep the lid on Watergate [FN208] or to limit discussion of related activities that were technically legal but reflected poorly on his administration. In the British case of Attorney-General v. Jonathan Cape Ltd. [FN209] a British cabinet member's memoirs were about to be published. An injunction was sought on the ground of breach of confidence in disclosing the details of various Cabinet discussions. The court, balancing the competing public interests as required by English breach-of-confidence law, denied the injunction because of the public's strong interest in knowing about government deliberations, state secrets excepted, and because of the passage of time since the discussions in question. In this country first amendment considerations would surely dictate the same result.

A closer case is suggested by the facts of Pearson v. Dodd, [FN210] a case in which Senator Dodd sought damages for material reported by columnists Jack Anderson and Drew Pearson linking the Senator to a right-wing lobbying group. [FN211] Employees of the Senator had surreptitiously copied the files in his office. The court found a breach of confidence, intrusion on privacy, and trespass. The suit was dismissed, however, because the court held that, although the defendant-journalists knew of the wrongful conduct in obtaining the information, they were not chargeable with that conduct. The employees were not being sued, and the court assumed without deciding that they could be held liable in damages for their wrongful conduct. [FN212] That assumption, if tested in a suit seeking any remedy more serious than discharge from employment, would be a close question.

Clearer limits on the public right to know in breach-of-confidence cases appear in areas outside the governmental and political spheres. In Doe v. Roe, [FN213] a case involving the publication by a psychiatrist of an identifiable case history, the court awarded not only damages, but also preliminary and permanent \*1468 injunctions. The first amendment considerations normally present in prior-restraint cases [FN214] were held to be outweighed by the patient's interest in confidentiality.

Essentially, first amendment considerations here create a public-right-to-know privilege. The privilege reflects society's interest in public knowledge of the lives and careers of important people and the workings of private corporations, organizations, and institutions as well as of political figures and governmental affairs. We do not want to ensnare potential autobiographers and commentators in a web of confidential obligations. The loss to society would be too great. On the other hand, the privilege is much more restrictive than the broad public-interest exemption to common law invasion of privacy. As discussed earlier, one is not released from an obligation of confidence whenever the information learned would be of legitimate public interest. Much more is required.

The contours of the right-to-know privilege are complex and by no means fully articulated in the cases. Its scope varies depending upon the kind of relationship involved, the extent of likely injury, the importance of the information to the public, and the degree of passage of time. For example, a much greater showing would probably be required of a psychiatrist than of a former confidential secretary before a breach of confidence would be excused as privileged on this basis.

## CONCLUSION

Breach of confidence has begun to emerge in the case law as a basis of tortious liability. Faced with compelling cases of injurious disclosures in breach of confidence, courts that have in the past relied on such traditional theories of liability as invasion of privacy, breach of contract, and implied statutory cause of action to provide a remedy, have recently begun to realize that these theories cannot protect the distinct interests present in a confidential relationship. As a result courts have searched for other bases of liability, and their answer appears to be a separate breach-of-confidence tort. The tort, though still in rudimentary form, has turned up in enough cases to justify an examination of its present contours and a projection of its future development. The standard for liability proposed in this Note--nonpersonal relationships customarily understood to carry an obligation of confidence-- could serve as a starting point for further development of breach of confidence as a tort.

[FN1]. See, e.g., Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961) (bank); Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup.Ct. 1977) (psychiatrist); Blair v. Union Free School Dist. No. 6, Hauppauge, 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist.Ct. 1971) (school).

[FN2]. This Note is concerned primarily with nonpersonal confidential relationships, rather than relationships of a personal nature with family or friends. The breach of confidence tort proposed by this Note would be an expansion of current law to cover many nonpersonal relationships. Attaching legal consequences to the breach of essentially personal confidences would be not only an even more radical extension, but would also be impractical and too intrusive into personal privacy. See *infra* notes 169-70 and accompanying text.

[FN3].

Since the layman is unfamiliar with the road to recovery, he cannot sift the circumstances of his life and habits to determine what is information pertinent to his health. As a consequence, he must disclose all information in his consultations with his doctor—even that which is embarrassing, disgraceful or incriminating. To promote full disclosure, the medical profession extends the promise of secrecy.

Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793, 801 (N.D. Ohio 1965).

Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. "Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result."

City of San Francisco v. Superior Court, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951) (en banc) (quoting Morgan, Foreword, A.L.I. Code of Evidence 25-26 (1942)); see also Holm v. Superior Court, 42 Cal. 2d 500, 506-07, 267 P.2d 1025, 1028 (1954) (en banc).

[FN4].

For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual biography.

Burrows v. Superior Court, 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal.Rptr. 166, 172 (1974) (en banc). This case involved the different question of whether a person's expectation of privacy in his personal bank account is sufficient to prohibit the police from obtaining information about the bank account without legal process. The case does, however, recognize the need for confidentiality in many of the relationships that society forces upon its members.

[FN5].

All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal.

Oath of Hippocrates, Dorland's Illustrated Medical Dictionary 609 (26th ed. 1981). See also A.M.A. Principles of Medical Ethics § 9 (1957), reprinted in 4 Encyclopedia of Bioethics 1750-51 (W. Reich ed. 1978); Model Code of Professional Responsibility Canon 4, EC 4-1, 4-4, 4-6, DR4-401 (1980).

[FN6]. See, e.g., N.Y. Educ. Law § 6509(9) (McKinney Supp.1981- 1982) (physician's professional misconduct includes "[c]ommitting unprofessional conduct, as defined" by regulation); Rules of the Board of Regents, N.Y. Admin. Code tit. VIII, 29.1(b)(8) (1979) (defines unprofessional conduct to include "revealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client"). See Alaska Stat. § 06.05.175(a) (1981) ("bank records pertaining to depositors and customers").

[FN7]. A "confidential relationship" should be distinguished from a mere "confidence." The essence of a confidential relationship is the relationship, which is founded on candor and trust. An obligation of secrecy is one of its attributes. A confidence, on the other hand, may arise between complete strangers. It depends entirely on the circumstances under which a particular piece of information is disclosed, and the existence and enforceability of an obligation of secrecy with respect to that information rests in contract or the law of equity. For an analogous discussion of the distinction between confidence and confidential relationship in the context of the law of ideas, see 3 M. Nimmer, On Copyright § 16.03 (1982). For the purposes of this Note, the term "breach of confidence" refers to breach of a confidential relationship.

[FN8]. 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup.Ct. 1977).



[FN9]. In searching for a theory of liability, the Doe court discussed implied statutory cause of action, implied contract, and tort, but ultimately appears to have relied on tort. See the discussion of the case *infra* notes 113-14 and accompanying text. The court also rejected a claim based on New York's appropriation of name or likeness statute. *Id.* at 211, 400 N.Y.S.2d at 675. In addition to finding the wife liable, the court held the husband liable as "a willing, indeed avid, co-violator of the patient's rights." *Id.* at 216, 400 N.Y.S.2d at 678. It acknowledged, however, that he was not in a contractual or other relationship with the plaintiff. This, along with the fact that punitive damages were considered, though rejected for lack of malice or evil intent, suggest that tort was the form of action. *Id.* at 215-17, 400 N.Y.S.2d at 678-79. Punitive damages are not available for breach of contract unless the conduct also makes out a cause of action in tort. See *infra* notes 95-97 and accompanying text. The statutory sources cited are all directed at the physician-wife and could not be applied to the husband. See *id.* at 208-09; 400 N.Y.S.2d at 673-74. He could only be held liable under a theory that he was a joint tortfeasor because he encouraged and assisted his wife's breach of confidence.

In a jurisdiction recognizing the common law right of privacy, recovery on facts similar to Doe, involving highly offensive disclosures and widespread publicity, might be based on the publicity branch of the invasion of privacy tort. See Restatement (Second) of Torts § 652D (1977). While the invasion of privacy tort may be available in some fact situations because of overlapping coverage by privacy and breach of confidence, recovery in breach of confidence would be more theoretically sound. See *infra* notes 50-54 and accompanying text.

[FN10]. 8 Utah 2d 191, 331 P.2d 814 (1958).

[FN11]. *Id.* at 195, 331 P.2d at 816. The daughter married the plaintiff anyway. The court found that the circumstances made out a conditional protection-of-interest-of-third-person privilege, but remanded the case to determine whether the defendant abused the privilege by communicating to persons other than the daughter. For discussion of this privilege, see *infra* notes 201-06 and accompanying text.

For other cases in which the primary injury results from disclosure to a small number of people, see *Horne v. Patton*, 291 Ala. 701, 287 So.2d 824 (1973) (doctor advises employer of employee's longstanding nervous disorder); *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982) (psychiatrist's disclosures to patient's wife); *Clark v. Geraci*, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup.Ct. 1960) (court would recognize claim, but physician privileged by duty to correct earlier misleading reports provided to employer at plaintiff's request); *Schaffer v. Spicer*, 88 S.D. 36, 215 N.W.2d 134 (1974) (mother's psychiatrist gives father an affidavit in child custody case without court order to do so).

A minority of cases have denied recovery for similar disclosures. These cases, however, were decided before the recent emergence of breach of confidence as a basis for liability, and in any event can be explained on grounds consistent with the existence of liability for breach of confidence. See *Collins v. Howard*, 156 F.Supp. 322 (S.D.Ga. 1957) (hospital releases to employer the results of railroad engineer's blood test for alcohol; court denies existence of breach of confidence tort, but it also finds that no confidential relationship existed; and the public interest in safety would in any case probably make out a privilege); *Hammer v. Polsky*, 36 Misc. 2d 482, 233 N.Y.S.2d 110 (Sup.Ct. 1962) (mother's physician testifies in child custody case about his observations of father; the court, however, found no confidential relationship between physician and father); *Quarles v. Sutherland*, 215 Tenn. 651, 389 S.W.2d 249 (1965) (store's doctor sends store's attorney report of his diagnosis and treatment of customer injured in store; court denied common law duty of confidentiality, but also noted absence of relationship because treatment was free and lack of damage because the contents of the letter would be discoverable if plaintiff sued the store; better explanation would be waiver).

[FN12]. In *Hammonds v. Aetna Casualty & Surety Co.*, 243 F.Supp. 793 (N.D. Ohio 1965), a hospital's insurance company induced a physician treating a plaintiff suing the hospital to discuss plaintiff's condition by falsely advising him that plaintiff was contemplating a malpractice suit against him. The court held that a physician has both a duty of confidence and a duty of loyalty to assist his patient in litigation. According to the court, a physician is not free to discontinue treatment and talk to a lawyer about the facts of the patient's treatment until the patient has expressed an intention to sue the doctor for malpractice. It was necessary to establish the doctor's wrongful conduct before the insurance company could be held liable for inducing it. *Id.* at 802-03. This court and some others have been very strict in imposing liability for similar informal interviews or communications even though the information disclosed would later be subject to formal discovery or elicitation at trial. E.g., *Anker v. Brodnitz*, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (Sup.Ct. 1979) (physician being sued for malpractice gives private interview to his insurance company outside of formal discovery procedures; court in dictum notes availability of damages action). The reason

undoubtedly is the availability of protective orders in a proper case where formal discovery procedures are followed.

For other cases in which improper disclosures were made to insurance companies, see Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962) (acknowledging duty of confidentiality, but finding privilege where plaintiff filed claim with insurance company); Felis v. Greenberg, 51 Misc. 2d 441, 273 N.Y.S.2d 288 (Sup.Ct. 1966) (physician submits false information to patient's insurance company causing loss of benefits for failure to disclose; alternative claim available for breach of confidence); Alexander v. Knight, 25 Pa.D. & C.2d 649 (1961), aff'd, 197 Pa. Super. 79, 177 A.2d 142 (1962) (specialist who examined auto accident victim's whiplash aggravated by mental problems sent report to defendant's counsel for a fee; dictum because new trial granted on other grounds).

For an argument that breach of physician-patient confidentiality should be actionable in tort, see Note, Medical Practice and the Right to Privacy, 43 Minn.L.Rev. 943 (1959). See generally Annot., 20 A.L.R.3d 1109 (1968) (collecting cases of physician breach of confidence).

[FN13]. 83 Idaho 578, 367 P.2d 284 (1961).

[FN14]. [1924] 1 K.B. 461 (C.A.). This case, in essence, found confidentiality to be an implied term of the deposit contract.

[FN15]. 83 Idaho at 582, 367 P.2d at 286.

[FN16]. The opinion speaks primarily in terms of implied contract, see Tournier, but much of the opinion deals with sources of public policy imposing a duty of confidence, both to imply a term of contract from the understanding of the parties--an implied-in-fact contract--as well as to find a duty resting directly on public policy--breach of confidence tort. Id. at 582-88, 367 P.2d at 286-90. For a discussion of implied contract as a basis of liability, see infra notes 80-99 and accompanying text.

[FN17]. Plaintiff was the local manager of a company that was also a depositor at the defendant bank. The communication was made to an officer of the parent company. It appears from the reported opinion that plaintiff no longer worked for the company at the time of the suit, but it does not indicate whether the bank's disclosure caused him to lose his job.

See also Suburban Trust Co. v. Waller, 44 Md. App. 335, 408 A.2d 758 (1979) (bank receiving sequentially numbered \$50 and \$100 bills from depositor notified police; bank held liable in breach of confidence for damages arising from subsequent false arrest).

[FN18]. 224 So.2d 759 (Fla.Dist.Ct.App.1969). The information revealed by the bank caused three lawsuits to be brought against the depositors. Damages claims covering attorney's fees and other expenses in defending these suits were held legally sufficient. Id. at 762-63. Although this Note is primarily concerned with disclosures of personal information in breach of confidence, this case is relevant to the topic for two reasons: first, the plaintiff was a corporate depositor and thus would not be able to recover for invasion of privacy under any circumstances, Restatement (Second) of Torts § 6521 and comment c (1977); second, the court awarded tort rather than contract damages because contract damages would not have satisfied the rule of Hadley v. Baxendale, 156 Eng.Rep. 145 (Ex.D. 1854), that damages must be in the reasonable contemplation of the parties at the time of contracting, see infra notes 87-89 and accompanying text. The majority opinion purported to base recovery on breach of an implied term of the deposit contract, citing I.F.G. Baxter, The Law of Banking 21-22 (2d ed. 1968), Peterson, and Tournier, 224 So. 2d at 760-61. The concurring opinion, persuasively arguing for recovery in tort, pointed out that the damages awarded could not be supported in contract because they exceeded an amount that fairminded people would have agreed to had all circumstances been known. The concurrence also argued that there was no allegation of an express or implied contractual agreement of secrecy, and the facts necessary to support such an implication, such as a usage of the banking trade, were not proved at trial. Id. at 763 (Pearson, J., concurring).

For another case in which financial loss was at issue, see Peoples Bank v. Figueroa, 559 F.2d 914 (3d Cir.1977) (not only does bank not have duty to warn endorsers on bank loan of borrower's shaky finances, but such disclosure might render bank liable for disclosure without consent). Cf. First Nat'l Bank v. Brown, 181 N.W.2d 178 (Iowa 1970) (recognizes duty of confidentiality owed to owner of business encumbered by bank's liens, but does not excuse bank's failure to warn a different borrower who proposed to purchase the property underlying the liens of the likelihood of foreclosure). For additional bank cases concerning the duty of nondisclosure owed customers and depositors, see Annot., 92 A.L.R.2d 900 (1963).

A related but arguably distinct line of bank cases involves appropriation of a business opportunity disclosed to a bank by a customer applying for a loan. See, e.g., Pigg v. Robertson, 549 S.W.2d 597 (Mo.Ct.App. 1977) (bargain land purchase). Appropriation-of-opportunity cases like Pigg fall somewhere in between an action for tortious breach of confidence and the traditional action in trust law seeking the imposition of a constructive trust for abuse of a confidential relationship; see, e.g., Hewett v. Bullard, 258 N.C. 347, 128 S.E.2d 411 (1962) (presumption of fraud when one party to a confidential relationship gratuitously transfers an interest in land to the other party). For cases similar to Pigg in a nonbank context, where defendant uses information learned in a confidential relationship to his or her own economic advantage, see cases collected in Bogert, *Trusts & Trustees* § 482 n.54 (2d ed.rev. 1977).

[FN19]. Compare the following statement in Tournier, [1924] 1 K.B. at 479 (Scrutton, L.J., dissenting):

It is curious that there is so little authority as to the duty to keep customers' or clients' affairs secret, either by banks, counsel, solicitors or doctors. The absence of authority appears to be greatly to the credit of English professional men, who have given so little excuse for its discussion.

[FN20]. This explanation seems implausible. Other relationships show up frequently in testimonial privilege litigation, where one party to a confidential relationship attempts to suppress unfavorable evidence that the other party has already revealed or is willing to disclose in testimony. See, e.g., 8 *Wigmore on Evidence* § § 2286, 2325, 2338 (McNaughton rev. 1961).

Of course, the immediate concern in testimonial privilege cases is different. The party seeking suppression is concerned with the unfavorable impact the disclosure will have on his or her case, and may not be concerned about the extrajudicial effect of the disclosure. See, e.g., Panko v. Consolidated Mut. Ins. Co., 423 F.2d 41, 44 n.6 (3d Cir. 1970) (court denied breach of confidence action where only damages alleged were loss of case against insurance company because of information plaintiff's doctor had supplied; the court expressed no opinion whether an action based on pretrial disclosures would lie for damages not alleged); Schaffer v. Spicer, 88 S.D. 36, 215 N.W.2d 134 (1974) (involving a psychiatrist's breach of confidence in giving an affidavit to the husband's attorney in a child custody case). Cf. Smith v. Driscoll, 94 Wash. 441, 162 P. 572 (1917) (a physician testified over plaintiff's objections before a different court in an earlier case; in plaintiff's later suit against the physician seeking damages for breach of confidence the testimony was held privileged because of the absence of any allegation that the earlier testimony was inadmissible or irrelevant and immaterial; the court further noted that a ruling of admissibility in the prior case, even if erroneous, would have immunized the plaintiff's testimony).

[FN21]. Such suits might be based on theories of breach of contract, invasion of privacy, or libel. See, e.g., Beaumont v. Brown, 401 Mich. 80, 257 N.W.2d 522 (1977) (letter from plaintiff's employer to Army Reserve to verify military leave contains unnecessary disclosures about plaintiff; invasion of privacy claimed); Bowling v. Pow, 293 Ala. 178, 187, 301 So. 2d 55, 63-64 (1974) (for purposes of motion to dismiss, "the case can be looked upon . . . as one in which defendant communicated to others the contents of his letter, without any legal, moral, or social obligation to do so, without justification and in breach of confidence reposed in him by plaintiff;" libel rather than breach of confidence alleged; unclear from opinion whether the relationship between the two professors could be considered confidential).

[FN22]. 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist.Ct. 1971).

[FN23]. Id. at 253, 324 N.Y.S.2d at 228. The case was presented on a motion to dismiss and remanded because the nature of the information revealed was not in the pleadings, although the incident allegedly forced plaintiff to sell his house and move. The court considered other theories of liability, but concluded: (1) there is no common law remedy for invasion of privacy in New York; (2) the conduct alleged was not within N.Y. Civ. Rights Law § § 50-51 (McKinney 1976) barring commercial exploitation of a person's name or likeness without written consent; and (3) recovery on the basis of intentional infliction of mental distress cannot be derivative to the parents. 67 Misc. 2d at 248-49, 324 N.Y.S.2d at 223-24. The court explored whether a cause of action for "extreme and outrageous" conduct can be made out (language reminiscent of intentional infliction of mental distress, already rejected by the court), and decided it could not, absent a special relationship. Id. at 253, 324 N.Y.S.2d at 228. Otherwise, the court indicated, liability would be too widespread, and the human tendency to gossip ignored. The court concluded, however, that a special relationship may, depending on the information revealed, justify a finding of "extreme and outrageous conduct." Id. at 253-54, 324 N.Y.S.2d at 228. For further discussion of the basis of liability in this case, see *infra* note 120 and accompanying text.

[FN24]. 183 Misc. 773, 49 N.Y.S.2d 915 (Sup.Ct. 1944), *aff'd mem.*, 269 A.D. 970, 58 N.Y.S.2d 359 (1945).

[FN25]. *Id.* at 775, 49 N.Y.S.2d at 917. See *infra* notes 100-10 and accompanying text for discussion of the use of implied statutory causes of action to remedy breaches of confidence. The court concluded that the disclosure did not violate the physician-patient relationship because persons committed to a mental institution do not have the kind of professional relationship with the institution contemplated by the physician-patient privilege statute. *Id.* at 776, 49 N.Y.S.2d at 918. This reasoning is questionable, but, more importantly, the applicability of a privilege statute should not be conclusive with respect to liability for a disclosure outside the courtroom. See *infra* notes 106-10 and accompanying text.

Compare *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930), in which a hospital permitted a newspaper to photograph a baby born with a rare deformity. The court denied a motion to dismiss on the ground that a cause of action for invasion of the parents' privacy was made out, the baby having died. The court did not discuss the plaintiff's allegations of "breach of confidence and trust reposed in the *Savannah Hospital*." *Id.* at 258, 155 S.E. at 195.

[FN26]. *Goldberg v. American Home Assurance Co.*, 80 A.D.2d 409, 412-13, 439 N.Y.S.2d 2, 5 (1981) (periodic reporting of progress of case to codefendant insurance company which paid for lawyer, but which had adverse interest in related matter; held, that the communication in question did not breach the attorney-client relationship); *Zimmerman v. Kallimopoulou*, 56 Misc. 2d 828, 831, 290 N.Y.S.2d 270, 274 (Civ.Ct. 1967) (in lawyer's suit for fees, counterclaim for breach of attorney-client relationship rejected as conclusory where no factual support is shown); *Lott v. Ayres*, 611 S.W.2d 473, 474-75 (Tex.Civ.App. 1980) (lawyer who had represented wife alone in divorce suit against plaintiff husband after representing both in previous damage suit; held, no specific confidential information alleged and breach cannot be presumed where there is not a substantial relationship between the two suits). An action for damages against an attorney for breach of the lawyer-client relationship has been recognized in dictum. *Richardson v. Hamilton Int'l Corp.*, 333 F.Supp. 1049, 1055 (E.D.Pa. 1971) ("If [attorney-litigant] should, whether intentionally or otherwise, during the course of that litigation reveal an attorney-client confidence reposed in him, such might be cause for separate disciplinary action or possible action for damages by the former client . . . ."); *Beal v. Mars Larsen Ranch Corp.*, 99 Idaho 662, 667-68, 586 P.2d 1378, 1383-84 (1978) ("The relationship of client and attorney is one of trust [and] . . . utmost good faith . . . . [F]or a breach or violation of [the concomitant professional duties], the client may hold the attorney liable or accountable;" held, no breach where attorney representing both buyer and seller merely drafted contract containing terms already agreed upon). The issue of breach of confidential relationship is more likely to come up in disciplinary proceedings, e.g., *State ex rel. Okla. Bar Ass'n v. Harlton*, 41 Okla. B.A.J. 1103 (1970) (attorney-landlord uses information given to him within attorney-client relationship to threaten and sue tenant for property damage to tenant's apartment; attorney had represented tenant in a related suit against a third person for personal injury and in an attempt to collect from the third party for that property damage), and in motions to disqualify opposing counsel, e.g., *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 223-29 (7th Cir.1978).

[FN27]. For an unsuccessful attempt to claim tortious breach of confidence in a business relationship, see *Wilson-Rich v. Don Aux Assoc.*, 524 F.Supp. 1226, 1233-34 (S.D.N.Y. 1981). The president and 50% owner of a close corporation sued a management consulting firm for sending copies of a diagnostic study critical of his management capabilities to other shareholders. The president claimed a confidential relationship with the consulting firm, which he had hired. The court, having already rejected breach of contract and intentional interference with contract theories, rejected the claim on the ground that there was no confidential relationship; the president was merely acting for the corporation in hiring the firm and the other shareholders were thus entitled to know the results of the study. In an intriguing footnote, however, the court indicated in dictum that a "tenable argument" might be made that a confidential relationship existed between the corporation and the consulting firm with respect to outsiders. *Id.* at 1234 n.16.

The British have gone so far as to find an actionable duty of confidentiality between husband and wife, *Argyll v. Argyll*, [1967] 1 Ch. 302 (husband, after divorce, feeds information to press about wife's past), and among cabinet ministers, *Attorney-General v. Jonathan Cape Ltd.*, [1976] 1 Q.B. 752 (British cabinet member's memoirs include details of confidential cabinet discussions; injunction denied because of passage of time and absence of a showing that the public interest required that publication be restrained).

[FN28]. See, e.g., City of San Francisco v. Superior Court, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951) ("[U]nless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavorable facts." (quoting Morgan, Foreword, A.L.I. Code of Evidence 25-26 (1942))); Holm v. Superior Court, 42 Cal. 2d 500, 510, 267 P.2d 1025, 1031 (1954) (Traynor, J., concurring and dissenting) ("The primary object of the attorney-client privilege is to encourage the client to make a full disclosure of all the facts to his attorney."). See supra note 3.

[FN29]. A seemingly innocuous or limited disclosure may nevertheless injure the wronged party directly because of the special significance that the party attaches to the information or because of the particular audience. Furthermore, even if the disclosure is innocuous, the wronged party may well fear future disclosures of more damaging information.

[FN30]. Compare Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup.Ct. 1977), discussed supra notes 8 & 9 and accompanying text, with Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958), discussed supra notes 10 & 11 and accompanying text.

[FN31].

For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule. 8 Wigmore on Evidence § 2192, at 70 (McNaughton rev. 1961) (footnote omitted).

All four of the following elements must be present to create a testimonial privilege: (1) the communication must "originate in a confidence"; (2) confidentiality "must be essential to the full and satisfactory maintenance of the relation"; (3) the relation "must be one which in the opinion of the community ought to be sedulously fostered"; and (4) the injury from disclosure "must be greater than the benefit thereby gained for the correct disposal of litigation." Id. § 2285 (emphasis in original; footnote omitted).

[FN32]. The denial of a testimonial privilege does not necessarily mean society has no interest in fostering the relationship, but may mean only that this interest is outweighed by the demands of judicial administration.

[FN33]. See, e.g., In re Pittsburgh Action Against Rape, 428 A.2d 126 (Pa. 1981) (denying absolute privilege for statements made by rape victim of counseling center).

[FN34]. See, e.g., Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3402, 3403 (Supp. IV 1980).

[FN35]. See, e.g., Calif. Admin. Code tit. 16, § 54 (1981); Ind. Admin. R. 25-2-1-13-1(d) (Burns 1976); AICPA Code of Professional Ethics § 301 (1977). See also Ernst & Ernst v. Carlson, 247 C.A.2d 125, 55 Cal.Rptr. 626 (Dist.Ct.App. 1966).

[FN36]. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(b)(4), (6) (1976) (exempting trade secrets and personal information from FOIA's access provision). But cf. Morris v. Danna, 411 F.Supp. 1300 (D.Minn. 1976) ("go-go" dancer caught by welfare department's antifraud unit sues county welfare officials for releasing confidential information from his file to newspaper; court refuses to read privacy tort into constitution and denies a federal statutory cause of action; no state law claim raised, presumably because federal court lacked subject matter jurisdiction).

[FN37]. 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup.Ct. 1977).

[FN38]. 83 Idaho 578, 367 P.2d 284 (1961).

[FN39]. 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist.Ct. 1971).

[FN40]. Id. at 253, 324 N.Y.S.2d at 228.

[FN41]. Restatement (Second) of Contracts § 21c & illustration 5 (1981).

This deference is probably appropriate in the area of personal and family relationships. While some of the individual interests may be the same in a genuine personal confidential relationship—for example, between a nephew and an aunt—the societal interests are equivocal. First, there is a competing individual interest in a zone of privacy within which an individual should be free to choose how to conduct his or her personal relations without government interference. Secondly, even if societal interferences were permitted, no general statement can be made about whether enforcement of the confidence would be beneficial to society. There are times when a personal confidence is best broken; for example, to mediate a misunderstanding between feuding family members or friends. This is not an area where a court can make reasoned decisions. Intuition plays a big role. Unfair results by second-guessing would be common. The likely outcome would be to discourage personal confidences altogether. See *infra* notes 169-70 and accompanying text.

[FN42]. See *infra* text accompanying notes 115-18.

[FN43]. E.g., Clayman v. Bernstein, 38 Pa.D. & C. 543 (1940). Most of the cases cited discuss more than one theory, and either rely on multiple bases of liability, e.g., Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973), or fail to indicate which of the bases discussed is relied upon, e.g., Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793 (N.D. Ohio 1965).

[FN44]. E.g., Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793, 801 (N.D. Ohio 1965) ("As an implied condition of . . . contract, this Court is of the opinion that the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission."); Milohnich v. First Nat'l Bank, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969) (implied term of bank deposit contract); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912) (breach of implied term in photographer-customer contract).

[FN45]. Courts have relied on three different kinds of statutes: testimonial privilege statutes, e.g., Schaffer v. Spicer, 88 S.D. 36, 38, 215 N.W.2d 134, 136 (1974) (mother's psychiatrist gave father's attorney in child custody case affidavit as to her mental condition); Berry v. Moench, 8 Utah 2d 191, 196, 331 P.2d 814, 817 (1958) (cause of action is flip side of testimonial privilege); licensing statutes, e.g., Simonsen v. Swenson, 104 Neb. 224, 227, 177 N.W. 831, 832 (1920) (implied cause of action in licensing statute, which provides for revocation of license for unprofessional conduct defined to include betrayal of secret); and anti-disclosure statutes, e.g., Munzer v. Blaisdell, 183 Misc. 773, 775-76, 49 N.Y.S.2d 915, 917-18 (Sup. Ct. 1944), *aff'd mem.*, 269 A.D. 970, 58 N.Y.S.2d 359 (1945) (statute barring disclosure of the records of patients in mental institutions).

[FN46]. E.g., Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 587-88, 367 P.2d 284, 289-90 (1961) (reviews sources of public policy to find duty, arguably in tort; but principal reliance on implied contract); MacDonald v. Clinger, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982) (tort duty arising out of but independent from the physician-patient contract, breach of which is tortious); Doe v. Roe, 93 Misc. 2d 201, 208-13, 400 N.Y.S.2d 668, 673-77 (Sup. Ct. 1977) (strong public policy as reflected in various statutory sources, Hippocratic Oath, and ethical canons; no need to label the wrong).

Some early cases also speak of breach of fiduciary duty. The word "fiduciary" does not appear to be used in a special or technical sense, but merely as another way of expressing the same idea as breach of confidence. E.g., Alexander v. Knight, 25 Pa.D. & C.2d 649 (1961), *aff'd* 197 Pa. Super. 79, 177 A.2d 142, 146 (1962) ("[M]embers of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients."). Courts have also used the phrase "breach of confidence or trust," apparently intending to express a single concept. E.g., Clayman v. Bernstein, 38 Pa.D. & C. 543, 549 (1940); Bazemore v. Savannah Hospital, 171 Ga. 257, 258, 155 S.E. 194, 195 (1930) (court's statement of plaintiff's complaint; unclear whether court is quoting or paraphrasing).

[FN47]. E.g., Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930) (hospital permits publication of picture of deformed baby by press). Cf. Berry v. Moench, 8 Utah 2d 191, 196, 331 P.2d 814, 817 (1958) (psychiatrist communicates information to parents of patient's prospective spouse; defamation relied on to extent information was false).

[FN48]. E.g., Milohnich v. First Nat'l Bank, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969) (majority opinion); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912); Munzer v. Blaisdell, 183 Misc. 773, 49 N.Y.S.2d 915 (Sup. Ct. 1944),

aff'd mem., 269 A.D. 970, 58 N.Y.S.2d 359 (1945). The search for sources of public policy is nicely illustrated in Doe v. Roe, 93 Misc. 2d 201, 208, 212-13, 400 N.Y.S.2d 668, 673, 676 (Sup.Ct. 1977) (focuses on privilege statute, licensing and disciplinary statute, and other statutes and regulations prohibiting disclosures by physicians).

[FN49]. 291 Ala. 701, 287 So. 2d 824 (1973). Compare Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793 (N.D. Ohio 1965), which lacks the clarity of Horne, but which runs through every conceivable basis of liability without being clear about which one(s) it finally relies on.

[FN50]. The common law right of privacy was first proposed in 1890, Warren & Brandeis, The Right to Privacy, 4 Harv.L.Rev. 193 (1890), and first recognized by a court in 1905, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905). See infra note 127 and accompanying text. Almost all states recognize the common law right of privacy today. See W. Prosser, Handbook of the Law of Torts 804 (4th ed. 1971).

[FN51]. See Restatement (Second) of Torts § § 652B-652E (1977).

[FN52]. Each of the branches of invasion of privacy could provide a cause of action in an appropriate case where the facts, if not the reasoning of the court, make out a breach of confidence, assuming, of course, that common law privacy is recognized by the jurisdiction of applicable law: intrusion, e.g., Clayman v. Bernstein, 38 Pa. D. & C. 543 (1940) (physician photographs facial disfigurement of patient without consent); appropriation, e.g., Feeney v. Young, 191 A.D. 501, 181 N.Y.S. 481 (1920) (exhibition of film footage of caesarean operation in public theater; patient consented to film for medical science use only); publicity, e.g., Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup.Ct. 1977) (psychiatrist publishes intimate secrets of identifiable patient); false light, e.g., Felis v. Greenberg, 51 Misc. 2d 441, 273 N.Y.S.2d 288 (1966) (physician submits false information as to patient's condition to insurance company causing loss of benefits on grounds of misrepresentation by patient to insurance company).

[FN53]. The Restatement (Second) describes the tort in this way:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D (1977). This branch of invasion of privacy is the closest to a pure breach of confidence case--i.e., one in which personal information is disclosed to third parties in violation of a confidence and no photographs, physical intrusions, or false innuendos are involved. It is often considered in the alternative with breach of confidence. See, e.g., Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973) (physician discloses information to patient's employer); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961) (bank gives information about depositor to employer, but privacy claim rejected for failure to allege publicity); Doe v. Roe, 42 A.D.2d 559, 345 N.Y.S.2d 560 (per curiam) (granting preliminary injunction against psychiatrist's publication of patient's confidences), aff'd, 33 N.Y.2d 902, 307 N.E.2d 823 (1973), cert. dismissed, 420 U.S. 307 (1975).

[FN54]. Prosser, Privacy, 48 Calif.L.Rev. 383, 398 (1960). Professor Bloustein challenges this view, arguing that one interest underlies all four types of privacy cases--an individual's dignity, integrity, and self-esteem. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L.Rev. 962 (1964). Professor Bloustein further maintains that the same interest is injured by a wide range of conduct, both within and without Prosser's categories--e.g., intrusion on childbirth, indecent contact, false imprisonment, or use of one's picture. *Id.* at 1003. Whichever position one finds persuasive, the fundamental interest posited becomes in practice a general interest in living life without unreasonable publication by anyone else of matters related to one's private affairs.

[FN55]. Restatement (Second) of Torts § 652D (1977).

[FN56]. *Id.* comment a. The comment asserts that the embarrassing information must be communicated in a manner that is "substantially certain to become one of public knowledge." *Id.* See Prosser, *supra* note 54, at 393-94. There is no liability, for example, where a creditor contacts an employer to seek help in collecting a debt from one of the latter's employees, e.g., Household Finance Corp. v. Bridge, 252 Md. 531, 250 A.2d 878 (1969). But there is liability if that same creditor puts a sign in his window. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927). The

Restatement (Second) indicates, "It remains to be seen whether a disclosure not equivalent to the giving of publicity will be actionable when the obtaining of the information was not tortious in character." Restatement (Second) of Torts § 652D comment a (1977). Professor Hill disputes this point, maintaining that the publicity requirement is not supported by the cases. "Prosser's view that disclosure of a private fact is not actionable unless made in a public manner was based on authorities involving the use or abuse of a privilege, and not pertinent at all to the proposition for which he cited them." Hill, *Defamation and Privacy under the First Amendment*, 76 Colum.L.Rev. 1205, 1287 (1976). This is obviously an important debate since the greatest injury may often occur when damaging information comes to the attention of only one person, such as an employer, or to the attention of a small group, such as one's neighbors. For a case that dismissed a privacy claim for failure to allege publicity, see Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961) (but finding the allegations would support breach of implied contractual confidentiality). For a case suggesting that a "smaller public" may be sufficient, see Beaumont v. Brown, 401 Mich. 80, 257 N.W.2d 522 (1977) (employer sends letter to Army Reserve making unprivileged statements about employee's fitness; publication to Army officials and clerks who see letter may be adequate publicity).

[FN57]. Restatement (Second) of Torts § 652D comment c (1977).

[FN58]. *Id.* comment d. This requirement was developed at common law but was raised to the constitutional level in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975) (rape victim's name aired on TV news; held, the first and fourteenth amendments prevent a state from imposing civil liability on the press for reporting truthful information contained in official court records open to public inspection). This case is criticized in Hill, *supra* note 56, at 1255.

The constitutionality of this branch of privacy is a serious question. The Supreme Court in *Cox Broadcasting* did not reach and has yet to rule on the question whether liability can ever be imposed for publication of true statements of fact. See Restatement (Second) of Torts, Special Note on Relation of § 652D to the First Amendment to the Constitution (1977). It seems that the dual requirements that the matter publicized be shocking and of no legitimate public concern go a long way toward satisfying the first amendment requirements. In the meantime, courts have entertained claims under this theory of liability. See Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir.1975), cert. denied, 425 U.S. 998 (1976) (thorough consideration of first amendment issues). See generally Hill, *supra* note 56, at 1262-69.

[FN59]. See generally Professor Hill's treatment of confidential relationships in the context of privacy and the first amendment, in Hill, *supra* note 56, at 1291-99.

[FN60]. Restatement (Second) of Torts § 652D (1977).

[FN61]. Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793, 802 (N.D. Ohio 1965). For a discussion of how even innocuous disclosures may invade confidentiality interests, see *supra* note 29 and accompanying text.

[FN62]. See *supra* note 28 and accompanying text. It is not clear from the case law whether the fact of a broken confidence should be weighed in determining the offensiveness of the matter published. For example, a statement that A consistently loses money in the stock market probably would not be considered highly offensive, though its publication to A's friends and colleagues might embarrass him. On the other hand, a reasonable person might well consider it highly offensive for A's bank to reveal this fact. If, as at least one commentator has suggested, a breach of confidence is one more "datum" to be weighed in deciding the offensiveness of a public disclosure, see Hill, *supra* note 56, at 1292-93 & n.417, the bank could be sued in privacy. If not, however, privacy law would provide only limited protection to A's legitimate interest in having his bank keep silent about his private matters. Professor Hill argues that obligations of confidence should not be enforceable as such; rather, recovery for disclosures should be left to the law of privacy with the fact of a broken confidence weighed in determining offensiveness. *Id.* The extensive comments to the Restatement (Second) section on unwanted publicity contain no suggestion or hint that breaches of confidence should be weighed in determining offensiveness. See Restatement (Second) of Torts § 652D comments a-h (1977).

The fact of a broken confidence does not appear to bear on plaintiff's pure interest in avoiding publicity. The classic case to allow a claim for unwanted publicity is Melvin v. Reid, 112 Cal.App. 285, 297 P. 91 (1931), in which a movie displayed to the world, including unsuspecting neighbors, the past life of a reformed prostitute who had become a respectable housewife. Much of the information in the film was a matter of public record since the



plaintiff had been acquitted in a spectacular murder trial eight years before. Would the housewife's privacy have been invaded more, however, if the source of the movie producer's information had been her psychiatrist rather than independent research? One's sense of outrage would probably be greater, but the increased outrage would result from the injury to the housewife's interest in having her psychiatrist honor his obligation of secrecy, not from any greater injury to her interest in freedom from embarrassing publicity. This point becomes more apparent if one agrees with Prosser's contention that the primary interest invaded by unwanted publicity is reputation, see *supra* note 56. For now, if the Restatement (Second), with its focus on the "matter publicized," accurately reflects authority, the presence of a broken confidence seems to have no relevance in a privacy action.

[FN63]. The dispute as to the existence of this requirement is discussed *supra* note 56.

[FN64]. In *Beaumont v. Brown*, 401 Mich. 80, 257 N.W.2d 522 (1977), for example, the court found a question for the jury in whether a letter from plaintiff's employer to the Army Reserve should be considered to have received adequate publicity because it passed through the hands of various Army officials and clerks and because it was included in the transcript of the plaintiff's civil service hearing, which the plaintiff claimed was a public record. The court suggested that a smaller public, such as one's neighbors, could support a claim. *Id.* at 99-100, 105, 257 N.W.2d at 528-29. Apparently this is a minority viewpoint. The comments to the Restatement (Second) indicate that such a smaller public is not yet generally accepted. Restatement (Second) of Torts § 652D comment a (1977). Notification to one's employer, for example, is not by itself considered adequate publicity. E.g., *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284, 288 (1961) (letter from bank to employer; privacy count rejected for failure to allege publicity). Note that the court indirectly suggests that the bank may have been privileged in its disclosure with respect to a privacy claim, citing a case where a creditor contacted his debtor's employer. *Id.* This suggestion is debatable since the bank here does not have the same self-interest as an unpaid creditor. The hint that an employer's interest in the ability and reputation of its employees might make out a privilege for the bank as to a privacy claim is dubious, as it would permit anyone to disclose to an employer virtually any private fact that might indirectly bear upon an employer's ability or reputation. Little would be left of the right of privacy, as the more extreme the content of the disclosure, the more likely the employer would be interested in learning of it in case it should become public and bring unwanted publicity by association to the employer. Compare Professor Hill's contention, discussed *supra* note 56, that the publicity requirement is a misreading of privilege cases.

[FN65]. See, e.g., *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982). The court indicated that a psychiatrist enjoys no automatic privilege to communicate matter learned in confidence to a patient's spouse. The patient may well be seeking psychiatric help to resolve a marital problem. The court disputed the sweeping privilege to reveal a patient's illness to a spouse or prospective spouse recognized in *Curry v. Corn*, 52 Misc. 2d 1035, 277 N.Y.S.2d 470 (Sup.Ct. 1966). See *MacDonald*, 84 A.D.2d at 487-88, 446 N.Y.S.2d at 805.

[FN66]. E.g., *Hammonds v. Aetna Casualty & Surety Co.*, 243 F.Supp. 793 (N.D. Ohio 1965) (inducing doctor to breach confidence); *Anker v. Brodnitz*, 98 Misc. 2d 148, 413 N.Y.S.2d 582 (Sup.Ct. 1979) (private interview outside of formal discovery between doctor and insurance investigator in malpractice action).

[FN67]. In *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 585, 367 P.2d 284, 288 (1961), where plaintiff's bank supplied information about his financial problems to his employer, the court dismissed a privacy count for failure to allege publicity.

[FN68]. See Restatement (Second) of Torts § 652D comment d (1977).

[FN69]. 420 U.S. 469 (1975).

[FN70]. See Restatement (Second) of Torts § 652D comments d-i (1977).

[FN71]. 113 F.2d 806 (2d Cir.1940). The case is discussed in Prosser, *supra* note 54, at 397, and in Hill, *supra* note 56, at 1258-59.

[FN72]. 113 F.2d at 807-08. There is some question as to whether the matter publicized should have been deemed highly offensive. The court appears to have felt that the exposure of the intimate details of the plaintiff's life was

highly offensive, and that the case therefore turned on the newsworthiness of the article. Given the circumstances and the glaring exposure afforded plaintiff despite his obsession with obscurity, it would appear that the publicity was as outrageous as that in Melvin v. Reid, 112 Cal.App. 285, 297 P. 91 (1931) (bringing to light the past life of a quiet housewife). Prosser, however, takes a different view of the case, interpreting it to rest on the ground that nothing in the article would be objectionable to a normal person. Prosser, *supra* note 54, at 397.

[FN73]. 113 F.2d at 807-08.

[FN74]. See Restatement (Second) of Torts § 652D comments d-k (1977).

[FN75]. *Id.* comments e-f.

[FN76]. *Id.* at comment f. E.g., Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929) (husband murdered before wife's eyes).

[FN77]. Restatement (Second) of Torts § 652D comment h (1977).

[FN78].

The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure. Some reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given.

*Id.*

[FN79]. The rationale for the public figure doctrine in privacy law is that voluntary public figures have chosen to be in the limelight and involuntary public figures are subject to the legitimate "curiosity of the public as to its heroes, leaders, villains and victims." *Id.* § 652D comments e-f; Prosser, *supra* note 54, at 411. These rationales do not apply to breach of confidence. Public figures may have waived their right to obscurity or events may have waived it for them, but they have not waived their right to be secure in their confidential relationships.

Whether a public or a private figure is involved, however, the existence of a confidential relationship cannot impose an impregnable veil of secrecy. There will be privileges to breach the confidence in appropriate cases. See *infra* notes 174-214 and accompanying text.

[FN80]. See, e.g., Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793 (N.D. Ohio 1965); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961); Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup.Ct. 1977).

[FN81]. Implied-in-fact contract should be distinguished from implied-in-law contract. The latter is invoked to construct mutual engagements when, because the parties did not deal with each other, or for some other reason, no actual contract exists. It is usually used to remedy unjust enrichment and does not play a role when a pre-existing confidential relationship is present and the remedy sought is compensation for reputation, hurt feelings, and the like. See E. Farnsworth, *Contracts* 98-100 & n.3, 142 n.2 (1982). See also 3 M. Nimmer, *supra* note 7, § 16.03 (discussing implied-in-fact and implied-in-law contract in breach-of-confidence cases involving literary works).

[FN82]. See, e.g., Horne v. Patton, 291 Ala. 701, 706-08, 287 So. 2d 824, 827-29 (1973) (physician); Doe v. Roe, 93 Misc. 2d 201, 208-10, 400 N.Y.S.2d 668, 673-74, (Sup.Ct. 1977) (psychiatrist).

[FN83].

The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Contract actions are created to protect the interest in having promises performed. Contract

# **EXHIBIT 56**

obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.

W. Prosser, *supra* note 50, at 613 (footnote omitted).

[FN84]. See, e.g., MacDonald v. Clinger, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982), quoted *infra* text accompanying note 116.

[FN85]. 215 Tenn. 651, 389 S.W.2d 249 (1965).

[FN86]. The court's finding of no duty was probably wrong; the case is criticized in Horne v. Patton, 291 Ala. 701, 708, 287 So. 2d 824, 829 (1973). The court did mention at the end of its opinion that even if liability were found, there could be no damages since the contents of the letter would have been discoverable in a suit by plaintiff against the store. A much stricter attitude toward extrajudicial conferences between claimants' doctors and insurance companies is reflected in Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793, 798-800, 804 (N.D. Ohio 1965). The Quarles result could probably be reached on sounder reasoning by arguing that the plaintiff impliedly waived her right to confidentiality with respect to the store by accepting free treatment from the store's doctor.

[FN87]. E. Farnsworth, *Contracts* 839-41 (1982).

[FN88]. 9 Ex. 341, 156 Eng.Rep. 145 (1854).

[FN89]. *Id.* at 354, 156 Eng.Rep. at 151.

[FN90]. "[T]he damages recoverable for a breach of . . . contract duty are limited to those reasonably within the contemplation of the defendant when the contract was made, while in a tort action a much broader measure of damages is applied." W. Prosser, *supra* note 50, at 613 (footnotes omitted).

[FN91]. MacDonald v. Clinger, 84 A.D.2d 482, 486, 446 N.Y.S.2d 801, 804 (1982).

[FN92]. Restatement (Second) of Contracts § 353 (1981).

[FN93]. *Id.* (emphasis added). Exceptions include the familiar botched-funeral and ejection-from-inn examples, but there does not seem to be any trend toward expanding the exceptions beyond the historical ones.

[FN94]. See, e.g., Clayman v. Bernstein, 38 Pa. D. & C. 543 (1940) (before and after pictures of wife's face; damages awarded on basis of contract between husband and doctor).

[FN95]. Restatement (Second) of Contracts § 355 (1981).

[FN96]. 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup.Ct. 1977).

[FN97]. *Id.* at 216-18, 400 N.Y.S.2d at 679.

[FN98]. See W. Prosser, *supra* note 50, at 620.

[FN99]. 224 So. 2d 759 (Fla.Dist.Ct.App. 1969) (Pearson, J., concurring specially).

[FN100]. See, e.g., Doe v. Roe, 93 Misc. 2d 201, 208-10, 400 N.Y.S.2d 668, 673-75 (Sup.Ct. 1977).

[FN101]. See, e.g., Abelson's Inc. v. New Jersey State Bd. of Optometrists, 5 N.J. 412, 425, 75 A.2d 867, 873 (1950) (aggrieved party-- dentist or patient--given express private cause of action for unauthorized use or disclosure of information in patient records).

[FN102]. See, e.g., Alaska Stat. § 06.05.175(a), (c) (1981) (failure of bank to maintain confidentiality of bank records subjects it to disciplinary action); N.Y.Educ. Law § 6509(9) (McKinney Supp.1981-1982), and Rules of the

Board of Regents, N.Y.Admin. Code tit. VIII, § 29.1(b)(8) (1979) (together providing that a physician's professional misconduct includes breach of patient confidence).

[FN103]. In Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 583, 367 P.2d 284, 286-87 (1961), there was no statute prohibiting bank disclosures, so the court could not imply a statutory cause of action. It did, however, cite an analogous statute prohibiting employees of the state finance department from revealing similar information. Id. at 588, 367 P.2d at 290.

[FN104]. In Doe v. Roe, 93 Misc. 2d 201, 215-16, 400 N.Y.S.2d 668, 678 (Sup.Ct. 1977) (husband), and Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793, 802-03 (N.D. Ohio 1965) (insurance company), the courts were faced with a codefendant not covered by the statutes directed to the principal defendant.

[FN105]. Cf. Restatement (Second) of Torts § 874A (1977) (tort liability for violation of legislative prohibition).

[FN106]. 291 Ala. 701, 287 So. 2d 824 (1973).

[FN107]. Id. at 707, 287 So. 2d at 828. See also Simonsen v. Swenson, 104 Neb. 224, 227-28, 177 N.W. 831, 832 (1920).

[FN108]. Quarles v. Sutherland, 215 Tenn. 651, 389 S.W.2d 249 (1965), characterized the claim as an attempt to imply a private cause of action in a nonexistent evidentiary rule, pointing out that Tennessee does not recognize the doctor-patient privilege. However, the court did not seem to appreciate that different values are at play in the extrajudicial context.

[FN109]. See, e.g., 2 Wigmore, Evidence § 601, at 856-58 (Chadbourn rev. 1979) (testimonial disqualification of spouse; Wigmore criticizes prevention-of-perjury policy); 8 Wigmore, Evidence § 2334 (McNaughton rev. 1961) (same).

[FN110]. For example, there is no banker-client testimonial privilege, Rosenblatt v. Northwest Airlines, 54 F.R.D. 21, 22 (S.D.N.Y. 1971), but there is an action for breach of confidence by bankers outside of court, e.g., Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961).

[FN111]. 44 Md.App. 335, 408 A.2d 758 (Ct.Spec.App. 1979).

[FN112]. Id. at 347, 408 A.2d at 766. See supra notes 87-91 and accompanying text.

[FN113]. 93 Misc. 2d 201, 216, 400 N.Y.S.2d 668, 678 (Sup.Ct. 1977).

[FN114]. Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793, 802-03 (N.D. Ohio 1965), also found a third party liable for breach of contract. Unlike the Doe court, this court at least addressed the theoretical problem. It drew a shaky analogy between the physician-patient relationship and that of a financial trust, following the trust rule that a third party who induces, participates in, or knowingly accepts benefits from a breach of trust is directly liable in damages to the aggrieved party. A theory that the third party was a joint tortfeasor, however, would have been more plausible. See W. Prosser, supra note 50, at 293-97.

[FN115]. 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982).

[FN116]. Id. at 486, 446 N.Y.S.2d at 804.

[FN117]. 291 Ala. 701, 287 So. 2d 824 (1973).

[FN118]. The court which looked to various sources of public policy, including a licensing statute, the Hippocratic Oath, and the A.M.A. Principles of Medical Ethics § 9 (1957), reasoned that there is no countervailing societal interest in giving physicians freedom to gossip about their patients, and formulated a common law cause of action. 291 Ala. at 708-09, 287 So. 2d at 829-30. The court treated all three counts as matters of first impression in the state.

Id. at 706, 709, 710, 287 So. 2d at 827, 830, 831.

The Georgia Supreme Court as early as 1930 held a hospital liable for what plaintiff alleged to be "violations of the confidence and trust" reposed in it, but was vague as to its precise meaning. Bazemore v. Savannah Hospital, 171 Ga. 257, 258, 155 S.E. 194, 195 (1930). This case did not involve either the physician-patient relationship or a contract. Recovery was in tort. The court, however, did not simply rely on the right of privacy already recognized by Georgia in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), probably because the hospital, although permitting a newspaper photographer to take a picture of a deformed baby without the parent's consent, did not itself take or distribute the photograph. Compare Collins v. Howard, 156 F.Supp. 322 (S.D.Ga. 1957), in which the court denied a railroad engineer's claim against a hospital for releasing the results of a blood alcohol test to his employer. The reasoning of the case would seem to be inconsistent with the Georgia Supreme Court precedent in Bazemore, although the result could be reached either on a waiver theory (the engineer implicitly agreed to permit testing for drunkenness as a condition of employment) or on a public-safety privilege theory. See *infra* notes 188-89 and accompanying text.

[FN119]. 8 Utah 2d 191, 196, 331 P.2d 814, 817 (1958).

[FN120]. 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist.Ct.1971).

[FN121]. Id. at 249-50, 253-54, 324 N.Y.S.2d 223-24, 227-28.

[FN122]. 93 Misc. 2d 201, 213, 400 N.Y.S.2d 668, 677 (Sup.Ct. 1977).

[FN123]. 243 F.Supp. 793, 802 (N.D. Ohio 1965).

[FN124]. 83 Idaho 578, 367 P.2d 284 (1961).

[FN125]. Id. at 588, 367 P.2d at 290.

[FN126]. Id. at 582, 367 P.2d at 286.

[FN127]. The emergence of a breach of confidence tort has an earlier parallel in the development of the common law action for invasion of privacy. Samuel D. Warren and Louis D. Brandeis in their famous article, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890), synthesized a line of cases in which unwanted public exposure of private matters had been remedied by resort to the law of property, implied contract, and, ironically, breach of confidence or trust, and expressed the opinion that the courts in fact were recognizing a more general right of privacy under the guise of mere fictions. Id. at 198- 213.

Cases cited in the article include Woolsey v. Judd, 11 How.Pr. 49 (N.Y.Super.Ct. 1855) (publication of private letters--property); Abernethy v. Hutchinson, 26 Rev.Rep. 237 (Ch. 1825) (surgeon's lectures--breach of confidence); Prince Albert v. Strange, 41 Eng.Rep. 1171 (Ch. 1849) (exhibition of unauthorized copies and catalogue of etchings made by the Queen and Prince--"possession of the etchings by the defendant had 'its foundation in a breach of trust, confidence, or contract'"); Tuck & Sons v. Priester, 19 Q.B.D. 629 (1887) (photographer reproduced for own use extra copies of photograph ordered by plaintiff--breach of contract); Pollard v. Photographic Co., 40 Ch.D. 345 (1888) (photographer enjoined from displaying or selling copies of photograph--breach of implied term of contract and breach of confidence); Folsom v. Marsh, 9 Fed.Cas. 342 (C.C.D.Mass. 1841) (No. 4901) (publication of personal letter enjoined as breach of confidence); Yovatt v. Winyard, 37 Eng.Rep. 425 (Ch. 1820) (publication of recipes copied by employee; trade secret--breach of confidence). See Prosser, *supra* note 54, at 384.

The right of privacy suggested by Warren and Brandeis was considered and rejected by the New York Court of Appeals in 1902 in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). The court examined each of the cases cited by Warren and Brandeis and concluded that each was soundly based on traditional common law and equity theories. It was concerned about the lack of authority in the cases for a right of privacy, the vast litigation it believed recognition of such a right would generate, and the difficulty of drawing a line between the right of privacy and the public's right to know.

Three years after Roberson, the Georgia Supreme Court in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), rejected the reasoning of the Roberson majority on similar facts and adopted the common law right of privacy urged by Warren and Brandeis. It did not dispute the New York Court of Appeals's reading of the cases

relying on property, contract, and confidence, *id.* at 205-07, 50 S.E. at 74-75; but it did not believe the tendency of lawyers and judges to feel more comfortable basing their arguments and decisions on well established causes of action justified "refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its non-existence as a legal right." *Id.* at 213, 50 S.E. at 78. Since Pavesich and the subsequent approval in the *Restatement of Torts* § 867 (1938) of a cause of action for "unreasonable and serious" interference with privacy, all but a few jurisdictions have recognized the right of privacy as a separate tort. W. Prosser, *supra* note 50, at 804.

[FN128]. See Stone, *The Common Law in the United States*, 50 Harv.L.Rev. 4, 10 (1936).

[FN129]. *Hammonds v. Aetna Casualty & Surety Co.*, 243 F.Supp. 793, 796 & n.2 (N.D. Ohio 1965).

[FN130]. Compare the process that led to recognition of the common law cause of action for invasion of privacy. See *supra* note 127.

[FN131]. 41 Eng.Rep. 1171 (Ch. 1849). While Prince Albert is commonly cited as the beginning of breach of confidence, the origin is not clear. Note the following from *Coco v. A.N. Clark (Engineers) Ltd.*, 1969 R.P.D. & T.M. Cas. 41, 46:

The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust. The Statute of Uses, 1535, is framed in terms of 'use, confidence or trust;' and a couplet, attributed to Sir Thomas More, Lord Chancellor, avers that

Three things are to be helpt in Conscience;

Fraud, Accident and things of Confidence.

(See 1 Rolle's Abridgement 374).

[FN132]. 41 Eng.Rep. at 1178. See The Law Commission, *Breach of Confidence*, Law Com. No. 110, at ¶ 3.3 (H.M.Stat.Off. 1981) [hereinafter cited as Law Commission Report]. Although Lord Cottenham was confident that equity could reach the catalogue on the basis of property, the question is not as free from doubt as he suggested. *Id.*

The catalogue took information, rather than form of expression. While form of expression can be protected by common law copyright, information as such cannot be property and can only be protected if disclosed in a confidential relationship. See 3 M. Nimmer, *supra* note 7, § 16.01 & nn.1 & 7.

The history of breach of confidence is obscured by the fact that courts have often granted recovery for breach of confidence on other grounds, including property, contract, and unjust enrichment, or have confused the conceptual basis of decision. The earliest cases appear to be based on common law copyright, e.g., *Pope v. Curl*, 26 Eng.Rep. 608 (Ch. 1741) (recognizing Alexander Pope's right of property in his letters). In *Abernethy v. Hutchinson*, 26 Rev.Rep. 237 (Ch. 1825) (enjoining publication of a surgeon's oral lectures), Lord Eldon implied a contract of confidentiality between lecturer and audience. The injunction, however, was directed to a publisher not party to the "contract," suggesting a property theory. In 1849, the court in *Prince Albert* finally identified breach of confidence specifically as a basis for relief separate from contract. Thereafter followed *Morison v. Moat*, 89 Rev.Rep. 416, 427 (Ch. 1851), involving communication of a secret recipe for medicine in "breach of faith and of contract," *Tuck & Sons v. Priester*, 19 Q.B.D. 629, 638 (1887) ("breach of contract . . . and . . . trust"), awarding an injunction and damages--a remedy at law--for unauthorized copying of a drawing, and *Pollard v. Photographic Co.*, 40 Ch.D. 345, 350-54 (1888) (dual grounds of breach of contract and breach of faith or confidence), enjoining a photographer from using for his own purposes a negative, admittedly belonging to him, of a portrait he prepared for a customer.

It is unclear why *Taylor v. Blacklow*, 132 Eng.Rep. 401 (C.P. 1836), which was a successful action at law for damages against an attorney who disclosed confidential information of one client to another and which came before Prince Albert, is not typically included in this line of cases. The mere fact that it is an action at law while the others are equitable actions cannot be the explanation since *Tournier v. National Provincial and Union Bank*, [1924] 1 K.B. 461 (C.A.), is frequently cited as a leading breach of confidence case and is based on implied contract.

The Law Commission Report, *supra* note 132, presents a thorough review of the law of breach of confidence in England and Wales. The history is set out in Part III, *id.* at 10-18.

[FN133]. 64 F. 280 (C.C.D.Mass. 1894).

[FN134]. *Id.* at 281 (emphasis added). The court indicated that plaintiff lost her common law copyright claim to the

photograph because of the public interest in knowing the portraiture of public figures. Protection in contract and confidence, however, continued. Id. at 282.

[FN135]. Id.

[FN136]. See Law Commission Report, *supra* note 132. See also K. Younger, Report of the Committee on Privacy 9-12 (London, H. M. Stationery Off. 1972). See *supra* note 132. The action for breach of confidence is clearly recognized as distinct from contract and property. See, e.g., *Argyll v. Argyll*, [1967] 1 Ch. 302, 322; *Saltman Engineering Co. v. Campbell Engineering Co.*, 1948 R.P.D. & T.M. Cas. 203, 215; *Attorney-General v. Jonathan Cape Ltd.*, [1976] 1 Q.B. 752.

[FN137]. *Tournier v. National and Provincial Union Bank of England*, [1924] 1 K.B. 461 (C.A.).

[FN138]. *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520 (C.A.).

[FN139]. *Argyll v. Argyll*, [1967] 1 Ch. 302.

[FN140]. *Taylor v. Blacklow*, 132 Eng.Rep. 401 (C.P. 1836).

[FN141]. *Attorney-General v. Jonathan Cape Ltd.*, [1976] 1 Q.B. 752.

[FN142]. *Saltman Engineering Co. v. Campbell Engineering Co.*, 1948 R.P.D. & T.M. Cas. 203; *Coco v. A.N. Clark (Engineers) Ltd.*, 1969 R.P.D. & T.M. Cas. 41; *Seager v. Copydex Ltd.*, [1967] 1 W.L.R. 923.

[FN143]. *Coco v. A.N. Clark (Engineers) Ltd.*, 1969 R.P.D. & T.M. Cas. 41, 46.

[FN144]. See Law Commission Report, *supra* note 132, at Part V, ¶¶ 5.1-5.32. Note the observation in *Coco v. A.N. Clark (Engineers) Ltd.*, 1969 R.P.D. & T.M. Cas. 41, 48, that the authorities do not provide precise guidance as to the test for what situations impose an obligation of confidence.

[FN145]. Law Commission Report, *supra* note 132, at ¶¶ 6.1-6.2.

[FN146]. By the 1890's the seeds of three branches of law for which breach of confidence is a central element had appeared: common law copyright in *Pope v. Curl*, 26 Eng.Rep. 608 (Ch. 1741); see *Birnbaum v. United States*, 436 F.Supp. 967, 978 (E.D.N.Y. 1977) (history of common law copyright), modified, 588 F.2d 319 (2d Cir.1978) (rejects common law copyright theory as applied to the particular facts, although affirming on other grounds); *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912) (letters of Mary Baker Eddy); 1 M. Nimmer, *supra* note 7, § 2.02; see also *Goldstein v. California*, 412 U.S. 546 (1973) (state common law copyright not entirely pre-empted by federal copyright law); trade secrets in *Morison v. Moat*, 89 Rev.Rep. 416 (Ch. 1851); see Milgrim, *Trade Secrets* § § 4.01-4.03 (1981); Introductory Note to Division Nine, *Restatement (Second) of Torts* (1976); A. Turner, *The Law of Trade Secrets* (1962); *Restatement of Torts* § § 757-59 (1939); and personal confidences in the *Prince Albert-Pollard-Corliss* line of cases. Though *Prince Albert*, *Pollard* and *Corliss* do have elements of property and common law copyright, a form of property, the essence of the injury in each case was hurt feelings and not pecuniary loss or interference in exclusive enjoyment of property. In addition, no property right existed with respect to the catalogue in *Prince Albert*, and in both *Pollard* and *Corliss* the negatives involved belonged to the photographer-defendant.

Trade secret law and common law copyright have developed into extensive and complex bodies of law, both of which still include branches relying on breach of confidence, but breach of confidence of a personal nature entered a long period of dormancy from which it is only now emerging. In contrast to its uninterrupted development in England, see Law Commission Report, *supra* note 132, at ¶¶ 3.1-3.16, breach of confidence did not appear in many cases in this country until the 1960's. The following cases are the bulk, if not all, of the isolated pre-1960 instances in which breach of confidence of a personal nature, as such, appears: *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930) (picture of deformed child born to plaintiff obtained from hospital attendants alleged to be "violation of confidence and trust reposed in [the hospital]" as well as invasion of privacy; court retried on privacy ground and did not discuss breach of confidence); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912) (father of dead babies joined from shoulder down engaged defendant to photograph them; photographer made additional



copies for own use; breach of implied contract found but damages awarded for mental distress, which is inconsistent with a contract theory); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920) (court would imply a private cause of action for damages in a physician licensing statute making betrayal of secrets grounds for revocation, but found a qualified privilege because of the need to prevent spread of contagious disease); Munzer v. Blaisdell, 183 Misc. 773, 49 N.Y.S.2d 915 (Sup.Ct. 1944) (implied cause of action in statute barring disclosure of patient records to third persons by mental institution); Clayman v. Bernstein, 38 Pa.D. & C. 543 (1940) (physician treating woman for facial disfigurement took photograph without her consent while she was semi-conscious; breach of implied term of contract between her husband and the physician as well as a breach of trust or confidence), *aff'd mem.*, 269 A.D. 970, 58 N.Y.S.2d 359 (1945); Smith v. Driscoll, 94 Wash. 441, 162 P. 572 (1917) (court assumes a physician would be liable for divulging a confidential communication from a patient, but found him privileged to do so in judicial proceedings if relevant and material or if a court erroneously ruled his testimony admissible).

In addition to trade secrets, common law copyright and personal confidences, breach of a confidential relationship affords recovery in two other areas. These might be referred to as appropriations of opportunity and appropriation of ideas. See, e.g., Davis v. Krasna, 14 Cal. 3d 502, 535 P.2d 1161, 121 Cal.Rptr. 705 (1975) (en banc) (writer submits story idea to producer in confidence; producer discloses it to others who, together with producer, turn it into a successful play; intermediate court's finding of cause of action for appropriation in breach of confidence treated as law of the case; dismissed on other grounds); Pigg v. Robertson, 549 S.W.2d 597 (Mo.App. 1977) (farmer discloses bargain property in applying for loan to purchase it; bank auditor beats him to it). Cf. M.L. Stewart & Co. v. Marcus, 124 Misc. 86, 207 N.Y.S. 685 (1924) (bank not liable for appropriation of bargain deal where no confidence was found and the bank officer had prior independent notice of the opportunity). See generally 3 M. Nimmer, *supra* note 7, § 16; Restatement of Torts § 759 (1939).

[FN147]. Warren and Brandeis published their article proposing a right of privacy in 1890. The right was first recognized in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[FN148]. Law Commission Report, *supra* note 132, at ¶¶ 1.1-1.4; Younger Committee, Report on Privacy, *supra* note 136, at 26, 193-94, 295-99; *supra* note 145 and accompanying text.

[FN149]. In the breach of confidence context, "nonpublic" is intended to mean "not widely known." The fact that some confidential information has leaked out or is known to some people should not permit one subject to a duty of confidence to disclose or confirm the information. No value beyond the usual first amendment interests would be served by such a disclosure, and those interests will have been taken into account already in formulating the extent of the duty, see *supra* text accompanying note 59 and *infra* text accompanying notes 161-62, and of the public right-to-know privilege, see *infra* notes 207-14 and accompanying text. Cf. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975) (CIA employee's continued obligation of confidentiality with respect to classified information that has leaked out or is rumored to have done so).

Whether or not an obligation of confidentiality continues with respect to information that became part of a public court record presents another problem. The court in Winegard v. Larson, 260 N.W.2d 816, 821 (Iowa 1977) stated that this question was settled by Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Cox Broadcasting, however, dealt with the first amendment right of the public in general, rather than the rights of individuals subject to pre-existing obligations of confidence. If the press wants to publicize the contents of court records, the first amendment guarantees them that right; there does not, however, seem to be any value served by permitting a lawyer or psychiatrist who learned information in a confidential relationship to identify and comment on those items when they appear in a court record that may not otherwise come to public attention. Of course, to the extent information has been publicized the damages caused by such identification and commentary would become *de minimis*. Furthermore, even if this issue were resolved along the lines of Cox Broadcasting, a defendant would continue to be liable for any information disclosed which goes beyond the bare bones of the court record.

[FN150]. The use of the word "personal" is intended simply to distinguish the settled law of trade secrets, common law copyright, and appropriation of ideas or opportunities. It is not meant to be a narrowing term on the scope of liability. For example, a disclosure of confidential information that plaintiff is looking for a new job, as opposed to a disclosure of his latest invention, would still be personal to the plaintiff. For two cases suggesting that a corporation can sue for breach of confidence with respect to confidential information analogous to "personal" information, see Wilson-Rich v. Don Aux Associates, Inc., 524 F.Supp. 1226, 1234 & n.16 (S.D.N.Y. 1981) (dictum: corporation may have tortious breach of confidence action for release outside corporation of critical management study by

consulting firm); Milohnich v. First Nat'l Bank, 224 So. 2d 759, 763 (Fla.Dist.Ct.App. 1969) (Pearson, J., concurring specially).

[FN151]. Of course a confidence cannot be thrust upon a person who has not at least tacitly agreed to accept the stipulation of confidentiality by failing to object.

[FN152]. Restatement of Torts § 757(b) (1939) (trade secrets); 1 M. Nimmer, *supra* note 7, § 2.02 (unpublished work revealed to another in confidence).

[FN153]. Restatement of Torts § 757(b) (1939). Liability also attaches if the trade secret was obtained by improper means. *Id.* at § 757(a).

[FN154]. Such disparate confidants as employees, business partners, potential joint venturers, relatives, and even friends are covered.

[FN155]. While the analogy might be attacked on the ground that trade secrets and literary works are essentially property and confidential personal information is not, the breach-of-confidence branch of trade secret law does not rely on property concepts. Milgrim, Trade Secrets § 4.03 (1981); Restatement of Torts § 757 comment a (1939). See also 1 & 3 M. Nimmer, *supra* note 7, §§ 2.02, 16.06 (1982).

[FN156]. Restatement of Torts § 757 comment a (1939). A general duty approach pervades the law of torts. For example, all persons are under a duty not to injure others negligently. Only a few torts--such as the duty to rescue--are limited to certain classes or circumstances. See W. Prosser, *supra* note 50, at ch. 9.

[FN157]. 1969 R.P.D. & T.M. Cas. 41, 48. See discussion of this formulation in Law Commission Report, *supra* note 132, at ¶¶ 4.4, 6.6-6.7.

[FN158]. Law Commission Report, *supra* note 132, at ¶ 6.14 (emphasis added).

[FN159]. The purpose of this change is to avoid situations where unsolicited confidential information, such as an idea for an invention, is thrust upon an unwilling recipient. *Id.* at ¶¶ 5.3, 6.6-6.9. Cf. Restatement of Torts § 757 comment j (1939) (A cannot impose an obligation of confidence with respect to a trade secret on B over B's objection).

[FN160]. See Law Commission Report, *supra* note 132, at 188, for the proposed statutory language defining "Circumstances in which obligations of confidence arise."

[FN161]. See *supra* notes 40-41 and accompanying text.

[FN162]. Blair v. Union Free School Dist. No. 6, Hauppauge, 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist. Ct. 1971).

[FN163]. See, e.g., Attorney-General v. Jonathan Cape Ltd., [1976] 1 Q.B. 752. See also Woodward v. Hutchins, [1977] 1 W.L.R. 760, 763-64 (C.A.): "The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon."

[FN164]. Law Commission Report, *supra* note 132, at ¶ 6.82: "Having regard to the importance in our view of the free circulation of information, we think it in principle right that the plaintiff should be required to establish that the balance of the public interest lies in his particular case in protecting the confidentiality of the relevant information." Prior to Cape, this was a matter of affirmative defense.

[FN165]. See *supra* note 136-45 and accompanying text. "This extension of the doctrine of confidence beyond commercial secrets has never been directly challenged, and was noted without criticism by Lord Denning M. R. in Fraser v. Evans [1969] 1 Q.B. 349, 361." Attorney-General v. Jonathan Cape Ltd., [1976] 1 Q.B. 752, 769.

[FN166]. E.g., MacDonald v. Clinger, 84 A.D.2d 482, 487, 446 N.Y.S.2d 801, 805 (1982) ("violation of a fiduciary responsibility . . . implicit in and essential to the doctor patient relationship"); Simonsen v. Swenson, 104 Neb. 224, 227, 177 N.W. 831, 832 (1920) ("The relation of physician and patient is necessarily a highly confidential one. . . . [T]he physician is bound, not only upon his own professional honor and the ethics of his high profession, to keep secret [a patient's confidences], but by reason of the affirmative mandate of the statute itself. A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for the damages naturally flowing from such wrong."). See also Alexander v. Knight, 25 Pa.D. & C.2d 649, 655 (1961), *aff'd*, 197 Pa.Super. 79, 177 A.2d 142 (1962).

[FN167]. 10 Williston on Contracts § 1285, at 914 n.3 (1967) (quoting Lank v. Steiner, 213 A.2d 848 (Del.Ch. 1965)).

[FN168]. E.g., Pigg v. Robertson, 549 S.W.2d 597, 600-01 (Mo.App. 1977) (bank's relation with customer is debtor-creditor, not fiduciary; but obligation of confidence owed with respect to business opportunity disclosed in applying for loan). See discussion of fiduciary character of doctor-patient relationship in Hammond v. Aetna Casualty & Surety Co., 243 F.Supp. 793, 802-03 (N.D. Ohio (1965)).

[FN169]. See *supra* note 41. Cf. Argyll v. Argyll, [1967] 1 Ch. 302 (legal obligation of confidence inherent in marriage relationship).

[FN170]. See *supra* notes 60-62 and accompanying text.

[FN171]. A reasonable-person test would cover any relationship where, under the particular facts, a reasonable person would conclude that a confidential relationship existed. See *supra* notes 157-60 and accompanying text.

[FN172]. See *supra* text accompanying notes 161-65.

[FN173]. 527 F.2d 1122 (9th Cir.1975), *cert. denied*, 425 U.S. 998 (1976).

[FN174]. [1924] 1 K.B. 461 (C.A.).

[FN175]. *Id.* at 473. The illustrations show that "duty to the public" encompasses danger to the state or similar public duty, "interests of the bank" applies more narrowly to such aspects in banking practice as returning a check with overdraft indicated, and "implied consent" covers situations such as a customer's listing the bank as a credit reference.

[FN176]. Law Commission Report, *supra* note 132, at ¶¶ 4.69, 6.93.

[FN177]. *Id.* at ¶¶ 4.70, 6.94-96.

[FN178]. The Report indicated that there would be implied consent or the information would be in the public domain. It also pointed to conceptual problems with applying to breach of confidence the doctrine of abuse of privilege by virtue of one's knowledge of the untruth of one's statement. *Id.*

[FN179]. *Id.* at ¶ 6.96.

[FN180]. *Id.* at ¶¶ 4.41-44, 6.84(v).

[FN181]. E.g., Initial Services Ltd. v. Putterill, [1967] 3 W.L.R. 1032, 1037-39 (C.A.) (anticompetitive arrangement among laundries). Compare *infra* text accompanying notes 191-98.

[FN182]. E.g., Schering Chemicals v. Falkman, Ltd., [1981] 2 W.L.R. 848, 864-65 (C.A.) (public relations consultant produces film on corporation's efforts to respond to bad publicity surrounding drug). Compare *infra* text accompanying notes 207-14.

[FN183]. See, e.g., *Schering Chemicals v. Falkman, Ltd.*, [1981] 2 W.L.R. 848, 858 (C.A.); *Coco v. A.N. Clark (Engineers) Ltd.*, 1969 R.P.D. & T.M. Cas. 41, 46. Cf. Law Commission Report, *supra* note 132, at ¶ 6.2 (recommending reformulation of action as statutory tort).

[FN184]. See *Coco v. A.N. Clark (Engineers) Ltd.*, 1969 R.P.D. & T.M. Cas. 41, 48 (stating "reasonable . . . recipient" test).

[FN185]. See *supra* text accompanying notes 150-173.

[FN186]. As suggested earlier, the American approach is less awkward and provides clearer warning to potential defendants, at least where traditional privileges are involved. See *supra* text accompanying notes 162-65. In the area of free speech and free press, however, because of the impossibility of drawing sharp lines, the American courts engage in an ad hoc balancing process, with the burden of persuasion in essence on the plaintiff, that is indistinguishable from the English approach. See *infra* text accompanying notes 207-14.

[FN187]. In addition, a confidence privilege, like a defamation or privacy privilege, can be abused. An otherwise privileged communication will lose the privilege if it is not (1) in good faith, (2) without malice, (3) on reasonable grounds, and (4) restricted to persons reasonable and necessary to the purpose of the privilege. See *Simonsen v. Swenson*, 104 Neb. 224, 177 N.W. 831 (1920).

[FN188]. *Id.*

[FN189]. In some cases there may be a legal duty to breach the confidence. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 13 Cal. 3d 177, 551 P.2d 334, 129 Cal.Rptr. 118 (1976) (patient threatens to kill innocent third party; duty to take reasonable action); *Wojcik v. Aluminum Co. of America*, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup.Ct. 1959) (routine x-rays provided free by employer show tuberculosis; liable to employee and to family members who contracted disease for failure to warn).

[FN190]. E.g., *Hague v. Williams*, 37 N.J. 328, 181 A.2d 345 (1962).

[FN191]. E.g., *People v. Johnson*, 53 Cal.App. 3d 394, 125 Cal.Rptr. 725 (1975) (loss of right of confidentiality where depositor attempted to defraud bank); *State v. McCray*, 15 Wash.App. 810, 551 P.2d 1376 (1976) (bank's privilege to disclose depositor's bad checks to police on informal inquiry).

[FN192]. 44 Md.App. 335, 408 A.2d 758 (1979).

[FN193]. See *Tournier v. National Provincial & Union Bank*, [1924] 1 K.B. 46 (C.A.). In effect, the Suburban Trust court rejected the self-interest and public duty privileges articulated in *Tournier*, quoted *supra* in text accompanying note 175.

[FN194]. *Suburban Trust*, 44 Md.App. at 344, 408 A.2d at 764.

[FN195]. *Id.* at 343-44, 408 A.2d at 764.

[FN196]. See discussion *supra* text accompanying notes 174-86.

[FN197]. The court seems to have confused the unreasonable search and seizure line of cases with cases imposing liability on the bank for breach of confidence.

[FN198]. Cf. *Cunningham v. Merchant's Nat'l Bank*, 4 F.2d 25 (1st Cir.1925) (bank not under duty to warn investing public of shaky depositor).

[FN199]. 243 F.Supp. 793, 804 (N.D. Ohio 1965).

[FN200]. But see *Irby v. Citizens Nat'l Bank*, 239 Miss. 64, 121 So. 2d 118 (1960) (banks permitted to exchange

credit information; no allegation of breach of confidence). See also State v. McCray, 15 Wash.App. 810, 551 P.2d 1376 (1976).

[FN201]. 83 Idaho 578, 367 P.2d 284 (1961).

[FN202]. 291 Ala. 701, 287 So. 2d 824 (1973).

[FN203]. Id. at 711-12, 287 So. 2d at 832-33 (McCall, J., dissenting).

[FN204]. Id. at 710, 287 So. 2d at 831.

[FN205]. 8 Utah 2d 191, 331 P.2d 814 (1958).

[FN206]. Id. at 198, 331 P.2d at 818.

[FN207]. See generally Hill, supra note 56, at 1291-99 (discussing confidentiality and the first amendment).

[FN208]. See United States v. Nixon, 418 U.S. 683 (1974) (fundamental demands of due process in criminal trial overcome President's generalized interest in confidentiality); cf. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.) (CIA employee's contract of confidentiality), cert. denied, 421 U.S. 992 (1975); United States v. Marchetti, 466 F.2d 1309 (4th Cir) (same), cert. denied, 409 U.S. 1063 (1972).

[FN209]. [1976] 1 Q.B. 752.

[FN210]. 410 F.2d 701 (D.C. Cir.1969), cert. denied, 395 U.S. 947 (1968). See lower court opinion at 279 F.Supp. 101 (D.D.C. 1968).

[FN211]. An earlier attempt to get a preliminary injunction was rejected. Liberty Lobby v. Pearson, 390 F.2d 489 (D.C. Cir.1968).

[FN212]. Pearson v. Dodd, 410 F.2d at 704-05.

[FN213]. 43 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup.Ct. 1977).

[FN214]. Near v. Minnesota, 283 U.S. 697 (1931).

END OF DOCUMENT

Exhibit 2

RA002346

## **EXPERT WITNESS REPORT**

**Daniel J. Solove**

### **MY BACKGROUND AND QUALIFICATIONS**

My name is Daniel J. Solove, and I reside in Washington, DC. I am an associate professor at the George Washington University Law School, and I specialize in information privacy law. I am the author of the book, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (N.Y.U. Press, 2004) as well as the author of a 1000-page casebook, *INFORMATION PRIVACY LAW* (2d ed., Aspen, 2006) with co-authors Marc Rotenberg and Paul M. Schwartz. The first edition of *INFORMATION PRIVACY LAW* was published by Aspen in 2003. It is adopted in numerous information privacy law classes throughout the country.

I have published about 20 articles, which have appeared in leading law reviews such as the *Yale Law Journal*, *Stanford Law Review*, *California Law Review*, and *Duke Law Journal*. The vast majority of my work has focused on information privacy law issues, with topics including consumer privacy, government records, computer databases, law enforcement surveillance, and media invasions of privacy.

I have contributed to amicus briefs before the U.S. Supreme Court, testified before Congress, and been interviewed and featured in over 100 media broadcasts and articles, including *The New York Times*, *Washington Post*, *Chicago Tribune*, *Associated Press*, *Business Week*, ABC, CBS, NBC, CNN, and NPR. I have given over 60 lectures and presentations at various law schools and other institutions.

I graduated from Yale Law School, and I clerked for Judge Stanley Sporkin, U.S. District Court for the District of Columbia and Judge Pamela Ann Rymer, U.S. Court of Appeals for the 9th Circuit. I also worked at the law firm of Arnold & Porter, in Washington, D.C. I have taught information privacy for six years. My CV is attached in the appendix.

### **MY PRIOR TESTIMONY**

I have never testified before as an expert witness.

### **DOCUMENTS I REVIEWED**

Attached is a listing of the documents I reviewed relative to this assignment. These are the documents upon which I relied and upon which my opinions are based.

### **COMPENSATION**

My fees for services in this case are in the amount of \$500 per hour for research, preparation and consultation. For giving testimony under oath it is \$500 per hour.

**Confidential-NV Protective Order**

## OPINIONS AND BASES

Based on my review and analysis of the documents provided to me I offer the following opinions:

1. First, it is my opinion that some of the disclosures of Gilbert Hyatt's personal information by the California Franchise Tax Board (FTB) during its investigation constituted a violation of the FTB's responsibilities and duties in maintaining the privacy of his information. In particular, the FTB disclosed Hyatt's home address, business and financial transactions, and his Social Security Number (SSN), among other things, to a wide variety of third parties. Some of the information the FTB disclosed was gathered from Hyatt himself with the expectation that it would remain confidential. When government agencies gather, store, and use personal information, they have special responsibilities and duties. These responsibilities and duties are rooted in statutory law, constitutional law, contract law, fiduciary duties, and tort law. The law often imposes on the government greater responsibilities in handling personal data than it does for businesses and other private sector entities. As I will explain in more detail below, it is my opinion that the FTB acted overzealously in pursuing its investigation and revealed Hyatt's personal information in a way that strikes me as irresponsible and harmful.

2. Second, it is my opinion that the disclosures of the FTB are a breach of confidentiality. In many circumstances, our legal system recognizes implicit duties of confidentiality when personal information is exchanged from one person to another person or entity that stands in a special position of power. In the case of the FTB's disclosure, beyond implicit terms of confidentiality, the documents I reviewed indicate that Hyatt had a strong basis to assume confidentiality of his SSN, home address, and business and financial transactions. The documents I reviewed indicate that the FTB breached confidentiality. I will explain in more detail below the nature of the harm of breach of confidentiality and why it is my opinion that the FTB has breached Hyatt's confidentiality.

3. Third, it is my opinion that some of the FTB's investigatory practices were intrusive into Hyatt's private affairs. The auditor visited Hyatt's Las Vegas home on two separate occasions, and she trespassed onto Hyatt's property, peeked into his windows, rummaged through his mail and trash, and interrogated his neighbors.

4. Fourth, it is my opinion that the FTB's disclosure of the amount of tax Hyatt allegedly owed and his tax penalty not only constituted an irresponsible disclosure and a breach of confidentiality (as identified above) but also constituted information that cast Hyatt in a false light. The figures relating to Hyatt's tax liability were not those reached at the conclusion of the administrative appeal process, but they were presented as such. The FTB's disclosures of these figures were therefore misleading.

Below, in what follows, I will elaborate on the opinions above as well as provide other related opinions.



### Government Responsibilities in Handling Personal Information

My first opinion (discussed briefly above) is that the FTB acted irresponsibly in disseminating Hyatt's personal information. In order to explain my opinion, I believe that some background is necessary about the nature of the generally-recognized duties and responsibilities that government agencies have for handling personal information.

During the past half-century, government agencies at the state and federal level have been collecting a vast amount of personal information. Handling personal information is an activity that has profound consequences. This is because personal information, if leaked or disclosed to the wrong parties, can be used in ways that can cause severe embarrassment to a person, damage to his or her reputation, and even harm to her physical, emotional, or financial well-being. Throughout the Twentieth Century, these facts were clearly recognized in American society and were embodied throughout the law.

One of the most direct statements about the responsibilities of government agencies that maintain personal information was uttered by the United States Supreme Court in 1977. In *Whalen v. Roe*,<sup>1</sup> the Court concluded that the right to privacy protects not only "independence in making certain kinds of important decisions" but also the "individual interest in avoiding disclosure of personal matters."<sup>2</sup> The case involved a government record system of individuals who were taking prescriptions for certain medications. Although the government promised that the information was confidential and secure, the plaintiffs contended that they feared the possibility of the information leaking out. The Court concluded that because the security was adequate, the state had met its constitutional obligations. In a key passage in the case, the Court stated:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data

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<sup>1</sup> 429 U.S. 589 (1977).

<sup>2</sup> *Id.* at 599-600.

whether intentional or unintentional or by a system that did not contain comparable security provisions.<sup>3</sup>

There are at least two important principles articulated in the *Whalen* case. First, the Court noted that the U.S. Constitution recognizes and protects "individual interest in avoiding disclosure of personal matters."<sup>4</sup> The Supreme Court has not elaborated much more on this strand of its substantive due process line of cases, but numerous federal circuit courts have interpreted *Whalen* to create what has become known as the "constitutional right to information privacy." The right has been recognized in a majority of circuit courts.<sup>5</sup>

The second important principle in *Whalen* is that when the government maintains personal information, it has the responsibility to keep it secure. The Court upheld the New York statutory scheme because it demonstrated "a proper concern with, and protection of, the individual's interest in privacy."<sup>6</sup>

The principle that when the government gathers and maintains personal information, it has duties to protect the privacy and security of that information is well-embodied in United States law. The principle of responsibility emerged with the development of the computer in the middle of the Twentieth Century. The computer revolutionized the way records and data were collected, disseminated, and used. Government agencies were among the first entities to take advantage of the computer and use it to manage their record systems. Indeed, many government agencies were among IBM's early customers.<sup>7</sup>

The increasing use of computers in the 1960s raised a considerable public concern about privacy.<sup>8</sup> Commentators devoted significant attention to the issue.<sup>9</sup> And legislatures

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<sup>3</sup> *Id.* at 605-06.

<sup>4</sup> *Id.* at 599-600.

<sup>5</sup> After *Whalen*, the Court has done little to develop the right of information privacy. As one court observed, the right "has been infrequently examined; as a result, its contours remain less than clear." *Davis v. Bucher*, 853 F.2d 718, 720 (9th Cir. 1988). Most circuit courts have recognized the constitutional right to information privacy. *See, e.g.*, *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577-580 (3d Cir.1980); *Plante v. Gonzalez*, 575 F.2d 1119, 1132, 1134 (5th Cir.1978); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.1983); *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); *J.P. v. DeSanti*, 653 F.2d 1080, 1089 (6th Cir.1981); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *but see* *American Federation of Government Employees, AFL-CIO v. Department of Housing & Urban Development*, 118 F.3d 786, 191-92 (D.C. Cir. 1997) (expressing "grave doubts" as the existence of the right but not directly addressing the issue of the existence of the right).

<sup>6</sup> *Whalen*, 429 U.S. at 605.

<sup>7</sup> *See generally* DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 14-15 (2004).

<sup>8</sup> PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* 82 (1995).

<sup>9</sup> *See, e.g.*, VANCE PACKARD, *THE NAKED SOCIETY* (1964); MYRON BRENTON, *THE PRIVACY INVADERS* (1964); ALAN WESTIN, *PRIVACY AND FREEDOM* (1967); ARTHUR MILLER, *THE ATTACK ON PRIVACY* (1971); NOMOS XII: *PRIVACY* (J. Ronald Pennock & J.W. Chapman eds. 1971); ALAN WESTIN & MICHAEL A. BAKER, *DATABANKS IN A FREE SOCIETY: COMPUTERS, RECORD-KEEPING AND PRIVACY* (1972); Kenneth L. Karst, "The Files": *Legal Controls Over the Accuracy and Accessibility of Stored Personal*

responded. In 1966, for example, Congress passed the Freedom of Information Act (FOIA), dramatically reforming public access to government records.<sup>10</sup> Many statutes followed suit, updating their open government laws. Today, all fifty states have freedom of information laws, many of which are based upon the FOIA. The drafters of FOIA were quite cognizant of privacy, and among the nine exemptions to disclosure, FOIA contains not one but two exemptions to protect privacy. Exception 6 exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>11</sup> Exemption (7)(C) exempts "records or information compiled for law enforcement purposes . . . which could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>12</sup>

The increasing computerization of information and the burgeoning repositories of personal data in federal agencies continued to be a topic of importance. In 1973, the United States Department of Health Education and Welfare (HEW) issued a report, *Records, Computers, and the Rights of Citizens*, which analyzed these problems in depth. This report has become one of the most important documents in privacy law, and it has influenced the development of privacy law around the world as well as has shaped the privacy practices of countless companies and organizations. The HEW report observed:

It is no wonder that people have come to distrust computer-based record-keeping operations. Even in non-governmental settings, an individual's control over the personal information that he gives to an organization, or that an organization obtains about him, is lessening as the relationship between the giver and receiver of personal data grows more attenuated, impersonal, and diffused. There was a time when information about an individual tended to be elicited in face-to-face contacts involving personal trust and a certain symmetry, or balance, between giver and receiver. Nowadays an individual must increasingly give information about himself to large and relatively faceless institutions, for handling and use by strangers-unknown, unseen and, all too frequently, unresponsive. Sometimes the individual does not even know that an organization maintains a record about him. Often he may not see it, much less contest its accuracy, control its dissemination, or challenge its use by others.

In more than one opinion survey, worries and anxieties about computers and personal privacy show up in the replies of about one third of those interviewed. More specific concerns are usually voiced by an even larger proportion. . . .

It may be that loss of control and confidence are more significant issues in the "computers and privacy" debate than the organizational appetite for information. An agrarian, frontier society undoubtedly permitted much less personal privacy than a modern urban society, and a small rural town today still permits less than a

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*Data*, 31 L. & Contemp. Probs. 342 (1966); Symposium, *Computers, Data Banks, and Individual Privacy*, 53 Minn. L. Rev. 211-45 (1968); Symposium, *Privacy*, 31 L. & Contemp. Probs. 251-435 (1966).

<sup>10</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>11</sup> 5 U.S.C. § 552(b)(6).

<sup>12</sup> 5 U.S.C. § 552(b)(7)(C).

big city. The poet, the novelist, and the social scientist tell us, each in his own way, that the life of a small-town man, woman, or family is an open book compared to the more anonymous existence of urban dwellers. Yet the individual in a small town can retain his confidence because he can be more sure of retaining control. He lives in a face-to-face world, in a social system where irresponsible behavior can be identified and called to account. By contrast, the impersonal data system, and faceless users of the information it contains, tend to be accountable only in the formal sense of the word. In practice they are for the most part immune to whatever sanctions the individual can invoke.<sup>13</sup>

The report recommended the passage of a code of Fair Information Practices:

- There must be no personal data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.<sup>14</sup>

The Fair Information Practices “played a significant role in framing privacy laws in the United States,”<sup>15</sup> and influenced privacy law around the world.

A year after the HEW report, Congress passed the Privacy Act of 1974.<sup>16</sup> The Act responded to many of the concerns raised by HEW. It regulates the collection and use of records by federal agencies, and affords individuals right to access and correct their personal information.<sup>17</sup> In passing the Privacy Act, Congress found that:

- (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
- (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use,

<sup>13</sup> U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS: REPORT OF THE SECRETARY'S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYSTEMS 29 (1973).

<sup>14</sup> *Id.* at 41-42.

<sup>15</sup> See Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get)*, 2001 Stan. Tech. L. Rev. 1, 44.

<sup>16</sup> Pub. L. No. 93-579, 88 Stat. 1896 (2000) (codified at 5 U.S.C. § 552a).

<sup>17</sup> 5 U.S.C. § 552a(d).

or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

Subsequent to the articulation of the Fair Information Practices and the passage Privacy Act, a litany of laws have arisen at the state and federal level striving toward achieving these purposes. The federal Privacy Act only applies to federal agencies, not state ones, and some states therefore passed their own version of a Privacy Act. For example, in 1977, just a few years after the passage of the federal Privacy Act, California passed the Information Practices Act,<sup>18</sup> a law that borrowed significantly from the Privacy Act.

As it relates to this case, the California Information Practices Act was passed to regulate the gathering, use, and dissemination of personal information by California governmental agencies. In its preamble, the California Information Practices Act states: "In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits."<sup>19</sup> The term "personal information" is defined by the act as "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical and employment history. It includes statements made by, or attributed to, the individual."<sup>20</sup>

The Act provides: "Each agency shall collect personal information to the extent practicable directly from the individual who is the subject of the information rather than from another source."<sup>21</sup> In the documents I reviewed, there were numerous instances where the FTB attempted to obtain information from third parties that would seemingly be able to be obtained directly from Hyatt himself. For example, the FTB sought information about Hyatt's visits to doctors and medical facilities, his newspaper subscriptions, and other services he obtained from the third parties through demand letters. Some of this information could have been obtained from Hyatt himself by asking him to supply invoices and other documentation.

The Act also provides: "No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains. . . ."<sup>22</sup> In this

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<sup>18</sup> Cal. Civ. Code, § 1798 *et seq.*

<sup>19</sup> Cal. Civ. Code § 1798.1(c).

<sup>20</sup> Cal. Civ. Code § 1798.3(a).

<sup>21</sup> Cal. Civ. Code § 1798.15.

<sup>22</sup> Cal. Civ. Code § 1798.24.

case, the FTB disclosed in numerous demand letters sent to a variety of individuals and organizations Hyatt's SSN and his confidential residential address. This is "personal information" as defined by the Act. The Act does, however, have a number of exceptions to the disclosure restriction quoted above. The most relevant exception I could find in my examination of the Act was that information may be disclosed:

To another person or governmental organization to the extent necessary to obtain information from the person or governmental organization as necessary for an investigation by the agency of a failure to comply with a specific state law that the agency is responsible for enforcing.<sup>23</sup>

A key phrase in this provision is "to the extent necessary." This exception does not allow for the broad dissemination of personal information in investigations; rather, it allows for limited disclosures to the extent they are necessary.

In reviewing the demand letters sent to third parties by the FTB, there were a number of disclosures in which I could not conceive of a rationale for their necessity. For example, the FTB sent demand letters to several newspapers (Times Orange County, Orange County Register, Las Vegas Sun) requesting information about Hyatt's subscriptions.<sup>24</sup> Included in these letters was a document entitled "Demand to Furnish Information" which included Hyatt's SSN. Although I do not know the specific practices of each newspaper's subscriptions department, it strikes me as highly anomalous for newspaper subscriptions to require a person to provide a SSN. Therefore, the SSN is an irrelevant piece of information, not necessary for the newspaper to locate its records on Hyatt to provide to the FTB.

Hyatt's SSN was also disclosed in demand letters to various stores such as Sam's Club,<sup>25</sup> The Sport's Authority,<sup>26</sup> and Bizmart.<sup>27</sup> Hyatt's SSN was disclosed in demand letters to Temple Beth Am,<sup>28</sup> Congregation Ner Tamid,<sup>29</sup> Licensing Executives Society,<sup>30</sup> the Association of Computer Machinery,<sup>31</sup> Personal Computer Users Group,<sup>32</sup> Copley Colony Cablevision,<sup>33</sup> Southwest Company Club,<sup>34</sup> Additionally, Hyatt's SSN was disclosed in demand letters to Great Expectations, a dating service, which were sent to two different branch addresses.<sup>35</sup> The letters demanded a copy of any original application for

<sup>23</sup> Cal. Civ. Code § 1798.24(p).

<sup>24</sup> FTB Letter and Demand to Furnish Information to Las Vegas Sun, Mar. 24, 1995; FTB Letter and Demand to Furnish Information to Times Orange County, Mar. 24, 1995; FTB Letter and Demand to Furnish Information to Orange County Register, Aug. 4, 1995;

<sup>25</sup> FTB Letter and Demand to Furnish Information to Sam's Club, Feb. 17, 1995.

<sup>26</sup> FTB Letter and Demand to Furnish Information to The Sport's Authority, Jan. 24, 1995.

<sup>27</sup> FTB Letter and Demand to Furnish Information to Bizmart, Feb. 17, 1995.

<sup>28</sup> FTB Letter and Demand to Furnish Information to Temple Beth Am, Jan. 24, 1995.

<sup>29</sup> FTB Letter and Demand to Furnish Information to Congregation [sic] Ner Tamid, Mar. 23, 1995.

<sup>30</sup> FTB Letter and Demand to Furnish Information to Licensing Executives Society, Jan. 24, 1995.

<sup>31</sup> FTB Letter and Demand to Furnish Information to Association of Computer Machinery, Jan. 24, 1995.

<sup>32</sup> FTB Letter and Demand to Furnish Information to Personal Computer Users Group, Jan. 26, 1995.

<sup>33</sup> FTB Letter and Demand to Furnish Information to Copley Colony Cablevision, Mar. 21, 1995.

<sup>34</sup> FTB Letter and Demand to Furnish Information to Southwest Company Club, Mar. 21, 1995.

<sup>35</sup> FTB Letter and Demand to Furnish Information to Great Expectations (Irvine, CA), Jan. 24, 1995; FTB

membership along with other information.<sup>36</sup> Hyatt's SSN was also disclosed in demand letters to the Nevada Development Authority,<sup>37</sup> Dale M. Fiola, Inc.,<sup>38</sup> and to a man named Roger McCaffrey.<sup>39</sup>

Hyatt's SSN and Las Vegas home address were disclosed in demand letters to the Las Vegas Valley Water District,<sup>40</sup> Silver State Disposal Service,<sup>41</sup> and Southwest Gas Corp.<sup>42</sup> Hyatt had taken steps to conceal the fact that he resided at his home address by purchasing the home in a trust without his name and by placing his utility bills in the name of another person, G. Julia Jeng.<sup>43</sup>

His home address was disclosed in a letter requesting information to Allstate Sand and Gravel<sup>44</sup> and in a letter requesting information from a person named "Kyle" at KB Plumbing.<sup>45</sup>

There are several demand letters sent to various doctors with the last name "Shapiro," apparently because the FTB thought one of Hyatt's doctors had this name. Letters were sent to Dr. Eric Shapiro, Dr. Melvin Shapiro, Dr. Nathan Shapiro, Dr. Norman Shapiro, Dr. Richard Shapiro, and a Dr. Shapiro.<sup>46</sup> Interestingly, in contrast to other letters, these did not contain the "Demand to Furnish Information" form with Hyatt's SSN. Similarly, letters sent to Dr. Gerald Isenberg, the Association of Colo-Rectal Surgeons, and to Clark County School District also did not include a "Demand to Furnish Information" form with Hyatt's SSN.<sup>47</sup> Likewise, a letter to Ron's Repair and Remodeling did not include Hyatt's SSN.<sup>48</sup> There is no explanation why the FTB decided to disclose Hyatt's SSN to obtain information from newspapers, businesses, dating services, and religious temples yet not from physicians, remodeling services, or school districts.

In nearly all the demand letters I examined, SSNs were provided with little connection to whether they would actually be needed by the third party to locate the records or information on Hyatt the FTB was seeking. In several instances, Hyatt's confidential home address was provided as well, although under many circumstances, I believe that the

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Letter and Demand to Furnish Information to Great Expectations (Los Angeles, CA), Jan. 24, 1995.

<sup>36</sup> FTB Letter and Demand to Furnish Information to Great Expectations (Irvine, CA), Jan. 24, 1995; FTB Letter and Demand to Furnish Information to Great Expectations (Los Angeles, CA), Jan. 24, 1995.

<sup>37</sup> FTB Letter and Demand to Furnish Information to the Nevada Development Authority, Jan. 24, 1995.

<sup>38</sup> FTB Letter and Demand to Furnish Information to Dale M. Fiola, Inc., Mar. 31, 1995.

<sup>39</sup> FTB Letter and Demand to Furnish Information to Roger McCaffrey, Mar. 31, 1995.

<sup>40</sup> FTB Letter and Demand to Furnish Information to the Las Vegas Valley Water District, Mar. 24, 1995.

<sup>41</sup> FTB Letter and Demand to Furnish Information to Silver State Disposal Service, Mar. 24, 1995.

<sup>42</sup> FTB Letter and Demand to Furnish Information to Southwest Gas Corp., Mar. 24, 1995.

<sup>43</sup> FTB Narrative Report on Gilbert Hyatt, TYE 1992, at pp. 7-8.

<sup>44</sup> FTB Letter to Allstate Sand and Gravel, Apr. 11, 1995.

<sup>45</sup> FTB Letter to Kyle at KB Plumbing, Mar. 10, 1995.

<sup>46</sup> FTB Letter to Dr. Eric Shapiro, Feb. 27, 1995; FTB Letter to Dr. Melvin Shapiro, Feb. 27, 1995; FTB Letter to Dr. Nathan Shapiro, Feb. 27, 1995; FTB Letter to Dr. Norman Shapiro, Feb. 27, 1995; FTB Letter to Dr. Richard Shapiro, Feb. 27, 1995; FTB Letter to Dr. Shapiro, Feb. 27, 1995.

<sup>47</sup> FTB Letter to Dr. Gerald Isenberg, Feb. 27, 1995; FTB Letter to Colo-Rectal Surgeons, Mar. 21, 1995; FTB Letter to Clark County School District, Mar. 28, 1995.

<sup>48</sup> FTB Letter to Ron's Repair and Remodeling, Mar. 28, 1995.

information requested from the third parties would not require the disclosure of Hyatt's home address. In short, the FTB demand letters disclosed Hyatt's personal information to a very wide range of third parties with virtually no attempt to ensure that the information disclosed was necessary in order to receive the responses the FTB was seeking from the third parties.

It is my opinion that few would quarrel with the principle that whenever a government agency collects personal information, it has certain obligations and responsibilities to ensure that the information is kept secure from unwarranted disclosures. The law embodies this basic principle in countless ways, from U.S. Supreme Court decisions to federal and state statutory law. As a government agency, the FTB had a responsibility to ensure that Hyatt's personal information would be kept secure and not disseminated unless necessary.

Moreover, government agencies, as well as all citizens and entities, have responsibilities to not disseminate the private information of individuals to others. Almost all of the states have recognized the tort of public disclosure of private facts. As described by the Restatement of Torts:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.<sup>49</sup>

The public disclosure tort protects against a wide range of disclosures of personal information. For example, the tort applies to the dissemination of information about people's finances and debts.<sup>50</sup> A key issue is whether a person has a reasonable expectation of privacy in the matter that is publicized.

As I will discuss below in the section entitled "The Harms of Disclosing Personal Information," there is a strong legal recognition of one's privacy interest in one's private home address and confidential financial and business transactions. There is also a strong legal recognition of one's privacy interest in one's SSN. Although not a public disclosure of private facts case, the case of *Remsburg v. Docusearch, Inc.*,<sup>51</sup> persuasively explains why there is a privacy interest in one's SSN:

A person's SSN has attained the status of a quasi-universal personal identification number. *Id.* at 531-32. At the same time, however, a person's privacy interest in his or her SSN is recognized by state and federal statutes, including RSA 260:14, IV-a (Supp.2002) which prohibits the release of SSNs contained within drivers' license records. *See also* Financial Services Modernization Act of 1999, 15 U.S.C. §§ 6801-6809 (2000); Privacy Act of 1974, 5 U.S.C. § 552a (2000). "[A]rmed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on

<sup>49</sup> Restatement (Second) of Torts § 652D.

<sup>50</sup> *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927).

<sup>51</sup> 816 A.2d 1001 (N.H. 2003).



that person's checking account, obtain credit cards, or even obtain the person's paycheck." *Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir.1993).

Like the consequences of stalking, the consequences of identity theft can be severe. The best estimates place the number of victims in excess of 100,000 per year and the dollar loss in excess of \$2 billion per year. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 Tex. L.Rev. 89, 89 (2001). Victims of identity theft risk the destruction of their good credit histories. This often destroys a victim's ability to obtain credit from any source and may, in some cases, render the victim unemployable or even cause the victim to be incarcerated. *Id.* at 91.<sup>52</sup>

In the context of discussing whether a person has an actionable intrusion upon seclusion tort claim when his or her SSN is improperly obtained, the New Hampshire Supreme Court concluded that people have a reasonable expectation of privacy in their SSN:

In addressing whether a person's SSN is something secret, secluded or private, we must determine whether a person has a reasonable expectation of privacy in the number. *See Fischer*, 143 N.H. at 589-90, 732 A.2d 396. SSNs are available in a wide variety of contexts. *Bodah v. Lakeville Motor Express Inc.*, 649 N.W.2d 859, 863 (Minn.Ct.App.2002). SSNs are used to identify people to track social security benefits, as well as when taxes and credit applications are filed. *See Greidinger*, 988 F.2d at 1352-53. In fact, "the widespread use of SSNs as universal identifiers in the public and private sectors is one of the most serious manifestations of privacy concerns in the Nation." *Id.* at 1353 (quotation omitted). As noted above, a person's interest in maintaining the privacy of his or her SSN has been recognized by numerous federal and state statutes. As a result, the entities to which this information is disclosed and their employees are bound by legal, and, perhaps, contractual constraints to hold SSNs in confidence to ensure that they remain private. *See Bodah*, 649 N.W.2d at 863. Thus, while a SSN must be disclosed in certain circumstances, a person may reasonably expect that the number will remain private.<sup>53</sup>

Perhaps more than any state, California has demonstrated a strong commitment to protecting privacy in its laws. Pursuant to Article I, section 1 of the California Constitution: "All people are by nature free and independent and have inalienable rights. Among these are ... pursuing and obtaining safety, happiness, and privacy." In *White v. Davis*,<sup>54</sup> the California Supreme Court stated:

Although the general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief, the moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased

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<sup>52</sup> *Id.* at 1007-08.

<sup>53</sup> *Id.* at 1008.

<sup>54</sup> 13 Cal.3d 757 (Cal. 1975).

surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy.<sup>55</sup>

Accordingly, it is my opinion that Hyatt could certainly expect that the FTB would treat his personal data with the utmost care and responsibility and would limit its disclosures as narrowly as necessary to achieve its goals. He could expect that the FTB would seek data from him first before going out to seek it from third parties. It is my opinion that the FTB did not heed its responsibilities. It disclosed Hyatt's information in a cavalier fashion, with a kind of bureaucratic regularity and indifference.

### Breach of Confidentiality

Beyond violating its basic responsibilities to maintain the privacy and security of the personal information it collected, it is my opinion that the FTB also breached the confidentiality it promised to Hyatt.

An important, and often underappreciated privacy interest in the law, is the notion of confidentiality. With breach of confidentiality, the trust in a relationship is being violated. Protection against breach of confidentiality helps ensure that certain relationships that depend upon trust are promoted. Protection against disclosure also protects one's relationships of trust, but the harm of disclosure turns on the damage wrought by the release of embarrassing secrets or data that renders one vulnerable. Breach of confidentiality involves a betrayal of trust, regardless of the nature of the data revealed.

Many states have recognized tort liability for breach of confidentiality. The "clear modern consensus of the case law" is to recognize the breach of confidentiality tort.<sup>56</sup> The tort of breach of confidentiality emerges from the concept of a fiduciary relationship, which is "founded on trust or confidence reposed by one person in the integrity and fidelity of another."<sup>57</sup> "A fiduciary relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another. Out of such a relation, the laws raise the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust[,] or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of utmost good faith."<sup>58</sup> According to the Restatement: "[O]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."<sup>59</sup>

One of the most common contexts in which the tort of breach of confidentiality is applied is when a physician breaches a patient's confidences. For example, in *McCormick v.*

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<sup>55</sup> *Id.* at 773-74.

<sup>56</sup> David A. Elder, *Privacy Torts* §5:2 (2002).

<sup>57</sup> See *Mobile Oil Corp. v. Rubinfeld*, 339 N.Y.S.2d 623, 632 (1972).

<sup>58</sup> *Mobile Oil Corp. v. Rubinfeld*, 339 N.Y.S.2d 623, 632 (1972).

<sup>59</sup> Restatement (Second) of Torts § 874.

England,<sup>60</sup> Mrs. McCormick was involved in a contentious divorce and custody battle with her husband. McCormick's doctor gave a letter to her husband that stated that McCormick was suffering from "major depression and alcoholism, acute and chronic." McCormick sued her doctor. According to the court, a "majority of jurisdictions faced with the issue have recognized a cause of action against a physician for the unauthorized disclosure of confidential information unless the disclosure is compelled by law or is in the patient's interest or the public interest."<sup>61</sup> Unlike the tort of public disclosure, the tort of breach of confidentiality does not have the element that the disclosure be "highly offensive." The court reasoned that the public disclosure tort "focuses on the *content*, rather than the *source* of the information. The unauthorized revelation of confidential medical information should be protected without regard to the degree of its offensiveness."<sup>62</sup> The tort applies not only to physicians, but also to bankers and other professionals who maintain relationships of trust.<sup>63</sup>

Additionally, some courts have extended liability for breach of confidentiality to third parties who induce the physician to disclose. In *Hammonds v. AETNA Casualty & Surety Company*,<sup>64</sup> an insurance company persuaded the plaintiff's doctor to disclose confidential information about him for use in a legal proceeding. The court held that the insurance company could be liable for inducing the doctor to breach confidentiality: "The law is settled in Ohio and elsewhere that a third party who induces a breach of a trustee's duty of loyalty, or participates in such a breach, or knowingly accepts any benefit from such a breach, becomes directly liable to the aggrieved party." In the documents I reviewed, several demand letters are for information from Hyatt's physicians and medical institutions seeking dates of treatment. While the information requested does not ask for data about Hyatt's medical ailments, it does call for the disclosure details about the nature and duration of his treatment.

The breach of confidentiality tort is not just limited to disclosures by physicians. For example, it has been applied frequently to bankers. A number of jurisdictions extend the tort of breach of confidentiality to disclosures by banks and financial institutions of their customers' financial information.<sup>65</sup>

Conceivably, the tort could apply whenever a fiduciary relationship exists. There are no fixed set of relationships that are fiduciary ones, and courts "have carefully refrained from defining instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded."<sup>66</sup> Courts look to the following factors in defining a

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<sup>60</sup> 494 S.E.2d 431 (S.C. Ct. App. 1997).

<sup>61</sup> *Id.* at 435.

<sup>62</sup> *Id.* at 438.

<sup>63</sup> See, e.g., *Peterson v. Idaho First National Bank*, 367 P.2d 284 (Idaho 1961) (breach of confidentiality tort for disclosure by bank).

<sup>64</sup> 243 F. Supp. 793 (D. Ohio 1965).

<sup>65</sup> See, e.g., *Peterson v. Idaho First National Bank*, 367 P.2d 284 (Idaho 1961); *Barnett Bank of West Florida v. Hooper*, 498 So.2d 923 (Fla.1986); *Indiana National Bank v. Chapman*, 482 N.E.2d 474 (Ind.App.1985); *Suburban Trust Co. v. Waller*, 408 A.2d 758 (Md. App. 1979); *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W.2d 648 (Minn. 1976); *McGuire v. Shubert*, 722 A.2d 1087 (Pa. Super. 1998).

<sup>66</sup> *Swerhun v. General Motors Corp.*, 812 F. Supp. 1218 (M.D. Fla. 1993).

fiduciary relationship: "[T]he degree of kinship of the parties; the disparity in age, health, and mental condition; education and business experience between the parties; and the extent to which the allegedly subservient party entrusted the handling of . . . business affairs to the other and reposed faith and confidence in [that person or entity]."<sup>67</sup>

The harm from a breach of confidence, then, is not simply that information has been disclosed, but that the victim has been betrayed. When it recognized a cause of action for breach of confidentiality in 1920, the court in *Simonsen v. Swenson*,<sup>68</sup> noted that "the physician is bound, not only upon his own professional honor and the ethics of his high profession, to keep secret [a patient's information] . . . A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for the damages naturally flowing from such wrong."<sup>69</sup>

There are certainly instances where we might find the breach of confidentiality desirable. In *Tarasoff v. Regents of the University of California*,<sup>70</sup> a psychotherapy patient murdered a young woman with whom he was obsessed. The court concluded that the patient's psychotherapist had a duty to the woman because he had knowledge that his patient posed a danger to her. However, these instances generally involve the threat of injury or death to others or a threat to the public.

I am not opining as to whether, in fact, the FTB is liable under the breach of confidence tort. Rather, I mention these cases to illustrate that there is considerable recognition in the law and otherwise that breaching confidentiality constitutes a nontrivial injury. It is important to recognize that breach of confidentiality is a distinct harm that is related to, yet differs from, the disclosure of personal information. In essence, breach of confidentiality may be understood as a subset of disclosure of personal information. What makes breach of confidentiality a distinctive harm is that it is a violation of trust.

It is my opinion that the FTB owed Hyatt a duty of confidentiality. The documents I reviewed demonstrate that Hyatt requested that the information he supplied to the FTB remain confidential and that he had every reason to expect that the information would remain confidential.

First, the documents reveal direct assurances of confidentiality communicated to Hyatt and his representatives. According to Hyatt's affidavit, he states that "Ms. Cox expressly promised that she would keep my secret address private, and I therefore provided her with the address which I had so painstakingly kept secretive in a reasonable (but detrimental) reliance on her trustworthiness as an agent or employee of the State of California."<sup>71</sup>

<sup>67</sup> *Pottinger v. Pottinger*, 605 N.E.2d 1130 (Ill. App. 1992). For more information on the breach of confidentiality tort, see generally Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426 (1982); Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 Buffalo L. Rev. 1 (1995);

<sup>68</sup> 177 N.W. 831 (Neb. 1920).

<sup>69</sup> *Id.* at 832.

<sup>70</sup> 551 P.2d 334 (Cal. 1976).

<sup>71</sup> Hyatt Affidavit, at ¶ 137.

In his deposition, Hyatt states:

Q. Okay. Did the FTB promise you any protection, other than what's required by law concerning your privacy?

A. The FTB promised me unconditionally that it would protect my privacy.

Q. Do you believe it undertook in your case special obligations in addition to what the law requires?

A. Yes. In addition to the promise -- In addition to what the law requires, it made additional promises in its initial contact letter or letters, and then the auditors and also made additional promises of confidentiality.

Q. By those additional promises, what obligation was added on to the FTB's obligations required by law?

A. Well, for example, in the contact letter, the initial Notice of Audit, the FTB promised me not only would it abide by the California Privacy -- I'm getting tired. You have to bear with me.

Q. Take your time.

A. Informational Practices Act, and the Federal Privacy Act, but that it would also disclose my information only to certain government agencies, such as the IRS.<sup>72</sup>

Hyatt also stated in his deposition: "I think that the promises that the auditors made to my tax representatives were -- included those that were required by law, but that went much further and were unconditional statements that they would preserve the confidentiality of the documents that they wanted me to submit to them."<sup>73</sup>

When the audit began, Hyatt had research done about the California Information Practices Act and his privacy rights:

Q. Why were you having this research done?

A. I was curious about what was in store for me in the audit and whether the FTB would keep my information private.

Q. What reason did you have, upon receipt of notice from the FTB, to be concerned about maintaining confidentiality of your information?

A. Well, the FTB made a, an important point of privacy, so I knew that it would be an issue, and wanted to be familiar with it.

Q. Did you have any reason to believe at that time the FTB would not maintain your privacy?

A. No. I believed what they promised at that time.<sup>74</sup>

Hyatt also testified in his deposition that: "The FTB accepted my secret address in confidence -- in secrecy and confidentiality, promised to keep it confidential, and then without notifying me sent it out to newspapers and utilities."<sup>75</sup>

<sup>72</sup> Videotape Deposition of Gilbert Hyatt, Aug. 17, 2005, Vol. III, pp. 497-98.

<sup>73</sup> *Id.* at p. 499.

<sup>74</sup> Videotape Deposition of Gilbert Hyatt, Aug. 16, 2005, Vol. II, p. 312.

<sup>75</sup> Videotape Deposition of Gilbert Hyatt, Dec. 5, 2005, Vol. IV, p. 714.

Second, whenever Hyatt or his representatives submitted information to the FTB, they sought assurances of confidentiality and clearly expressed that the information and documents conveyed to the FTB were to remain confidential. Frequently, FTB officials provided acknowledgment that they understood Hyatt's strong desire for confidentiality and assurances that Hyatt's information would remain confidential. For example, in a 1997 memo from Eugene Cowan (Hyatt's tax attorney) memorializing conversations with Anna Jovanovich of the FTB, he stated:

Ms. Jovanovich asked if we would supply her with certain agreements that the FTB had previously reviewed and had copied excerpts from. She reiterated her understanding that Mr. Hyatt was extremely concerned over the confidential nature of his agreements and his case in total.<sup>76</sup>

Additionally, in letters from Eugene Cowan to the FTB, transmitting Hyatt's licensing agreements with various companies, Cowan stated: "Copies of these agreements are being sent to you under your assurance that the agreements will be kept confidential and secure."<sup>77</sup>

In a June 25, 1998 memo to his file, Cowan wrote: "From the outset of the audit conducted by the FTB on the taxpayer's 1991 and 1992 taxable year, we have informed the FTB of the taxpayer's need and desire to keep the materials furnished as part of the audit private and confidential."<sup>78</sup> In that memo, Cowan provided a "chronology of the written and oral contacts that I have had with the FTB concerning the taxpayer's desire for confidentiality and/or privacy."<sup>79</sup> According to Cowan's recollections of his conversations with FTB officials in the chronology, on September 13, 1993, "Mr. Shayer explained that FTB personnel was required to maintain the confidentiality of a taxpayer records, Mr. Shayer assured me that the taxpayer's file would be maintained in a locked cabinet and that only the FTB personnel working on the case would have access to the file."<sup>80</sup> On September 29, 1993, "I [Cowan] reiterated to Mr. Shayer the sensitive, confidential nature of the documentation, Mr. Shayer assured me that the confidentiality of the documents would be maintained."<sup>81</sup> Cowan references a conversation he had with Mr. Soriano "regarding the taxpayer's desire to keep his home address private and confidential."<sup>82</sup> On February 23, 1995, Cox made a visit to Cowan's offices to review Hyatt's documents. According to Cowan's description of the visit: "I told Ms. Cox that the taxpayer is very concerned for his privacy and tried to maintain a very low profile in Nevada. Ms. Cox assured me that everyone in the FTB was subject to the security and disclosure policy of the FTB the violation of which would cause an FTB employee to lose his job or worse."<sup>83</sup> Throughout the memo, Cowan writes about numerous oral and

<sup>76</sup> Memorandum from Eugene Cowan to file (Dec. 3, 1997).

<sup>77</sup> Letters from Eugene Cowan to Anna Jovanovich (Dec. 22, 1997).

<sup>78</sup> Memo from Eugene Cowan to file (June 25, 1998), p. 1.

<sup>79</sup> Memo from Eugene Cowan to file (June 25, 1998), p. 1.

<sup>80</sup> *Id.* at p. 1.

<sup>81</sup> *Id.* at p. 1.

<sup>82</sup> *Id.* at p. 2.

<sup>83</sup> *Id.* at pp. 2-3.

written communications with FTB officials, including Mr. Soriano and Ms. Cox, in which Cowan repeatedly stated that Hyatt expected confidentiality and privacy, and the FTB officials assured him that they would maintain confidentiality.<sup>84</sup>

In an August 29, 1995 letter to the FTB, Cowan states that "Mr. Hyatt has been careful to protect his privacy as a result of past harassment and disruption of his work."<sup>85</sup> Cowan further writes:

As part of maintaining his private profile, Mr. Hyatt has imposed on friends and colleagues to serve as trustees or as nominal addressees for Mr. Hyatt's personal residence and related items (such as voting address, utilities, etc.) in Las Vegas. Mr. Hyatt also uses Post Office boxes for his correspondence to maintain privacy. Mr. Hyatt does not want his name publicly associated with his residence. Of course, Mr. Hyatt uses Las Vegas business cards and has had extensive business correspondence and contacts using his Las Vegas address and phone number in 1991 and 1992 (and to the present). But, as mentioned above, to protect against undesirable contacts, he has tried to insulate his name from readily-accessible public records.<sup>86</sup>

In a response letter, Cox writes: "The FTB acknowledges that the taxpayer is a private person who puts a significant effort into protecting his privacy. . . . Your letter states that the taxpayer does not want his name publicly associated with his residence."<sup>87</sup>

In Cowan's deposition testimony, he stated that "Mr. Shayer [of the FTB] and I discussed keeping Mr. Hyatt's documents confidential and keeping them locked in a cabinet, I think, he described, and allowing as few as possible – basically, those folks who needed to know at the FTB to be able to review that."<sup>88</sup> In another parts of his deposition, Cowan states that he discussed the importance of protecting Hyatt's confidentiality with the FTB officials.<sup>89</sup>

Third, beyond explicit promises of confidentiality, the documents also indicate that the FTB had duties of confidentiality by virtue of the nature of its relationship with Hyatt, its special position of power, its own rules and procedures, and its other obligations under the laws and constitution of California. In particular, the FTB's Disclosure Education Training Manual emphatically calls for keeping personal information confidential. Throughout this booklet, on nearly every page, the slogan "If in doubt, don't disclose" appears. Moreover, the Manual states that "[t]he primary types and sources of confidential information received by FTB include: tax information received from individuals such as: an individual's name, social security number, addresses, exemptions,

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<sup>84</sup> *Id.* at pp. 1-6.

<sup>85</sup> Letter from Eugene Cowan to FTB, Aug. 29, 1995, at p. 2.

<sup>86</sup> *Id.* at pp. 4-5 (emphasis in original).

<sup>87</sup> Letter from Sheila Cox to Eugene Cowan, Aug. 31, 1995, at pp. 1-2 (emphasis in original).

<sup>88</sup> Cowan Deposition, Apr. 17, 2000, Vol. II, p. 268

<sup>89</sup> Cowan Deposition, Apr. 17, 2000, Vol. III, p. 492 ("Q. BY MR. BRADSHAW: You helped preserve the taxpayer's – A. Confidential rights and discussed that issue with the auditors.").

or filing status.”<sup>90</sup> On that page are four text graphics with the words “CONFIDENTIAL,” “TOP SECRET,” “NEED TO KNOW,” and “CLASSIFIED.”

The FTB’s duty of confidentiality is also established by statements it makes to taxpayers. A document entitled *California Taxpayers Bill of Rights – 1988: A Guide for Taxpayers* states:

Your Rights to Confidentiality

We keep confidential the information that you provide to us on your state tax returns, in letters and during any meetings with our auditors or other representatives. We share confidential information, only as required by law, with other government agencies such as the Internal Revenue Service and other state and local tax agencies.

If, however, you are no longer married or living with your spouse and you filed a joint return with an amount due, upon written request, we can tell you whether we have tried to collect from your spouse, the general nature of the collection activities, and the amount we have collected.<sup>91</sup>

On documents requesting information from Hyatt, a Privacy Notice appears describing the privacy rights established in the California Information Practices Act of 1977.<sup>92</sup>

In a letter to Hyatt dated June 17, 1993, the FTB provided Hyatt with a questionnaire for use in the FTB’s investigation. That questionnaire contained provisions about the FTB’s responsibilities:

Your tax return has been selected for audit by the California Franchise Tax Board (FTB).

What should you expect from a Franchise Tax Board audit?

- Courteous treatment by FTB employees
- Clear and concise requests for information from the auditor assigned to your case
- Confidential treatment of any personal and financial information that you provide to us
- Completion of the audit within a reasonable amount of time.<sup>93</sup>

The promise of confidentiality is broad and clear: “Confidential treatment of *any* personal and financial information that you provide to us.”<sup>94</sup> In the Privacy Notice (FTB 1131), the FTB states:

<sup>90</sup> FTB Disclosure Education Training Manual, p. 5.

<sup>91</sup> FTB, *California Taxpayers Bill of Rights – 1988: A Guide for Taxpayers*, at p. 2.

<sup>92</sup> See Information Concerning Resident Status Form p. 2 (Privacy Notice).

<sup>93</sup> Letter from FTB to Hyatt, June 17, 1993 and Audit Scheduling Information Form.

<sup>94</sup> *Id.* (emphasis added).



We may give the information you furnish us to the United States Internal Revenue Service, the proper official of any state imposing an income tax or a tax measured by income, the Multistate Tax Commission and to California government agencies and officials, as provided by law. If you owe any monies, we may disclose the amount due to employers, financial institutions, County Recorders, vacation trust funds, process agents and other payers.<sup>95</sup>

This language is consistent with the language in the document entitled *California Taxpayers Bill of Rights – 1988: A Guide for Taxpayers*. It is my opinion that these documents make explicit promises of confidentiality. They strongly and repeatedly state the general rule that any information that a taxpayer furnishes to the FTB is to be kept confidential. The documents state that there are exceptions to this general rule, and they delineate these exceptions. Nowhere in the documents does the FTB state that it will disclose personal information to third parties such as doctors, newspapers, dating services, and others.

It is worth noting that the FTB Privacy Notice (FTB 1131, revised 5-89/6-91) attached to the forms sent to Hyatt differs from the latest version of the FTB Privacy Notice (FTB 1131, revised 08-2004). In particular, the section on information disclosure has been re-written.

The FTB Privacy Notice provided to Hyatt is quoted above. The 08-2004 version of the FTB Privacy Notice states:

**Information Disclosure**

We may disclose your tax information to:

- The Internal Revenue Service.
- Other states' income tax officials.
- The Multistate Tax Commission.
- Appropriate Californian government agencies and officials.
- Third parties when necessary to determine or collect your tax liabilities.<sup>96</sup>

Similar to the Privacy Notice provided to Hyatt, the 2004 version mentions that information may be disclosed to the IRS, other states' tax officials, the Multistate Tax Commission, and appropriate California government agencies and officials. However, there is an addition at the end of the 2004 version: "Third parties when necessary to determine or collect you tax liabilities." This does not appear in the Privacy Notices Hyatt received.

The FTB's 2004 Privacy Notice at least mentions the possibility that information will be provided to third parties "when necessary." As discussed above, even were this the notice that Hyatt received, it is my opinion that many of the FTB's disclosures of Hyatt's

<sup>95</sup> FTB Privacy Notice, FTB 1131, included in the Audit Scheduling Information Form *supra*.

<sup>96</sup> FTB 1131, 08-2004, available at <http://www.ftb.ca.gov/forms/misc/1131.pdf>.

personal information lack any apparent justification. But Hyatt received the older Privacy Notice, which enumerated the entities and officials that might receive his personal information. Nowhere in the notice Hyatt received are third parties mentioned.

The very purpose of a Privacy Notice is to inform the taxpayer of the limited exceptions to the strong rule of confidentiality that the FTB is to follow. Accordingly, the FTB clearly breached the confidentiality it promised in its Privacy Notice. To the extent it had the practice of disclosing information to third parties under any circumstances, then its Privacy Notice was misleading and inaccurate.

The documents reveal that Hyatt, through his representatives, read and relied upon that Privacy Notice. For example, Eugene Cowan stated in his deposition:

Q. Now, are you aware that at the time that was standard operating procedure – whether or not that was standard operating procedure of the FTB to send out Demands to Furnish Information from third parties without first requesting it from the taxpayer?

A. No, I wasn't aware. I was aware that on the audit forms and letters that the Franchise Tax Board sends to you is the promise of following the Information Practices Act and all the requirements that are imposed on the Franchise Tax Board in doing so."<sup>97</sup>

In the private sector context, businesses often make promises to consumers that their personal data will remain confidential and will not be disclosed to third parties. In a number of instances, companies violating their privacy policies by disclosing information to third parties have had actions brought against them by the Federal Trade Commission.<sup>98</sup> The FTB's promises of confidentiality are more than mere promises. They are based in the FTB's legal duties under the California Constitution and the California Information Practices Act. Indeed, the Privacy Notice on the FTB's forms begins by invoking the California Information Practices Act.

Therefore, it is my opinion that the FTB clearly owed a duty of confidentiality to Hyatt with regard to the information he supplied to the FTB – his SSN, home address, and business and financial documents. This duty was established by the FTB's express promises of confidentiality conveyed to Hyatt and his representatives, the nature of the FTB's relationship with Hyatt, the FTB's own policies regarding maintaining strict confidentiality, the FTB privacy notices and other literature conveyed to taxpayers about its maintenance of confidentiality, the California Constitution, and the California Information Practices Act, among other sources.

It is my opinion that in spite of the duty of confidentiality the FTB owed to Hyatt, the FTB in this case breached confidentiality by disseminating Hyatt's personal information.

<sup>97</sup> Eugene Cowan Deposition, May 17, 2000, Vol. IV, p. 540.

<sup>98</sup> See, e.g., *In Re GeoCities*, 1999 FTC LEXIS 17 (Feb. 5, 1999); *FTC v. Eli Lilly*, No. 012-3214; *In re Gateway Learning Corp.*, No. C-4120.

As discussed above, in numerous instances, the FTB disclosed Hyatt's SSN and private home address in demand letters sent to a panoply of individuals and entities. The FTB also disclosed Hyatt's business documents to two Japanese companies (Fujitsu and Matsushita) that did business with Hyatt. Hyatt was concerned about the Japanese companies finding out about his being audited with the FTB, as well as the fact that Hyatt had allowed the FTB to examine his business documents with these companies. According to Hyatt, the Japanese companies had "been targeted by U.S. taxing authorities, which has caused them a lot of grief and a lot of belief that they were being discriminated against."<sup>99</sup> Hyatt believed that the FTB's contacting the Japanese companies would strain or ruin his business relationship with them. Therefore, Eugene Cowan repeatedly sought assurances from the FTB of confidentiality, and when he transmitted Hyatt's licensing agreements to the FTB, he explicitly stated that:

Copies of these agreements are being sent to you under your assurance that the agreements will be kept confidential and secure. Please limit access to these agreements only to those persons who must review the agreements in connection with the case. There have been lapses in confidentiality in this case previously and so we must admonish you and your colleagues to maintain the upmost care in respecting the confidentiality of the materials provided to you and the information contained in the files of this case.<sup>100</sup>

The FTB, however, went ahead and sent letters to Tadashi Sekizawa, President and Representative Director of Fujitsu and Akiri Kokaji, Assistant Director of Matsushita requesting "dates wire transfers were made to Gilbert P. Hyatt."<sup>101</sup> The FTB's letter to Fujitsu contains a page from Hyatt's agreement with Fujitsu. The FTB's letter to Matsushita contains a letter from Kokaji to Hyatt about his Patent Agreement with the company. These disclosures are in breach of the FTB's duty of confidentiality as established by the sources discussed above. I am perplexed at why the FTB did not try other ways to gather information about the wire transfers in lieu of contacting the companies. Nor can I conceive of a reason why enclosing portions of business documents and correspondence was necessary. In his deposition, Hyatt states: "The FTB sent out the letters to Matsushita and Fujitsu, and all of a sudden my licensing program came to a halt. That is a, I think a significant cause-and-effect relationship. And in fact, the FTB did so in blatant violation of the privacy agreements that they had with me."<sup>102</sup>

My review of the documents indicates that there appears to have been a substantial relationship developed between Hyatt and the FTB during the course of the investigation. There are numerous communications between Hyatt, his representatives, and the FTB. As a result, this is not akin to a situation of a government bureaucracy disclosing data as a matter of course, without having the benefit of knowing each individual's particular circumstances and preferences. Instead, from my review of the documents, it is my

<sup>99</sup> Videotape Deposition of Gilbert P. Hyatt, Aug. 15, 2005, Vol. I, p. 139.

<sup>100</sup> Letters from Eugene Cowan to Anna Jovanovich (Dec. 22, 1997).

<sup>101</sup> Letter from Sheila Cox to Tadashi Sekizawa, Fujitsu, Apr. 11, 1995, H01710, and Letter from Sheila Cox to Akiri Kokaji, Matsushita, Apr. 11, 1995, H01713.

<sup>102</sup> Videotape Deposition of Gilbert P. Hyatt, Aug. 15, 2005, Vol. I, p. 139.

opinion that the FTB had extensive contact with Hyatt and his representatives and was well aware of his strong desire to keep his information confidential. For example, in an August 31, 1995 letter from Sheila Cox to Eugene Cowan, Cox writes: "The FTB acknowledges that the taxpayer is a private person who puts a significant effort into protecting his privacy."<sup>103</sup> The FTB's relationship with Hyatt and his representatives and its acknowledgement of Hyatt's desire for confidentiality makes the FTB's breaches of confidence all the more difficult to justify in my opinion.

### **The Harms of Disclosing Personal Information**

It is my opinion that Hyatt has a privacy interest in his SSN, home address, and business and financial transactions and that he has bona fide reasons for wanting to keep this information private.

Hyatt is a prominent inventor, having developed computer technology that revolutionized the industry. As a result, he has received significant media attention and has also accumulated substantial wealth. Hyatt thus has several good reasons to attempt to keep a low profile. First, his activities are not those of a person who wants to seek out the limelight. He is not striving to become a public figure such as Bill Gates or Donald Trump or others. Rather, Hyatt desires to keep a low profile and to continue to work on and license his inventions.

According to Hyatt's affidavit, he has many legitimate concerns about others learning about his home address. His address is where he also maintains his laboratory and does his research. Accordingly, he has an interest in preventing others from engaging in industrial espionage or the theft of his ideas.<sup>104</sup> He keeps his "most sensitive documents in [his] private home-office."<sup>105</sup> He has also been "harassed by three abusive estranged relatives."<sup>106</sup> In his August 29, 1995 letter to the FTB, Cowan explains: "Mr. Hyatt made up his mind to leave California in mid-1990. Since receiving public recognition about mid-1990, certain members and former members of his family (such as his brother) had been constantly harassing him (legally and otherwise) and he grew fed up with their interference. Mr. Hyatt's work was constantly interrupted by the press and the public. He was harassed by anonymous callers. Additionally, the nature of his patent and research work required a quieter, more remote environment."<sup>107</sup> One can imagine that when it becomes known that a person is worth millions of dollars, all sorts of individuals surface who would like a piece of one's success.

Hyatt took steps to ensure that his address would not appear on public records. He had his home purchased through a trust so his name would not appear on public property.

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<sup>103</sup> Letter from Sheila Cox to Eugene Cowan (Aug. 31, 1995).

<sup>104</sup> Hyatt Affidavit, at ¶ 18.

<sup>105</sup> Hyatt Affidavit, at ¶ 18.

<sup>106</sup> Hyatt Affidavit, at ¶ 140.

<sup>107</sup> Letter from Eugene Cowan to FTB, Aug. 29, 1995, at pp. 2-3.

records, and he took steps to shield his name and address from appearing on various other public records.<sup>108</sup>

Nevertheless, the FTB disseminated Hyatt's SSN, home address, and business and financial transactions.

## 1. SSNs

Exposure of SSNs creates a risk of identity theft. The FTB included Hyatt's SSNs on numerous demand letters sent to dozens of individuals and organizations without regard for whether there was any need to disclose them. The more that a person's sensitive personal data is disseminated, the more that the individual is exposed to the risk of an identity theft. All it takes for an identity theft to occur is for one unscrupulous individual to use one's SSN to access accounts. Hyatt's considerable wealth makes him a particularly attractive target for identity theft.

As defined by the United States General Accounting Office, "identity theft or identity fraud generally involves 'stealing' another person's personal identifying information . . . and then using that information to fraudulently establish credit, run up debt, or take over existing financial accounts."<sup>109</sup>

According to the FBI, identity theft is the most rapidly growing type of white-collar criminal activity.<sup>110</sup> According to estimates by the Federal Office of the Comptroller of the Currency, there are half a million victims of identity theft each year.<sup>111</sup>

Identity theft can be a harrowing experience, and it can be devastating to victims. According to estimates, a victim must spend over two years and close to 200 hours to repair the damage that identity theft causes.<sup>112</sup> Further, victims often have to spend thousands of dollars to remedy the harm.<sup>113</sup> Victims experience great anxiety, leading to psychological harm in certain cases.<sup>114</sup> Victims have difficulty "obtaining loans,

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<sup>108</sup> Hyatt Affidavit, at ¶ 18.

<sup>109</sup> U.S. General Accounting Office, Report to the Honorable Sam Johnson House of Representatives, Identity Theft: Greater Awareness and Use of Existing Data Are Needed 1 (June 2002); see also Jennifer 8. Lee, *Fighting Back When Someone Steals Your Name*, N.Y. Times, Apr. 8, 2001. For more background, see generally BETH GIVENS, THE PRIVACY RIGHTS HANDBOOK 227-48 (1997).

<sup>110</sup> See Jennifer 8. Lee, *Fighting Back When Someone Steals Your Name*, N.Y. Times, April 8, 2001.

<sup>111</sup> See Robert O'Harrow Jr., *Identity Thieves Thrive in Information Age: Rise of Online Data Brokers Makes Criminal Impersonation Easier*, Wash. Post, May 31, 2001, at A1.

<sup>112</sup> See JANINE BENNER, BETH GIVENS, & ED MIERZWINSKI, NOWHERE TO TURN: VICTIMS SPEAK OUT ON IDENTITY THEFT: A CALPIRG/PRIVACY RIGHTS CLEARINGHOUSE REPORT (May 2000) available at <<http://www.privacyrights.org/ar/idtheft2000.htm>>; see also Jennifer 8. Lee, *Fighting Back When Someone Steals Your Name*, N.Y. Times, April 8, 2001; Brandon McKelvey, *Financial Institutions' Duty of Confidentiality to Keep Personal Information Secure from the Threat of Identity Theft*, 34 U.C. Davis L. Rev. 1077, 1086-87 (2001).

<sup>113</sup> Christopher P. Couch, Commentary, *Forcing the Choice Between Commerce and Consumers: Application of the FCRA to Identity Theft*, 53 Ala. L. Rev. 583, 586 (2002).

<sup>114</sup> Christopher P. Couch, Commentary, *Forcing the Choice Between Commerce and Consumers: Application of the FCRA to Identity Theft*, 53 Ala. L. Rev. 583, 586 (2002).

mortgages, security clearances, promotions and even gaining employment.”<sup>115</sup> In certain cases, victims are even arrested based on warrants for the crimes of the identity thieves.<sup>116</sup>

SSNs are a key piece of information for identity theft. SSNs can unlock a host of other information held by the government and the private sector.<sup>117</sup> The identity thief, as Lynn LoPucki observes, “ordinarily needs personal information about the victim, such as the victim’s name, social security number, birth date, or mother’s maiden name.”<sup>118</sup> Thus, information enables the identity thief to apply for credit or open accounts in the victim’s name.<sup>119</sup>

SSNs are used as passwords to obtain access to a host of personal records from banks, investment companies, schools, hospitals, doctors, and so on.<sup>120</sup> The SSN is a powerful number, for with it a person can open and close accounts, change addresses, obtain loans, access personal information, make financial transactions, and more. Indeed, several courts have noted the myriad ways SSNs can be misused to gain access to an individual’s personal information or accounts. In *Greidinger v. Davis*,<sup>121</sup> the court struck down a voter registration system requiring voters to provide SSNs (which were then made publicly available). This system forced people to risk public disclosure of their SSNs in order to vote, exposing them to undue risks by creating a burden on their right to vote.<sup>122</sup> In *Beacon Journal v. City of Akron*,<sup>123</sup> a court held that a state freedom of information act did not extend to public employees’ SSNs:

Thanks to the abundance of data bases in the private sector that include the SSNs of persons listed in their files, an intruder using an SSN can quietly discover the intimate details of a victim’s personal life without the victim ever knowing of the intrusion.<sup>124</sup>

According to the Court, the disclosure of SSNs would create a “high potential for fraud

<sup>115</sup> Martha A. Sabol, *The Identity Theft and Assumption Deterrence Act of 1998: Do Individual Victims Finally Get Their Day in Court?*, 11 Loy. Consumer L. Rev. 165, 167 (1999); see also Maria Ramirez-Palafox, *Identity Theft on the Rise: Will the Real John Doe Please Step Forward?*, 29 McGeorge L. Rev. 483, 484 (1998); Brandon McKelvey, *Financial Institutions’ Duty of Confidentiality to Keep Personal Information Secure from the Threat of Identity Theft*, 34 U.C. Davis L. Rev. 1077, 1087 (2001).

<sup>116</sup> Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 Tex. L. Rev. 89, 90 (2001); see also Privacy Rights Clearinghouse and Identity Theft Resource Center, *Criminal Identity Theft* (May 2002), <http://www.privacyrights.org/fs/fs11g-CrimIdTheft.htm>.

<sup>117</sup> U.S. General Accounting Office, Report to the Honorable Sam Johnson House of Representatives, *Identity Theft: Greater Awareness and Use of Existing Data Are Needed* 7 (June 2002).

<sup>118</sup> Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 Tex. L. Rev. 89, 94 (2001).

<sup>119</sup> LoPucki, *Identity Theft*, *supra* note XX, at 104.

<sup>120</sup> For example, an identity thief purchased the SSNs of several top corporate executives from Internet database companies. The thief then used the SSNs to obtain more personal information about the victims. Benjamin Weiser, *Identity Theft, and These Were Big Identities*, N.Y. Times, May 29, 2002.

<sup>121</sup> 988 F.2d 1344 (4th Cir. 1993).

<sup>122</sup> *Id.* at 1354.

<sup>123</sup> 70 Ohio St.3d 605 (Ohio 1994).

<sup>124</sup> *Id.* at 611.

and victimization.”<sup>125</sup> Likewise, in *City of Kirkland v. Sheehan*,<sup>126</sup> a court restricted the disclosure of law enforcement personnel’s SSNs because:

Access to an individual’s SSN enables a new holder to obtain access to and to control, manipulate or alter other personal information. In effect, access to an SSN allows a person, agency or company to more efficiently and effectively search for and seize information and assets of another.<sup>127</sup>

In short, The SSN functions as a magic key that can unlock vast stores of records as well as financial accounts. Thus, the SSN is the identity thief’s best tool.

Because the SSN can be used in such pernicious ways to harm an individual, it is incumbent upon any entity that maintains people’s SSNs to keep them secure.

## 2. Home Addresses

The facts in this case also indicate that the FTB disclosed Hyatt’s home address. Without knowing much on the issue, people might be tempted to glibly say: “What possible privacy interest could a person have in her home address? Isn’t this information typically contained in the phone book?” Such a view is clearly uninformed. There can be very important privacy interests in one’s home address. Of course, there are many people for whom the disclosure of their home address and phone number will not present any problems; but for others, it could make the difference between life or death.

The federal Driver’s Privacy Protection Act (DPPA) of 1994,<sup>128</sup> was passed in response to the state DMV’s disclosure of a home address. In 1989, a fan obsessed with actress Rebecca Shaeffer hired a private investigator to find out where she lived. The investigator obtained the address from California’s DMV. The fan then went to Shaeffer’s home and murdered her. This murder was a major impetus leading Congress to pass the DPPA, which prohibits states from disclosing personal information in DMV records without an individual’s consent.<sup>129</sup> The key point is that Congress recognized the importance of protecting the privacy of home addresses – so much so that it even passed a law about it.

Many people have a strong interest in keeping their addresses confidential. Celebrities want to protect themselves from being harassed by obsessed fans, stalkers, and paparazzi. Victims of stalkers and domestic abuse victims who have fled their abusive partners also need to safeguard the privacy of their home addresses. They often move to a new location to hide themselves (and their children) from an abusive partner. If their addresses are made public in public records, then they could be hunted down and perhaps

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<sup>125</sup> *Id.* at 612.

<sup>126</sup> 29 Media L. Rep. 2367, 2001 WL 1751590 (Wash. Sup. Ct. 2001).

<sup>127</sup> *Id.* at \*7.

<sup>128</sup> 18 U.S.C. §§ 2721-2725.

<sup>129</sup> See Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* 102 (1995) for background into the legislative history of this law.

killed. Witnesses in a criminal case may need to conceal where they live to prevent retaliation against themselves and their families.

Another group of people needing protection of their home addresses are abortion doctors. There are many people who want to kill or maim these doctors and their families. For example, an Internet site known as the "Nuremberg Files" posted information about doctors working in abortion clinics, including their home addresses. The site also listed doctors who had been killed or wounded. The doctors feared for the safety of themselves and their families, and they won a \$107 million lawsuit, which was upheld on appeal.<sup>130</sup> Clearly, the interests in safeguarding the privacy of residential addresses is not trivial.

Yet another group of people whose safety can be compromised by the disclosure of home addresses are police officers. In *Kallstrom v. City of Columbus*,<sup>131</sup> Ohio was planning to disclose police officers' home addresses under its public records law to the defense counsel of members of the Short North Posse, a violent drug conspiracy ring. The 6th Circuit concluded that the release of this information would violate the officers' constitutional rights: "[T]he City's release of private information concerning the officers to defense counsel . . . rises to constitutional dimensions by threatening the personal security and bodily integrity of the officers and their family members." The court further concluded that "[w]hile there may be situations in which the release of this type of personal information might further the public's understanding of the workings of its law enforcement agencies, the facts presented her do not support such a conclusion."

The Third Circuit also embraces the constitutional right to information privacy (the constitutional right implicated in *Kallstrom*), and it has held that there are privacy interests in home addresses. In *Paul P. V. Verniero*,<sup>132</sup> the Third Circuit observed that case law "reflect[s] the general understanding that home addresses are entitled to some privacy protection, whether or not so required by a statute." What is particularly interesting about *Paul P.* is that the home addresses entitled to privacy protection were those of convicted sex offenders. Indeed, under the constitutional right to information privacy, even convicted sex offenders have a privacy interest in their home addresses.

California also acknowledges privacy interests in addresses. In *Planned Parenthood Golden Gate v. Superior Court*,<sup>133</sup> the California Court of Appeals struck down a discovery order that a Planned Parenthood facility disclose the names, residential addresses, and phone numbers of staff and volunteers who had knowledge relevant to the litigation:

Perhaps more importantly in the present circumstances, the discovery order also impinges on non-parties' residential privacy interests by compelling disclosure of residential addresses and telephone numbers. Courts have frequently recognized

<sup>130</sup> See *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

<sup>131</sup> 136 F.3d 1055 (6th Cir. 1998).

<sup>132</sup> 170 F.3d 396 (3d Cir. 1999).

<sup>133</sup> 99 Cal. Rptr.2d 627 (Cal. Ct. App. 2000).



that individuals have a substantial interest in the privacy of their home. (*Lorig v. Medical Board* (2000) 78 Cal.App.4th 462, 468, 92 Cal.Rptr.2d 862; *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1019-1020, 88 Cal.Rptr.2d 552 (City of San Jose), and cases discussed therein.) Indeed, as the United Supreme Court recently confirmed "[t]he recognizable privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when 'strolling through Central Park' than when 'in the confines of one's own home,' or when persons are 'powerless to avoid' it. [Citation.]" (*Hill v. Colorado* (2000) 530 U.S. 703, 716, 120 S.Ct. 2480, 2489, 147 L.Ed.2d 597.) This residential privacy interest is particularly potent in the context of a dispute relating to the ability of women to seek and obtain lawful services related to pregnancy. (See *Planned Parenthood Assn. v. Operation Rescue* (1996) 50 Cal.App.4th 290, 299, 57 Cal.Rptr.2d 736 ["if a home is involved the state interest in preserving residential privacy is exceptionally potent"].)

The court concluded that "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings" was outweighed by the privacy interests in the home addresses and phone numbers. The court mentioned the Nuremberg Files case and stated that "Planned Parenthood's staff and volunteers could well face unique and very real threats not just to their privacy, but to their safety and well-being if personal information about them is disclosed." The Court noted that the privacy interest could even outweigh a criminal defendant's Sixth Amendment right to confrontation:

Even in a criminal proceeding in which a defendant has a constitutional right of confrontation, a court has discretion to bar disclosure of the address and telephone number of an eyewitness to a crime in order to protect that person's safety, particularly when the facts raise no issue as to the witness's reputation in the community for veracity. (See *Montez v. Superior Court* (1992) 5 Cal.App.4th 763, 7 Cal.Rptr.2d 76; cf. also *People v. Ramirez* (1997) 55 Cal.App.4th 47, 56-57, 64 Cal.Rptr.2d 9.) In a later case discussing *Montez* and its holding, another Court of Appeal held that the determinative factor was whether there is evidence of "harassment, threats, or danger to the safety" of the potential witnesses to justify an order preventing disclosure of witness information to defense counsel. (See *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1329, 1336-1339, 64 Cal.Rptr.2d 714.).

Likewise, in *People v. Lewis*,<sup>134</sup> a criminal defendant wanted to obtain through discovery the home addresses of two police officers in order to "investigate their reputations within their home communities for possible impeachment purposes." The court refused to order the disclosure:

The constitutionally guaranteed right to confront witnesses is not without limitations. One such limitation is where the disclosure of certain information about the witness, such as his residence address, would endanger the witness or his

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<sup>134</sup> 184 Cal.Rptr. 31 (Cal. Ct. App. 1982).

family. In California, the Legislature has seen fit to include peace officers within this protected group by enacting Penal Code section 1328.5, which provides:

"Whenever any peace officer is a witness before any court or magistrate in any criminal action or proceeding in connection with a matter regarding an event or transaction which he has perceived or investigated in the course of his duties, where his testimony would become a matter of public record, and where he is required to state the place of his residence, he need not state the place of his residence, but in lieu thereof, he may state his business address."

The United States Supreme Court has also recognized that there are substantial privacy interests in home addresses and phone numbers. In *Department of Defense v. FLRA*,<sup>135</sup> for example, the Court held that FOIA did not permit agencies to disclose their employees' home addresses to collective bargaining representatives. This disclosure would constitute a "clearly unwarranted invasion" of privacy.<sup>136</sup> Moreover, the Court noted that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."<sup>137</sup>

In a report by the New Jersey Privacy Study Commission,<sup>138</sup> which was created out of the enactment of the New Jersey Open Public Records Act,<sup>139</sup> to address whether home addresses and other personal information should be disclosed in public records, the Commission recommended:

- Individuals should be permitted to provide an address of record for disclosure purposes, in addition to their home address when interacting with public agencies.
- The Governor or Legislature should establish objective guidelines defining when and from which government records home addresses should be redacted.
- Individuals should be permitted to opt out of disclosure of their home addresses.<sup>140</sup>

Accordingly, there are many legitimate reasons why people may want to keep their home addresses private. In many circumstances, courts recognize privacy interests in home addresses, although there certainly are instances to the contrary. But the important principle is that it is clear that there are bona fide reasons for maintaining the privacy of home addresses and many authorities recognize such reasons and protect the privacy of

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<sup>135</sup> 510 U.S. 487 (1994).

<sup>136</sup> *Id.* at 489.

<sup>137</sup> *Id.* at 500.

<sup>138</sup> See FINAL REPORT OF THE PRIVACY STUDY COMMISSION, Submitted to Governor Richard J. Codey and The New Jersey State Legislature (Dec. 2004). The report is available at [http://nj.gov/privacy/prc\\_final\\_report\\_v21.pdf](http://nj.gov/privacy/prc_final_report_v21.pdf). I submitted testimony, making many of the points I have made herein, to the Commission. My testimony is referenced and discussed in the report.

<sup>139</sup> N.J.S.A. 47A:1A-1 *et seq.*

<sup>140</sup> FINAL REPORT OF THE PRIVACY STUDY COMMISSION at 2.

home addresses. It is imperative that the government act with care when handling information about people's home addresses, as the reasons why people often desire their residential addresses to remain private are often ones relating to safety and security. These reasons are highly contextual and vary depending upon each individual's circumstances. An individual may have good reasons for keeping their home addresses private, and it is best to leave this determination to the individual, who is much more well-aware of the situation and circumstances giving rise to his or her desire to maintain the confidentiality of this information, than to leave it to the whim of government bureaucrats who lack the knowledge of each individual's particular situation.

In the case at bar, the FTB disclosed Hyatt's home address to third parties. Hyatt had taken significant steps to ensure that his home address would remain private. From the facts, it does not appear that the FTB considered or weighed Hyatt's reasons for keeping his home address private before disclosing it. Of course, it is possible that the FTB weighed Hyatt's reasons for keeping his home address confidential and rejected them after careful consideration. The documents I reviewed, however, seem to point to another possibility -- that the FTB simply disclosed the information without considering Hyatt's wishes at all and without considering any effects it might have on Hyatt's safety, welfare, or other interests.

Of course, government agencies cannot be required to give individualized hearings to each person before disclosing his or her home address. But this case differs in that the FTB had an ongoing relationship with Hyatt where his desires were clearly communicated to the FTB on numerous occasions. It strikes me as especially problematic that the FTB would disclose Hyatt's home address under these circumstances, without at least attempting to formulate a way to minimize the dissemination of Hyatt's data while obtaining the information it needed for its investigation.

### **3. Business and Financial Transactions**

It is my opinion that in the course of investigating Hyatt, the FTB disclosed sensitive information relating to his business and financial transactions in breach of its promises to keep it confidential.

There is a longstanding and significant recognition of the importance of protecting the privacy of financial transactions. For example, in *Peterson v. Idaho First Nat'l Bank*,<sup>141</sup> the court held that a bank could be sued for breach of confidentiality for disclosing customer information:

To give such information to third persons or to the public at the instance of the customer or depositor is certainly not beyond the scope of banking powers. It is a different matter, however, when such information is sought from the bank without the consent of the depositor or customer of the bank. Indeed, it is an implied term of the contract between the banker and his customer that the banker will not divulge to

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<sup>141</sup> 367 P.2d 284 (Idaho 1961).

third persons, without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account. . .

It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolable secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors.

In *City of Carmel-by-the-Sea v. Young*,<sup>142</sup> the California Supreme Court proclaimed the importance of financial privacy:

As plaintiff city points out, the right of privacy concerns one's feelings and one's own peace of mind (*Fairfield v. American Photocopy etc. Co.* (1955) 138 Cal.App.2d 82, 86, 291 P.2d 194), and certainly one's personal financial affairs are an essential element of such peace of mind. Moreover, personal financial affairs are clearly more than the 'adjunct to the domestic economy' referred to in *Edwards*, *Supra* (p. 1149 of 71 A.C., 80 Cal.Rptr. 633, 458 P.2d 713); instead they would appear to constitute the primary supporting pillar of that economy.<sup>143</sup>

It is my opinion that the FTB interfered in Hyatt's business relationships by disclosing to his Japanese licensees portions of their confidential communications to Hyatt.

#### **Intrusive Investigatory Activities**

It is my opinion that during its investigation of Hyatt, the FTB engaged in activities that were highly intrusive into Hyatt's private life.

The documents also reveal that Cox snooped around Hyatt's Las Vegas home and talked to his neighbors.<sup>144</sup> But Hyatt's Las Vegas residency during the time he resided at his home was not in dispute. Instead, what was in dispute was whether Hyatt was a resident while he was living in a Las Vegas apartment before purchasing his home. Therefore, I am puzzled at why Cox would be snooping around the Las Vegas home and talking to Hyatt's neighbors there when there was no dispute over Hyatt's residency at the time he began residing in that home.

It is my opinion that several of Cox's actions are intrusive into Hyatt's private affairs. Cox wandered about Hyatt's property,<sup>145</sup> peered through his window,<sup>146</sup> looked into his trash,<sup>147</sup> and rooted through his mail.<sup>148</sup> These are the activities of a television gumshoe, but unlike the world of Hollywood where private investigators can snoop around and

<sup>142</sup> 466 P.2d 225 (Cal. 1970).

<sup>143</sup> *Id.* at 231.

<sup>144</sup> FTB Letter to Mr. Harold Pryor, Mar. 10, 1995; FTB Letter to G.C. Eggers, Mar. 10, 1995.

<sup>145</sup> Deposition of Candace Vanessa Les, Jan. 12, 2000, Vol. II, p. 269.

<sup>146</sup> Deposition of Candace Vanessa Les, Jan. 12, 2000, Vol. II, p. 269.

<sup>147</sup> Deposition of Candace Vanessa Les, Jan. 12, 2000, Vol. II, p. 269.

<sup>148</sup> Deposition of Candace Vanessa Les, Jan. 12, 2000, Vol. II, p. 269.

trespass with virtual impunity, there are strong protections of people's private matters and property in the law.

The law recognizes and protects against intrusive activities that invade a person's privacy. For example, the intrusion upon seclusion creates a cause of action when one intrudes "upon the solitude or seclusion of another or his private affairs or concerns" if the intrusion is "highly offensive to a reasonable person."<sup>149</sup> For example, courts have found viable intrusion upon seclusion actions for peering into a person's home windows.<sup>150</sup>

### **Disclosures of Tax Information in the Litigation Rosters and to Others**

The FTB disseminated information about Hyatt's civil litigation against the FTB in its litigation roster. FTB litigation rosters are made available to anybody who want to access them on its Internet website, <http://www.ftb.ca.gov/law/documents.html>. In several litigation rosters, Hyatt's civil case against the FTB is listed. Included in the listing is the amount of tax Hyatt allegedly owes and his tax penalty.<sup>151</sup>

It is my opinion that the FTB acted irresponsibly in including the tax information about Hyatt in this listing. The litigation rosters do not appear to be a legally-mandated court docket. Instead, they constitute information the FTB has decided to release to the public regarding tax appeals. The Hyatt case listed in the litigation roster, however, is not his appeal over his tax assessment and audit. Instead, it is the civil case Hyatt initiated against the FTB for tortious conduct and other causes of action in connection with its audit. I cannot think of a rationale for why the amount of tax and the tax penalty are relevant to this case, which focuses on the conduct of the FTB, not on the merits of the tax issues in Hyatt's audit.

One possible explanation why the FTB discloses Hyatt's tax information in the roster is that it is part of a general pattern, as the tax information for other cases is listed in the roster. However, Hyatt's case is very different from the cases listed on the roster. Unlike the other cases in the roster, which had been finally decided by the FTB, Hyatt's case was still in the administrative process. Accordingly, the disclosures of tax information for Hyatt did not represent information in the stage it would be in *after* the administrative process had been completed. These disclosures of Hyatt's information were premature as well as misleading, since they appeared as the equivalent to the disclosures in other cases (which were at a very different stage in the process).

It is my opinion that in disclosing Hyatt's tax information on the litigation roster, the FTB irresponsibly violated Hyatt's privacy, breached confidentiality, and cast him in a false light.

<sup>149</sup> Restatement of Law: Torts (2d. 1977) § 652B.

<sup>150</sup> Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 132 S.E.2d 119 (Ga. App. 1963).

<sup>151</sup> For example, see Franchise and Income Tax Monthly Refund Litigation Roster (May 30, 2005) at 5.

There is a long and powerful tradition in the United States of maintaining the privacy of tax records. In the early days of federal tax records, Congress sometimes flirted with making tax records public. In 1924, Congress required the public disclosure of taxpayer income. But it then repealed the requirement two years later. In 1934, Congress once again required this disclosure – by requiring taxpayers to submit a form called a “pink slip” which contained name, address, gross income, deductions, net income, credit against net income, tax payable. The law was repealed a year later.<sup>152</sup> Ever since, the confidentiality of tax information has been well-established.

The implementation of taxation requires that the government gather extensive information about a person’s private financial affairs. As I discussed above, financial information has long been protected as private in our traditions and laws.

Moreover, to be carried out effectively, tax systems require an extensive amount of voluntary participation. They depend upon people’s willingness to disclose relevant facts and documents to government tax agencies. Accordingly, the maintenance of confidentiality takes on a role of significant importance, as it facilitates cooperation and disclosure on the part of the taxpayer. Thus, for example, the U.S. Internal Revenue Code provides that tax “[r]eturns and return information shall be confidential.”<sup>153</sup> There are some enumerated exceptions, but the general rule is one of confidentiality.<sup>154</sup> Beyond the law, there is a deeply-rooted sentiment that tax records shall remain confidential. This was demonstrated recently in late 2004 when a provision that authorized two members of the House to read people’s tax returns was errantly inserted into an appropriations bill passed by the U.S. House of Representatives. The provision resulted in a significant outcry, and it was quickly eliminated.<sup>155</sup>

As discussed above, the California Information Practices Act mandates confidentiality, and numerous statements in FTB literature ensure confidentiality as well. I will not repeat my discussion of the establishment of the FTB’s duty of confidentiality, and will therefore incorporate it in this section by reference. I will, however, point out one source directly on point. The FTB’s publication, *California Taxpayer’s Bill of Rights: A Comprehensive Guide* provides:

*We keep confidential the information you provide us on your state income tax returns and the amounts you owe us. If, however, you are no longer married or living with your spouse and you previously filed a joint return with an amount due, we can tell you whether we have tried to collect from your spouse, the general nature of the collection activities and the amount we have collected.*<sup>156</sup>

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<sup>152</sup> See ERIK LARSON, *THE NAKED CONSUMER: HOW OUR PRIVATE LIVES BECOME PUBLIC COMMODITIES* 10 (1992).

<sup>153</sup> 26 U.S.C.A. § 6103.

<sup>154</sup> 26 U.S.C.A. § 6103.

<sup>155</sup> Dan Morgan, *Aide Takes Blame for Tax Return Provision: Staffer Surprised by Privacy Uproar*, Wash. Post, Dec. 3, 2004, at A1.

<sup>156</sup> FTB, *California Taxpayer’s Bill of Rights: A Comprehensive Guide*, ¶22 (emphasis added).

This states quite explicitly that “the amounts you owe us” are kept confidential. Indeed, the California Taxpayers’ Bill of Rights begins with a legislative finding that:

It is the intent of the Legislature to place guarantees in California law to ensure that the rights, privacy, and property of California taxpayers are adequately protected during the process of the assessment and collection of taxes.<sup>157</sup>

The disclosure of Hyatt’s tax information in the litigation roster was a violation of his privacy and a breach of confidentiality. Had Hyatt not brought the civil case against the FTB, his tax information would not have been disclosed in the litigation roster at this stage of his tax appeal process.

It is also my opinion that the disclosure of the information in this premature stage is misleading. Since the administrative process was not completed on Hyatt’s case, the figures disclosed about Hyatt’s tax liability did not reflect the final amounts that are reached at the conclusion of the process (as with the other cases listed in the roster). Accordingly, the figures are misleading, in that they are presented in an equivalent manner to figures at the end of the process, thus suggesting that they have the same status and stature, which they do not.

The law recognizes the injury caused by spreading falsehoods about individuals. The defamation torts – libel and slander – provide redress when one makes a “false and defamatory statement concerning another.”<sup>158</sup> A “defamatory” statement “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>159</sup> False light, a more recent tort inspired by the Warren and Brandeis article, protects against giving “publicity to a matter concerning another that places the other before the public in a false light” that is “highly offensive to a reasonable person.”<sup>160</sup> It safeguards the “interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is.”<sup>161</sup>

Beyond the litigation rosters, the FTB disclosed information about Hyatt’s tax liability to others. In particular, FTB auditor Sheila Cox spoke with Hyatt’s ex-wife, Priscilla Maystead, and said, in Maystead’s recollection, that “Hyatt had been convicted and had – or had to pay some taxes or something to that effect” and that Hyatt “was in very serious trouble.”<sup>162</sup> It is my opinion that such a disclosure is highly inappropriate and improper. Although made at a general level, it is revealing information about Hyatt’s tax liability. It

<sup>157</sup> Cal. Rev. & Taxation Code § 21002.

<sup>158</sup> Restatement (Second) of Torts § 559.

<sup>159</sup> Restatement (Second) of Torts § 559.

<sup>160</sup> Restatement (Second) of Torts § 652E. Although there is a significant amount of overlap between the two torts, false light has a more expansive view of the harm caused by distortion. While defamation requires the proof of reputational harm, false light does not, and plaintiffs can be compensated solely for emotional distress. See Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 Case W. Res. L. Rev. 885 (1991).

<sup>161</sup> Restatement (Second) of Torts § 652E, comment b.

<sup>162</sup> Deposition of Priscilla Maystead, Dec. 15, 1999, Vol. I, pp. 182-183.


is also misleading in that Hyatt's case was not even close to being finished in the administrative process. Moreover, Cox's statements gave the impression that Hyatt was engaging in criminal activity even though no criminal charges had been brought -- let alone a conviction been secured. Accordingly, this statement strikes me as both invasive of Hyatt's privacy as well as potentially defamatory.

Additionally, to gather information about Hyatt, the FTB disseminated dozens of letters along with an accompanying form with bold capital letters: "DEMAND TO FURNISH INFORMATION." These forms then stated: "The People of the State of California to: [recipient's address]," followed by "In the Matter of Gilbert P. Hyatt." The forms then contained the following statement:

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

In Hyatt's case, this form was sent out to numerous businesses, entities, and individuals whom Hyatt knew, did business with, or obtained services from.

The form is rather imposing. Many people, after receiving such a form, might conclude that they were being required to furnish information in connection with a criminal matter. It is my opinion that this form could have misled recipients into believing that Hyatt was under criminal investigation. The words "People of the State of California" are typically associated with criminal matters. The form never explicitly stated that this was for a civil matter rather than a criminal one. Indeed, most of the recipients were laypeople without legal training. Thus, it is my opinion that the form cast Hyatt in a false light by giving the impression that he was under criminal investigation.

  
Daniel J. Solove

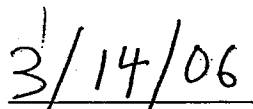
  
Date



Exhibit 3

RA002381

1 **OPP**

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**FILED**

**JUN 3 3 59 PM '05**

*Shirley D. Cunningham*  
**CLERK**

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

16 **GILBERT P. HYATT,**

17 **Plaintiffs,**

18 **v.**

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

21 **Defendants.**

**Case No.: A382999**

**Dept. No.: X**

**PLAINTIFF GILBERT P. HYATT'S  
OPPOSITION TO THE FTB'S MOTION TO  
DISMISS, OR IN THE ALTERNATIVE, FOR  
PARTIAL SUMMARY JUDGMENT RE:  
STATUTORY INFORMATION PRIVACY  
CLAIMS**

**Date of Hearing: June 20, 2005**

**Time of Hearing: 9:00 a.m.**

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

22  
23  
24  
25  
26  
27  
28  
**RA002382**

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\*Case is cited in the lengthy quotation on pages 14 through 19 taken from Hyatt's Opposition to the FTB's Summary Judgment Motion.

1  
2 Plaintiff Gilbert P. Hyatt ("Hyatt") opposes the FTB's Motion to Dismiss, or In the  
3 Alternative, for Partial Summary Judgment Re: Statutory Information Privacy Claims ("the  
4 Motion").

5  
6 **1. Issues presented:**

7 *Invasion of privacy claims.* Hyatt has pled and otherwise given notice of his Nevada  
8 common law invasion of privacy claims, including, but not limited to, invasion of Hyatt's  
9 informational privacy. The District Court and the Nevada Supreme Court have each considered  
10 the scope and supporting evidence for these and Hyatt's other intentional tort claims, and  
11 rejected the FTB's summary judgment motion as to each claim because Hyatt has set forth  
12 evidence establishing a *prima facie* case for each claim and has established that disputed issues  
13 of material fact exist as to each claim. Hyatt has *not* pled a California statutory "Informational  
14 Practices Act" ("IPA") claim. Given the "law of the case" that establishes summary judgment is  
15 *not* appropriate for any of Hyatt's intentional tort claims (including that summary judgment is  
16 not appropriate for any of the various forms of invasion of privacy pled by Hyatt), and given  
17 Hyatt's lack of pleading a California statutory IPA claim, does this motion raise any issue for  
18 which judicial resolution is required?

19 *Scope of discovery.* The Discovery Commissioner has handled all discovery issues and  
20 disputes in this case since its inception and has made dozens of significant rulings on discovery  
21 over the last 6 plus years. The Discovery Commissioner has ruled that Hyatt may take discovery  
22 of FTB policies and procedures, and/or regulations and laws applicable to the FTB, *that relate to*  
23 *the Hyatt audits*. In other words, Hyatt may discover what the FTB did concerning the Hyatt  
24 audits, and what the FTB should have done or should not have done regarding the Hyatt audits.  
25 Failure by the FTB to follow its own policies and procedures, as well as State regulations and  
26 laws, during the Hyatt audits may constitute, or at least may lead to the discovery of, admissible  
27 evidence of the FTB's torts, including various forms of common-law invasions of privacy and  
28 whether the FTB conducted a bad-faith fraudulent audit. Certain provisions of the IPA address

1 what the FTB is suppose to do or not do during audits such as the Hyatt audits. Hyatt has sought  
2 to take discovery of these Hyatt-related provisions. Should any questions relative to Hyatt's  
3 compliance with the Discovery Commissioner's rulings in this case on discovery directed at the  
4 IPA be referred in the first instance to the Discovery Commissioner?

5  
6 **2. Summary of argument.**

7 *Invasion of privacy claims.* The FTB fails to inform this Court that Hyatt has pled  
8 and/or presented Nevada common law invasion of privacy claims, including the FTB's violation  
9 of Hyatt's informational privacy. Hyatt's common law invasion of privacy claims have already  
10 been subjected to a summary judgment motion by the FTB, and this Court's ruling that disputed  
11 issues of material fact preclude issuance of summary judgment was affirmed by the Nevada  
12 Supreme Court, which considered but rejected an FTB writ petition. None of Hyatt's invasion of  
13 privacy claims are based on California's IPA. Hyatt makes no statutory IPA claim. As a result,  
14 there is simply no legitimate issue for the Court to rule on relative to this motion.

15 To the extent the FTB is using the motion to attack earlier rulings of the Court, the "law  
16 of the case" prevents the FTB from doing so. Hyatt's common law invasion of privacy claims,  
17 including his informational privacy claims, must be tried given the past rulings of the Court.

18 *Scope of discovery.* Alternatively, the FTB's motion is a thinly disguised attempt to  
19 obtain a discovery limitation *without first presenting the issue to the Discovery Commissioner.*  
20 The FTB is simply wrong in suggesting that discovery relating to the FTB's violations of the IPA  
21 are not within the bounds of discovery ordered by the Discovery Commissioner. Such violations  
22 are evidence, or may lead to the discovery of admissible evidence, of the torts at issue here. To  
23 the extent the FTB disagrees, the matter should be presented to the Discovery Commissioner.  
24 The FTB's request relative to discovery should therefore be stricken so that there is no  
25 misunderstanding as to whether the Court's ruling on this motion is intended to effect, change, or  
26 any way limit the Discovery Commissioner's rulings.

1       **3.     There is no statutory IPA claim at issue, and therefore nothing for the**  
2       **Court to dismiss.**

3             The California statutory IPA claim that the FTB seeks to dismiss is not and never has  
4     been asserted by Hyatt. Hyatt has not and does not assert a statutory claim under California's  
5     IPA. Rather, Hyatt has asserted Nevada common law claims for invasion of privacy, one form  
6     of which is the violation of "informational privacy" as discussed further below. Hyatt's Nevada  
7     common law tort claims have already been reviewed and approved by this Court via multiple  
8     motions filed by the FTB. This includes all forms of Hyatt's invasion of privacy claims. This is  
9     also discussed in further detail below.<sup>1</sup>

10            The FTB's extensive discussion in its moving papers relating to comity, sovereign  
11   immunity, and so forth is therefore simply wasted. There is no such issue here as Hyatt is not  
12   asserting a California statutory IPA claim. The FTB seeks dismissal of a non-existent claim.  
13   Consequently, there is no issue ripe for judicial resolution.

14            The significance of the California IPA for this case is that FTB violations of the  
15   California IPA have, and may again, lead to the discovery of admissible evidence of the common  
16   law torts committed by the FTB. Any dispute over the scope of this discovery must be referred  
17   to the Discovery Commissioner.

18  
19       **4.     Any dispute over the scope of Hyatt's discovery regarding the IPA must**  
20       **be referred to the Discovery Commissioner.**

21            This motion, if nothing else, is a collateral attack on the Discovery Commissioner and the  
22   rulings he has issued in this case. The FTB seeks a ruling by this motion to prohibit discovery  
23   relating to FTB violations of the IPA. The appropriateness of discovery relating to the IPA has  
24   been addressed by the Discovery Commissioner, and any violations, further limitations, or  
25   expansions of those rulings must first be presented to the Discovery Commissioner pursuant to

26            <sup>1</sup> On page 11 of its motion, the FTB accurately quotes, but inaccurately argues, a statement made by Hyatt's counsel  
27   during the hearing on summary judgment in this matter. As the FTB quotes, Hyatt's counsel said, "we are suing for  
28   the same sort of thing in Nevada [referring to Hyatt's Nevada common law claim for invasion of privacy based on  
  "informational privacy."] Hyatt's invasion of privacy/informational privacy claim, and the manner in which it has  
  been reviewed and approved for trial by this Court and the Nevada Supreme Court is discussed in Section VI, *infra*.



1 Local Rule 2.34(a) ("Unless otherwise ordered, all discovery disputes. . . must first be heard by  
2 the Discovery Commissioner.").

3 From the outset of this case, the Discovery Commissioner has taken a very active role in  
4 guiding, shaping, and — where appropriate — limiting the discovery process. To date, at least  
5 18 hearings have been conducted relating to approximately 24 discovery motions filed by the  
6 parties. Contrary to the out-of-context reference the FTB makes to a statement made by the  
7 Discovery Commissioner during an early hearing, the Discovery Commissioner has made  
8 abundantly clear that the FTB's violations of its own policies and procedures and/or regulations  
9 and laws that relate to the Hyatt audits are appropriate subjects for discovery. The most salient  
10 ruling on this point is set forth in a January 8, 2004 Order, which approved the Discovery  
11 Commissioner's Report and Recommendation. It specifically provided in Paragraph 2 of the  
12 Findings:

13 The scope of discovery will be the FTB process dealing with Hyatt  
14 during the audit and subsequent activity and how the FTB acted in regard  
15 to Hyatt. *It will be about as broad as it can be in regards to the FTB's*  
16 *actions relating to Hyatt. Hyatt shall be permitted to conduct discovery*  
17 *directed at gaining an understanding about the FTB's conduct or process*  
18 *as applied to Hyatt.*

19 ...

20 The conduct of any of the people who worked on the Hyatt audit  
21 can be examined in light of *what FTB's manual at that time said they*  
22 *should do and what they did.* If there is such a manual that said what they  
23 should do in a particular instance, that's it. For example, if the manual  
24 instructed an auditor on how to do something, and the auditor who worked  
25 on Hyatt's audit chose to ignore those instructions, then Hyatt has a right  
26 to know what the manual said and what the auditor did.<sup>2</sup>

27 The Discovery Commissioner previously ruled that Hyatt may discover the full scope of  
28 the FTB's fraudulent conduct during the audits:

29 Well, I am kind of confused on why the file shouldn't be an open book,  
30 Mr. Leatherwood. *If there is nothing to conceal why shouldn't the process*  
31 *be open to the taxpayer when they are claiming that there is fraud.* You  
32 are claiming that he is defrauding you. He is claiming that your conduct is  
33 fraudulent. I say yours, the FTB's conduct is fraudulent. I can't say I  
34 completely agree with you that all of the taxpayer's machinations here,

35 <sup>2</sup> See January 8, 2004 Order Approving Discovery Commissioner's Report and Recommendation, attached to the  
36 Appendix of Evidence as Exhibit 1 (emphasis added).

1                   however they are done, should be completely explored, and you are  
2                   certainly entitled to do that.

3                   I am concerned, and I think there is concern countrywide about the tax  
4                   collecting services using methods that are not appropriate and, you know,  
5                   we all are completely aware of that in regard to the IRS and methods like  
6                   that, and *I think that these processes should be explored in the proper*  
7                   *context.*

8                   You indicate that Mr. Hyatt has all of his rights and remedies in California  
9                   to challenge the tax. I don't know if those rights and remedies include  
10                  exploration of the process and availability to all the information that he  
11                  could get by way of the claims that the Court has left intact here. *If there*  
12                  *is fraud to be discovered, I think it should be discovered on one side or the*  
13                  *other.*<sup>3</sup>

14                 Hyatt's fraud claim as pled and presented in opposing the FTB's unsuccessful motions  
15                 described above seeks recovery for the FTB conducting a fraudulent, bad faith audit. In short,  
16                 the FTB represented it would conduct a fair and unbiased audit and maintain the confidentiality  
17                 of the information provided by Hyatt as part of the audits. The FTB provided neither.

18                 In sum, the FTB's violations of certain provisions of the IPA demonstrate, or at least  
19                 arguably evidence, bad faith conduct by the FTB directed at Hyatt. As Hyatt argued in opposing  
20                 the FTB's summary judgment motion, at the outset of the audit the FTB sent Hyatt the FTB's  
21                 official privacy notice<sup>4</sup> that stated that the FTB complies with the Federal Privacy Act of 1974  
22                 and the IPA (*i.e.*, California Information Practices Act of 1977, California Civil Code §§ 1798 et  
23                 seq.) Both statutes assure individuals that government agencies compiling personal information  
24                 will do so under strict limits, that disclosure will be strictly limited and accounted for, that  
25                 individuals will have access to their entire file upon request, and that individuals can request  
26                 corrections to their records. This "informational privacy" that was promised to Hyatt by the FTB  
27                 at the outset of his audits provides that an individual under audit has a reasonable expectation of  
28                 privacy upon which the individual, in this case Hyatt, relies in turning over extensive and  
29                 confidential information.<sup>5</sup>

<sup>3</sup> Transcript of November 9, 1999 hearing before Discovery Commissioner, at 55-56, excerpts attached to the Appendix as Exhibit 2 (emphasis added).

<sup>4</sup> FTB Privacy Notice, attached to the Appendix of Evidence as Exhibit 3.

<sup>5</sup> See *infra*, at 16-19, full discussion regarding Hyatt's "informational privacy" claims.

1 The FTB itself therefore injected the informational privacy issue into this case, including  
2 its compliance, or lack of compliance, with the IPA. This relates directly to Hyatt's invasion of  
3 privacy claims as he was promised confidentiality, and the FTB was obliged to provide the  
4 promised confidentiality. Hyatt has therefore rightly pursued discovery of FTB violations of  
5 Hyatt's informational privacy rights, including violations of the IPA, as part of Hyatt's fraud  
6 claim and common law invasion of privacy claims. The Discovery Commissioner has allowed  
7 appropriate discovery, particularly on the fraud claim as quoted above. Hyatt has strictly  
8 complied with all rulings of the Discovery Commissioner in pursuing limited discovery relating  
9 to the FTB's violations of the IPA, and for that matter all discovery that he has pursued. To the  
10 extent the FTB asserts Hyatt is conducting discovery beyond the bounds of the Discovery  
11 Commissioner's rulings (as seems to be the FTB's real complaint in this motion), the matter  
12 should be directed to the Discovery Commissioner.

13 Any and all requests in the FTB's motion relating to discovery, such as limiting Hyatt's  
14 discovery in any way, should be stricken as improperly requested and in direct violation of  
15 Local Rules requiring all discovery disputes be presented first to the Discovery Commissioner.  
16 Hyatt therefore, and hereby, formally requests that the Court strike the following portions of the  
17 FTB's motion:

- 18 • page 5, lines 17-19;
- 19 • page 11, line 20 - page 12, line 25.

20  
21 **5. Hyatt's intentional tort claims, including common law invasion of**  
22 **privacy based on informational privacy rights, are intact and have**  
23 **withstood a summary judgment challenge.**

24 Contrary to the FTB's implicit suggestion, almost all of Hyatt's case as pled remains  
25 intact. The FTB's motions for judgment on the pleadings and summary judgment were  
26 overwhelmingly rejected. The Nevada Supreme Court review also left intact almost the entirety  
27 of Hyatt's case, dismissing only a single negligence claim and remanding for trial all intentional  
28 tort claims.

*Motion for judgment on the pleadings.* The FTB first sought to dismiss Hyatt's claims

1 through a motion challenging the sufficiency of Hyatt's First Amended Complaint. For Hyatt's  
2 tort claims, the FTB argued Hyatt failed to even plead facts sufficient to state claims for the  
3 asserted torts.<sup>6</sup> Hyatt set forth in detail the factual allegation supporting his Nevada common law  
4 tort claims for the various forms of invasion of privacy — including violation of his  
5 informational privacy.<sup>7</sup> That Hyatt was seeking to recover under a Nevada common law claim  
6 for FTB disclosures of his private and confidential information gathered and maintained by the  
7 FTB was obvious on the face of Hyatt's opposition.<sup>8</sup> Judge Nancy Saitta unequivocally rejected  
8 the FTB's request to dismiss this claim and all of Hyatt's other tort claims.<sup>9</sup>

9 ***Motion for Summary Judgment.*** The FTB then sought a Motion for Summary Judgment  
10 making essentially two separate arguments: (i) Hyatt's claims were barred by the sovereign  
11 immunity that the FTB was accorded in California under California law and (ii) Hyatt did not  
12 have sufficient evidence to establish the necessary elements of his Nevada common law tort  
13 claims. The FTB directly argued, unsuccessfully, in its motion for summary judgment that Hyatt  
14 did not have evidence of genuine issues of material facts. The FTB argued this point claim by  
15 claim for over 10 pages.<sup>10</sup>

16 In other words, and despite statements to the contrary in the FTB's motion, the FTB did  
17 unequivocally challenge, unsuccessfully, at summary judgment the sufficiency of Hyatt's  
18 evidence for each claim via summary judgment. Hyatt, in turn, provided detailed and supporting  
19 evidence for each element of each Nevada common law tort claim — including extensive  
20 discussion and presentation of evidence concerning his claim for breach of informational privacy  
21

22 <sup>6</sup> FTB Motion for Judgment on the Pleadings, at 15-30, attached to accompanying Appendix of Evidence as Exhibit  
14.

23 <sup>7</sup> Hyatt Opposition to Motion for Judgment on the Pleadings, at 24-43, attached to accompanying Appendix of  
24 Evidence as Exhibit 4.

25 <sup>8</sup> *Id.*, at 25-30.

26 <sup>9</sup> Order re Motion for Judgment on the Pleadings, at 2, attached to accompanying Appendix of Evidence as Exhibit  
27 5; Transcript from April 7, 1999 hearing on Motion for Judgment on the Pleadings, at 56, attached to accompanying  
Appendix of Evidence as Exhibit 6.

28 <sup>10</sup> Reply of FTB in Support of Motion for Summary Judgment, at 7-18, attached to accompanying Appendix of  
Evidence as Exhibit 7.

1 under his multi-prong invasion of privacy claim. After presenting extensive discussion of the  
2 development of the law concerning informational privacy claims as a new and accepted form of  
3 invasion of privacy,<sup>11</sup> Hyatt demonstrated substantial supporting evidence for each element of  
4 each claim.<sup>12</sup> Regarding informational privacy, Hyatt argued in opposing summary judgment:<sup>13</sup>

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

10           This right of privacy was violated when the FTB contacted  
11 neighbors, businesses, government officials and others within Nevada,  
12 Japan and California, either in person or by mail, gave them secret  
13 information such as Hyatt's secret Las Vegas address and social security  
14 number, and led them to believe that Hyatt was under investigation in  
15 California, thereby casting doubt upon Hyatt's honesty, integrity and moral  
16 character.<sup>14</sup> This conduct by the FTB did in fact harass, annoy, vex and  
17 embarrass Hyatt and siphon off his time, energy and money from his  
18 productive work.<sup>15</sup> Even as the FTB and its agents were continuing to  
19 provide assurances of confidentiality to Hyatt, Sheila Cox and the FTB  
20 were in the process of sending bogus "DEMAND[S] TO FURNISH  
21 INFORMATION" to Las Vegas utility companies including Southwest  
22 Gas Corp., Silver State Disposal Service and Las Vegas Valley Water  
23 District, providing each company with Hyatt's secret personal home  
24 address, disregarding Hyatt, his privacy rights and the FTB's assurances of  
25 confidentiality.<sup>16</sup> Cox also sent them to four newspapers.<sup>17</sup>

26           The District Court agreed with Hyatt's position finding material issues of fact for each of  
27 Hyatt's Nevada common law tort claims, and denying summary judgment on any of Hyatt's tort  
28 claims.<sup>18</sup> The District Court also denied the FTB's alternative theory that the FTB's sovereign

20 <sup>11</sup> Opposition to FTB Motion for Summary Judgment, at 21-28, attached to accompanying Appendix of Evidence  
21 as Exhibit 17.

22 <sup>12</sup> *Id.* at 27-48.

23 <sup>13</sup> *Id.* at 49-64.

24 <sup>14</sup> Original footnote: "See, e.g., Hyatt Affid., ¶¶ 129-138, 196, 200."

25 <sup>15</sup> Original footnote: "See, e.g., Hyatt Affid., ¶ 138."

26 <sup>16</sup> Original footnote: "H 01639, 01641, 01643 . . ."

27 <sup>17</sup> Original footnote: "H 01637, 01853, 01855, 01857, 01899 . . ."

28 <sup>18</sup> Order re Motion for Summary Judgment, at 2, attached to accompanying Appendix of Evidence as Exhibit 15;  
Transcript from April 21, 2000 hearing on Motion for Summary Judgment, at 47:6-8; 49:20-23, attached to  
accompanying Appendix of Evidence as Exhibit 16.

1 immunity under California law prohibited this suit against the FTB in Nevada.<sup>19</sup>

2 ***FTB writ petition re summary judgment ruling.*** The FTB then eventually filed a writ  
3 petition with the Nevada Supreme Court seeking review of the District Court's ruling on  
4 summary judgment relating to the denial of the recognition of the FTB's asserted right to  
5 sovereign immunity under California law. The FTB argued that it should be granted complete  
6 sovereign immunity under principles of comity and other constitutionally related arguments.<sup>20</sup>  
7 The FTB specifically did *not* seek writ review of the District Court's ruling that material issues  
8 of fact existed that precluded summary judgment for any of Hyatt's common law tort claims.<sup>21</sup>  
9 Hyatt's response to the FTB's writ petition therefore only addressed the sovereign immunity  
10 argument, without addressing the evidence presented at summary judgment that demonstrated  
11 and supported the District Court's ruling that material issues of fact existed that precluded  
12 summary judgment.<sup>22</sup>

13 ***The Nevada Supreme Court's first ruling.*** After extensive briefing and oral argument  
14 relative to the sovereign immunity argument presented by the FTB, the Nevada Supreme Court  
15 issued a ruling in which it admitted that it was going beyond the issues presented in the writ  
16 petition, had examined the record presented, determined Hyatt had not presented evidence  
17 sufficient to establish his tort claims, and therefore saw no issues of material fact thereby  
18 requiring the District Court to grant the FTB's request for summary judgment on that ground.<sup>23</sup>  
19 In this initial ruling, the Nevada Supreme Court did not address the sovereign immunity issue  
20

21 \_\_\_\_\_  
<sup>19</sup> *Id.* at 2.

22 <sup>20</sup> FTB' Petition for a Writ of Mandamus ordering Dismissal, or Prohibition and Mandamus Limiting the Scope of  
23 This Case, at 22 (describing issues presented) attached the accompanying Appendix of Evidence as Exhibit 8. This  
24 was the FTB's second writ petition, as the Nevada Supreme Court had already agreed to consider the FTB's first  
writ petition relating to certain discovery rulings of the District Court.

25 <sup>21</sup> *Id.* at 22.

26 <sup>22</sup> Hyatt's Answer to FTB's Petition for a Writ of Mandamus ordering Dismissal, or Prohibition and Mandamus  
27 Limiting the Scope of This Case at 1-2 (describing issues presented) attached to the accompanying Appendix of  
Evidence as Exhibit 9.

28 <sup>23</sup> Nevada Supreme Court ruling dated June 13, 2001, attached to the accompanying Appendix of Evidence as  
Exhibit 10.

1 presented in the FTB's writ petition and briefs of the parties.<sup>24</sup>

2       *Hyatt's petition for rehearing.* Based on the Nevada Supreme Court's acknowledged  
3 reaching beyond the issues presented and briefed by the parties, Hyatt filed a petition for  
4 rehearing arguing that he had not presented the substantial evidentiary support that established  
5 his common law tort claims because that issue was not before the Court in the FTB's writ  
6 petition. Hyatt initially presented a 10 page petition for review.<sup>25</sup> But based on the Nevada  
7 Supreme Court's order agreeing to consider the petition, Hyatt was given leave to submit an  
8 additional 15 pages of argument supporting his petition.<sup>26</sup> In these two briefs, Hyatt presented  
9 and addressed the significant factual record supporting Hyatt's common law tort claims that had  
10 been presented in the District Court in opposing the FTB's motion for summary judgment. In  
11 particular, Hyatt addressed the FTB's invasion of privacy claims, including the informational  
12 privacy prong of this tort. He demonstrated that there was evidentiary support for each element  
13 of each tort thereby prohibiting the granting of summary judgment.

14       The FTB opposed Hyatt's petition for rehearing arguing that Hyatt had not established  
15 the elements for each of his tort claims. Indeed at the outset of its answer to Hyatt's petition for  
16 rehearing, the FTB asserts:

17               [Hyatt] had not met his threshold burden under Rule 56 to present  
18               evidence to support any of his tort claims.<sup>27</sup>

19       The FTB then proceeds throughout its 25 page answer to argue that Hyatt did not present  
20 sufficient evidence of his various tort claims. Indeed, the section headings from the FTB's  
21 answer are instructive and demonstrate precisely what the FTB unsuccessfully argued to the  
22 Nevada Supreme Court. The FTB argued:

23  
24 <sup>24</sup> *Id.*

25 <sup>25</sup> Hyatt's 10 page petition for rehearing filed with the Nevada Supreme Court is attached to the accompanying  
26 Appendix of Evidence as Exhibit 11.

27 <sup>26</sup> Hyatt's 15 page supplemental argument to his petition for rehearing filed with the Nevada Supreme Court is  
28 attached to the accompanying Appendix of Evidence as Exhibit 12.

<sup>27</sup> FTB's Answer to Hyatt Petition for Rehearing and Supplemental Petition for Rehearing, at 4, attached to the  
accompanying Appendix of Evidence as Exhibit 13.

1 HYATT HAS FAILED TO PRESENT EVIDENCE TO SUPPORT HIS  
2 INVASION OF PRIVACY CLAIMS;<sup>28</sup>

3 HYATT HAS FAILED TO PRODUCE EVIDENCE TO SUPPORT HIS  
4 ABUSE OF PROCESS CLAIM.<sup>29</sup>

5 Further, the FTB spent 10 of its allotted 25 pages arguing Hyatt had not submitted  
6 sufficient evidence relating to the nature and scope of the FTB's investigation and audits of  
7 Hyatt.<sup>30</sup> The FTB cannot credibly dispute that the primary issue argued by the parties, and  
8 decided by the Nevada Supreme Court, was not whether Hyatt had submitted sufficient  
9 evidentiary support for his claims to withstand Rule 56 review. Any argument to the contrary by  
10 the FTB is belied by its answer opposing Hyatt's petition for rehearing.

11 Without question therefore, and contrary to FTB's representations in its moving papers,  
12 the Nevada Supreme Court was directly presented with and determined whether Hyatt presented  
13 sufficient evidentiary support for his tort claims so that material issues of fact existed preventing  
14 summary judgment. That was precisely the issue the Court decided in ruling on Hyatt's petition  
15 for rehearing.

16 *The Nevada Supreme Court's second ruling.* The FTB submitted as Exhibit 1 to its  
17 moving papers the Nevada Supreme Court's decision dated April 4, 2002 granting Hyatt's  
18 petition for rehearing, vacating its prior ruling, and remanding Hyatt's intentional tort claims to  
19 the District Court. At the outset of its decision the Nevada Supreme Court states its earlier ruling  
20 had "granted the [FTB's] petition . . . on the basis that Hyatt did not produce sufficient facts to  
21 establish the existence of a genuine dispute justifying denial of the summary judgment  
22 motion."<sup>31</sup> The Court then held: "Having considered the parties documents and the entire record  
23 before us, we grant Hyatt's petition for rehearing, vacate our June 13, 2001 order and issue this  
24

25 <sup>28</sup> *Id.* at 22.

26 <sup>29</sup> *Id.* at 23.

27 <sup>30</sup> *Id.* at 11-21.

28 <sup>31</sup> See April 4, 2002 Order, at 2, attached as Exhibit 1 to FTB moving papers.



1 order in its place.”<sup>32</sup> The Court also denied the FTB’s alternative request in its original petition  
2 to “limit the scope of the trial.”<sup>33</sup>

3 In short, the Nevada Supreme Court held, upon actual review of the evidentiary record,  
4 that Hyatt had presented sufficient facts supporting his tort claims thereby creating “the existence  
5 of a genuine dispute justifying denial of the summary judgment motion.”<sup>34</sup> The Court then  
6 addressed the sovereign immunity issue raised in the FTB’s initial writ petition, ruling that for  
7 Hyatt’s intentional tort claims, including all prongs of his asserted common law invasion of  
8 privacy claim, Nevada courts should not and would not recognize as a matter of comity that the  
9 FTB was immune from the alleged intentional torts because a Nevada government agency would  
10 not be immune under Nevada law. Conversely, the Court held that Hyatt’s sole negligence claim  
11 should be dismissed as a matter of comity because a Nevada government agency would have  
12 immunity for the alleged negligence under Nevada law.

13 *United States Supreme Court review.* The FTB attached as Exhibit 5 to its moving  
14 papers the decision of the United States Supreme Court in this case. The FTB’s moving papers  
15 make reference that the United States Supreme Court did not address whether material facts were  
16 in dispute. However, this issue was not before the U. S. Supreme Court, and it never would  
17 address that kind of an issue. Consistent with its limitation to review matters only with  
18 constitutional significance, the Court did not review the Nevada Supreme Court’s decision  
19 relative to finding disputed material facts. Rather, the United States Supreme Court’s review,  
20 consistent with the FTB’s certiorari petition, was limited to the sovereign immunity issue and the  
21 Nevada Supreme Court’s refusal to grant comity to California in regard to Hyatt’s intentional tort  
22 claim. On this issue, the United States Supreme Court unanimously upheld the Nevada Supreme  
23 Court.

24  
25  
26 

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<sup>32</sup> *Id.*

27 <sup>33</sup> *Id.*

28 <sup>34</sup> *Id.*

1  
2 **6. Hyatt has presented a Nevada common law informational privacy claim**  
3 **as part of his broader invasion of privacy claims, but he had not and**  
4 **does not assert a statutory IPA claim.**

5 Hyatt has pled, presented evidence of, and otherwise developed and presented a *prima*  
6 *facie* case for various prongs of Nevada's common law invasion of privacy tort, including  
7 violation of informational privacy. These are common law claims. As set forth above, the legal  
8 sufficiency, pleading sufficiency, and evidentiary sufficiency of these claims — at least relative  
9 to a summary judgment — has been established by the rulings by this Court and the Nevada  
10 Supreme Court. The FTB's reference to and discussion of a statutory IPA claim is disingenuous  
11 as Hyatt has not asserted such a claim. To the extent the FTB's motion is a disguised attack on  
12 Hyatt's common law invasion of privacy claims, and particularly the informational privacy  
13 aspect of those claims, the FTB is seeking an end-run around prior rulings of this Court and the  
14 Nevada Supreme Court.

15 To be clear, and as the FTB knows and should have referenced in its motion, Hyatt has  
16 presented and is pursuing a common law claim for informational privacy as part of his invasion  
17 of privacy tort. Hyatt has extensively briefed this issue in the proceedings described above  
18 demonstrating the development of the common law for informational privacy as a now accepted  
19 part of the invasion of privacy tort. In opposing the FTB's summary judgment motion, Hyatt  
20 explained as quoted extensively below (including headings and footnotes<sup>35</sup>) his informational  
21 invasion of privacy claim:

22 **"1. The right to privacy — in particular "informational privacy"**  
23 **— protects an individual such as Hyatt from the type of abuse**  
24 **committed by the FTB**

25 The U.S. Constitution (specifically the Fourth Amendment) and  
26 the constitutions of many states — including Nevada and California —  
27 forbid unreasonable searches and seizures. Springing forth from this

28 <sup>35</sup> See Hyatt's Opposition to the FTB's Motion for Summary Judgment, at 27-48, attached to the accompanying Appendix of Evidence as Exhibit 17. The footnotes in the quoted language below from the Opposition reflect different footnote numbers from the actual Opposition as quoted language has been inserted directly into this document such that the footnote numbering is consecutive based on this document.

1 Constitutional right is the right of privacy.<sup>36</sup> Nevada, California, and the  
2 U.S. Supreme Court enshrine privacy as a fundamental right.<sup>37</sup>

3 Nevada has "long recognized the existence of the right to  
4 privacy."<sup>38</sup> Nevada law further requires that, in determining whether a  
5 particular action is "highly offensive," courts should and do consider the  
6 degree of intrusion, the intruder's objectives, and *the expectations of those*  
7 *whose privacy is invaded.*<sup>39</sup>

8 The Nevada Supreme Court articulated one of the reasons that the  
9 FTB's massive intrusion into Hyatt's life infringed on his privacy: "The  
10 principle is well established that searches conducted outside the judicial  
11 process, without prior approval by judge or magistrate, are *per se*  
12 unreasonable under the Fourth Amendment — subject only to a few  
13 specifically established and well-delineated exceptions."<sup>40</sup>

14 There is a two part test for assessing whether governmental action  
15 violates the Fourth Amendment. The first question is whether a person  
16 has exhibited an actual or *subjective* expectation of privacy. Hyatt easily  
17 establishes this subjective prong of the test, for he is very private.<sup>41</sup> Even  
18 though Hyatt received considerable publicity after his micro-computer  
19 patent issued in 1990 and during his patent interference dispute with Texas  
20 Instruments, the publicity was primarily business-related, not personal.<sup>42</sup>

21 The second question is whether that expectation of privacy is one  
22 that *society* deems to be reasonable. Here the FTB announced in its first  
23 contact letter with Hyatt that he could expect confidential treatment of all  
24 of his personal information.<sup>43</sup> Subsequently, FTB auditors promised Hyatt

25 <sup>36</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The Fourth  
26 Amendment, including the right to privacy, applies in a civil context as well as criminal. *Soldal v. Cook County*,  
27 506 U.S. 56, 87, n. 11, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) (holding "the protection against unreasonable  
28 searches and seizures fully applies in the civil context").

<sup>37</sup> See Request for Judicial Notice, at 5, submitted with opposition to motion for judgment on the pleadings,  
[attached to Appendix submitted with the original Opposition to Motion for Summary Judgment].

<sup>38</sup> *People for Ethical Treatment of Animals (PETA) v. Bobby Beronini, Ltd.*, 111 Nev. 615, 895 P.2d 1269  
(1995), *modified on other grounds*, 113 Nev. 632, 940 P.2d 127 (1997) (crediting Justice Louis Brandeis and  
Professor William Prosser for the invention of the tort of privacy, noting that the *Restatement* language, drafted by  
Dean Prosser, has been "adopted, often verbatim, by the vast majority of American jurisdictions.").

<sup>39</sup> *PETA*, 111 Nev. at 634 (emphasis added).

<sup>40</sup> *Alward v. State*, 112 Nev. 141, 151, 912 P.2d 243, 250 (1996) (citing to U.S. Supreme Court precedent and  
earlier Nevada Supreme Court precedent).

<sup>41</sup> See, e.g., Hyatt Affid., ¶ 6-8, 127-138.

<sup>42</sup> *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

<sup>43</sup> June 17, 1993 letter from Marc Shayer, H 01213, [attached to Appendix submitted with the original  
Opposition to Motion for Summary Judgment].

1 confidential treatment both orally and in writing.<sup>44</sup> In addition, the FTB  
2 publishes statements on its web page and in booklets saying that taxpayers  
3 have a right to confidential treatment.<sup>45</sup>

4 Ironically, the FTB's own internal policies, notices, regulations,  
5 handbooks, guidelines — which were ignored by the FTB in this case —  
6 also promise the right to privacy.<sup>46</sup>

7 Notwithstanding Hyatt's high expectation of privacy, the FTB  
8 made mandatory "Demands for Information" about him to individuals,  
9 government agencies, and businesses for which no judicial permission was  
10 sought or received and for which no notice was given to Hyatt.<sup>47</sup>

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

13 Of importance to Hyatt's action, "[d]uring the past five years about  
14 150 lawsuits have been filed against the IRS claiming wrongful disclosure  
15 of confidential information."<sup>48</sup> In 1997, a Colorado judge awarded  
16 \$250,000 in punitive damages against the IRS for being "grossly  
17 negligent" and "reckless" in placing a woman in a false light by claiming  
18 she owed \$380,000 more than she in fact owed.<sup>49</sup>

19 Another recent large verdict against tax authorities for invasion of  
20 privacy rights and abuse of authority is *Jones v. United States*.<sup>50</sup> The  
21 district court awarded two taxpayers over \$5,700,000, including over  
22 \$325,000 in emotional distress damages for the destruction of their  
23 business caused by an IRS agent leaking confidential information which  
24 damaged their reputation in the oil business. There are striking parallels  
25 between this case and *Jones*. In each case, morals, character, and integrity  
26 are extremely important for the business involved.<sup>51</sup>

27 The abusive tactics of taxing agencies are increasingly the subject  
28 of not only judicial action, but also Congressional investigation.<sup>52</sup>

44 Cowan Affid., ¶ 6-29.

45 Bourke Affid., ¶ 25.

46 Bourke Affid., ¶ 25.

47 See, e.g., Hyatt Affid., ¶ 49-51, 143-147

48 Louis R. Mizell, Jr., *Invasion of Privacy*, of 127, (Berkeley Books 1998), see excerpts attached [to  
Appendix submitted with the original Opposition to Motion for Summary Judgment].

49 *Id.* at 127-128.

50 9 F. Supp. 2d 1119 (D. Neb. 1998).

51 *Id.* at 1134.

52 U.S. Congressional Record excerpt, [attached to Appendix submitted with the original Opposition to  
Motion for Summary Judgment].

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

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

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

9           The U. S. Supreme Court has issued three opinions bearing on the  
10          issue. *United States Department of Defense v. Federal Labor Relations*  
11          *Authority (FLRA)*, held that disclosure of employees' home addresses to  
12          their union was a "clearly unwarranted invasion of privacy."<sup>53</sup> That case  
13          was largely based on *United States Dept. of Justice v. Reporters*  
14          *Committee for Freedom of Press*,<sup>54</sup> which recognized that "both the  
15          common law and the literal understandings of privacy encompass the  
16          individual's control of information concerning his or her person." Finally,  
17          *United States Department of State v. Ray*,<sup>55</sup> held that the disclosure of  
18          names and addresses would be a clearly unwarranted invasion of privacy  
19          because *confidentiality had been promised* and disclosure of the  
20          information would be "a special affront to his or her privacy."

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

23          *State ex rel. Beacon Journal Publishing Co. v. City of Akron*,<sup>56</sup>  
24          found that the disclosure of social security numbers "would violate the  
25          federal constitutional right of privacy" and held that because the Privacy  
26          Act of 1974 regulates the use of Social Security numbers, individuals  
27          "have a legitimate expectation of privacy in their Social Security  
28          numbers." Two recent Washington cases have found disclosure of social  
29          security numbers to be highly offensive. *Progressive Animal Welfare*  
30          *Society v. University of Washington*,<sup>57</sup> held that "[T]he disclosure of a  
31          public employee's social security number would be highly offensive to a  
32          reasonable person . . . ." Furthermore, in *Tacoma Public Library v.*

53          510 U.S. 487, 489, 502, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994) (emphasis added).

54          489 U.S. 749, 763, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989).

55          502 U.S. 164, 177, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991).

56          70 Ohio St. 3d 605, 607, 640 N.E.2d 164, 166 (Ohio 1994).

57          125 Wash. 2d 243, 884 P.2d 592 (Wash. 1994).

1           Woessner,<sup>58</sup> the Court similarly held that "[w]e agree that release of  
2 employees' identification number would be highly offensive."<sup>59</sup>

3           Other cases concluded that certain citizens — such as Gil Hyatt —  
4 have a particular need or desire to keep their address confidential.  
5       *National Association of Retired Federal Employees v. Horner*,<sup>60</sup> held that  
6 "[i]n our society, individuals generally have a large measure of control  
7 over the disclosure of their own identities and whereabouts. That people  
8 expect to be able to exercise that control is 'evidenced by . . . unlisted  
9 telephone numbers by which subscribers may avoid publication of an  
10 address in public directory, and postal boxes, which permit the receipt of  
11 mail without disclosing the location of one's residence.'" Moreover, the  
12 court could have had Gil Hyatt in mind when it noted that it is public  
13 knowledge that when one gains wealth, "*that individual may become a*  
14 *target* for those who would like to secure a share of that sum by means  
15 scrupulous or otherwise."<sup>61</sup>

16           *American Federation of Government Employees, AFL-CIO, Local*  
17 *1923 v. United States*,<sup>62</sup> expresses privacy concerns similar to those  
18 alleged by Hyatt in this case. The court held that union members had a  
19 privacy right not to disclose their home addresses to their own union  
20 because disclosure could subject the employees to an unchecked barrage

21       <sup>58</sup> 90 Wash. App. 205, 951 P.2d 357 (Wash. App. 1998), *opinion amended on remand on other grounds*, 972  
22 P.2d 932 (Wash. App. 1999).

23       <sup>59</sup> See also *Sheet Metal Workers International Association, Local Union No. 19 v. United States Department*  
24 *of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (holding that disclosures of names, **social security numbers** and  
25 addresses of employees would constitute an unwarranted invasion of personal privacy); *Greidinger v. Davis*, 988  
26 F.2d 1344, 1352, 1354 (4th Cir. 1993) (finding that the Virginia voter registrar's public disclosure of voters' **social**  
27 **security numbers** brought the attendant possibility of "a serious invasion of privacy" and detailing horror stories of  
28 stolen identities and concluding that "the harm that can be inflicted from the disclosure of a **social security number**  
to an unscrupulous individual is alarming and potentially financially ruinous."); *Yeager v. Hackensack Water Co.*,  
615 F. Supp. 1087, 1091-92 (D.N.J. 1985) (citing to Federal Privacy Act, Public Law No. 93-579 and holding that  
**social security numbers** were "within the constitutionally protected right of privacy" as Congress designed the  
Federal Privacy Act of 1974 to discourage improper uses of **social security numbers** and to allow individuals the  
opportunity to make an intelligent decision regarding disclosure). Hyatt's opposition to the FTB's motion on the  
judgment for pleadings at note 14 cites additional authorities.

21       <sup>60</sup> 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

22       <sup>61</sup> *Id.* at 876 (emphasis added). See also *Painting Industry of Hawaii Market Recovery Fund v. United States*,  
23 *Dept. of Air Force*, 26 F.3d 1479, 1486-1487 (9th Cir. 1994) (forbidding disclosure of social security numbers,  
24 names, and **home addresses** with concurring opinion stating "publishing your phone number may invite annoying  
25 phone calls, but publishing your address can lead to far more intrusive breaches of privacy, and even physical  
26 danger."); *Painting and Drywall Work Preservation Fund, Inc. v. Dept. of HUD*, 936 F.2d 1300, 1303 (D.C. Cir.  
27 1991) (concluding that disclosure of names and **addresses** of construction workers would be "a substantial invasion  
28 of privacy," indeed, "a clearly unwarranted invasion of personal privacy."); *Hopkins v. United States Dept. of HUD*,  
929 F.2d 81 (2d Cir. 1991) (holding that because privacy encompasses all interest involving the individual's control  
of information concerning his or her person, "we have no doubt that individual private employees have a significant  
privacy interest in avoiding disclosure of their names and **addresses**"). Additional supporting authority is cited in  
note to Hyatt's opposition to the motion for judgment on the pleadings at note 15 cites additional authorities.

21       <sup>62</sup> 712 F.2d 931 (4th Cir. 1983).

1 of mailings and perhaps personal solicitations. The court then observed  
2 that no effective constraints could be placed on the range of uses to which  
3 the information, once revealed, might be employed.<sup>63</sup> The dissent pointed  
4 out that only a rare person — like Hyatt — conceals his address from real  
5 property records, voting lists, motor vehicle registration, licensing records  
6 and telephone directories. The court majority nevertheless recognized the  
7 privacy right *even for those less sensitive about secrecy*.<sup>64</sup>

8 Hyatt also explicitly presented his common law informational privacy claim to the  
9 Nevada Supreme Court as part of Hyatt's petition for rehearing. There Hyatt explained:

10 This claim [invasion of privacy by illegal disclosure of private facts] is  
11 really two: the more recently emerged invasion of  
12 informational/constitutional privacy and the more traditional branch of  
13 disclosure of private facts. Each claim involves the disclosure of private  
14 facts for which an expectation of privacy had been created and for which a  
15 reasonable person would find offensive — particularly  
16 informational/constitutional privacy under which disclosure of private,  
17 personal information gathered by the government is *per se* unlawful.<sup>65</sup>

18 Again, both this Court and the Nevada Supreme Court have rejected the FTB's attempts  
19 to dismiss this and Hyatt's other intentional tort claims finding genuine issues of fact in dispute.  
20 Common law informational privacy, as a prong of Hyatt's asserted invasion of privacy tort, is  
21 very much a part of this case. But Hyatt asserts no IPA claim.<sup>66</sup>

22 <sup>63</sup> *Id.* at 932.

23 <sup>64</sup> One of the first home address cases, *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 n. 15 (3d Cir. 1974),  
24 forbade disclosure of individual home-wine-maker names and home addresses since "there are few things which  
25 pertain to an individual in which his privacy has traditionally been more respected than his own home. Mr. Chief  
26 Justice Burger recently stated: "The ancient concept that "a man's home is his castle" into which "not even the king  
27 may enter" has lost none of its vitality." It also held "That society recognizes an interest in keeping his address  
28 private is indicated in such practices as non-listing of telephone numbers and the renting of post office boxes." One  
of the most recent cases, *Scottsdale Unified School Dist. of Maricopa County v. KPNX Broadcasting Co.*, 191 Ariz.  
297, 955 P.2d 534, 536 (1998), held that school districts need not disclose the home addresses or birth dates of  
teachers to reporters since "birth dates, like social security numbers are private information."

<sup>65</sup> See Hyatt's 10 page petition for rehearing, at 1, n. 1, attached to the accompanying Appendix of Evidence as  
Exhibit 11.

<sup>66</sup> Hyatt does not directly address the FTB's various arguments as to why an IPA claim is barred (e.g., statute of  
limitation, California tort claims act, comity) because the FTB's arguments are moot. Hyatt's silence on these issues  
is because they are moot, not because he concedes the FTB is right. Hyatt's silence is not, and should not be  
construed as, an admission of any kind regarding these moot issues.

1  
2 **7. Any issues relating to the admissibility at trial of evidence of FTB**  
3 **violations of the IPA, or any other evidence, can only be resolved after**  
4 **completion of all discovery and through an appropriate motion in**  
5 **limine.**

6 To the extent this motion seeks a ruling now as to the admissibility of any evidence,  
7 particularly the FTB's violations of the IPA, such a request by the FTB is grossly premature.  
8 Discovery is not complete, trial is not set to commence until August 2006, and no motions in  
9 limine have been filed, let alone argued and ruled upon. The Court should deny any request  
10 seeking a ruling as to admissibility at trial of any evidence.

11 **8. Conclusion.**

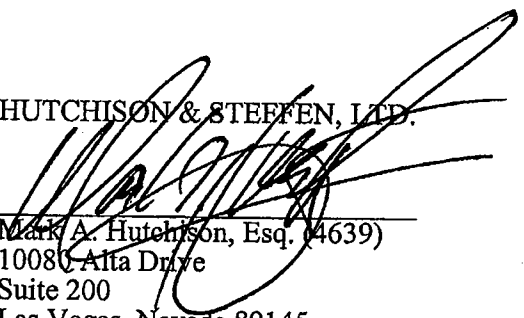
12 There is no issue for the Court to resolve in this motion. Hyatt does not assert California  
13 statutory IPA claim. Any dispute over discovery relating the California's IPA and what  
14 discovery Hyatt may take regarding the FTB's violations of the IPA as evidence of Hyatt's  
15 Nevada common law informational privacy claim must be referred to the Discovery  
16 Commissioner who, contrary to FTB suggestions, has allowed discovery on IPA violations that  
17 relate to Hyatt and the Hyatt audits.  
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1           This motion should therefore not only be denied but the motion should be stricken as  
2 there is no legal basis for seeking to dismiss a non-existent claim.  
3

4  
5           Dated this 3rd day of June, 2005.

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13 *Attorneys for Plaintiff Gilbert P. Hyatt*

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

16 GILBERT P. HYATT,

17 Plaintiffs,

18 v.

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

21 Defendants.

Case No.: A382999

Dept. No.: X

**RECEIPT OF COPY AND CERTIFICATE  
OF SERVICE OF PLAINTIFF GILBERT P.  
HYATT'S OPPOSITION TO THE FTB'S  
MOTION TO DISMISS, OR IN THE  
ALTERNATIVE, FOR PARTIAL  
SUMMARY JUDGMENT RE: STATUTORY  
INFORMATION PRIVACY CLAIMS AND  
APPENDIX OF EXHIBITS**

**Date of Hearing: June 20, 2005**

**Time of Hearing: 9:00 a.m.**

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

RECEIPT OF COPY

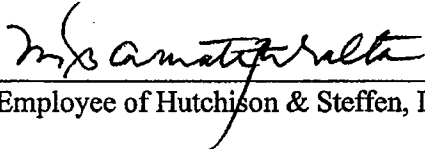
RECEIPT OF COPY of PLAINTIFF GILBERT P. HYATT'S OPPOSITION TO  
THE FTB'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR PARTIAL  
SUMMARY JUDGMENT RE: STATUTORY INFORMATION PRIVACY CLAIMS  
AND APPENDIX OF EXHIBITS is hereby acknowledged this \_\_\_\_ June, 2005.

By: \_\_\_\_\_  
Jeffrey Silvestri, Esq.  
McDonald Carano Wilson LLP  
2300 West Sahara Avenue  
No. 10, Suite 1000  
Las Vegas, Nevada 89102

1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b) I certify that I am an employee of HUTCHISON & STEFFEN,  
3 LLC and that on this 3<sup>rd</sup> day of June, 2005, I delivered a true copy of PLAINTIFF  
4 GILBERT P. HYATT'S OPPOSITION TO THE FTB'S MOTION TO DISMISS, OR IN  
5 THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT RE: STATUTORY  
6 INFORMATION PRIVACY CLAIMS AND APPENDIX OF EXHIBITS via federal  
7 express, in a sealed envelope and addressed to:  
8

9 James W. Bradshaw, Esq.  
10 McDonald Carano Wilson LLP  
11 100 West Liberty Street, 10<sup>th</sup> Floor  
12 Reno, NV 89501

13   
14 \_\_\_\_\_  
15 An Employee of Hutchison & Steffen, LLC  
16  
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1 **APP**

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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

**APPENDIX OF EXHIBITS IN SUPPORT OF  
PLAINTIFF GILBERT P. HYATT'S  
OPPOSITION TO THE FTB'S MOTION TO  
DISMISS, OR IN THE ALTERNATIVE, FOR  
PARTIAL SUMMARY JUDGMENT RE:  
STATUTORY INFORMATION PRIVACY  
CLAIMS**

**Date of Hearing: June 20, 2005  
Time of Hearing: 9:00 a.m.**

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

22  
23 Plaintiff Gilbert P. Hyatt submits this Appendix of Exhibits in Opposition to the FTB's  
24 Motion To Dismiss, or in the Alternative, for Partial Summary Judgment Re: Statutory  
25 Information Privacy Claims. Set forth below is an index of the exhibits.

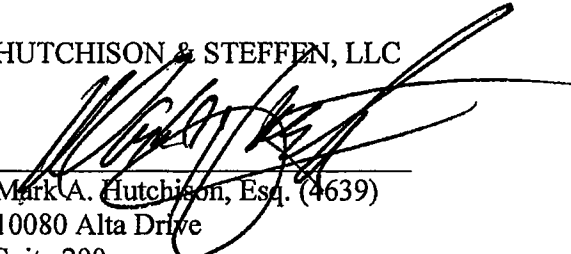
26  
27 Exhibit 1 January 8, 2004 Order Approving Discovery Commissioner's Report and  
28 Recommendation.

- 1 Exhibit 2 Excepts of transcript of November 9, 1999 hearing before Discovery  
2 Commissioner, at 55-56.
- 3 Exhibit 3 FTB Privacy Notice.
- 4 Exhibit 4 Hyatt's Opposition to the FTB's Motion for Judgment on the Pleadings.
- 5
- 6 Exhibit 5 Order re Motion for Judgment on the Pleadings.
- 7
- 8 Exhibit 6 Transcript from April 7, 1999 hearing on Motion for Judgment on the  
9 Pleadings.
- 10 Exhibit 7 Reply of FTB in Support of Motion for Summary Judgment.
- 11 Exhibit 8 FTB's Petition for a Writ of Mandamus ordering Dismissal, or  
12 Prohibition and Mandamus Limiting the Scope of This Case.
- 13 Exhibit 9 Hyatt's Answer to FTB's Petition for a Writ of Mandamus ordering  
14 Dismissal, or Prohibition and Mandamus Limiting the Scope of This  
15 Case.
- 16 Exhibit 10 Nevada Supreme Court ruling dated June 13, 2001.
- 17 Exhibit 11 Hyatt's 10 page petition for rehearing filed with the Nevada Supreme  
18 Court.
- 19 Exhibit 12 Hyatt's 15 page supplemental petition for rehearing filed with the Nevada  
20 Supreme Court.
- 21 Exhibit 13 FTB's Answer to Hyatt Petition for Rehearing and Supplemental Petition  
22 for Rehearing.
- 23 Exhibit 14 FTB Motion for Judgment on the Pleadings.
- 24
- 25 Exhibit 15 Order re Motion for Summary Judgment.
- 26 Exhibit 16 Transcript from April 21, 2000 hearing on Motion for Summary  
27 Judgment.
- 28

Exhibit 17      Opposition to FTB Motion for Summary Judgment.

Dated this 3<sup>rd</sup> day of June, 2005.

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*Attorneys for Plaintiff Gilbert P. Hyatt*

Exhibit 4

RA002412



COPY

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

FILED  
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CLERK

GILBERT P. HYATT

Plaintiff

vs.

CALIFORNIA STATE FRANCHISE  
TAX BOARD

Defendant

CASE NO. A-382999

DEPT. X

Transcript of  
Proceedings

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

HEARING ON DEFENDANT'S OBJECTION TO  
REFEREE'S REPORT AND RECOMMENDATION

WEDNESDAY, MARCH 22, 2006

APPEARANCES:

FOR PLAINTIFF:

PETER C. BERNHARD, ESQ.

FOR DEFENDANT:

JAMES W. BRADSHAW, ESQ.  
PAT LUNDVALL, ESQ.

COURT RECORDER:

TRANSCRIPTION BY:

VICTORIA BOYD  
District Court

FLORENCE M. HOYT  
Las Vegas, Nevada  
(702) 221-0246

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.

RA002413

1 LAS VEGAS, NEVADA, WEDNESDAY, MARCH 22, 2006, 10:40 A.M.

2 (Court was called to order)

3 THE CLERK: Case A-382999, Hyatt versus California  
4 State Franchise Tax Board.

5 MR. BRADSHAW: 'Morning, Your Honor. Jim Bradshaw  
6 for the Franchise Tax Board. With me is my partner Pat  
7 Lundvall.

8 THE COURT: Good morning.

9 MR. BERNHARD: Peter Bernhard, Your Honor, on behalf  
10 of Mr. Hyatt.

11 THE COURT: Good morning.

12 This is the Franchise Tax Board's objections to the  
13 Discovery Commissioner's recommendations.

14 MR. BRADSHAW: Yes. Rarely do we object to the  
15 Discovery Commissioner's recommendations. He has an enormous  
16 job. The vast majority of time he does it well and accurately  
17 and fairly. However, today we object because relevant  
18 information in plaintiff Mr. Hyatt's possession and control is  
19 being denied us.

20 Specifically we seek to discover compensation paid  
21 by Mr. Hyatt to his material witnesses identified by him  
22 formally in discovery as witnesses who will testify on his  
23 behalf at trial; and we also seek their billing records,  
24 because some of these witnesses are attorneys and accountants  
25 who meticulously document their activities, date, task and

1 type of activity, time. We seek to discover those records,  
2 because what's at issue in this case, of course, is what  
3 happened and when it happened between the Franchise Tax Board  
4 and Mr. Hyatt.

5           As Your Honor knows from prior motion practice, the  
6 Franchise Tax Board is the state agency tasked with enforcing  
7 the income tax laws in the state of California. That's  
8 basically an honor system, much like the IRS income tax  
9 system, but the honor system's enforced by audit. And that's  
10 what happened to Mr. Hyatt. He did not deal directly with the  
11 Franchise Tax Board, however. He engaged California Tax  
12 Attorney Eugene Cowan of the Riordan McKenzie law firm, now  
13 known as the Bingham McCutchen law firm, attorney of record  
14 for -- attorneys of record for Mr. Hyatt in this case. He  
15 engaged Mr. Cowan to do his '91 tax return, which is at issue  
16 in this case. It's pled in his complaint. And Mr. Cowan  
17 represented Mr. Hyatt in the audit, a residency audit that  
18 occurred between mid-1993 and 1997. As you know, Mr. Hyatt  
19 protested the result, and that administrative proceeding is  
20 pending in California.

21           Mr. Hyatt also engaged local tax accountant Michael  
22 Kern of the Piercy Bowler Taylor Kern firm to represent him in  
23 his '91 and '92 tax returns and in the audit and subsequent  
24 protest. These are his witnesses. We seek to discover how  
25 much these witnesses have been compensated and their billings,

1 which would be a diary of their activities with the Franchise  
2 Tax Board auditors.

3           Picture us at trial today if Mr. Cowan or Mr. Kern  
4 were on the witness stand and had just testified favorably for  
5 Mr. Hyatt on his case in chief, then on cross-examination I  
6 might ask Mr. Cowan or Mr. Kern, sir, how much money did Mr.  
7 Hyatt pay you in 2006. Objection, irrelevant, embarrassing,  
8 oppressive, whatever the objection might be. How would the  
9 Court rule as to compensation of a witness? Well, in our view  
10 what a party compensates his witnesses, whether lay witnesses  
11 or expert witnesses, is always discoverable, and the jury gets  
12 to hear that, because it goes to their bias or their motive.

13           Now, if any material witness in a case keeps a diary  
14 of activities with the opposing party and those are at issue,  
15 then I'd be remiss not to discover that diary. Well, that's  
16 what attorneys' and accountants' billings are, is diaries of  
17 their activities. And according to Mr. Hyatt's pleadings,  
18 these tax representatives' activities with the Franchise Tax  
19 Board are relevant. So we seek to discover them.

20           We did not bring our -- we're here on a DCR&R from a  
21 motion to compel, but that's not the first one. In 2000 we  
22 made a motion to compel the same type of discovery, and we  
23 obtained the Court's order dated February 2nd, 2004. It  
24 ordered Mr. Hyatt to produce -- and I'm quoting from the order  
25 -- "information on compensation pertaining to any of Hyatt's

1 witnesses." Further that order required that Cowan and Kern,  
2 who are under subpoena, and their firm "shall produce any fee  
3 agreements they had with plaintiff and their timekeeping and  
4 billing documents." Well, that's the Court's order, and  
5 indeed after a time billings were produced for those firms'  
6 activities through 1997. Mr. Hyatt filed his complaint  
7 January of 1998. So the contention then was these are the  
8 relevant records because only the facts and circumstances  
9 preceding the filing of the complaint are relevant.

10 Well, more recently, as you know, Mr. Hyatt's taken  
11 issue with the protest and whether or not there's a bad-faith  
12 delay. So we've been forced to do discovery and the FTB's tax  
13 attorneys involved in the protest submit to protest on the  
14 reasons for the delay. Well, that puts at issue Mr. Hyatt's  
15 own tax representatives' activities concerning that delay. So  
16 we should have those diaries or those billings to show that.  
17 And because Mr. Cowan's firm and Mr. Kern's firm are engaged  
18 in this litigation, the firms are also compensated, and we  
19 believe the jury is entitled to know how much money these  
20 material witnesses and their firms have been paid by Mr. Hyatt  
21 in order to gauge their bias and motives.

22 Now, Discovery Commissioner Biggar did something  
23 extraordinary, and this is the language we would ask the Court  
24 to strike from his DCR&R. And it's -- I'm reading from  
25 page 4, paragraph 3. "If the amount paid to any of these

1 witnesses is more than \$100,000 a year, that is all the  
2 Discovery Commissioner is going to have Hyatt produce. But if  
3 the amount is less than that for a particular witness, the FTB  
4 may further explore the issue by seeking additional production  
5 of records concerning that witness."

6           We think that is error. If the witness and his firm  
7 has been paid a million dollars a year or a hundred thousand  
8 dollars a month for 15 years, which spans the length of time  
9 these witnesses have worked for Mr. Hyatt, I think the jury  
10 can appreciate the difference between a witness who's paid  
11 some unknown amount over a hundred thousand dollars over 15  
12 years and a witness who's paid millions of dollars over those  
13 same years. I don't think the argument can be made that  
14 that's not relevant and discoverable, nor the diaries that  
15 would be apparent from the billings of these professionals.

16           There are other witnesses that are compensated by  
17 Mr. Hyatt. His close associate Grace Jane, who is the only  
18 person who can corroborate much of his story about the facts  
19 and circumstances concerning his Nevada residency. There's  
20 another attorney of record in this case, Greg Roth. He has  
21 other attorneys he's identified as material witnesses, Roger  
22 McAffrey, Dale Fiola, his son, Dan Hyatt, his girlfriend,  
23 Carolyn Cosgrove, his associate Barry Lee. All of these are  
24 compensated witnesses, and we believe we're entitled to  
25 discover the records of that compensation.

1           Now, we've been allowed some deposition testimony.  
2 For the most part, because of the span of years, these  
3 witnesses can't recall without reference to their records,  
4 certainly not Mr. Kern or Mr. Cowan without reference to their  
5 billings over many years, they can't recall how much they were  
6 paid or what the tasks were. And this diary or chronology we  
7 think we're entitled to, as well as the amount of  
8 compensation.

9           This, of course, is information in Mr. Hyatt's  
10 possession and control. He's been provided these billings,  
11 he's paid them over these many years. He would have cancelled  
12 checks. These -- I think there's contentions of privilege or  
13 work product here, but attorneys and accountants know that  
14 their billings can come under scrutiny. There's a number of  
15 reasons. We're audited by the IRS or the State Bar or the  
16 Board of CPAs, or clients make the application for attorneys'  
17 fees at the end of the case. They expect that these are going  
18 to be published to the Court, and in most cases they're  
19 public. So these billings become publicly known. We keep  
20 records in a manner so that they can be made available in the  
21 event of a fee dispute with a client. Mr. Hyatt in this case  
22 has pled -- has asked in his prayer for an award of attorneys'  
23 fees and costs.

24           So we think for all of these reasons we're entitled  
25 to know and discover complete information about Hyatt's

1 compensation of his witnesses and their documentation of their  
2 activities that might be apparent from their billing.

3 THE COURT: Mr. Bradshaw, it's my view that the  
4 Court is often at a disadvantage with respect to ruling on the  
5 Discovery Commissioner's recommendations because, while  
6 counsel has had an opportunity to make their case before the  
7 Discovery Commissioner and hear the Discovery Commissioner's  
8 thought process, the Court has only the written pleadings,  
9 oral argument, and the Discovery Commissioner's order, the  
10 transcript. So I'm at a loss sometimes to understand the  
11 thought process, and I'm not clear at all as to what he means,  
12 perhaps you can enlighten me, when he states, as you read into  
13 the record a moment ago, "If the amount paid to any of these  
14 witnesses is more than \$100,000 a year, that is all the  
15 Discovery Commissioner is going to have Hyatt produce." I  
16 don't understand what he means by that. Can you tell -- can  
17 you elaborate a bit on that?

18 MR. BRADSHAW: I could not. This blows us away.  
19 This takes us by surprise. I don't know what he had in mind.  
20 Mr. Hyatt's interpreted it as if there -- if the witness has  
21 been paid more than a hundred thousand a year that's all they  
22 have to testify at deposition is, I've been paid more than a  
23 hundred thousand a year, and that's the end of it.

24 Now, he has produced some additional information or  
25 some has come out at other depositions about compensation of



1 these witnesses, but not the records of these amounts, amounts  
2 as to some witnesses only based on recollection because their  
3 work spans many years. And if Mr. Hyatt has these records,  
4 they need to be produced. They're not identified on a log.  
5 Usually the Discovery Commissioner, if a party's withholding  
6 records, there's got to be some basis in privilege, and they  
7 have to be properly identified on a Vaughn index, on a  
8 privilege log. That's not been done in this case. I think  
9 he's simply overwhelmed, and we're late in this litigation and  
10 he's trying to contain it. And although most of the time his  
11 rulings are correct, we've never seen anything like this,  
12 can't explain it to the Court, don't see a basis for it, and  
13 believe that language should be stricken.

14 THE COURT: Do you interpret that statement to mean  
15 that what the plaintiff has to produce in order to comply with  
16 that order would simply be a sheet of paper indicating Mr.  
17 Hyatt paid such and such a firm \$100,000, another firm  
18 \$100,000, but not to actually produce any billings? Is that  
19 how you interpret that?

20 MR. BRADSHAW: I think so. I think so. And if it's  
21 less than a hundred thousand dollars, then Mr. Hyatt's  
22 burdened with producing the records. So the less important  
23 the witness, the more the burden to produce the substantiating  
24 documents. We don't understand.

25 THE COURT: And are you of the opinion that how much

1 a particular witness may have been paid is going to have an  
2 impact on bias and motive? Is that your position?

3 MR. BRADSHAW: Sure. And for that very reason Mr.  
4 Hyatt has indeed discovered how much each and every FTB  
5 employee witness has been compensated. We always ask  
6 witnesses how much they're paid by a party. We always ask  
7 experts how much they're paid by a party, and the jury always  
8 hears that.

9 THE COURT: Well, I think the issue of bias and  
10 motive is always an issue for purposes of impeachment. But  
11 I'm a little curious about this benchmark figure. So --

12 MR. BRADSHAW: I don't know where it came from.

13 THE COURT: I'm sorry?

14 MR. BRADSHAW: We don't know where it came from. I  
15 don't even think Mr. Hyatt asked for that relief, it was  
16 simply what was fashioned.

17 MS. LUNDVALL: The Discovery Commissioner I recall  
18 -- sat there, and I recall the body language when we were  
19 arguing this issue. He kind of cocked his head one way and  
20 then another and then out popped a hundred thousand dollars as  
21 far as limit. It just came out of the blue. It had not been  
22 requested by Mr. Hyatt in his motion practice. It hadn't even  
23 been mentioned in the briefing then by the parties in their  
24 motion practice.

25 THE COURT: Mr. Bernhard.

1           MR. BERNHARD: Thank you, Your Honor. And I  
2 appreciate the Court's disadvantage, and frankly we're at the  
3 same disadvantage. And I don't whine about technical  
4 compliance with rules like matters to be decided on the  
5 merits, but you don't have a complete record in front of you.  
6 Under Rule 2.34(f) we were not allowed to submit points and  
7 authorities or briefs or supplement the record. The FTB, on  
8 the other hand, did submit what I think are improper points  
9 and authorities, and they attached these for exhibits, but  
10 what they chose to give you as their Exhibit B was their  
11 motion to compel which was in front of Commissioner Biggar.  
12 But they didn't see fit to attach our opposition where we laid  
13 out some of these problems. And because you did not in your  
14 order justifiably grant leave for us to supplement, we have  
15 not given you our side of that even to the point of attaching  
16 our opposition, which Commissioner Biggar had in front of him  
17 during the time that he made this obviously a compromise  
18 ruling, which was fair to address their bias concern, and yet  
19 also protective of the attorney-client and work product  
20 privileged information that we were objecting to.

21           So, frankly, Your Honor, my position today is that  
22 I'm at a disadvantage because I know you don't have the  
23 information you need to uphold Commissioner Biggar's decision.  
24 However, if you're willing to do so today, there's no need for  
25 me to submit all this material and encumber the record

1 further.

2           However, if for some reason after you've heard our  
3 arguments you feel that Commissioner Biggar was wrong, then  
4 I'm entitled to, I believe, an opportunity to present the  
5 briefing. And that's what Rule 2.34(f) provides. Objections  
6 to Discovery Commissioner recommendations are supposed to be  
7 just a list of objections. And the rule expressly says, as we  
8 point out, the objection must not contain argument and serve  
9 as a memorandum of points and authorities seeking reversal of  
10 the report and recommendations.

11           So the process should be very simple. The objection  
12 the other side files should give you a bullet-point list of  
13 what the objections are. Then the Court will either look at  
14 those and decide, as the form indicates, I don't think your  
15 bullet-point objections are warranted, I'm going to consider  
16 those bullet points and still adopt the recommendation, and  
17 you on the form have the option to sign that. Or you have the  
18 option to order a hearing. And as their request provided,  
19 they asked for leave to file a brief and points and  
20 authorities if in fact the Court orders a hearing. And, of  
21 course, in our opposition that we filed, just a response,  
22 basic bullet-point positions, not arguing the merits, we said,  
23 if in fact the Court wants to hear the merits whether or not  
24 to overturn Discovery Commissioner Biggar's recommendation,  
25 then we asked for leave to file our side to support this

1 recommendation.

2           So today the posture of this case that's before you  
3 is that you've asked for a hearing to at least clarify the  
4 questions you have, which I think is appropriate; but you have  
5 not seen any briefing, any points and authorities, or even the  
6 opposition that Commissioner Biggar had before him. So I  
7 submit if you're willing to adopt that recommendation, then  
8 we're fine and we can go forward and proceed with the case.  
9 If, however, you're inclined to think that Commissioner Biggar  
10 made an error, at a minimum we're entitled to be given leave  
11 to file a copy of our opposition before Commissioner Biggar  
12 and explain why it is that he came up with the ruling he did.

13           And as I say, I don't like that kind of technical  
14 argument. I'm more than happy to address on the merits. I  
15 think what's significant for the Court in considering today's  
16 proceeding is that the next significant event in which this  
17 issue is relevant will occur April 4th and 5th, and that's  
18 when Mr. Cowan will be deposed again in Los Angeles.

19           So if the Court is inclined to rule against --  
20 overturn Commissioner Biggar, I would ask that we defer this  
21 matter for say a week and come back next week. In the  
22 meantime I can submit to our opposition to the very motion  
23 that they submitted to you from their standpoint, and we can  
24 just continue this matter and still get a decision from you  
25 before Mr. Bradshaw has to ask Mr. Cowan the questions. So we

1 have time to do that.

2           However, I don't think that's necessary, because I  
3 think Commissioner Biggar's report and recommendation is  
4 correct. And I think the issues that he wrestled with at that  
5 time was this claim that Mr. Bradshaw's making that bias and  
6 prejudice is always at issue for credibility, for impeachment  
7 purposes at trial. And we agree. What Commissioner Biggar  
8 was looking at was whether or not Mr. Bradshaw and the  
9 Franchise Tax Board would be prejudiced if they could get  
10 testimony from Mr. Cowan, Mr. Kern, Ms. Jennings, Mr. McAffrey,  
11 Mr. Roth, any of these people receive more than a hundred  
12 thousand dollars, can they make the argument that that would  
13 constitute some incentive for these professionals to lie.  
14 We'll argue no, it does not, that these professionals,  
15 accountants and attorneys would not lie no matter how much  
16 money they're paid. But the flexibility that Commissioner  
17 Biggar gave to the Franchise Tax Board is to tell the jury  
18 this guy got at least a hundred thousand dollars, and Mr.  
19 Hyatt's not going to tell you how much more he paid them.

20           Now, if I were Mr. Bradshaw, I would love to make  
21 that argument, it could be millions, it could be tens of  
22 millions, it could be a hundred million dollars, maybe this  
23 man is bought and paid for. Commissioner Biggar gave them the  
24 flexibility to make that argument. If Mr. Hyatt chooses not  
25 to produce the actual amounts, if it's more than a hundred

1 thousand dollars, then the jury can hear that and the FTB be  
2 make whatever arguments it wants about why that witness should  
3 not be believed because that witness is bought and paid for.

4 Now, from our perspective, yes, we did ask the  
5 Franchise Tax Board employees how much they were paid, because  
6 all of these people are State employees, 100 percent of their  
7 compensation is from the Franchise Tax Board. So Commissioner  
8 Biggar again, as part of weighing these competing interests,  
9 allows me to make the argument at trial, these witnesses,  
10 their credibility can be challenged because 100 percent of  
11 their income, 100 percent of their retirement as a State  
12 employee is based on their continuing employment with the  
13 Franchise Tax Board. So I can make the argument that their  
14 testimony is going to be biased in favor of Franchise Tax  
15 Board. So he compromised and he said, I'll let both of you  
16 make these arguments on bias and credibility and it'll be up  
17 to the jury to decide. And that's a very fair and valid  
18 decision that he could make.

19 Why a hundred thousand dollars? I don't know,  
20 except that that number is a big enough number to where the  
21 jury -- most jurors will look at that as substantial  
22 compensation. We know it's much more than what the State  
23 employees of the Franchise Tax Board make, so we know that  
24 they can make the credibility argument based on a higher  
25 dollar amount than what we can.

1           So that's all in play, and that's all going to be  
2 considered at the time of trial. But for purposes of  
3 discovery at this stage of the proceeding they don't need the  
4 detail they're asking for in order to make the bias argument.  
5 Because we have these competing interests of the attorney-  
6 client issues and work product issues and the details  
7 concerning strategy, not just with the tort case that we have  
8 here in front of you, but also with the protest that is still  
9 pending in California, Commissioner Biggar was very sensitive  
10 not to require my client and his professionals to proceed and  
11 produce that kind of information.

12           So the decision makes a whole lot of sense. If bias  
13 and prejudice is the reason why the Franchise Tax Board wants  
14 to know how much my witnesses -- my client's witnesses are  
15 being paid, he's got that and then some. He can make that  
16 argument at trial. On the other hand, we don't have to fight  
17 over each particular time entry, each particular strategy  
18 decision that was made and come before you again and again and  
19 again to see what can or can't be testified to because of the  
20 protections of the privileges.

21           So the Franchise Tax Board has what it needs to make  
22 the bias and prejudice argument, we have what we need to make  
23 the bias and prejudice argument as to their clients, and  
24 frankly I think it weighs a lot better from their side with  
25 this particular ruling. So it makes sense. It makes a lot of



1 sense.

2 I can't speak to Ms. Lundvall's body language. I  
3 don't think it's evidence, I don't think it should be  
4 persuasive. Commissioner Biggar made a decision that's well  
5 grounded in law, well grounded in fact based on the specific  
6 facts and circumstances of this case. So I submit if you're  
7 willing to accept that as a limitation that's fair to both  
8 sides, we can walk out of the courtroom today, go forward on  
9 April 4th and 5th, Mr. Cowan will say, yes, I got more than a  
10 hundred thousand dollars from Mr. Hyatt for my legal services  
11 from 1991 to the present, and we'll go forward.

12 However, if you do feel that there's some legal  
13 deficiency in what Commissioner Biggar did, which we don't  
14 think there is, give us the chance to show you what our  
15 opposition was, what it was that he was considering when he  
16 made this decision. That's only fair to us. We'll come back  
17 in a week and we'll argue the merits of it again. I think  
18 that's what the rule contemplates. Franchise Tax Board has  
19 not followed that rule, and it's placed us at a disadvantage  
20 because you don't have in front of you what we submitted in  
21 opposition to their motion to compel. Thank you, Your Honor.

22 THE COURT: Well, Mr. Bernhard, I think you  
23 articulate your position rather well. I guess the difference  
24 is that the Court views this case from the perspective of  
25 trying to visualize what the trial is going to look like,

1 while the Discovery Commissioner tries to narrow the focus of  
2 the issues so that the case might be streamlined for trial.  
3 And this Court appreciates his role very much for that reason  
4 and for those reasons.

5           The only thing I would say to you, though, Mr.  
6 Bernhard, is that the whole notion of discovery is that it's a  
7 fairly open process. Not all of the information gained and  
8 gleaned by way of discovery is going to be admissible at trial  
9 necessarily. And so I can't help thinking as we discuss these  
10 issues of compensation to witnesses and how much or how little  
11 a particular witness is compensated, I can't help thinking,  
12 gee, is that the subject of a motion in limine at some point  
13 in the future. I don't know.

14           I would like to have the benefit of seeing your  
15 written response to defendant's objections to the Discovery  
16 Commissioner's report and recommendations. I'd like to have  
17 an opportunity to think about the thought process, to think  
18 about the analysis, to view this from whatever perspective you  
19 intend to take, however you intend to draft these issues and  
20 frame them for the Court. So I suppose that means we need to  
21 continue this so that you might have an opportunity to do  
22 that.

23           I will say to you this. You've had an opportunity  
24 to sit through our morning court, and you've seen that there  
25 were some number of objections to Discovery Commissioner's

1 recommendations calendared today. I think that Rule 2.34,  
2 that is the correct number, is flawed in that it proposes a  
3 method for counsel to object to Discovery Commissioner's  
4 recommendations, but without giving the Court really anything  
5 to review in the way of authority or analysis. And so I think  
6 that rule is flawed.

7           This Court will quite often schedule a hearing when  
8 I do receive an objection to Discovery Commissioner's report  
9 for the purposes of being able to assess the analysis. I know  
10 of no other fair way to do that. And when we schedule the  
11 hearing I would say to counsel, I think that's an invitation  
12 for you to file any pleadings you want to file. I'll take a  
13 look at anything you submit. You can criticize me for a lot  
14 of things, but you can't criticize me for not being prepared.  
15 So I hope you'll keep that in mind not only with respect to  
16 this case, but to other cases, as well.

17           When do we need to set this back on calendar, do you  
18 think, that I might have an opportunity to review your  
19 pleadings?

20           MR. BERNHARD: We can submit a copy of our  
21 opposition with a very short three- or four-page cover within  
22 -- oh, by Monday at the latest, and if it could be set for  
23 hearing for the end of next week, we still have time before  
24 April 4th and 5th.

25           THE COURT: April 4th?

1 MR. BERNHARD: April 4th is the deposition in Los  
2 Angeles, so -- that's a Tuesday. So if we could have it heard  
3 by a week from Friday --

4 MR. BRADSHAW: Do we have a Discovery Commissioner  
5 hearing that week of the 4th?

6 MR. BERNHARD: I don't believe so.

7 THE COURT: Are you available on the 29th of March?  
8 Would be next Wednesday.

9 MR. BRADSHAW: We'll make a point of being  
10 available.

11 MR. BERNHARD: That's fine, Your Honor.

12 MR. BRADSHAW: I -- they might have -- they did  
13 oppose our objection, and our objection isn't really points  
14 and authorities. We -- our interpretation of the rule was the  
15 Court receives the objection, we try and frame the issues.  
16 But the points and authorities are the motion and the  
17 opposition that have been heard. But what I'm hearing is the  
18 Court would like additional points and authorities. Because  
19 what the Discovery Commissioner ruled on was many other  
20 things, and they aren't objected to. Just this one issue,  
21 discovery of witness compensation and billings, that's what  
22 we're focused on now. Would the Court like brief points and  
23 authorities on that issue alone?

24 THE COURT: If you want to submit them, I'll look at  
25 anything you submit, Mr. Bradshaw. I will tell you that I

1 particularly liked this statement contained within the  
2 Commissioner's recommendation, "Hyatt need not produce every  
3 scrap of paper relating to compensation paid to these  
4 individuals." I think the Commissioner was right on target in  
5 their assessment.

6 MR. BRADSHAW: All right. Well, we don't know what  
7 exists, but if he's got checks that he's paid, and if he's got  
8 billings, those ought to be easy. Attorneys and accountants,  
9 these professional witnesses, by law they preserve, protect,  
10 and maintain those kinds of records, and all the client has to  
11 do is ask for a copy. And I can't believe during the course  
12 of this litigation, asking for an award of attorneys' fees as  
13 he has, he's thrown away those cancelled checks that would  
14 prove up such an award on application. So just those two  
15 things, the billings, the proof of payment, that would  
16 suffice.

17 THE COURT: I thought the defendant's argument with  
18 respect to attorneys' fees in the way of damages was  
19 particularly compelling, and I would imagine that potentially,  
20 Mr. Bernhard, you'd be seeking damages in the way of  
21 attorneys' fees; right?

22 MR. BERNHARD: That is correct.

23 THE COURT: What about with respect to other damages  
24 as it relates to these other witnesses?

25 MR. BERNHARD: Yes. To the extent that these are

1 attorneys or accountants whose fees are being sought as part  
2 of our substantive causes of action, yes. And we understand  
3 that we have to produce those, and we have.

4           The other issue I would make in our opposition that  
5 you're allowing us to file, we have provided detailed  
6 information concerning those amounts at least through the year  
7 1997. And to the extent we're going on further toward the  
8 protest through trial, then, yes, we will produce these  
9 statements and amounts for those particular items, and that  
10 does avoid the privilege issues that we were concerned about  
11 before Commissioner Biggar.

12           THE COURT: Defense couldn't expect to be blindsided  
13 on the issues of damages without being provided those specific  
14 numbers. That would be the Court's view.

15           MR. BERNHARD: Oh. And I think Nevada Supreme Court  
16 precedent is very clear that you're correct on that, and  
17 there's no doubt in our mind that if we're going to ask for it  
18 we have to give them the amounts so that they know what it is  
19 we're asking for.

20           THE COURT: Okay.

21           MR. BERNHARD: Is Monday sufficient, Your Honor?  
22 Would you like us to try to get something to you by Friday,  
23 before our Wednesday hearing?

24           THE COURT: Monday will be fine if -- well, actually  
25 I would prefer it Friday, if you can.

1 MR. BERNHARD: All right.  
2 THE COURT: If you can get it to me Friday, I would  
3 appreciate it. Will that work for both of you? I don't know  
4 if you'll be submitting anything, Mr. Bradshaw. If you do,  
5 I'll look at it carefully, as I do.  
6 MR. BRADSHAW: I appreciate that, Your Honor.  
7 THE COURT: All right. Thank you, counsel.  
8 MR. BERNHARD: And what time on the 29th?  
9 THE COURT: It'd have to be about -- why don't we  
10 say 10:00 o'clock. Did that work well for counsel?  
11 MR. BERNHARD: That's fine.  
12 MR. BRADSHAW: Thank you.  
13 THE COURT: All right. 10:00 o'clock it is.  
14 MR. BRADSHAW: Thank you, Your Honor.  
15 THE COURT: Save the best for last.  
16 MR. BERNHARD: It's always a pleasure.  
17 THE COURT: Same here.  
18 THE PROCEEDINGS CONCLUDED AT 11:10 A.M.  
19 \* \* \* \* \*  
20  
21  
22  
23  
24  
25

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

FLORENCE HOYT  
Las Vegas, Nevada 89146  
(702) 221-0246

*Florence Hoyt*  
FLORENCE HOYT, TRANSCRIBER

*3/27/06*  
DATE



# **EXHIBIT 57**

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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

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)**

**FILED**

APR 18 3 22 PM '06

*Shirley S. Rungtana*  
CLERK

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);  
28

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  
28

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