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

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant

v.

GILBERT P. HYATT

Respondent

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

APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 6 OF 17

MARK A. HUTCHISON, Nev. Bar No. 4639
MICHAEL K. WALL, Nevada Bar No. 2098
HUTCHISON & STEFFEN, LLC.
10080 Alta Drive, Suite 200
Las Vegas, NV 89145
Telephone: (702) 385-2500
Facsimile: (702) 385-2086

PETER C. BERNHARD, Nev. Bar No. 734
KAEMPFER CROWELL
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135-2958
Telephone: (702) 792-7000
Facsimile: (702) 796-7181

DONALD J. KULA, Cal. Bar No. 144342
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Los Angeles, CA 90067-1721
Telephone: (310) 788-9900
Facsimile: (310) 788-3399
Attorneys for Respondent Gilbert P. Hyatt

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

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 1st day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 6 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):

James A. Bradshaw, Esq.
MCDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor
Reno, NV 89501

Attorneys for Appellant Franchise Tax Board of the State of California

Patricia K. Lundvall, Esq.
MCDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, NV 89102

Attorneys for Appellant Franchise Tax Board of the State of California

Robert L. Eisenberg, Esq.
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Suite 300
Reno, NV 89519

Attorneys for Appellant Franchise Tax Board of the State of California

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

The Franchise Tax Board believes that they do and they must, for a number of reasons. First is Full Faith and Credit clause of the United States Constitution and the recognized exception to Nevada verses Hall. That is the footnote 24 exception. States have a special and fundamental interest in their tax collection system. There is no dispute about that.

There is also no dispute that verifying sources and checking information, sometimes out-of-state sources and out-of-state information, are part of what a residency tax audit requires. To deny application California's immunity laws to not just what happened in California but what happened as part of this residency tax audit would impede that audit process. And thus, it involves an inherent responsibility that a state not applying these laws would interfere with the capability of California to fulfill that function. And as such, they would fall within the Nevada verses Hall exception.

Another reason that these laws must apply is constitutional choice of law consideration. Refusing to apply California law to the California residency tax audit process involving a California tax agency and a long-time California resident, who claims now to have moved, is fundamentally unfair and inconsistent with the constitutional choice of law authorities cited in the

Franchise Tax Board papers. If nothing else, comity directs that these laws be applied to the entirety of this case, for to hold otherwise again would threaten the ability of the Franchise Tax Board to do its job.

Part of its job is to determine what tax people owe in California, including people who claim to have taken up residence in another state. This necessarily involves checking facts about things that occur out of state because of people who have claimed to have moved. If the Franchise Tax Board is threatened with punishment for taking minimal actions that they took in this case out of state, this will severely impede the ability of the Franchise Tax Board to learn relevant and out-of-state facts in the course of a residency audit. In fact, we threaten not only the Franchise Tax Board's ability to conduct such audit but all agencies of other states that conduct out-of-state investigations, including Nevada agencies like the Nevada Gaming Control Board which conducts similar investigations within and outside of Nevada.

Thus, California's laws do apply and they must apply to the entirety of this case, not just to what the Franchise Tax Board did in California but also what happened in Nevada. This is the essence of the dismissal motion.

Turning to the summary judgment motion, that motion can also be boiled down into three basic issues. The

first issue is: Does Mr. Hyatt have any business litigating non-Nevada acts against the California government in this Nevada Court? Now at the beginning of this case, Mr. Hyatt made multiple assurances that his Nevada litigation against the California government arose strictly from the California government's Nevada conduct. That's expressly stated in Mr. Hyatt's pleadings in the federal Court to which this case was originally removed and attached to Franchise Tax Board papers.

Now Mr. Hyatt appears to be reneging on those assurances and saying that because the California government took some action in Nevada, everything that the California government did involving Mr. Hyatt, not just here but elsewhere, is also on trial. The issue then is that the law allow him to breach these assurances that he has made at the beginning and use a small amount of Nevada conduct as a springboard for litigating about everything that the Franchise Tax Board did, not just here but also elsewhere.

The answer is, no, the law does not allow that based on the same legal principle connected to the Franchise Tax Board's dismissal motion. Full faith and credit, constitutional choice of law, sovereignty and comity all dictate that California sovereignty and immunity laws must be recognized, at a minimum, for California's non-Nevada conduct.

The Franchise Tax Board, as an arm of the California State Government, it's in a state with its own laws and a state with a sovereign right to have its own laws applied, at a minimum, on its own soil. Refusing to apply California's immunity laws concerning its own acts on its own soil would be completely inconsistent with that sovereignty.

It's not a situation, as Mr. Hyatt alleges, where the Franchise Tax Board is splitting Mr. Hyatt's claims, but a situation where his Nevada legal remedies, if any, only extend so far when the actions of the California government are involved. Allowing the non-Nevada acts of the California government to form the basis for the Nevada liability, therefore, cannot be allowed.

This brings us to the second major issue on the summary judgment motion. Given the evidence, not all of the rhetoric, is there really sufficient prima facia evidence of tortious conduct to take this case to trial. The FTB, the Franchise Tax Board, was painstaking in identifying what it did in Nevada for its motion.

Mr. Hyatt has filed an opposition of unprecedented length but what Franchise Tax Board act involving Mr. Hyatt does all that really show? It shows that Mr. Hyatt only has evidence disputing, as to the Nevada acts, what happened on a short trip to Las Vegas in 1995. None of the disputes

about what happened on that trip creates a genuine issue of a material fact for the reasons stated in the Franchise Tax Board's reply. All that paper also shows is that Mr. Hyatt has no evidence disputing the facts about any other Nevada act of the Franchise Tax Board.

And as to what the Franchise Tax Board disclosed involving Mr. Hyatt, all of that paper merely confirms what the Franchise Tax Board said in its motion. The Franchise Tax Board communicated with third parties in a manner suggesting truthfully that it was auditing Mr. Hyatt. If this is a torte, how can the Franchise Tax Board do its job.

The Franchise Tax Board disclosed his Social Security number to some Nevada agencies and businesses. Such disclosure was permitted in California law, and Mr. Hyatt disclosed it himself in several instances in the public record. Here is Mr. Hyatt's voter registration. This is an exhibit to the Franchise Tax Board's moving papers filled out July 5th, 1994. There is his name. Here is his Social Security number. It's a public record, public document. This was filed well before these early 1995 disclosures that Mr. Hyatt is talking about that were supposedly tortious. We can go back in time a little farther, a document from 1988, a California probate record. There is Mr. Hyatt's name. There is his Social Security number, another public document in a public Court file.

As to Mr. Hyatt's allegations regarding disclosure of his secret Nevada address or linking his name to that address, what the evidence shows is that the Franchise Tax Board merely disclosed that address to companies that might have needed that information to check their records. This also was authorized by California law and was necessary to perform the Franchise Tax Board's function as part of its residency audit. All of these acts simply do not justify any of Mr. Hyatt's tortes in the context of that residency tax audit. Vague promises of courteous and fair treatment don't justify those tortes either. Those are too vague to be actionable, and the Franchise Tax Board didn't breach them in any event.

In fact, all of this paper really shows that what Mr. Hyatt is trying to do is still litigate the facts about his residency, whether he was a resident or not, he is trying to litigate that fact here. That was the subject of his previously dismissed declaratory relief claim. The Court dismissed that on the last motion for judgement on the pleadings. Mr. Hyatt's attempt to litigate that issue after dismissal of that claim is improper. And none of Mr. Hyatt's evidence creates a genuine factual issue as to the remaining tortes.

Now the final issue on summary judgment is whether the Franchise Tax Board's actions were privileged. If the

Court indeed does believe there is evidence on which a jury could reasonably find tortious Franchise Tax Board conduct. The answer is, yes, the Franchise Tax Board's conduct was privileged. That privilege arises from an administrative agency's authority to make its own investigatory decisions from the body of case law evidencing that government tax law can do things that private persons cannot.

Mr. Hyatt claims that the Franchise Tax Board's decision to investigate is not an issue but his challenge of virtually everything that the Franchise Tax Board did involving him speaks louder than those words. Crying torte merely because the Franchise Tax Board suggested, truthfully, to people that he was being audited or sent documents from which people could infer that, that's no different than saying it had no right to do anything at all. And as such, the decision to investigate really is part of the issue, given the scope of Mr. Hyatt complaint and his claims.

Moreover, the privilege cases in the Franchise Tax Board's papers show a deference not just to the decision to investigate but also to the substance of the investigation as well. As to Mr. Hyatt's claim that the Franchise Tax Board is saying that it can do whatever it wants, wherever it wants, whenever it wants, that's not true. If that were the case, the Franchise Tax Board would not have been so

painstaking about laying out the facts about what happened involving Mr. Hyatt. What the Franchise Tax Board is simply saying is that, stripped of all the rhetoric, these actions involving Mr. Hyatt followed in the proper functions of a government taxing agency, and as such, do not give rise to Mr. Hyatt's torte claims.

That's all I have, Your Honor. The Franchise Tax Board, we believe, is entitled either to summary judgment or to dismissal. Granting either motion would end this case and that's the correct result.

THE COURT: Counsel, I just have a preliminary question. At first blush, my impression of at least part of your argument is that the privilege, which the tax authority may or may not have is, in fact, absolute. Is that what I hear you saying?

MR. HELLER: I'm not saying -- well, under California law, there is an absolute privilege, yes. Applying that law, there has not been an upper limit demarcated on that statute, that California government code 860.2. I'm not saying, however, that this rises to a level of absolute immunity. I'm tying it to the facts and saying that these facts fall well within the privilege that the Franchise Tax Board has.

THE COURT: Thank you. In response?

MR. HUTCHISON: Judge, Mark Hutchison on behalf of

the plaintiff. With me is Don Kula to my right, Tom Steffen, and Tom Bourke here on behalf of the plaintiff, Your Honor. My client, Mr. Hyatt, is also here today.

Thank you for the opportunity to address this issue, Your Honor. Really what we are talking about is the complete and total deprivation of Mr. Hyatt's right to proceed to trial. That's why we are here. Cut it off. Don't let us go. We have set aside six weeks in November and December. Let's not do that. Let's not have an opportunity to fill these chairs and present the claims that my client has made. If the motion is granted, we are completely out of Court and we have no opportunity to present to Nevada citizens all of the issues and all of the questions that have been raised in this case.

I think Your Honor will agree that this is a case of utmost importance. We are here to talk about the sovereignty of the State of Nevada, its right to protect its citizens. Mr. Hyatt is described as somebody who claims to have moved to Nevada. He moved here in 1991 and he is still here. Going on nine years now he has been a resident of Nevada. He is a man with a mission, somebody who has the means and resources to finally stand up to the IRS and the State of California.

That's what's going on here is that we have a plaintiff who can finally stand up to the IRS and the State

of California. And the Franchise Tax Board isn't accustom to that. They are scared to death to have their motives, to have their actions scrutinised by a jury. And they'll do anything they can, they have done anything they can, Your Honor, to keep us from going to trial.

Your Honor, because it is such a fundamental right, as you know, when any party comes in and says let's stop this whole process, let's not go to trial, the law says you need to be able to show, number one, that as a matter of law you are entitled to judgement. And then number two, there are no genuine issue of facts, nothing that can be disputed. The judge can take a look at the -- usually deposition testimony and other avenues and motion papers and decide we don't even need to go to trial.

Let me just address first, Your Honor, the legal issue. What has changed since the last time we were here? On April 7, as a matter of fact, Your Honor even said something that you said this morning. It was interesting, it was almost the same. This is what you said back in April. "You may rest assured, all of you, that I have spent countless hours reading everything that you have prepared." Then after you listened to an hour and a half of Mr. Wilson and Mr. Steffen's argument, you said this. "I'm ruling that I believe that we have subject matter jurisdiction with respect to the torte claims, and for that reason this case

is going to stay with me for a while." Then you emphasized your point in the very next page. "As to the torte claims, I believe we do have subject matter jurisdiction. They will remain."

What has changed since then? Nothing. The state of the law has not changed. They can't come in here and say, Your Honor, you forgot about this Supreme Court case that just came down that absolutely wipes out all of the analysis and the countless hours that you have spent last time deciding whether or not, as a matter of law, we are entitled to move forward with the torte claims. You have already decided that, Your Honor. There has been no motion for reconsideration. There has been no writ to the Nevada Supreme Court. There has been no appeal, Your Honor.

If we were to come in here today and say "Your Honor, let's talk again about the deck relief and the residency issue," we would hear from the other side screaming. That's already been decided. It's done. We have heard the argument from counsel to that effect. They are doing the very same thing to us. We have spent countless hours. It's already decided there is a matter of law. You have looked through the law. The law hasn't changed. We have argued all of the subject matter arguments before. We have argued all of the elements of the tortes before. Nothing has changed. They cannot pass the very

first threshold issue that is a matter of law. They are entitled to judgment. Nothing has changed, Your Honor, there is not one new case decided that would overrule everything and change your mind. Maybe there has been additional cases thrown in, but it's all the same stuff that we decided a year ago, Your Honor. So frankly, we are not sure why we are here again.

Now moving on to the fact side, Your Honor, probably our most difficult torte would be the claim of fraud. I think most lawyers would say if you are asserting fraud, that's a pretty difficult claim to assert. And, Your Honor, in the reply papers, I want to correct one thing we submitted. There were a couple different orders that Discovery Commissioner Biggar had signed relating to Exhibit 4. And we submitted the incorrect order. If I may approach the bench, Your Honor, and give you that.

THE COURT: Certainly.

MR. HUTCHISON: This is the correct Exhibit 4. And I'll give this to counsel as well. And counsel has seen this before. Your Honor, as a matter of fact, if you look at the bottom of this exhibit, Discovery Commissioner Biggar writes in his handwriting "I have reviewed the Defendant's proposed changes in its recommendation submitted in the letter of 11/28/99 but find such changes to be unnecessary to their recommendations." This is something that Discovery

Commissioner Biggar found to be the case.

Judge, if you wouldn't mind, I would ask you to turn to paragraph four. This is just an example of the one judicial officer that has had more time on this case than you and what he has said about this case. Paragraph four. "At November 9, 1999, hearing, the discovery commissioner found that the entire process of the FTB's audit of Hyatt, including the FTB assessment of taxes in the protest is at issue in this case, and a proper subject of discovery based on Judge Saitta's ruling on the FTB's motion for judgment on the pleadings leave intact all of Hyatt's torte claims. Specifically, Hyatt is alleging fraud among the tortes by the FTB and the manner it audited him and assessed and attempted to collect taxes and penalties from him. Hyatt's claim of fraud against the FTB entitles him to discovery on the entire audit and assessment process performed by the FTB that was and is directed at him as part of the FTB's attempt to collect taxes from Hyatt."

Judge, the background to that report recommendation, which by the way Your Honor signed after considering it, was that we had filed motions to compel. I think it was back in May or June. And Discovery Commissioner Biggar literally went through thousands of pages of briefs in camera. We waited for five months for this to come out. We all showed up on November 9, anxious

to hear what he was going to say. And he said that, you know what, that there was enough here to move forward with the most difficult torte case we have to prove, fraud. Your Honor, I just want to underscore that point. This is, I think, Exhibit 5 to our opposition. If I may approach, Your Honor?

THE COURT: Certainly.

MR. HUTCHISON: Much easier to take a look at the transcript itself. I'll certainly be happy to provide one to counsel if he doesn't have a copy of this.

This is what Commissioner Biggar said after five months of consideration and thousands of pages of documents. Page 55, Your Honor, line 23. Commissioner Biggar, "Well I'm kind of confused as to why the file shouldn't be opened, Mr. Leatherwood." By the way, FTB's lead counsel. "If there is nothing to conceal, why shouldn't the process be open to the taxpayer where the claim there is fraud? You are claiming that he is defrauding you. He is claiming that your conduct is fraudulent. I say yours, the FTB's conduct is fraudulent. I can't completely agree with you that all of the taxpayers machinations here, however they are done, should be completely explored. You are certainly entitled to do that. I'm concerned and I think there is concern countrywide about the tax collecting services using methods that are not appropriate. And, you know, we all are

completely aware of that in regard to the IRS and methods like that. And I think that these processes should be explored in their proper context."

Your Honor, this is not a summary judgment case. This is a case where there are many, many issues of facts involved. This isn't even a case where the FTB can come in and say: Since last April we took a bunch of depositions and we conducted a bunch of discovery and, Your Honor, let us show you that the facts -- even applied to the law, the law has not changed -- but the facts as applied to the law warrant the imposition of summary judgment.

The most telling aspect of that, Your Honor, is that there is not -- I may be wrong here but I went through it again this morning -- there is not one citation to a deposition of the motion. The citations are to, number one, affidavits of Mr. Leatherwood and, number two, Miss Cox who was the auditor under the microscope here and who we have determined a perjurer and unworthy of credibility, those are the two affidavits they have for their entire motion. No deposition testimony other than that. They can't come in here and say: We have developed all of these facts, now let us show you, Judge, that as a matter of law. And then there is no genuine issue of material facts.

Those two major problems are absent, Your Honor, at the very threshold level of this motion. What we have

though, Your Honor, is something that Mr. Steffen alluded to a year ago. He said and -- I think there was some resentment by the FTB, frankly, in his statement -- that we have evidence that the FTB has actually come into Nevada and targeted wealthy individuals in Nevada. As a matter of fact, there are going into gated communities and looking through the directories and then heading home and looking to see if, by chance, any of those people happen to be former California residents.

We unearthed a former FTB auditor. Her name is Candice Less. She has become the whistle blower in this case and she has told us information that supports that very allegation that we made a year ago and which so incensed the FTB at that time. She said that that was true, that there are people that have come to Nevada, looked around, looked for wealthy taxpayers and gone back to California to see if they couldn't find some way to trump up a case against them. She also said that she heard Sheila Cox tell her husband, I'm going to get that Hyatt. She used more cultural language than that as expressed in Mr. Bourke's affidavit, but basically saying I'm going to get Mr. Hyatt. Then Priscilla Maysted, Mr. Hyatt's ex-wife said that Sheila Cox said to her, I got Mr. Hyatt.

Now, Your Honor, motives, intent are all issues of fact. Those are reasonable inferences that can be drawn

suggesting that the FTB was engaged in a vendetta and in an extortionist attempt to collect taxes. Those are some of the things that have come up during the depositions. But the FTB has not found anything that they can point to and say emphatically that this evidence proves that the facts are such in this case that we shouldn't even go to trial.

Your Honor, I'm going to sit down here in just one second. But let me just list for you five or six jugular, material, important facts that are in dispute that over arch all of the allegations in this case and all of the defenses in this case.

Number one, did the FTB conduct a routine audit as they were saying? Were they just doing their job or was this audit an attempt, an extortionist attempt to get Mr. Hyatt to settle for millions and millions of dollars in tax money? In that regard, Your Honor, I'll just have you turn to that same deposition transcript that I just handed you, the one with Judge Biggar. And Mr. Leatherwood has argued repeatedly to Commissioner Biggar -- who by the way has heard 20 or 30 motions in this case -- that, you know, we didn't do anything wrong here.

Page 57, starting with line 20, Your Honor, Commissioner Biggar says this. "But you never answered my original hypothetical question about if there were attempts to obtain taxes in some kind of fraudulent fashion, as I

believe would be the case, if the attempt would have been made to say, you know, if you don't pay we are going to assess a fraud penalty on you. Even though there is no fraud that we can determine legally, we are going to assess that fraud penalty on you if you don't settle with us. Now, in my view, that would be an improper way of collecting taxes. I think you should be able to explore and find out whether or not that, in fact, happened, if it did or if it did not."

Flipping over to page 59, Your Honor, line 17, Commissioner Biggar continues -- after Mr. Leatherwood assured him that he wouldn't pursue that course -- "I'm not sure, Mr. Leatherwood, that in the zeal to collect taxes, which the state of California is positive they are entitled to do, I don't think that's too strenuous a word to use. I think that all of the investigation here that has been conducted has led a number of people in the tax collecting process to be as competent as you are and as warranted to the subject as you are that taxes are owed that thereby justifies procedures that may not be within the rules to collect those taxes."

And Mr. Leatherwood said "That did not occur here." That's what he said here, "That didn't occur here, Your Honor, as a matter of law and as a matter of factual incorrectness didn't occur here." What did Commissioner

Biggar say? "Well, then I think we need to find out what was done exactly and then let the jury or judge to decide whether that occurred or not." Then Commissioner Biggar said -- or Mr. Leatherwood said "Well, they have taken 20 or something depositions. They have not found anything yet." Now Commissioner Biggar says "Perhaps it's in the documents you don't want to turn over to them." Then Mr. Leatherwood says "You had a chance to review those documents. You had five months to review them, Your Honor." This is what Commissioner Biggar said "I don't think you want to know my opinion on that, Mr. Leatherwood."

The first material, jugular issue that is in absolute dispute is whether or not this is a routine audit or whether or not this is an extortionist attempt to get my client to pay millions of dollars in taxes. Second, Your Honor, what did Deanna Genvonovich (phonetic), who was a protest officer, intend when they told Mr. Hyatt's tax attorney that, you know, these tax disputes usually settle at this stage because wealthy taxpayers don't want to risk the disclosure of confidential financial information?

Was that part of the extortionist attempt? Was that part of the continued efforts to coheres and intimidate my client or was that just what the FTB said, a simple statement of fact? With nothing other than innocent intent. Intent, motives and perceptions of my client are all issues

of fact, Your Honor, that are in dispute.

Third, the right to have a reasonable level of privacy in keeping his private matters confidential. There are really two prongs to that, Your Honor. There is the subjective expectation and an objective expectation. Subjectively my client is a world renowned engineer and scientist who has a right to protect trade secrets and has done so at great expense to him. He is also somebody who has experience with industrial espionage. And the best way for him to maintain his security is anonymity. Anonymity is the best security to him. Did he have then a subjective expectation of privacy? That is a question of fact. And then was it objective when the FTB came calling the very first time and promised confidentiality in their first letter to him? And then followed up, as Mr. Cowan's deposition shows, again, and again, and again with promises of confidentiality. Was it then reasonable for him to expect confidentiality? Reasonableness is a question of fact, Your Honor.

Fourth, was Hyatt a resident in Nevada when the tortes were committed? The FTB wants you to assume -- and there is no evidence that would make this an undisputed fact as to when Mr. Hyatt became a Nevada resident. They can test that strenuously, and so do we. That's a question of fact. It permeates every torte and fact in this case, Your

Honor. If, in fact, Mr. Hyatt is a Nevada resident, this Court has no higher interest than protecting him and providing an opportunity for him to present his claims to a jury. If he is not a resident, there is not a real strong interest here. But it's a question of fact.

Fifth, has this lawsuit interfered with the FTB's proceedings with the protest issues? That's a question of fact. They claim that they can't move forward with their protest proceedings because this lawsuit impedes them. Your Honor has already carved out the residency issue in that regard. And what Your Honor also needs to know is that that protest is preceded. In fact, it is scheduled for hearing before this case goes to trial. On both the 1991 and 1992 audit protests, they are scheduled to go for hearing, I believe, this fall.

Finally, Your Honor, did Hyatt know when he would receive the millions of dollars at the end of 1991 and the beginning of 1992 from the patent licenses when he moved to the state of Nevada? The FTB claims absolutely that he knew that he was going to get millions of dollars and he was leaving the state of California because he didn't want to pay any taxes. Your Honor, the evidence at least presents the disputed fact to that point. For example, the Phillips consulting agreement, license agreement that he entered into with the Phillips Corporation called for a contingency fee

arrangement. With two or three months of effort, the Phillips Corporation earned about $15 million for their efforts. Now if Mr. Hyatt knew he was going to get millions of dollars at the end of 1991 and 1992, why would he just enter into an hourly agreement with them as opposed to $15 billion dollars on a contingency fee? That at least presents a disputed issue of fact, Your Honor, that is over arching again on all of the issues and all of the defenses here.

Your Honor, I don't want to belabor the point any further. We are prepared certainly to move on and discuss point by point what has been addressed already by the FTB. But we would prefer if Your Honor has specific areas that you want us to address, to do that here. If not, Mr. Kula is certainly prepared, and Mr. Bourke is prepared to address, I know, the subject matter of jurisdiction arguments and the privacy matters.

THE COURT: The only questions I have at this point of you have to do with the response to the same question which I considered a preliminary question that I asked to our Deputy Attorney General to the State of California. And that is, I need to hear some discussion about the extent of the privilege or whether or not the immunity in this matter to the California taxpayer would be absolute.

MR. KULA: Yes, Your Honor, I'll address that. First of all, when you get to the privilege argument, you get to that, you have to, I think, address the subject matter of jurisdiction because they rely on California law and ask this Court to apply California law. And my answer to that -- first answer to that is you can't do that. One thing has not been said today is Meilicke. Meilicke is, I think, the linchpin that decides that issue. That is, Nevada has a strong interest here in protecting its citizen, in this case, Mr. Hyatt.

So then does this Court apply California law or does it look to Nevada's interest? And clearly we briefed that, Your Honor. And I'm not going to go into detail on it. If THE COURT wants more discussion on that, I'll refer you to Mr. Bourke. I don't think you get to privilege without getting past that issue. Now for privilege, what the FTB does is point to a slew of cases dealing with IRS agents. First of all, obviously they are talking about sovereign immunity that the federal government preserves for itself. Now you have California here in Nevada trying to apply that immunity. So those are not applicable for that reason.

Secondly, if you look at most of their cases, they don't involve the situation here where we are saying there is a separate tax proceeding that's going on. Whatever here

happens, it's separate. We have tortes.

Third and most importantly, there are cases themselves that they cite that provide that this is not an absolute privilege. Let me read from one case, Your Honor, that was in the reply brief. We haven't had a chance to respond to it because, obviously, it was in the reply brief. The FTB sites to it, Caposily V. Tracy, 663 F 2nd, 654. Now at first blush, this seems to be a good case for the FTB because THE COURT ultimately says under the federal law that there is an immunity for what the agent did in this case, the IRS agent. But I think in direct response to the court's question, on page -- at the end of the opinion on 658, THE COURT says "We do not intend to suggest that the government is insulated from torte liability from any and all transgressions committed by IRS employees. Section 26 ADC does not so state. That's the federal immunity statute.

When an IRS employee commits a torte wholly unrelated to his or her official duties of assessing or collecting taxes, the sovereign immunity contained under 28 USD, section 26 ADC were not applied. So I think if you take their actions -- to answer your question -- no, it's not an absolute immunity. Again, I don't think we get there because I think under full faith and credit, choice of law, comity, we don't reach that opinion. But I'll reserve those issues for Mr. Bourke.

THE COURT: Mr. Bourke?

MR. BOURKE: I got quite an education on this, Your Honor, because I was addressing directly the choice of law questions. And Nevada law choice of law is very much in accordance with most states which says that one of the first things you do is see whether or not there is a conflict or not. And if there is no conflict, then you don't have to worry about it. You just apply Nevada law.

THE COURT: That's what they told us in law school, that law was going to be a simple and straightforward analysis.

MR. BOURKE: California allows a lot of liability on the part of tax auditors and of the state of California for what tax auditors do. And this has not been brought forth by the attorney general's office. And I wanted to point out four big holes in the sovereign immunity law and just a little bit of history on this. I don't want to boar you on it. But in 1960s and '70s around the country, most states in the country abolished sovereign immunity by action of judicial officers, saying this is a common law docket that doesn't make sense. That the king can do no wrong might have applied in the middle ages. But for modern America, we are not going to do that. The reaction of a lot of legislators was, hey, wait a minute, don't be so fast about that. We are going to reenact sovereign immunity.

And California did that in 1963. So what they basically said is that we are making a statute saying there is sovereign immunity for a lot of things but what they were also saying is that if there is a statutory exception, there is no sovereign immunity. And obviously, as in most states, there is a constitutional provision that governs over our little statute of sovereign immunity.

The four big loopholes in the sovereign immunity barriers in the state of California are, number one, the California Constitution. The California Constitution, article one, section one was enacted after that statute of sovereign immunity and was directed at governmental snooping, governmental collection of data and governmental dissemination of that.

There is a 1972 amendment to the California Constitution. And what it did was make the California government, including the FTB, liable in a self-executing -- this is a California Constitution, Your Honor. Sometimes it's self-executing, meaning you don't need to pass the statute in order to get liability under it. This California Constitution statute has been applied to find government liable for invading privacy, the same sort of privacy that we are talking about, informational privacy, disclosing confidential information. So that's a big loophole that overrides any statute supposedly giving immunity to FTB

people. If they are violating the same things protected by the California statute, then there is no immunity and, therefore, Nevada can find the same thing for the same kind of conduct.

The second exemption is another statute enacted after that sovereign immunity statute called the Information Practices Act after 1977. As in the name of the act, it was codified in what they call, in California, the civil code. Civil code 1798.45 says that you can sue the State of California in any Court of competent jurisdiction for violating the Information Practices Act. We are in a competent Court of jurisdiction and we are suing for the same sort of thing in Nevada law that do violate the Information Practices Act.

Thirdly, and here I have to apologize for not making a blowup because one of the statutes that their reply brief pointed out and submitted to you in their latest appendix is a revenue and taxation code 21,021 -- 21,000 and 21. This restricts the ability of the State of California to avoid liability for the acts of FTB employees. This is a tax statute. And it says that if any officer or employee of the board recklessly disregards board published procedures, a taxpayer affected by that action may bring an action for damages against the State of California. This one it does say in Superior Court. And they say that means only in

California. But the point is that they have waived so much immunity for that sort of action.

Lastly, the governmental immunity statutes in California do not have any application to breach of contract. And the reason I mention contract and I mentioned reckless disregard of public procedures is that a lot of their actions here violate their own procedures. Their own procedures are what they say to have to keep everything confidential. They have to treat taxpayers fairly. They have to give an impartial audit. They have to do this, this, and this.

And they have violated their own procedures and their own contracts with Mr. Hyatt. They have sent to Mr. Hyatt a privacy notice that is required by federal law and the Information Practices Act. They sent it to him five different times in Nevada during the course of the audit. And the privacy notice says: We are bound by the Information Practices Act, we are bound by the federal privacy laws. We are going to give you access to your records, and we are not going to disclose the information that you give us to third parties unless it's on this list. And the list says IRS, state income taxing agency and government agencies in the State of California. Their violations of that are a violation of their own published regulations and their own contract with Mr. Hyatt.

Therefore, I think that these four holes demonstrate that what they are doing is violating not only things that violate Nevada Common Law but also give rise under their own law, even under their own law, give rise to liability. And therefore, there is not that conflict that Nevada choices law says to look at.

As we have pointed out, all of us have pointed out, Mr. Hyatt was a long-term California resident before he moved. He moved nine years ago, that makes him a long-term Nevada resident now. Because he has been living here for nine years, what that gives him is the right to protections of this Court against injuries that occurred here. If he has suffered emotional distress during the course of this audit, which is admittedly long after he moved to Nevada, they have admitted he moved to Nevada in 1992, if he suffered emotional distress, it was here. When he suffered financial losses or mitigation of damages, they are suffered in Nevada. And Meilicke and Nevada verses Hall says that a state has a right to protect its own interests. And Nevada has a strong interest in this case that should be protected. So that's what I have, Your Honor.

THE COURT: Thank you.

MR. KULA: If you have any other questions, we'll be happy to answer them. The one point I didn't address -- and I will just mention -- is that we strongly dispute that

this case is in any way interfering with the protest pending in California. We briefed that. Mr. Collins' affidavit addressed that. And if anything, that's an issue of fact, and we don't think they have submitted any facts to oppose that. If THE COURT has any questions.

THE COURT: I do not at this time, Counsel.

MR. BOURKE: Could I address one last thing?

THE COURT: Certainly.

MR. BOURKE: The last thing I wanted to mention was violation of their own regulations and of their own contracts with Mr. Hyatt. Because they have blown up, for you, two examples of where in the records, in dusty records somewhere, Mr. Hyatt did disclose that, yes, he had a Social Security number. But we have pointed out to THE COURT, in our original brief, three Supreme Court cases on informational privacy. And the first of the ones that we cited is the United States Department of Defense verses the Federal Labor Relations Authority. What we didn't quote was a sentence in there saying is that an individual's interest and controlling the dissemination of information regarding personal matters does not dissolve civilly because the information may already be available to the public in some form. What THE COURT was saying that wrap sheets and criminal records should not necessarily be made public again, simply because maybe 5 or 10 years ago or some other

place in some dusty records somewhere, someone could find it.

I wanted to point to a couple things about these, Your Honor. This one, for example, is a 1988 record relating to Mr. Hyatt is over a decade old before his audit even began. They didn't find this in the course of the audit. They did this as part of their million dollar defense of this lawsuit. In other words, they didn't get Mr. Hyatt's Social Security number from this document. They got it from Mr. Hyatt. And they got it from Mr. Hyatt after they had sent him a privacy notice that promised him we are going to keep your information private, except for this limited list of who we are going to send to. They broke that promise. They broke their own regulations, Privacy Act and Information Practices Act.

The second public record that they are referring to is another record that they never examined during the course of the audit. This is something that's in the public records of Nevada, Clark County, where Mr. Hyatt applied to become a voter in Nevada. And they are emphasizing, well, his Social Security number is in there. But I would like to emphasize the fact that he is here making a public affirmation that he is becoming a Nevada resident in 1991. But if we focus again on the Social Security number, the fact that it is in some record that you could get access to

is irrelevant. Because there is a second Supreme Court case that we cited to you called a Reporter's Committee Case which says that the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure in dissemination of the information, quoting from Rehnquist in a Law Review article.

And again, Your Honor, you could find -- if you really want to find those cases -- those in our brief under the section US Supreme Court cases on informational privacy. This case too then is another example of a Social Security number that may or may not be found if you go to the public records. And I know that because I have gone to the Clark County Elections Department and sometimes asked to see public records. And sometimes they let you see it and sometimes they don't. It depends week to week whether or not they are allowing the privacy rights of people. But I do also know this, that we investigated this and that the Clark County Department of Elections is subject to an injunction from this Court restricting them from disclosing confidential information of the residents of Clark County, Nevada. Thank you.

THE COURT: Thank you, Mr. Bourke.

In reply, Counsel?

MR. HELLER: Your Honor, on the issues that Mr. Bourke raised regarding the various statutes that carve

out certain exceptions, those are what they say they are, statutes, not common law. They don't authorize common law claims against the state of California. If there is a claim against an auditor under California law, it has to be pursuant to a California statute and not under the common law under the statute. That's the nature of the immunity that's reserved and that's stated in section 860.2. There are certain carveouts for that but they are statutory actions. Mr. Hyatt is not alleging a statutory action. He is alleging common law tortes. And those statutes do not say anything about allowing those claims.

THE COURT: None the less, would you agree that in some form, at least, they limit certain conduct of certain actors, as in this case, the members of the Tax Board investigatory members?

MR. HELLER: Certain California statutes set remedies, yes, by statute, that is true. As to the issue Mr. Hutchison raised about why are we here again, that last motion was a motion for judgment on the pleadings. This is a motion about the facts where the facts are laid out. It's not merely relying on the pleadings but trying to look at everything that happened, and as such, is a different motion than the motion on pleadings. They are two different types of dismissal motions that are facial motions and factual motions. We raised the first one, facial motion, over a

year ago, now we are raising a factual one.

As to Mr. Hutchison's statements about what the discovery commissioner says is and is not the subject of discovery in this case, that's all well and good, but again we are talking about discovery. We are not talking about what can form the basis for liability and whether the audit file can be an open book for purposes of discovery.

It doesn't mean that the audit file can be an open book for purposes of imposing liability, particularly on a sovereign entity, the California government. The Franchise Tax Board is an arm of the California government, and as such, those acts about those claims that the file or this case should be an open book just don't fly when we are talking about a Nevada action against the California State Government.

As to the various disputed acts Mr. Hutchison raises, many of them don't involve Nevada at all, for instance, the statement by Mr. Bonivitch. None of them changes what actually happened. The case is about what happened, not about all of these rumors and innuendos that they are trying to raise and to look objectively at the acts that occurred and do those acts form the basis for torte liability, and we submit that they do not. That's all I have, Your Honor.

THE COURT: Thank you, very much. I have a

question which I believe should go to the plaintiff's side. First of all, it is perhaps an oversimplification of the greater issue. We have touched on a little bit of the fraud claim in this case. At least a couple of cases that I found having to do with the negligent misrepresentation component, negligence out of misrepresentation of claim, my reading of the Nevada law suggests that we only recognize this torte in the context of commercial or business transaction. Would that be, in your opinion, an incorrect statement? And if so, why? And then that case doesn't have any effect on that claim.

MR. HUTCHISON: Your Honor, I'd be happy to address that. I think that there's limitations in terms of commercial transactions on the negligent misrepresentation side. Then the question becomes whether or not this tax assessment that involves millions of dollars becomes a financial or an economic transaction between my client and between the FTB.

THE COURT: Business or commercial.

MR. HUTCHISON: Business or commercial, right. Generally when we talk about business or commercial, we are talking about money exchanging hands. We are talking about consideration, that sort of thing. The kinds of things we're talking about here where the State of California is attempting to assess, we think, fraudulently, we think

without proper motive or proper basis, a procedure whereby we would have my client give up millions of dollars in his money to the State of California. That's a business. That's a commercial transaction, I think, for the purposes of the negligent misrepresentation claim.

MR. WILSON: Your Honor, may I put a question?

THE COURT: Certainly.

MR. WILSON: For the record, my name is Thomas Wilson. I'm counsel for Franchise Tax Board.

THE COURT: Welcome.

MR. WILSON: George Takenouchi is also present with me.

THE COURT: Welcome.

MR. WILSON: And also present is Robert Dunn who is counsel of the department itself. I have a question with respect to the scope of this case. And Mr. Bourke made a comment about injuries which occurred here which the parties wish to litigate. I have a question for THE COURT. And that is, does THE COURT see this case as being limited to actions which occurred within Nevada? THE COURT raised a basic threshold question here which is the extent of the privilege. Is it limited or is it absolute when we talk about sovereign immunity, whether it's absolute or whether it's limited. And I understand the question which THE COURT puts. Are we talking about actions limited to those which

occurred in the state of Nevada or are we talking about trying the entire audit in California as well?

Now there are procedures for the trial and the resolution of a claim of tortious actions which occurred within the state of California. But we have a very basic question here which I believe there is some degree of confusion. And that is, are we litigating what occurred in Nevada or are we trying the entire audit, whether in California or Nevada? It makes a vast difference in the scope of this case. It makes a vast difference in the scope of the discovery and certainly the duration of the case. That would be helpful to us, I think, if we have a common understanding of that.

THE COURT: I think that's a fair question. And while I wish that I could give you a simple blackline answer, to suggest to you that I wish to revisit or otherwise litigate the entire audit would be an incorrect statement. That, in its entirety, is not the subject matter of this lawsuit, frankly.

On the other hand, to limit the environment of this lawsuit merely to acts which occurred in Nevada would be to narrow it far too technically. I believe that acts that could occur in any number of places, not limited to Nevada, certainly not limited to the state of California, but that none the less would affect the plaintiff here in

the state of Nevada. So to give you a limitation with respect to only those acts that occurred in Nevada, I can give you an unequivocal no. We are not limiting it to that extent.

On the other hand, however, I can assure you that I have no desire, nor do I think that this lawsuit frames the complaint in such a manner that would cause us to revisit the entire audit that gives rise to this lawsuit. And I don't know that that's as helpful as you perhaps had hoped it might be.

MR. WILSON: Maybe this is a work in progress, Your Honor.

THE COURT: Oh, I think it is.

MR. WILSON: And I think it's one that we probably need to define. In fairness to THE COURT, it's going to be more difficult for you than it is for we. Because we are involved in the case and you see it from time to time. But for, I suppose, an effective trial of this case, if it gets that far, if it is not limited or disposed of on motion, I guess we are going to have to reach a point where THE COURT and we understand the limits of the factual issues and the limits of the legal issues which are going to be reserved for trial if indeed THE COURT decides it wants to try this case and we don't dispose of it on motion.

THE COURT: Frankly, I think that you pointed out

something that has caused me -- while I don't wish to suggest on the record or otherwise that I don't spend as much time in preparation for lesser cases, shall we say, less weighty cases -- part of the reason that I have tried to stay as close to this case as I can is because of that precise issue. When this matter comes, should it go all of the way to trial, as you suggest, we are going have to do several things in terms of limiting and very suscinctly identifying the issues for trial. Not only for our purposes but if this matter needs to be set for a jury -- and as I seem to recall, this is a jury case -- we need to be absolutely certain that we are streamlining what we are trying, for everyone.

MR. WILSON: I think after this motion was initially filed by plaintiff -- and I may be wrong on my chronology, and correct me if I am -- the point I want to get to is that plaintiff has some discovery that is outstanding, depositions that have not been taken that were lately noticed and are now proceeding. This puts this threshold question as to whether the privilege is absolute, and if not, what are the limitations. Are we within the sovereign purpose for the State of California or have we exceeded that in some way with the actions of an auditor or somebody else involved in the process. So we have that issue. And we have the question and the issue that Your

Honor is discussing: Are we trying the whole audit here or are we going to define the other issues if we need to go farther?

If THE COURT is disposed to deny this motion, I would suggest this. And maybe this is a way of narrowing this question that THE COURT puts to us. We have a series of depositions which are scheduled that we are going to be spending some time together on.

I would suggest that with respect to each of the causes of action in the complaint -- obviously except the one that has been dismissed -- that we discuss at appropriate hearing, after supplemental briefing, what are the facts that we are trying. I'm not talking about lawyer's opinions in the form of affidavits. That's political arguments, you know. I'm talking about discoverable facts, developed as you do so in discovery, as they address each cause of action to decide whether or not the privilege applies or whether or not it suggests some exception to it because the sovereign process of the State of California has been exceeded. That way, we might be able to question and limit the causes of action which are applicable to this case. And if any survive that process, then I suppose we are looking at trial with respect to those.

But I'm trying to grope for -- rather a awkwardly

and in kind of a windy manner, I suspect -- is that this case has had a great deal of discovery. I'm not being critical of that. We have to get our hands around it if we are going to try it. We have to get our hands around it if we are going to discuss it on motions for the purposes of narrowing it if not limiting it. One deposition has gone for nine days and has not been concluded. I'm not being critical. The plaintiff has not announced the end of any deposition that they have done yet. We have got to bring some terminus to this one. So I suggest we finish these that plaintiff has noticed and then look at the various causes of action and bring this motion back to you for further discussion because right now this case are all over the map.

THE COURT: Let me explain something on the tax rules, address one of the points. One of the requests that was set forth on the opposition's list, of course, was the point of 56 F.

MR. WILSON: Pardon me?

THE COURT: 56 F. There was a request that if, at the barest of minimums, THE COURT was inclined to grant the motion either in part or full, the request was made properly supported by affidavit under rule 56 F which requires me, in most instances, to look at allowing the party making that request to allow them to have a little bit more discovery.

Not only do I understand and recognize -- and quite frankly appreciate the comments you are making -- I do think that the first thing I need to do is let me render a decision with respect to the motions that are presently before THE COURT.

I am -- as I suspect comes as no surprise to any of you -- I'm going to deny the motion in its entirety at this point. The reason that I believe that that's the easiest part that I have in front of me is precisely the issue that you raise. I anticipate that there will be -- should be significant pretrial motions carving out what we are actually going to be trying.

Furthermore, it has been my practice -- although, again, I'm sure that you are all aware that I'm a relatively new judge -- it has been my experience that the best way to resolve this type of case in preparation for a trial is for -- what I have called in the past -- an order of proceeding which not only identifies who will be testifying, but to a certain extent a more expansive definition of what we expect that individual to testify to and with respect to what cause of action, what claim, what very succinct statement of the issue is being suggested by and through that witness.

Also in this case, because of the breadth of it, once again, certainly in California, I believe it will have

to be a day-long conference where we will all sit down together at a very large conference-like table and truly do what you have set out. Let us identify this issue, how it is going to be presented. And again, as I said earlier, we need to do this not for just proper trial process but because if we are trying this to a jury, we need to be very clear. If we are going to keep these people -- should this matter actually go to trial to the extent that we believe it could, we need to keep these people fully awake and aware of what's going on.

MR. WILSON: One follow-up question. Am I to take the Court's order that we can without prejudice to our ability to renew this motion as we go through that process?

MR. KULA: Your Honor, let me just address that.

THE COURT: Yes, go ahead. I didn't mean to cut you off earlier.

MR. KULA: Obviously whatever the rules will allow -- and I'd have to confer with Mr. Hutchison in terms of how many summary judgement motions a party can bring -- but when this motion was first filed, we suggested to the FTB, why don't we put this off for a couple months. What Mr. Hutchison quoted to you from the report, that recommendation, that's up in a writ right now. That's discovery we have not done. They didn't want to do that. Not only did they not do that, they filed three discovery

motions. I actually prepared an affidavit, which I won't submit to THE COURT, it is obviously not necessary. They did not want to do that. After they filed our opposition, they offered to postpone it. We said we briefed it. We think there is issue of fact in all of these claims, let's just dispose of this motion. Why do we have to again incur costs and expenses when you forced us to do it in the month of March?

So opposition would be, we don't think they should get a second bite of the apple. Obviously whatever the rules would allow, but I just thought THE COURT should know the context of what we went through to get our opposition filed.

THE COURT: Some of that I can anticipate. And believe it or not, I can see what goes on to get this motion heard let alone written replies, etcetera, I believe, and I'm certainly subject to correction if this is wrong. The answer is, yes, the motion is being denied without prejudice. It needs to be.

These are, I believe, by both counsel's assessment, factually based on motions. Certainly the denial of the motion on summary judgement would suggest that it's a factual issue and of course within reason. And you raise a good point. Some of these issues perhaps should be necessarily revisited once we have more -- if it is

discovered or identified through the discovery process -- more information that would more clearly eliminate -- as any summary judgement standard -- any material issue.

However, the word limitation is one that I am going to be discussing for a few moments. I know this is a weighty case. And, Mr. Hyatt, with respect to your concerns, I don't in any way wish to handcuff your attorneys nor am I implying that from the defendant's side anything should be withheld.

What I am suggesting is that I do want to come to some understanding of limitation in terms of the filings. It is really my commitment to this job that I be as well prepared for each and every proceeding as I can. That requires me to read that which has been submitted to me. I would suggest that I have a fairly strong, factual and legal understanding of what has gone on. And I am going to ask without precedent artificial limitations, this time should there be further motions, I would ask that all counsel use what I refer to as the brief form. That's what we are filing.

I would ask -- I do appreciate when foreign law is cited. I do appreciate the support of the document of the law being attached to it. None the less, in this world of computers, should I feel a need to reference certain of the matters cited, I can certainly do so. I have one of the

most brilliant law clerks within these walls. She can also do tremendous research. So I'm asking that any further motions be limited in their breadth and their volume.

We are now at the point, that you so appropriately point out, we are limiting issues now. We are taking pre-trial stages into preparation for trial. We are there. I mean, if we are looking at a fall trial, we are there. So we need to be limiting what we are doing. Having said that, again, I would emphasize I would like any subsequent pleadings to be filed in the brief, brief form.

Other than that, I guess what we need to be doing in this case is some scheduling, some realistic scheduling well in advance to sit down and identify narrowing issues, actually doing the order of proceeding and identifying how I'm going to be trying this case. Where are we in terms of -- I know there is ongoing discovery.

MR. HUTCHISON: Your Honor, we have a writ to the Supreme Court that is pending on what we consider to be material documents and information that we are waiting for. We have no control of that, obviously, as to when that would come back.

Discovery Commissioner Biggar has just ordered last week or two weeks ago that 14 FTB employee witnesses should go forward. Prior to that time, since June 1st, we had deposed one FTB employee.

THE COURT: I'd certainly move quicker.

MR. HUTCHISON: We have been trying, Your Honor. There has been lots of motions brought before Discovery Commissioner Biggar, frankly. And, you know, our position is that there has been foot-dragging to the side. Their position is that there's certain privileges, or whatever. The point is, we have not been able to do all of the discovery. We are going to be doing as quickly as we can all of the discovery. And we are going to wait for the Supreme Court to come back with the writ issue.

THE COURT: I'm not hearing the basis being laid for a motion to continue the trial, am I?

MR. HUTCHISON: Your Honor, that's hard to control when the discovery is going to be available.

THE COURT: I think that we might need to do a status check on this case about 60 days out from now. Sixty days out is going to put us -- if my calendar is correct -- into June. Which as I said, I feel -- admittedly when I was in practice I may have been overly compulsive -- if we are looking at a fall trial date, we need to know where we are going by June 30th. Does anyone presently -- I know that you don't have your June calendars with you. Does anyone have long-term vacation plans that are going to take you out of this city for any period of time during the month of June that you know of presently?

MR. WILSON: We'll be available, Your Honor, and we'll assume a status conference with THE COURT in 60 days. Book it, we'll be here.

THE COURT: Thank you.

MR. KULA: I was going to make joke of it. Obviously I can come to Las Vegas any day in June.

THE COURT: Understood. What more can you ask for, a day in Vegas in June. No one else has anything prolonged that they are going to be concerned about? What I'm going to do -- not allowed to do scheduling without the arm of --

Can you call Jackie? Let's get a date right now. If it is subject to previously noticed depositions or other situations, we can certainly leave it. But I want to get a date to do a status check on this case in June.

MR. STEFFEN: Your Honor, while you are doing that, if I could just speak briefly as to the possibility for another motion for summary judgement.

THE COURT: Certainly.

MR. STEFFEN: It appears to me that Your Honor has provided basis for determining whether the proof will exist to satisfy the elements of each cause of action. You want a conference and you want to see what witnesses are going to be available and what they will say. And it would appear to me, Your Honor, that that would be the best way to handle

it. Because right now the trial date is rapidly approaching and there is going to be so much to do and thousands of pages of paper, I think if we have to go through another process of trying to answer a motion for summary judgment, it appears to me it would be counterproductive.

A better way to do it would be, in the conference, for you to see what the plaintiff has by way of proof with respect to the elements. If you conclude that the proof is lacking with respect to any cause of action, then I suppose Your Honor could invite such a motion. But barring that, it would appear to me that it would be far better use of everyone's limited time and resources if we could focus on moving ahead with discovery and preparing for trial.

THE COURT: I couldn't agree with you more. It is not, however, my desire to in any way cut off what is an obvious legal right and that would be to bring a motion should the facts support it. What I think I might have heard you say is even a 60-day stay with respect to any additional filings, is that basically what I heard you say until we are able to do the status conference?

MR. STEFFEN: I would certainly say at a minimum, Your Honor, because, again, the time is short.

THE COURT: That was my concern in this case is that, as I said, what I know about trial preparation in a case of this breadth is it's going to take a long time to

prepare, from both sides. I appreciate that and I understand what we are looking at.

While I'm not prepared at this point necessarily to grant a formal 60-day stay on proceedings, I can't imagine -- maybe I need to do that -- but I really want to make both sides aware that, as far as I'm concerned, we are at the point where we are to fish or cut bait is I believe the saying that's most appropriate. These motions were voluminous. They covered every issue, as they are supposed to, in terms of what a reasonable belief from the moving party side was that they felt were already subject to dismissal based upon, either there be no factual situation or no factual situation that could be found for those.

I'm hesitant, as I said, to take away the authority of anyone, the legal right to file a motion. But I would suggest that a 60-day hiatus or a stay while we put these cases together go further in discovery would, none the less, be a good thing.

Without entering a formal order, I would have to say something brand new, something unbriefed, otherwise undiscovered, absent something of a compelling nature, let's take the next 60 days and discover our way through this case as opposed to writing and filing motions.

MR. WILSON: Your Honor, we have no objection to that. We have -- plaintiff is continuing through -- based

upon agreed dates for deposition -- an additional list depositions it is taking now. Defendant has only recently started its own deposition discovery, and we are going to be in that process during the next 60 days. So I think the window is about right --

THE COURT: Good.

MR. WILSON: -- to wrap up our discovery, then revisit your question --

THE COURT: Good.

MR. WILSON: -- which is: Is the privilege absolute and to what extent are we looking at audit activity in California.

THE COURT: Good.

MR. WILSON: I think we will have a better handle on it then. And that makes sense to me.

THE COURT: I appreciate the cooperation which I see going on, despite the fact that you are adversaries. It is a sign of good attorneys when they recognize what needs to be done on behalf of their clients and move toward it in a professional manner as you are all apparently doing. Other than the date, is there something else?

MR. HUTCHISON: Judge, I just want to make sure the record is clear that Your Honor isn't talking about evidence that will be presented to the jury at trial, we are going to be cutting that down. You are not suggesting are

you, that the numerous orders and the numerous days that we have spent before Discovery Commissioner Biggar in terms of the breadth of the discovery is going to be affected here, because we have orders to that effect.

THE COURT: Absolutely not.

MR. HUTCHISON: Because those are all in place.

THE COURT: Absolutely.

(Off of the record.)

THE COURT: What I would like to do is tentatively schedule status check for June 13, 9:00. Does that make flights difficult for anyone?

MR. WILSON: What time, Your Honor?

THE COURT: 9:00.

MR. WILSON: That's all right.

THE COURT: No problem with flights? You can get here in time?

MR. HUTCHISON: Yes, Your Honor.

MR. KULA: Yes, Your Honor.

MR. STEFFEN: Yes.

MR. BOURKE: Yes.

THE COURT: We will schedule a whole day. I think it's appropriate to do so. Should this pose a problem, we will convene a telephone conference to reset to so everyone can be a part of the discussion.

MR. HUTCHISON: Judge, would you mind reviewing

again what subject matter is that you would like to discuss during that day-long proceeding.

THE COURT: What I would like to do is at least begin to draft what I refer to as an order of proceeding. What that includes is a list of witnesses, what you anticipate their testimony is going to be. And when I use that quotation, I do not mean the typical 16.1 explanation. I would also like you to take the extra step and identify what that testimony is going to be and to which cause of action it applies. And it should, in most instances, be rather obvious. But none the less, that would be a starting point for us.

I want you all to begin thinking about exhibits in this case. Other than the standard demonstrative exhibits, something that I think you might find you have in common. You are probably going to be using some of the same documents. What I would also ask counsel to begin to look toward is perhaps finding, almost in the form of a repository, a way to present the exhibits, at least to the extent that you are able in a uniform -- instead of having plaintiff's exhibits and defendant's exhibits and boxes and boxes of exhibits, there may be a way to present these exhibits in a catalog manner that applies to both sides. And I would like you to begin to consider that.

And as, shall we say, a supporting document to

your order of proceeding, I would also like to see a list of exhibits as best you can. I'm not asking anyone to give away, in any stretch or in any manner, their trial theory. That's not what I'm looking for. What I'm trying to have is a document that I can wrap myself around to decide really and realistically how much time I need to plow out, how we can best set forth the legal issues so that we can get them to the jury in a manner that is going to, as I said, keep them awake and aware of what is going on.

It's very important that we do that. I don't say that in jest. I believe that the order of proceeding with witnesses and the supporting documents that you might like to share or catalog together is a starting point. The only other thing I would ask is that I would need those documents at least 10 days before the 13th so that I can have an opportunity to review and understand them. So we are looking at June 3rd -- if that comes up on a real day. No, it does not. So I would ask that they be submitted to THE COURT by Friday the 2nd.

MR. WILSON: Your Honor, may I request a copy of the transcript of the Court's order so that I have it in specific?

THE COURT: Certainly. What I may do is actually turn this into the form of some type of a status conference, scheduling order or notice. Is there anything else?

MR. HUTCHISON: Judge, can we also address the June 13 status conference, which witnesses will be here live verses via videotape? That's going to be a real question that I think everybody is going to have legally as well as factually in terms of having the jury awake.

THE COURT: Excellent. I also think that one of the reasons that I use an order of proceeding in this type of case is precisely for that purpose. A lot of times we may need to take certain witnesses out of order, we may need to fill in some time with the reading or the viewing of a deposition and this will really help us to streamline the case that we are looking at. And I think that's an appropriate request. We will have to look at whether or not they are going to be live or by video or by deposition transcript.

MR. HUTCHISON: Right.

THE COURT: Anything else?

MR. WILSON: No, Your Honor, thank you.

MR. HUTCHISON: Thank you, Your Honor.

(Thereupon, the taking of the proceeding was concluded.)

* * * * *

CERTIFICATE OF REPORTER

STATE OF NEVADA)
SS:
COUNTY OF CLARK)

I, Carre Lewis, certified court reporter, do hereby certify that I took down in shorthand (Stenotype) all of the proceedings had in the before-entitled matter at the time and place indicated; and that thereafter said shorthand notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record of the proceedings had.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 26th day of April, 2000.

Carre Lewis

Carre Lewis, CCR 497

EXHIBIT 23

ORDR
Thomas L. Steffen (1300)
Mark A. Hutchison (4639)
John T. Steffen (4390)
HUTCHISON & STEFFEN
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117
(702) 385-2500

Thomas K. Bourke (CA State Bar No. 56333)
LAW OFFICES OF THOMAS K. BOURKE
One Bunker Hill
601 West 5th Street, Eighth Floor
Los Angeles, CA 90071
(213) 623-1092

Attorneys for Plaintiff
GILBERT P. HYATT

FILED

MAY 31 4 25 PH '00

Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive, Defendant.	Case No. A382999 Dept No. XVIII Dckt No. F **ORDER**

Defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), having come before the Court, the plaintiff being represented by Thomas L. Steffen, Esq., Mark A. Hutchison, Esq., Donald J. Kula, Esq., and Thomas K. Bourke, Esq., and the defendant being represented by Thomas R. Wilson, II, Esq., Thomas Heller, Esq., and George Takenouchi, Esq., the Court having considered all of the papers filed by the parties and argument of counsel, and GOOD CAUSE APPEARING;

. . .

. . .

IT IS HEREBY ORDERED that defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), is denied.

ORDER

IT IS SO ORDERED.

DATED this 31 day of May, 2000.

NANCY M. SAITTA

DISTRICT COURT JUDGE
NANCY M. SAITTA

SUBMITTED BY:

Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
HUTCHISON & STEFFEN
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117

Attorneys for Plaintiff

APPROVED AS TO FORM BY:

Matthew C. Addison, Esq.
Bryan R. Clark, Esq.
McDONALD CARANO WILSON
McCUNE BERGIN, ET AL.
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102

Attorneys for Defendant

HUTCHISON & STEFFEN
A PROFESSIONAL CORPORATION
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

NEOJ
Thomas L. Steffen (1300)
Mark A. Hutchison (4639)
John T. Steffen (4390)
HUTCHISON & STEFFEN
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117
(702) 385-2500

Thomas K. Bourke (CA State Bar No. 56333)
LAW OFFICES OF THOMAS K. BOURKE
One Bunker Hill
601 West 5th Street, Eighth Floor
Los Angeles, CA 90071
(213) 623-1092

Attorneys for Plaintiff
GILBERT P. HYATT

FILED
JUN 1 4 13 PM '00
Shirley E. Regina
CLERK

HUTCHISON & STEFFEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

vs.

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

Defendant.

Case No. A382999
Dept No. XVIII

NOTICE OF ENTRY OF ORDER

TO: ALL INTERESTED PARTIES

NOTICE IS HEREBY GIVEN that on May 31, 2000, an Order was entered in this case, a copy of which is attached hereto.

DATED this 1st day of June, 2000.

HUTCHISON & STEFFEN

By: _____
Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117

Attorneys for Plaintiff

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, and that on this 1 day of June, 2000, I deposited a true copy of **NOTICE OF ENTRY OF ORDER** for mailing in the U.S. Mail at Las Vegas, Nevada, in a sealed envelope upon which first class postage was prepaid and addressed to:

James W. Bradshaw
McDonald, Carano, Wilson, McCune,
Bergin, Frankovich & Hicks
241 Ridge St., Fourth Floor
P.O. Box 2670
Reno, Nevada 89505

Felix E. Leatherwood
California Attorney General
300 South Spring Street, Suite 5212
Los Angeles, California 90013

An employee of Hutchison & Steffen

HUTCHISON & STEFFEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

EXHIBIT 24

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

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

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest.

No. 35549

ORDER DIRECTING ANSWER, TEMPORARILY STAYING DISTRICT COURT PROCEEDINGS AND DIRECTING CLARIFICATION OF DOCUMENTS

This original petition for a writ of mandamus and/or prohibition challenges the district court's protective order and order compelling petitioner to release certain documents to the real party in interest. Having reviewed the petition, it appears that petitioner has set forth issues of arguable merit and that petitioner may have no plain, speedy and adequate remedy in the ordinary course of the law. Therefore, the real party in interest, on behalf of respondents, shall have thirty (30) days from the date of this order within which to file an answer, including authorities, against issuance of the requested writ.

We conclude that a temporary stay is warranted and therefore grant petitioner's motion for stay, filed on April 13, 2000. Accordingly, the district court's orders imposing a protective order and compelling petitioner to release certain documents, as well as the proceedings in District Court Case

No. A382999, are hereby stayed pending our receipt and consideration of the real party in interest's answer.

Petitioner contends that portions of documents FTB 100139, FTB 100218 and FTB 100401 should be redacted pursuant to the attorney-client privilege. However, it is unclear whether unredacted copies of these documents were submitted with the petition. If the documents provided to this court are unredacted copies, it is unclear precisely which portions of these documents petitioner contends are protected. Accordingly, petitioner is directed to provide unredacted copies of documents FTB 100139, FTB 100218 and FTB 100401 (in a sealed envelope, with a description on the outside of the envelope describing the documents contained therein), and indicate on these copies which portions of these documents it contends should be protected from discovery pursuant to the attorney-client privilege.

It is so ORDERED.

Rose, C.J.

Maupin, J.

Shearing, J.

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

EXHIBIT 25

BILL LOCKYER
Attorney General
RICHARD W. BAKKE
Supervising Deputy Attorney General
FELIX E. LEATHERWOOD, Admitted per SCR 42
GEORGE M. TAKENOUCHI, Admitted per SCR 42
THOMAS G. HELLER, Admitted per SCR 42
Deputy Attorneys General

THOMAS R. C. WILSON, ESQ.
Nevada State Bar # 1568
JAMES C. GIUDICI, ESQ.
Nevada State Bar # 224
MATTHEW C. ADDISON, ESQ.
Nevada State Bar # 4201
BRYAN R. CLARK, ESQ.
Nevada State Bar #4442
McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS LLP
241 Ridge Street, 4th Floor
P.O. Box 2670
Reno, NV 89505-2670
(775) 788-2000
Attorneys for Franchise Tax Board

IN THE SUPREME COURT OF THE

STATE OF NEVADA

* * * * *

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

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

Respondent,

and

GILBERT P. HYATT,

Real Party in Interest.

Case No.:_____

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

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

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McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

TABLE OF AUTHORITIES

Page(s)

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

TABLE OF AUTHORITIES

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

TABLE OF AUTHORITIES

Other Authorities

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

TABLE OF AUTHORITIES

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

Under Nev. Rev. Stat. § 34.150 *et seq.*, Petitioner FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA (the "FTB") petitions the Court for a Writ of Mandamus directing Respondent Eighth Judicial District Court to dismiss this Nevada state court tort action against the California government for lack of subject matter jurisdiction. Alternatively, the FTB petitions the Court for a Writ of Prohibition and Mandamus limiting any trial of this action to the FTB's Nevada acts and Nevada contacts concerning real party in interest Gilbert P. Hyatt ("Hyatt"), and directing the District Court to reconsider the FTB's summary judgment motion in light of this jurisdictional limitation.

The FTB previously filed a writ petition with this Court on January 27, 2000, concerning discovery matters. (Case No. 35549.) The Court has issued a stay of further proceedings in the District Court and ordered Hyatt to answer that petition by July 7, 2000. The FTB now files this additional writ petition following entry of the District Court's May 31, 2000 order denying the FTB's Motion for Summary Judgment under NRCP 56(b), or Alternatively for Dismissal under NRCP 12(h)(3). By a separate motion filed today, the FTB asks that this writ petition be consolidated with the FTB's previous writ petition.

The FTB's request for a Writ of Mandamus ordering dismissal concerns the District Court's denial of the dismissal portion of the FTB's motion. The District Court erred in denying the FTB's dismissal motion because the Nevada courts lack subject matter jurisdiction over Hyatt's California tax-related tort claims. California has multiple laws reflective of its sovereign immunity that bar Hyatt's common-law tort claims against the FTB, and principles of Full Faith and Credit, sovereign immunity, and constitutional choice of law all require application of these laws and dismissal of this case. Even if applying these laws was not required, the Court should still apply them as a matter of comity. Hyatt's action is also barred by Nevada's own administrative exhaustion/ripeness law. For all of these reasons, the District Court's ruling was erroneous, and mandamus relief is necessary to compel the District Court to fulfill its judicial duties.

The FTB's alternative request for a Writ of Mandamus and Prohibition limiting the scope of this case concerns the District Court's denial of the summary judgment portion of the FTB's motion. As part of its alternative summary judgment motion, the FTB argued that, at a minimum, California's sovereignty and immunity laws precluded a Nevada state court from imposing liability on the California

government for its California internal, non-Nevada taxation acts. The District Court rejected the FTB's argument as part of its summary judgment denial. Thus, the California government is faced with the prospect of a Nevada trial concerning not just its Nevada-related conduct involving Hyatt, but also its internal tax policies and practices, and its tax audit activities involving Hyatt that occurred entirely within its own state. To the extent that the District Court has any subject matter jurisdiction at all, it does not have jurisdiction to conduct such a wide-ranging trial. Accordingly, in the event that the Court does not issue a Writ of Mandamus directing dismissal, it should issue a Writ of Prohibition and Mandamus limiting any trial of this action to the FTB's Nevada acts and contacts involving Hyatt, and directing the District Court to reconsider the FTB's summary judgment motion in light of this jurisdictional limitation.

Under Nev. R. App. P. 21(a), this Petition is based on the attached Statement of Facts, Issues, Relief Requested, and Reasons, and supporting Appendix of Exhibits.

This Petition for alternative writ relief (mandamus ordering dismissal, or alternatively mandamus and prohibition limiting the scope of any trial) is 43 pages in length. The thirty page limitation on briefs in Nev. R. App. P. 28(g) does not expressly apply to writ petitions under Rule 21(a). Should the Court decide, however, that this Petition is subject to the page limit in Rule 28(g), then FTB hereby requests permission of the Court to exceed thirty pages, because of the important constitutional and state policy issues presented by this Petition. In the alternative, FTB requests permission to re-file two separate writ petitions: one petition for mandamus ordering dismissal, and a second petition for mandamus and prohibition limiting the scope of any trial.

DATED this 7th day of July, 2000.

McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS

By _____
THOMAS R.C. WILSON
JAMES C. GIUDICI
BRYAN R. CLARK
JEFF A. SILVESTRI
TODD J. DRESSEL

Attorneys for Petitioner Franchise Tax Board

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

STATEMENT OF FACTS, ISSUES, RELIEF REQUESTED, AND REASONS

INTRODUCTION

This petition involves important legal issues regarding the power of Nevada state courts to adjudicate tax-related tort claims against the California state government. This common-law tort action involves claims of California government agency misconduct against an alleged Nevada resident. Gilbert Hyatt, a computer industry multimillionaire, claims that the State of California Franchise Tax Board committed seven types of torts while auditing, and eventually refusing to accept, Hyatt's claim to have changed his state of residence from California to Nevada in late 1991. The FTB is the California government agency that enforces California's personal income tax laws, and it audited Hyatt's 1991 and 1992 tax years. At issue in the FTB's audits and in the FTB's ongoing administrative proceedings about them, is when Hyatt changed his residency from California to Nevada, and whether Hyatt must pay California income tax on over one hundred million dollars that he received in late 1991 and early 1992. At issue in this petition is whether the California government's tax administration acts involving Hyatt are a proper subject for Nevada state court litigation.

By Hyatt's own admission, all of his claims concern acts of FTB employees "within the course and scope of their employment" as administrators of California's income tax laws. (Appendix of Exhibits ("App.") Ex. 4 p. 2, ¶ 4 (First Am. Compl.).) A small portion of the FTB's audit activity involved Nevada, where FTB auditors spent nominal time checking Hyatt's claim of change of residency, and into which FTB auditors in California directed short phone and mail contacts when checking Hyatt's claim. Seizing on these limited Nevada acts, Hyatt filed this action in the Eighth Judicial District Court, and now claims that virtually every FTB tax administration act involving Hyatt, whether involving FTB contact with Nevada or not, is subject to a Nevada trial. Hyatt also claims that all variety of California tax policies and procedures are on trial in Nevada, because those California tax policies and procedures were allegedly tortious. Hyatt knows that he is barred in California from bringing such a case, and is trying use the FTB's limited activity in Nevada to circumvent that bar.

In January 2000, the FTB moved for summary judgment, or alternatively for dismissal for lack of subject matter jurisdiction. This petition concerns the District Court's denial of these alternative motions in a May 31, 2000 order. (App. Ex. 1-2 (Order and Notice of Entry).) As to the dismissal

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

motion, the District Court erred in denying it, because a Nevada state court lacks subject matter jurisdiction over Hyatt's tax-related claims against the California government. California has multiple laws reflective of its sovereign immunity that bar Hyatt's claims, and principles of Full Faith and Credit, sovereign immunity, and constitutional choice of law all require application of these laws and dismissal of this case. Even if applying these laws were not required, the Court should still apply them as a matter of comity, especially given the precedential impact on Nevada's own agencies, including the Gaming Control Board. Finally, Hyatt's action is also barred by Nevada's own administrative exhaustion/ripeness law. For all of these reasons, the District Court's ruling was erroneous, and mandamus relief ordering dismissal is necessary.

Alternatively, the FTB petitions the Court for a Writ of Prohibition and Mandamus limiting any trial of this action to the Nevada acts and contacts of the FTB involving Hyatt, and directing the District Court to reconsider the FTB's summary judgment motion in light of this jurisdictional limitation. As part of its alternative summary judgment motion, the FTB argued that, at a minimum, California's sovereignty and immunity laws precluded a Nevada state court from imposing liability on the California government for its California internal, non-Nevada acts involving administration of California's tax laws. The District Court rejected the FTB's argument as part of its summary judgment denial, and thus the California government is faced with the prospect of a Nevada trial concerning not just its Nevada-related conduct involving Hyatt, but also its internal tax policies and practices, and its tax audit activities involving Hyatt that occurred entirely within its own state, California. To the extent that the District Court has any subject matter jurisdiction at all, it does not have jurisdiction to conduct a trial of such broad scope. Accordingly, in the event that the Court does not issue a Writ of Mandamus directing dismissal, it should issue the Writ of Prohibition and Mandamus that the FTB requests.

FACTS

1. Background facts.

Under its inherent sovereign power, the State of California imposes a personal income tax upon its residents. California residents include : (1) every individual who is in California for other than a temporary or transitory purpose; and (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. (Cal. Rev. & Tax. Code §§ 17014, 17015, 17016.)

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

The purpose of these statutes is to ensure that all those who are in California for other than a temporary or transitory purpose, and enjoying the benefits and protection of the state, should in return contribute to the support of the state.

This case arises from the FTB's supposed misconduct during its California residency tax audits of Hyatt for tax years 1991 and 1992. (App. Ex. 4 pp. 2-3 & 4-9, ¶¶ 7 & 10-25 (First Am. Compl. (June 12, 1998)).) When a California taxpayer claims to have changed his or her state of residence, the FTB sometimes performs a California residency audit to determine whether the taxpayer established significant permanent ties with the taxpayer's new state of claimed residency, and whether the taxpayer severed significant permanent ties with California on or near the asserted change of residency date. (App. Ex. 8, Illia Aff. ¶ 2, Cox Aff. ¶ 36 (Evid. in Supp. of FTB's Mot. for Summ. J. or Dismissal (Jan. 27, 2000).)[1] The FTB is the California government agency that conducts residency audits as part of its statutory duty to administer California's personal income tax laws. (Cal. Rev. & Tax. Code § 17001 *et seq.*) Hyatt is a computer industry figure who acknowledges being a long time California resident through at least most of 1991. (App. Ex. 4 p. 21, ¶ 60, lines 26-27.)

In 1990, Hyatt obtained patents on certain computer technologies, resulting in over one hundred million dollars of income in late 1991 and 1992. (*See* App. Ex. 4, p. 3 ¶ 8, lines 21-23; App. Ex. 8, Bauche Aff. at Ex. A & C thereto.) Substantial publicity surrounded Hyatt's patents, including a newspaper article that attracted an FTB auditor's attention in 1993. (App. Ex. 8, Leatherwood Aff. ¶ 8 & Ex. 1 thereto (attaching excerpt from FTB auditor's deposition).) The 1993 article reported that Hyatt lived in Las Vegas, but was involved in a California legal dispute with his ex-wife about earnings from recent patent awards. (*Id.*)

The FTB reviewed its records and found that Hyatt filed only a part-year income tax return with the State of California for 1991. (*See* App. Ex. 4 p. 4, ¶ 10; App. Ex. 8, Cox Aff. ¶ 4 & Ex. 1 thereto.) In that return, Hyatt claimed that he severed his California residency on October 1, 1991, and resided

---

[1]Under Nevada Rule of Appellate Procedure 21(a), the FTB is submitting only those exhibits attached to the FTB's Evidence in Support pleading, and its April 14, 2000 reply brief, that are necessary to an understanding of this petition. The FTB will submit the entirety of these pleadings at the Court's request.

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

in California only before that time. (App. Ex. 8, Cox. Aff. ¶ 4 & Ex. 1 thereto at p. 14.) On the return, he reported $613,606 as California business income from total receipts of $42,266,667 that would have been reportable had he been a full year resident. (*Id.*, Cox Aff. Ex. 1 at pp. 14, 30)

The FTB initiated an audit of Hyatt's 1991 tax return. (*See* App. Ex. 8, Cox Aff. ¶ 5 & Ex. 2 thereto at pp. 34-35.) During the audit, FTB employees took various actions to try to verify Hyatt's change of residency claim. FTB auditors requested relevant information from Hyatt's taxpayer representatives, a Las Vegas accountant, Mr. Michael Kern, CPA, and a Los Angeles tax attorney, Mr. Eugene Cowan with Riordan and McKinzie. (*See* App. Ex. 7 at 6-9 (FTB's Mot. for Summ. J. or Dismissal) (citing App. Ex. 8, Cox. Aff.).) Some FTB information requests required multiple request letters to Hyatt's representatives; some FTB information requests were never satisfied despite repeated requests. (*See* App. Ex. 7 at 6-7 (citing App. Ex. 8, Cox. Aff.).) Some information that Hyatt provided raised more questions with FTB auditors than it answered. (*See* App. Ex. 7 at 6-9 (citing evidence in App. Ex. 8, Cox. Aff.).)

A few examples include the following:

A. <u>Departure from California to Nevada</u>:

FTB's auditor at the outset requested information from Hyatt with respect to when and how he changed his residency from California to Nevada. At issue were (1) when Hyatt established significant permanent ties with Nevada and (2) when Hyatt severed significant permanent ties with California. Hyatt originally represented in his 1991 tax return that he had moved to Nevada on October 1, 1991. (App. Ex. 8, Cox Aff. ¶ 4 & Ex. 1 thereto at Document 0000014). However, in response to FTB's initial requests for information, Hyatt claimed to have moved to Nevada on September 25, 1991, as opposed to the previous date of October 1, 1991. (App. Ex. 8, Cox Aff. ¶ 8 & Ex. 5 thereto at Document 0000047). The FTB then learned that Hyatt had a California doctor's appointment on September 26, 1991. In response, Hyatt once again changed his move date from September 25, 1991 to September 26, 1991, after he visited his doctor in California. (App. Ex. 8, Cox Aff. ¶ 9 & Ex. 8 thereto at Documents 0000093 and 0000094 thereto).

Hyatt also represented that he moved from LaPalma, California to Las Vegas, Nevada, using his automobile and a trailer (App. Ex. 8, Cox Aff. ¶ 11 & Ex. 11 thereto at Document 0000227 (trailer

1993 registration)), that he resided in Las Vegas ever since, that he rented an apartment in Las Vegas on October 20, 1991, and that he thereafter purchased and moved into a single-family residence in Las Vegas on April 3, 1992. (App. Ex. 8, Cox Aff. ¶ 9 & Ex. 8, Document 0000094 thereto (apartment rental)).

On July 15, 1993, the FTB auditor asked Hyatt to identify the event which occurred and its date to establish his departure from California. (App. Ex. 8, Cox Aff. ¶ 7 & Ex. 4, Document 0000041 thereto.)

On August 4, 1993, Hyatt explained that he traveled to Las Vegas and became a resident of Nevada on September 25, 1991. (App. Ex. 8, Cox Aff. ¶ 8 & Ex. 5, Document 0000043 thereto.)

On December 5, 1994, the auditor asked Hyatt for copies of receipts, contracts or other documentation of moving expenses incurred in moving to Las Vegas. (App. Ex. 8, Cox Aff. ¶ 32 & Ex. 9, Document 0000221 thereto.) These were not provided.

On January 6, 1995, the auditor again asked Hyatt for copies of any receipts, contracts or other documentation of the moving expenses. (App. Ex. 8, Cox Aff. ¶ 32 & Ex. 9, Document 0000222 thereto.) Hyatt through his representative explained that he moved himself with a trailer. When the auditor asked for purchase receipts, registration, and insurance to substantiate ownership of the trailer, Hyatt on January 10, 1995, indicated he would respond to the requests, (App. Ex. 8, Cox Aff. ¶ 10 & Ex. 10, Document 0000226 thereto); however, he did not.

On January 20, 1995, the auditor again requested copies of any receipts, contracts or other documentation of moving expenses. (App. Ex. 8, Cox Aff. ¶ 13 & Ex. 13, Document 0000251 thereto.) The auditor was then advised by telephone on February 17, 1995, that the documents had been sent to the taxpayer's representative, Mr. Cowan, in Los Angeles due to their sensitivity and confidentiality. (App. Ex. 8, Cox Aff. ¶ 33 & Ex. 29, Document 0000401 thereto.) At a meeting on February 23, 1995, the auditor requested the copies of documents of the move and was told that Hyatt moved himself. A registration document for the trailer was provided by mail on February 22, 1995, which was for a registration in 1993. (App. Ex. 8, Cox Aff. ¶ 11 & Ex. 11, Document 0000227 (trailer registration) and 0000229 thereto.)

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McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

B. Residency During September and October, 1991:

On August 31, 1995, the auditor asked of Hyatt's representative that if Hyatt had moved to Las Vegas on September 24, 1991, and he rented an apartment on October 20, 1991, where did he stay from September 24, 1991, when he moved to Las Vegas, to October 20th when he rented an apartment. Documentation such as hotel receipts, restaurant receipts, etc. were requested. (App. Ex. 8, Cox Aff. ¶ 15 & Ex. 15, Document 0000289 thereto.). None was ever provided.

On September 26, 1995, the auditor again made that request of Hyatt's representative. (App. Ex. 8, Cox Aff. ¶ 15 & Ex. 15, Document 0000293 thereto.) On October 13, 1995, Mr. Hyatt's taxpayer representative replied that Hyatt was researching that period and had not found any receipts. (App. Ex. 11, Bourke Aff. Errata Ex. 1 [10/13/95 fax from Eugene Cowan to Sheila Cox].) No information of any kind about Hyatt's whereabouts during this period, with or without documentation, was ever provided to the auditor by Hyatt or his taxpayer representatives.

C. Rental of the Las Vegas Apartment:

The rental agreement between Hyatt and the Wagon Trail Apartments in Las Vegas bears a notation that Hyatt paid $228 for the period of October 20, 1991 through October 31, 1991. (App. Ex. 8, Cox Aff. ¶ 14 & Ex. 14, Document 0000283 thereto.)

The printed rental agreement reflects the rental of apartment 237 at 3225 Pecos Avenue in Las Vegas from November 1, 1991 through April 1, 1992. The managers of the Wagon Trail Apartments advised the auditor that Grace Jeng, an employee and associate of Hyatt, had done the initial walk-through of the apartment and that Hyatt had later signed the lease for it. (App. Ex. 8, Cox Aff. ¶ 18 & Ex. 16, Document 0000298 thereto.)

The manager advised the auditor that she had not seen Mr. Hyatt often, that he had said he traveled a lot on business, that he paid rent by check each month, often paying ahead of time with a post dated check. The auditor saw in the file one envelope Hyatt had used to pay rent. The return address was a Las Vegas post office box; it was postmarked from Long Beach, California on December 8, 1991. (App. Ex. 8, Cox Aff. ¶ 18 & Ex. 16, Document 0000299 thereto.)

D. Credit Card Information:

To corroborate Hyatt's claimed Nevada residency in 1991 and 1992 by purchases he made in

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

Nevada, the FTB auditor on December 5, 1994, requested a list of credit card accounts held by Hyatt during 1990, 1991 and 1992. (App. Ex. 8, Cox Aff. ¶ 32 & Ex. 9, Document 0000221 thereto.) On January 6, 1995, the auditor again requested the information, indicating that she would contact the credit card companies directly for the account information. (App. Ex. 8, Cox Aff. ¶ 13 & Ex. 13, Document 0000250 thereto.) Another request was made on January 20 1995. (App. Ex. 8, Cox Aff. ¶ 13 & Ex. 13, Document 0000252 thereto.) On February 16, 1995, Hyatt's taxpayer representative in Nevada advised the auditor that the "information was forwarded to Mr. Cowan due to its sensitivity and confidentiality." (App. Ex. 11, Bourke Aff., Errata Ex. 1 [2/16/95 letter from Michael Kern to Sheila Cox].) On February 22, 1995, a list of credit card account numbers was provided for six accounts. (App. Ex. 8, Cox Aff. ¶ 11 & Ex. 11, Document 0000231 thereto.) Hyatt's taxpayer representative stated, however, that Hyatt was unable to find any credit card statements for those accounts for 1990, 1991 and 1992. (App. Ex. 8, Cox Aff. ¶ 11 & Ex. 11, Document 0000228 thereto.) On May 31, 1995, another request was made for credit card accounts. (App. Ex. 8, Cox Aff. ¶ 13 & Ex. 13, Document 0000270 thereto.) On June 22, 1995, the auditor requested of Hyatt's taxpayer representative a list of any other persons authorized to use his credit cards or, alternatively, confirmation that Hyatt was the only authorized user. (App. Ex. 8, Cox Aff. ¶ 32 & Ex. 28, Document 0000398 thereto.) On June 28, 1995, Hyatt's taxpayer representative stated that Hyatt may have authorized others to use the credit cards, but he did not maintain records of such authorization. (App. Ex. 11, Bourke Aff., Errata Ex. 1 [6/28/95 letter from Michael Kern to Sheila Cox].)

E. <u>Voter Registration</u>:

Hyatt also told the FTB that he had registered to vote in Nevada in 1991, his first voter registration anywhere since at least 1986. (App. Ex. 8 Cox Aff. ¶ 8 & Ex. 5 thereto at pp. 45-46.) When the FTB contacted the Clark County Election Department for verification, Election Department records showed that Hyatt had amended his registration in July 1994 to change his residency address to a Las Vegas home address on Sandpiper Lane. (App. Ex. 8, Cox Aff. ¶ 35 & Ex. 30 thereto at p. 402.) But the FTB learned that the home at this address has never been in Hyatt's name, and was actually the home of Hyatt's accountant at the time of Hyatt's voter registration. (App. Ex. 8, Cox Aff. ¶ 35 & Ex. 30-31 thereto at pp. 402, 405.) and (App. Ex. 8, Cox Aff. ¶ 35 & Ex. 31, Document

0000405, 0000406). The FTB also found out that Hyatt had purchased a different home on Tara Avenue in Las Vegas in April 1992. (See App. Ex. 8, Cox Aff. & Ex. 7 thereto at p. 59.)

In registering, Hyatt had attested to his actual physical residence as 5441 Sand Piper Lane with his declaration under penalty of perjury that such residence was true and factual:

> "I further swear or affirm under penalty of perjury that: the present address I listed herein is my sole legal place of residence and that I claim no other place as my legal residence." . . .
>
> Warning
>
> "Willingly giving a false answer to any question on this application is a felony and a civil penalty of up to a $20,000 fine."

(App. Ex. 8, Leatherwood Aff. ¶ 12 and Ex. 4, Document 0000431 thereto.)

F. Patent license agreements:

The audit also revealed that on October 14, 1991, Hyatt signed a Patent Agreement with Fujitsu Limited. (App. Ex. 8, Cox Aff. ¶ 22 & Ex. 23, Document 0000333 thereto at p. 12). Pursuant to that contract, Hyatt licensed Fujitsu to use certain technology which is subject to his patents in exchange for a single, lump sum payment of $15 million to be paid to him on or before October 31, 1991. *Id. at page 5, Document 0000330.* The contract was effective as of October 24, 1991 and identifies Hyatt as: "an individual having a mailing address as P.O. Box 3357, Cerritos, California 90703." *Id. at page 1, Document 0000327.* The contract was not just a licensing agreement for future use of technology subject to Hyatt's patents; it was also a settlement and release by Hyatt of any and all possible past claims of infringement by such use which he might have had against Fujitsu. *Id. at page 3*[2]*, Document 0000328.* The $15 million payment was to be made "by wire transfer of immediately available funds" to the client trust account of Hyatt's attorneys at "Union Bank, 900 South Maine Street, Los Angeles, California 90015." *Id. at page 6, Documents 0000330 and 0000331.* The contract and performance of the parties "shall be construed in accordance with and governed by the laws of the State of California . . . ". *Id. at page 11, Document 0000332* . Finally, any communication to Hyatt under the contract was

[2]The multiple purposes of the agreement gives rise to the question whether part of the payment was taxable income, regardless of Hyatt's residency.

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

to be sent via facsimile or mail to him care of his attorney in Los Angeles, California. *Id. at page 12, Document 0000333.*

On November 4, 1991, Hyatt signed a virtually identical contract with Matsushita Electric Industrial Co., Ltd. (App. Ex. 8, Cox Aff. ¶ 22 & Ex. 23 thereto at Document 0000321, p. 14). That contract was effective November 14, 1991, and Hyatt again identified himself as "an individual having a mailing address as P.O. Box 3357, Cerritos, California 90703." *Id. at page 1, Document 0000314.* Matsushita paid $25 million in cash *(page 6, Document 0000317)* by wire transfer to the same attorney client trust account in Los Angeles, California. *(Page 7, Document 0000318).* Again, the payment was for a settlement and release of any claims of prior infringement Hyatt might have had against Matsushita *(page 4, Document 0000315)* as well as for future license rights. The contract and performance of the parties were to be construed in accordance with and governed by California law *(page 13, Document 0000320),* and all communication to Hyatt was care of his attorney in Los Angeles. *(Pages 13-14, Documents 0000320 and 0000321).*

G. Verification:

Consistent with California Revenue and Taxation Code Section 17014, these and other questions and inconsistencies and a lack of information and records or other documentation led the auditor to attempt to obtain information and records verifying Hyatt's termination of California contacts and his claimed permanent contacts with and residence in Nevada. The FTB talked by phone to third parties with potentially relevant information, such as the Clark County Assessor's Office, and kept records reflecting the nature of each inquiry. (*E.g.*, App. Ex. 8, Cox. Aff. ¶ 27 & Ex. 25 thereto; *see also* App. Ex. 11 at Ex. 7 thereto (Bourke Aff. attaching audit narrative reports).)[3] The FTB interviewed third parties in California and Nevada, such as Hyatt's neighbors and relatives, and in some instances obtained statements from them about Hyatt's change of residency claim. (*E.g.*, App. Ex. 9, Hyatt Opp.

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[3]In its entirety, Hyatt's summary judgment opposition fills several banker's boxes. Much of that volume relates to the exhibits attached to Hyatt's opposition brief and supporting affidavits, such as the affidavit of Mr. Bourke cited above. Under Nevada Rule of Appellate Procedure 21(a), the FTB has only included those exhibits to Hyatt's opposition and supporting affidavits that the FTB cites in this petition. The FTB will submit the entirety of the exhibits to Hyatt's opposition and supporting affidavits upon the Court's request.

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

at Ex. 21 thereto (Beth Hyatt statement).) The FTB also corresponded by mail with third parties either by letter alone, or by a letter accompanied by a "Demand to Furnish Information," a standard FTB form. (*E.g.*, App. Ex. 8, Cox Aff. ¶¶ 28-30 & Ex. 26-27 thereto; *see also* App. Ex. 11 at Ex. 7 thereto.) Examples of third parties receiving such correspondence include: utility companies that Hyatt used, newspapers; government agencies and businesses in Nevada and California; Nevada politicians that Hyatt claimed to know; professional organizations in which Hyatt was a member; and doctors that Hyatt had seen. (*See id.*)

FTB auditors also traveled to Las Vegas in March 1995, and spent partial days on each of three consecutive days visiting businesses, talking to neighbors and neighborhood workers, and observing Hyatt's alleged residence. (App. Ex. 8, Cox. Aff. at Ex. 16 thereto (trip record); *see also* App. Ex. 7 at 11-12.) During late November 1995, the FTB's lead auditor, Sheila Cox, also accompanied another FTB auditor to Las Vegas to assist on the other auditor's cases, and made a brief observation of Hyatt's alleged residence during the trip. (App. Ex. 8, Cox Aff. ¶ 26.) Hyatt claims that during this latter trip, Ms. Cox went through Hyatt's garbage, rifled through Hyatt's mail, and trespassed on Hyatt's property. (*See* App. Ex. 11 at 68-71.) The FTB disputes Hyatt's version of events on this trip, (*see* App. Ex. 14 at 6-7), but this dispute is not relevant to this petition.

When FTB correspondence involved government agencies or businesses, the FTB generally identified Hyatt merely by name and social security number, and where necessary with Hyatt's claimed post office box or residence address. (*E.g.*, App. Ex. 8, Cox Aff. ¶¶ 29, 30 & Ex. 26, 27 thereto.) When the correspondence involved individuals, such as residents of Hyatt's neighborhood, the FTB often identified Hyatt only by name, or not at all. (*See id.*, Ex. 26 at pp. 348, 350, 352.) When an interview with a third party required it, Ms. Cox, the lead auditor, identified herself as a California Franchise Tax Board employee, showed her Franchise Tax Board identification card and indicated her questions concerned a tax matter. (*E.g.*, App. Ex. 8, Cox. Aff. ¶ 25 & Ex. 24 thereto.)

As a result of all of these efforts, the FTB gathered evidence that it believes proved that Hyatt did not really change his state of residence when he said, and thus owed more California income tax than he paid. The evidence that the FTB gathered included the inconsistencies noted above, and many others. (*See supra* at 7-12 (noting various items inconsistent with Hyatt's change of residency claim);

App. Ex. 11, Bourke Aff. at Ex. 7 thereto (FTB Audit Narrative reports).) Based on these inconsistencies, the FTB issued a "Notice of Proposed Assessment" against Hyatt for 1991 for $1,876,471 in additional tax, plus a fraud penalty of $1,407,353.25. (App. Ex. 8, Bauche Aff. ¶ 4 & Ex. A thereto.) A Notice of Proposed Assessment is not a final tax assessment, but a preliminary determination of the FTB's intended course of action that is subject to taxpayer protest. (*See* App. Ex. 8, Bauche Aff. ¶ 3; Cal. Rev. & Tax Code §§ 19042, 19044.) The bases for the FTB's Notice of Proposed Assessment were Hyatt's significant and continuing California ties, and the absence of any significant Nevada ties, from September 1991 through early 1992. (App. Ex. 8, Cox Aff. ¶ 37.)

Based on its 1991 audit results, the FTB also audited Hyatt's 1992 tax year. (App. Ex. 8, Cox Aff. ¶ 38.) As a result of this second audit, the FTB issued another Notice of Proposed Assessment for 1992 for $5,669,021 in additional tax, plus a fraud penalty of $4,251,765.75. (App. Ex. 8, Bauche Aff. ¶ 6 & Ex. C thereto.)

Hyatt protested both Notices of Proposed Assessment, meaning that the Notices of Proposed Assessment are both under FTB administrative review. (App. Ex. 8, Bauche Aff. ¶¶ 5, 7; *see also* Cal. Rev. & Tax. Code § 19044.) The FTB's California administrative proceedings related to Hyatt's protests are not over, and the FTB's Notices of Proposed Assessment are not yet final. (App. Ex. 8, Bauche Aff. ¶¶ 5 & 7; *see also* Cal. Rev. & Tax Code § 19044.) The FTB protest proceeding is a complete de novo review of the auditor's proposed assessment performed, in Hyatt's case, by an FTB lawyer. The taxpayer can elect an oral hearing. (Cal. Rev. & Tax Code § 19044). Such review may include requests for additional information, as well as taxpayer submittals of additional information, documentation, or other evidence.

Should the taxpayer object to the findings at protest, the taxpayer can appeal the decision for de novo review and oral hearing before the five member State Board of Equalization (SBE), an agency separate and distinct from the Franchise Tax Board. (Cal. Rev. & Tax Code §§ 19045, 19046).

Should the taxpayer disagree with the final decision of the SBE, which represents the exhaustion of administrative remedies, the taxpayer can elect judicial review. (Cal. Rev. & Tax Code § 19381). Judicial review of an SBE decision normally takes the form of a suit for refund, meaning the taxpayer must pay the assessment before the superior court has jurisdiction. The exception to the pay first

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

requirement are suits for a residency determination, which can commence without first paying the taxes assessed. (Cal. Rev. & Tax Code § 19381; Cal. Civil Code § 1060.5).

Despite all of these remedies, shortly after protesting the FTB's 1992 proposed assessment, Hyatt filed this Nevada case, seeking declaratory relief from the Eighth Judicial District Court to determine his Nevada residency and California nonresidency under California law, and further alleging that the Board acted tortiously during the audit process. (App. Ex. 3 (Compl. (Jan. 6, 1998)).)

On April 16, 1999, the District Court granted the FTB partial judgment on the pleadings as to Hyatt's first cause of action for declaratory relief. (App. Ex. 5 (Partial J. on Pleadings).) The District Court agreed with the FTB that the court lacked subject matter jurisdiction to declare Hyatt's non-residency status for California personal income tax purposes. (*Ibid.*) The causes of action that remain are for alleged FTB invasions of privacy (of three varieties), outrageous conduct, abuse of process, fraud, and negligent misrepresentation. (App. Ex. 4 (First Am. Compl.))

The focus of the complaint is the acts of the FTB that took place "in Nevada." (*E.g.*, App. Ex. 4 p. 9, ¶ 26, lines 22-24 ("This Court has personal jurisdiction . . . because of the FTB's . . . conduct within the State of Nevada (emphasis added)); *id.* pp. 13-16, ¶¶ 35, 42, 46, 51 (causes of action two through five, all alleging improper conduct "in Nevada" (emphasis added)); *id.* p. 18, ¶ 56, lines 1-4 (sixth cause of action, complaining of abuse of process directed at Nevada residents); *id.* p. 24, ¶ 62(c), lines 6-19 (seventh cause of action, alleging acts in Nevada as evidence of fraud).) In fact, Hyatt once assured the Nevada federal court, to which the FTB originally removed this case, that his claims "stem strictly from the FTB's tortious actions directed against him as a Nevada citizen within the State of Nevada." (App. Ex. 14, FTB Reply Ex. A at 24:9-11 (Hyatt Motion to Remand (Mar. 4, 1998)) (emphasis added).)[4]

The alleged Nevada acts about which Hyatt complains occurred during and after the FTB's issuance of Notices of Proposed Assessments of additional taxes and penalties. (App. Ex. 4 pp. 4-9,

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[4]Hyatt also told the federal court that he "seeks relief for the FTB's past tortious activities against him in Nevada," in asking that Nevada exercise jurisdiction over the FTB "so that it will be required to answer for its tortious conduct committed against a Nevada resident in Nevada." (App. Ex. 14, FTB Reply Ex. B at 12:10-11 & 13:10-12 (Hyatt's Surreply to FTB's Reply to Plf's Opp. to Mot. to Quash (Apr. 6, 1998) (emphasis added)).)

¶¶ 11-25.) Hyatt complains in particular about the FTB auditors' "intrusive, 'hands on'" trip to Las Vegas in early 1995, which supposedly "included unannounced confrontations and questioning about private details" of Hyatt's life, directed at "plaintiff's current and former neighbors, employees of businesses and stores frequented by plaintiff, and alas, even his trash collector!" (*Id.* p. 5, ¶ 12.) Hyatt also complains about an FTB auditor's delivery of the FTB's "Demand to Furnish Information" form to certain Nevada third parties, which Hyatt claims was both unauthorized and tortious. (*Id.* ¶¶ 13-14, 46, 55-58, 62.) Hyatt further alleges that an FTB lawyer made a statement to Hyatt's tax attorney in California amounting to an extortionate threat to disclose Hyatt's personal financial information absent a quick settlement of his California tax dispute, allegedly confirming the extortionate motive of the FTB's entire inquiry. (*Id.* ¶¶ 20, 25, 51, 55.) In addition, Hyatt complains about FTB employees' alleged disclosures to third parties of "highly personal and confidential information," (*id.* ¶¶ 34, 41, 61-62, 69), and the fact that Hyatt was "under investigation" concerning California taxes. (*Id.* p. 15, ¶ 46.) Hyatt considers the latter alleged disclosure an implied FTB statement that Hyatt had engaged in "illegal and immoral conduct." (*Ibid.*) Hyatt lastly complains about FTB employees' supposedly fraudulent or negligent promises of confidentiality and objectivity during the audit process. (*Id.* pp. 22-28, ¶¶ 61-72.)

Significantly, Hyatt specifically alleges that all of these acts of FTB representatives were "within the course and scope of their employment or agency, and in furtherance of their employer's or principal's business . . . ." (App. Ex. 4 p. 2, ¶ 4.) The "scope of [these FTB representatives'] employment or agency" is the administration and application of California's income tax laws. (Cal. Rev. & Tax. Code § 17001 *et seq.*)

2. The FTB's motion, and the result.

On January 27, 2000, the FTB moved for summary judgment, or alternatively for dismissal for lack of subject matter jurisdiction. (*See* App. Ex. 7 (FTB Mot.).) In the dismissal motion, the FTB argued that principles of Full Faith and Credit, sovereign immunity, constitutional choice of law, comity, and Nevada's administrative exhaustion/ripeness law all required dismissal of Hyatt's tax-related tort case under Nevada Rule of Civil Procedure 12(h)(3). (*See* App. Ex. 7 at 4-15, 31-39.) In its alternative summary judgment motion, the FTB argued that, at a minimum, California's sovereignty

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

and immunity laws precluded the District Court from imposing liability on the FTB for its California internal, non-Nevada acts involving Hyatt. (App. Ex. 7 at 4-31.) Focusing on the FTB's Hyatt-related Nevada acts and contacts, and the fact that the FTB's information disclosures to third parties at most revealed Hyatt's name, address, social security number, and involvement in an unspecified tax matter, the FTB argued that there was no evidence on which a jury could reasonably find that the FTB's conduct was tortious. (App. Ex. 7 at 4-28.) The FTB also argued that its acts were a privileged part of the FTB's governmental functions. (App. Ex. 7 at 28-31.)

Hyatt's voluminous opposition demonstrated the broad scope of Hyatt's proposed case, and his abandonment of his assurance that his claims "stem strictly from the FTB's tortious actions directed against him as a Nevada citizen within the State of Nevada." (*See* App. Ex. 9 (Hyatt Opp.); App. Ex. 10-13 (opposition affidavits); *see also supra* at page 15.)[5] Emboldened by a prior discovery order to which the FTB objected, Hyatt argued that the District Court could impose liability on the FTB for any act that injured Hyatt in Nevada. (*See* App. Ex. 9 at 14-19.) The discovery order to which the FTB objected included a finding that "the entire process of the FTB audits of Hyatt . . . is at issue in this case and a proper subject of discovery . . ." (*See* App. Ex. 6 (discovery order).) As described above, the FTB has petitioned for writ relief concerning that order, (Case No. 35549), and has concurrently filed a motion requesting that this writ petition be consolidated with that one. (*See supra* at page 2.)

Hyatt claimed that this discovery order and various legal authorities allowed the District Court to impose liability on the FTB for injurious acts wherever they occurred, notwithstanding California's own tax immunity laws. (App. Ex. 9 at 14-19.) According to Hyatt, this included FTB acts that occurred entirely within California, FTB letters from California to Japan, and FTB conduct involving California and states other than Nevada. Examples of such FTB acts that Hyatt argued were within the District Court's power to try include the following:

- FTB auditor correspondence with California doctors about Hyatt (App. Ex. 9 at 9, 41);

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[5]*See supra* footnote 2 regarding the FTB's inclusion of exhibits from Hyatt's opposition in the FTB's supporting appendix of exhibits.

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

- FTB auditor correspondence with a variety of California businesses (App. Ex. 9 at 9, 41);
- FTB auditor trips to Hyatt's former southern California neighborhood (App. Ex. 9 at 9, 29, 41);
- FTB disclosure of Hyatt's social security number to California individuals and entities in the context of its audits (App. Ex. 9 at 41);
- The FTB's alleged "intentional[] destr[uction]" of parts of the FTB's own audit file in its own offices (App. Ex. 9 at 41);
- FTB auditor correspondence with two Hyatt licensees in Japan, Fujitsu and Matsushita, asking when they made certain wire transfers to Hyatt (App. Ex. 9 at 41 & Ex. 2 thereto);
- The FTB's "disregard[]" and "bur[ial]" of facts favorable to Hyatt in its audit report (App. Ex. 9 at 43);
- The FTB's allegedly inappropriate consideration of "'affidavits' [that] were not even affidavits" that an FTB auditor obtained in California from Hyatt's ex-wife, his daughter, and his brother, all California residents (App. Ex. 9 at 44-45); and
- An FTB attorney's statement to Hyatt's California tax attorney that Hyatt alleges was an extortionate threat to disclose Hyatt's personal financial information absent quick settlement (App. Ex. 9 at 45-46).

Based on Hyatt's broad view of the scope of his case, Hyatt argued against dismissal or summary judgment based on virtually every facet of the FTB's interaction with Hyatt. Indeed, Hyatt complained not only about the FTB's methods of gathering evidence during Hyatt's audits and protests, but also about the FTB's "one-sided fraudulent" consideration of that evidence on Hyatt's change of residency claim. (App. Ex. 9 at 42.) As to the FTB's dismissal motion, Hyatt argued that none of the FTB's legal arguments had merit, and that the FTB's factual challenge to the District Court's subject matter jurisdiction was no different than the facial jurisdictional challenge in the FTB's previous motion for judgment on the pleadings, which the District Court denied as to Hyatt's tort claims. (App. Ex. 9 at 3, 49; *see also* App. Ex. 14 at 19-28 (FTB Reply, rebutting Hyatt's dismissal arguments).) As to the summary judgment motion, Hyatt argued that triable issues of fact existed on all of Hyatt's claims, that the FTB had no privilege to act as it did, and, alternatively, that Hyatt needed more time to conduct discovery. (App. Ex. 9 at 19-47, 65-68.)

Hyatt's written opposition never challenged the FTB's assertion that California's immunity and administrative exhaustion laws, if applied, would bar his case. (App. Ex. 9) In fact, Hyatt never even

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

cited those laws. (*Ibid.*)

Following multiple errata filings from Hyatt, the FTB replied and filed objections to Hyatt's evidence. (App. Ex. 14-15 (FTB Reply, FTB Objections).)[6] The District Court heard oral argument on April 21, 2000, which included a new Hyatt argument that multiple "loopholes" in the FTB's sovereign immunity allowed his case to proceed. (App. Ex. 16 at 30-34 (Tr. of Proceedings).) In its oral ruling, the District Court denied without prejudice the alternative motions, and rejected the FTB's argument that Hyatt's case was necessarily limited to the FTB's Nevada acts and contacts involving Hyatt. (App. Ex. 16 at 42-43, 47-51.) Instead, the District Court appeared to favor Hyatt's jurisdictional position, albeit not entirely, by suggesting that FTB acts "in any number of places" that "affect[ed] [Hyatt] here in the state of Nevada" could be tried:

> Mr. Wilson: . . . I have a question for the Court. . . . are we litigating what occurred in Nevada or are we trying the entire audit, whether in California or Nevada? . . .
>
> The Court: I think that's a fair question. And while I wish that I could give you a simple blackline answer, to suggest to you that I wish to revisit or otherwise litigate the entire audit would be an incorrect statement. That, in its entirety, is not the subject matter of this lawsuit, frankly.
>
> On the other hand, to limit the environment of this lawsuit merely to acts which occurred in Nevada would be to narrow it far too technically. I believe that acts that could occur in any number of places, not limited to Nevada, certainly not limited to the state of California, but that none the less would affect the plaintiff here in the state of Nevada. So to give you a limitation with respect to only those acts that occurred in Nevada, I can give you an unequivocal no. We are not limiting it to that extent.
>
> On the other hand, however, I can assure you that I have no desire, nor do I think that this lawsuit frames the complaint in such a manner that would cause us to revisit the entire audit that gives rise to this lawsuit. And I don't know that that's as helpful as you perhaps had hoped it might be. (App. Ex. 16 at 42-43.)

The Court entered its written order denying the motions on May 31, 2000. (App. Ex. 1.) Hyatt served notice of entry of that written order by mail on June 1, 2000. (App. Ex. 2.)

Although the Court suggested that the entire audit is not a proper part of the case, the Court's failure to take action to restrict the scope of Hyatt's case has resulted in letting Hyatt litigate the entire

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[6] Due to their volume, and because they are not essential to an understanding of the petition, Hyatt's errata filings are not included in the FTB's Appendix of Exhibits. They generally involve Hyatt's submission of original copies of affidavits, and affidavit exhibits omitted from Hyatt's original filing. The FTB will submit them upon request.

audit. As previously mentioned, the FTB filed an earlier writ petition with this Court on January 27, 2000 concerning the District Court's December 27, 1999 discovery order. (Case No. 35549). *See* pages 2 and 17, *supra.* The proceedings that led to that discovery order best exemplify how the District Court is exceeding its subject matter jurisdiction.

The District Court's December 27th discovery order did not just direct the FTB to produce a few privileged documents; it also adopted the discovery commissioner's proposed findings Nos. 4 and 5:

> 4. . . . that the entire process of the FTB audits of Hyatt, including the FTB assessments of taxes and the protests, is at issue in this case and a proper subject of discovery . . . Hyatt's claim of fraud against the FTB entitles him to discovery on the entire audit and assessment process performed by the FTB that was and is directed at him as part of the FTB's attempt to collect taxes from Hyatt. *(Emphasis added).*
>
> 5. . . . the process of the FTB audits direct at Hyatt is squarely at issue in this case.

See App. Ex. 6. In effect, the District Court has ordered discovery of the entire California audit.

That an improper scope of discovery has been allowed is made starkly clear by the transcript of the discovery commissioner's comments at the November 9, 1999, hearing which led to findings Nos. 4 and 5:

> COMMISSIONER BIGGAR: . . . If there is nothing to conceal why shouldn't the process be open to the taxpayer when they are claiming that there is fraud. . . . He is claiming that your conduct is fraudulent. I say yours, the FTB's conduct is fraudulent. . . .
>
> I am concerned, and I think there is concern countrywide about the tax collecting services using methods that are not appropriate and, you know, we are all completely aware of that in regard to the IRS and methods like that, and I think that these processes should be explored. . . .
>
> You indicate that Mr. Hyatt has all of his rights and remedies in California to challenge the tax. I don't know if those rights and remedies include exploration of the process and availability to all the information that he could get by way of the claims that the Court has left intact here. If there is fraud to be discovered, I think it should be discovered on one side or the other.

App. Ex. 17 at page 55, line 23 — page 56, line 24 *(emphasis added).*

> COMMISSIONER BIGGAR: But you never answered my original hypothetical question about if there were any attempts to obtain taxes in some kind of fraudulent fashion as I believe would be the case if the attempt would have been made to say, you know, if you don't pay we are going to assess a fraud penalty on you, even though there is no fraud that we can determine legally, we are going to assess that fraud penalty on you if you don't settle with us. Now, in my view that would be an improper way of collecting taxes, but I think that you should be able to explore and find out whether or not that in fact happened. If it did or if it did not happen.

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

Id. at page 57, line 20 — page 58, line 8 *(emphasis added).*

> COMMISSIONER BIGGAR: Well, because the way Nevada got involved in this was by acts done by the FTB in Nevada. Nobody disputes that certain acts were done in Nevada . . . in assessing the tax, and that's what, that's why you are here. That's why you are here.

Id. at page 58, lines 15-22.

> COMMISSIONER BIGGAR: . . . I think that all the investigation here that has been conducted . . . that taxes are owed, that that thereby justifies procedures that may not be strictly within the rules to collect those taxes.
>
> . . .
>
> COMMISSIONER BIGGAR: . . . I think we need to find out what was done exactly and then let the jury or the judge decide if that occurred or not.

Id. at page 59, line 17 — page 60, line 7 *(emphasis added).*

> COMMISSIONER BIGGAR: . . . Given the Court's failure to limit the issues in this case any more than the Court did, . . . that the plaintiff was entitled to press the case in all of the counts alleged in the complaint, and in this regard I think the heart of the case is the process by which the FTB conducted this audit, including but not limited to those parts of the audit which intruded into the state of Nevada.
>
> MR. LEATHERWOOD: So if I understand the Court correctly, the activities that were exclusively performed within the state of California this Court feels it has jurisdiction over?
>
> COMMISSIONER BIGGAR: Because it's directed at the plaintiff who I think it's unquestioned was a resident of the state of Nevada on the date on, as I understand and perhaps there is a disagreement on that, but I believe that even the state of California would stipulate and/or admit that as of sometime in 1992 that Mr. Hyatt became a resident of the state of Nevada.
>
> . . .
>
> COMMISSIONER BIGGAR: . . . I find that the Court did not limit it just to acts taking place in Nevada, so in my view unless the Court were to change that, I guess you are right in your assumption.

Id. at page 70, line 11 — page 72, line 1 *(emphasis added).*

> MR. BRADSHAW: I do recall this was briefed, and Judge Saitta did tell the parties at our oral argument on the motion for judgment on the pleadings that by dismissing the first cause of action[7], which was basically the tax case, that that should make a difference in the scope of discovery, and it seems what we are getting into is the

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[7]The dismissed first cause of action sought declaratory judgment that Hyatt in fact was a Nevada resident during the period of time subject to the tax audit.

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

breadth and detail of the tax administration.

> COMMISSIONER BIGGAR: . . . but the process I think is still fair game, and if you think otherwise you will have to have the judge say that because obviously in my view if we are only concerned with acts that took place in the state of Nevada, then we would have a very small range of discovery in this case because I think everybody is in agreement there were only some few certain acts done in Nevada, investigation by the FTB on premises, so to speak, here as well as inquiring with various Nevada companies and other things, but that in my view is only a part of the process of collecting the tax from Mr. Hyatt, and the process is what is under attack here, and I think in my view, particularly a state agency should feel that its process should be open to exploration in a case such as this so that we have an open form of government.

Id. at page 72, line 20 — page 74, line 8 *(emphasis added).*

As shown above, Findings 4 and 5 of the District Court's discovery order made the entire audit in California, Nevada, or elsewhere the subject of litigation to determine if government power was improperly used to assess taxes and a fraud penalty. The scope of the discovery allowed permits Hyatt to discover and litigate the governmental functions of a sister state's audit, the review and decisions made to determine if California's administration of its taxing powers was improper and whether its assessment of a fraud penalty was incorrectly made for the purpose of allegedly "extorting" a settlement.

Thus, despite the limiting comments by the Court at the hearing on FTB's summary judgment motion, the scope of discovery and litigation the District Court has allowed includes (1) the conduct of the audit in California; (2) the process, criteria and reasoning of the judgments/decisions made in California with respect to Hyatt's tax liability and the application of any fraud penalty; and (3) the conduct of the audit in Nevada. This exceeds the subject matter jurisdiction of the District Court.

ISSUES PRESENTED, AND RELIEF SOUGHT

1. Does the Nevada state court have the authority to subject the California government to a trial concerning its tax administration conduct involving Hyatt?

2. If the Nevada state court does have authority to conduct a trial, does that authority allow Nevada litigation against the California government over California tax policies, procedures, and FTB acts involving Hyatt that occurred entirely within California or otherwise outside of Nevada?

The FTB seeks a Writ of Mandamus directing Respondent Eighth Judicial District Court to dismiss this action against the California government for lack of subject matter jurisdiction. Alternatively, the FTB seeks a Writ of Prohibition and Mandamus limiting any trial of this action to the

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

FTB's Nevada acts and contacts involving Hyatt, and directing the District Court to reconsider the FTB's summary judgment motion in light of this jurisdictional limitation.

ARGUMENT

1. Standard of review.

A writ of mandamus issues to "compel the performance of an act which the law especially enjoins as a duty." Nev. Rev. Stat. § 34.160. Conversely, a writ of prohibition "arrests the proceedings of any tribunal . . . exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal." Nev. Rev. Stat. § 34.320. In this context, "jurisdiction" includes constitutional limitations. *See generally, Watson v. Housing Authority,* 97 Nev. 240, 242, 627 P.2d 405 (1981). By this writ Petition, FTB challenges the District Court's exercise of subject matter jurisdiction over Hyatt's case against the FTB.

Both prohibition and mandamus writs may be issued "only by the supreme court to an inferior tribunal . . .where there is not a plain, speedy, and adequate remedy in the course of law." Nev. Rev. Stat. § 34.330; *see also Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court*, 113 Nev. 521, 525, 936 P.2d 844, 846-847 (1997).

The District Court's May 31, 2000 order denying the FTB's alternative summary judgment and dismissal motions is not immediately appealable as to either motion. Nev. R. App. P. 3A(b); *Sorenson v. Pavlikowski*, 94 Nev. 440, 442, 591 P.2d 851 (1978) (denial of summary judgment not appealable under Rule 3A); *First Interstate Bank of California v. H.C.T., Inc.*, 108 Nev. 242, 250, 828 P.2d 405 (1992) (denial of dismissal motion not appealable under NRAP 3A). Thus, the writ process is the appropriate manner to challenge the District Court's order. *E.g., Sorenson*, 94 Nev. at 442.

Admittedly, writ relief is an extraordinary remedy. But this petition presents extraordinary issues, involving a Nevada state court's authority to subject the California government to a trial about its tax administration conduct involving a former California taxpayer's change of residency claim. Given these important issues, the Court should entertain this petition, acknowledge California's sovereignty, and issue writ relief that orders dismissal of this action. Absent writ relief ordering dismissal, the Court should issue writ relief that limits the scope of this case.

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McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

2. The FTB is entitled to a Writ of Mandamus ordering dismissal of Hyatt's case.

Under California law, there are multiple jurisdictional bars to Hyatt's tort claims. California Government Code Section 860.2, a reflection of California's sovereign immunity, specifically immunizes the FTB from liability for the torts that Hyatt claims, which all arise from FTB acts relating to the application of California's tax laws:

> Neither a public entity nor a public employee is liable for an injury caused by:
>
> (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.
>
> (b) An act or omission in the interpretation or application of any law relating to a tax.

See Mitchell v. Franchise Tax Board, 183 Cal.App.3d 1133, 1136, 228 Cal. Rptr. 750 (1986) (dismissing negligence, slander of title, interference with credit relations, and due process claims against the FTB based on section 860.2). In addition, California's Constitution and Revenue and Taxation Code bars legal action against any California official "to prevent or enjoin the assessment or collection of any tax," including taxes based on residency determinations, prior to exhaustion of all applicable administrative remedies, which Hyatt has not yet done. Cal. Const. Art. XIII, § 32; Cal. Rev. & Tax. Code § 19381. California's Tort Claims Act further protects the FTB from Hyatt's tort lawsuit by making presentation of such claims to California's Board of Control a jurisdictional prerequisite to suit, something that Hyatt did not do before filing, and something that Hyatt cannot do now. Cal. Gov. Code §§ 911.2, 905.2, 945.4.

At oral argument on the FTB's motion, Hyatt made a belated argument that four "loopholes" in California's sovereign immunity laws allowed Hyatt's Nevada claims to proceed: (1) the privacy rights in the California Constitution; (2) California's Information Practices Act; (3) California Revenue and Taxation Code section 21021; and (4) a claimed exception to governmental immunity for breach of contract. (App. Ex. 16 at 30-34 (Tr. of Proceedings).) But Hyatt's argument ignores that his claims are for Nevada common law torts, not for violation of the California Constitution, any California statute, or any California contract law. In fact, Hyatt's argument even ignores his own statements in prior pleadings, in which Hyatt expressly limited his case solely to Nevada common law tort claims. (*See, e.g.*, App. Ex. 14, FTB Reply Ex. A at 14:7 (Plaintiff's Mot. to Remand: "Plaintiff's causes of action

are based solely on state law"); *id.* at 19:2-3 ("Th[is] action is based entirely on Nevada law."))

Moreover, even damages actions based on these supposed "loopholes" are subject to the claims filing requirements in California's Tort Claims Act, with which Hyatt did not comply. Unless excepted by statute, that act makes presentation of a claim to the California Board of Control a jurisdictional prerequisite to a damages action for "any . . . injury for which the State is liable." Cal. Code Regs, tit.2, § 630(h); *see also* Cal. Govt. Code § 905.2. There are no statutory exceptions for damages actions based on any of Hyatt's claimed "loopholes," not even actions based on breach of contract claims. *Adler v. Los Angeles Unified School Dist.*, 98 Cal. App. 3d 280, 285-286, 159 Cal. Rptr. 528 (1979) (contract claims for money subject to claim filing requirements); *see also* Cal. Govt. Code § 905.2. Thus, even if Hyatt's case involved these supposed "loopholes" in California's sovereign immunity laws, Hyatt could not proceed to trial if the California laws that the FTB cites are applied.

As described below, principles of Full Faith and Credit, sovereign immunity, and constitutional choice of law all required that the District Court apply California's governmental immunity and administrative exhaustion laws. Under these principles, the District Court had to apply California's governmental immunity laws regarding tax administration to the entirety of the FTB's conduct, including its Nevada acts. The District Court also had to apply California's administrative exhaustion laws, and Hyatt failed to exhaust his administrative remedies before filing. Even if applying these laws was not constitutionally required, this Court should still apply them as a matter of comity. Finally, Nevada's own law of administrative exhaustion/ripeness is also a bar to Hyatt's actions. For all of these reasons, the District Court erred, and this Court should issue a Writ of Mandamus ordering dismissal.

A. Full Faith and Credit required the District Court to apply California's governmental immunity and administrative exhaustion laws.

Principles of Full Faith and Credit required the District Court to apply California's governmental immunity laws regarding tax administration to the entirety of the FTB's conduct, including its conduct in Nevada. *Nevada v. Hall*, 440 U.S. 410, 424 n.24, *reh'g denied*, 441 U.S. 917 (1979). Full Faith and Credit also required the District Court to apply California's administrative exhaustion laws to the entirety of Hyatt's case. *Id.*

In *Nevada v. Hall*, a University of Nevada employee driving a State of Nevada car in California

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

negligently caused an accident resulting in severe physical injury to California residents. At the time, Nevada law limited tort recoveries against the State of Nevada to $25,000. *Nevada v. Hall*, 440 U.S. at 412. The California courts declined to apply this limitation, despite Nevada's argument that the Full Faith and Credit Clause required California to respect the limitations on Nevada's statutory waiver of its immunity from suit. *Id.* at 412-413.

The Supreme Court affirmed, holding that the Full Faith and Credit Clause did not require California to apply Nevada's immunity laws to the California car accident. *Nevada v. Hall*, 440 U.S. at 424. The Court noted that California had an interest in providing full protection to those injured on its highways, and that requiring California to limit recovery based on Nevada law would have been obnoxious to California's policy of full recovery. *Id.* But the Court also stated that different state policies could require a different Full Faith and Credit analysis, particularly where one state's exercise of jurisdiction over a sister state could "interfere with [the sister state's] capacity to fulfill its own sovereign responsibilities:"

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

Under *Nevada v. Hall*, negligently driving a car on the highways of a sister state is not an exercise of an inherent sovereign function. But auditing a citizen's claimed change of residency and corresponding state income tax liability is an exercise of an inherent sovereign function in which states have "a special and fundamental interest." *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1193 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999) ("Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system.") The FTB's Nevada acts were all performed as part of such audits, and thus were taken as part of the State of California's inherent sovereign right to collect and lay taxes. (*See* App. Ex. 8, Illia Aff. ¶ 2; *id.*, Cox Aff. ¶ 36.)

Given that the FTB's Nevada acts involved an inherent sovereign function, this case falls squarely within footnote 24 of the *Nevada v. Hall* opinion. Allowing Hyatt to proceed notwithstanding the existence of multiple California laws barring his action would seriously interfere with California's

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

capacity to fulfill its sovereign responsibilities. California, and the FTB in particular, have the sovereign responsibility to administer California's tax laws. Hyatt's case seeks to punish the FTB for making minimal disclosures of identifying information about Hyatt for the purpose of determining his residency under these laws. Allowing Hyatt to litigate these acts further without applying California law would impede the FTB's entire residency audit program, as making even minimal inquiries and information disclosures out of state would expose the FTB to the threat of protracted, out of state tort litigation about its residency audit processes. This would necessarily interfere with the FTB's ability to administer California's tax laws, as consulting third party sources and making minimal information disclosures out of state are things that the nature of a change of residency claim often requires.

Allowing Hyatt's case to proceed also exposes the FTB to additional legal expenses and the threat of punishment for trying to obtain relevant information during residency audits. The FTB would incur these additional litigation expenses before it has even finalized its proposed tax assessment against Hyatt, something that the FTB should never have to do. The FTB's administrative process could result in modification or withdrawal of the FTB's proposed assessments, yet the FTB already has to justify virtually all of its audit actions and conclusions in this Nevada litigation as if the final result were set in stone. This deprives the parties of much of the value of the administrative process.

Hyatt's argument below that "there is no recognized exception to *Nevada v. Hall*" is absurd. Numerous courts have recognized the *Nevada v. Hall* exception that the FTB asserts, applied it, and dismissed lawsuits against sister states as a result. In *Guarini v. State of N.Y.*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd,* 521 A.2d 1294, *cert. denied,* 484 U.S. 817 (1987), New Jersey claimed that the Statue of Liberty and the island on which it is located were under its jurisdiction and sovereignty. New York had exercised jurisdiction over the statue and the island for at least 150 years. New Jersey sued the state of New York in a New Jersey Court, but the New Jersey court dismissed the case under the exception to *Nevada v. Hall. Id.* at 1366-67. The *Guarini* court held that the "ruling [in *Nevada v. Hall*] did not mean that a state could be sued in another as a matter of course," *id.* at 1366, and dismissed the action based on its threat to the constitutional system of cooperative federalism, including a potential "cascade of lawsuits" by one state's citizens against neighboring states:

> The present case clearly requires a "different analysis" and a "different

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

> result." . . . Plaintiffs are challenging in a suit in New Jersey the authority of New York State over land bordering the two states. Plaintiffs, if successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 compact. Exercise of jurisdiction by this court would thereby pose a "substantial threat to our constitutional system of cooperative federalism." *Id.*

Mejia-Cabral v. Eagleton School, Inc., No. 972715, 1999 WL 791957 (Mass. Super. Sept. 16, 1999), involved another application of the *Nevada v. Hall* exception. In *Mejia-Cabral*, the plaintiff sued a Massachusetts school for wrongful death caused by a juvenile delinquent attendee. The State of Connecticut was joined as a third-party defendant under allegations that it was negligent in placing the juvenile at the school. The State of Connecticut moved to dismiss the claim on the ground of sovereign immunity. The Massachusetts court agreed and said:

> Unlike *Hall*, the present third-party complaint directly implicates important governmental functions and controversial policy choices. The sentencing and treatment of juveniles who have committed serious criminal offenses is a matter left entirely to the state, and striking the appropriate balance between the competing demands of rehabilitation and public safety is a policy problem that each state must address. The prospect of one state's court deciding whether another state was negligent in selecting a particular rehabilitation program for a juvenile offender is profoundly troubling, and this court's assertion of jurisdiction over such a claim against the state of Connecticut would pose a "substantial threat to our constitutional system of cooperative federalism." The State of Connecticut makes a compelling argument that this third-party complaint would, if allowed to proceed, "interfere with [Connecticut's] capacity to fulfill its own sovereign obligations" and that recognition of its sovereign immunity is therefore mandatory. *Id.* (Internal citations omitted).

Similarly, in *Reed v. University of North Dakota*, 543 N.W.2d 106 (Minn. Ct. App. 1996), a plaintiff sued the State of North Dakota in a Minnesota court for a negligence action. The Minnesota Court of Appeal, citing footnote 24 of the *Hall* case, declined to exercise jurisdiction over the State of North Dakota as a matter of comity. *Id.* at 109-111. In *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1998), the State of Montana was sued by an individual plaintiff in Blackfeet Tribal Court for negligence in the design, construction and maintenance of a highway intersection at which the plaintiff was injured in a car accident. The Ninth Circuit held that even if *Nevada v. Hall* were extended to include Indian tribes, it could not apply to a suit which sought to hold Montana liable for governmental decisions concerning highway design. *"Because the suit's theory would affect governmental processes, it falls outside the scope of Nevada v. Hall." Id.* at 1138 (emphasis added).

Thus, Hyatt's claim that the *Nevada v. Hall* exception has never been recognized could not be

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

further from the truth. The falsity of Hyatt's assertion is proven not only by the above cases, but even by cases that Hyatt cited in his own brief to the District Court. *Haberman v. Washington Public Power Supply System*, 744 P.2d 1032, 1066 (Wash. 1987) ("Full faith and credit does not require a forum state to respect another state's rule on sovereign immunity *unless the other state's ability to govern would be threatened.*") (emphasis added); *Biscoe v. Arlington County*, 738 F.2d 1352, 1358 (D.C. Cir. 1984) (discussing possible application of footnote 24 of *Nevada v. Hall*). The *Nevada v. Hall* exception exists, has been applied in other cases, and should similarly be applied here.

The District Court's refusal to apply California's governmental immunity and administrative exhaustion laws to Hyatt's case, which arises entirely from acts incident to California tax administration, violated the Full Faith and Credit Clause of the United States Constitution. This Court should correct that violation by issuing a writ of mandamus ordering dismissal of this case.

B. The Supreme Court's recent sovereign immunity decisions confirm that the District Court erred.

If there was ever any doubt that dismissal of this action is constitutionally required, the Supreme Court's recent sovereign immunity decisions dispel it. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), was the beginning of the Supreme Court's recent revisiting and clarification of states' expansive sovereign immunity, a process that continues to the present day. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999) (provision of the Fair Labor Standards Act purporting to authorize private actions against unconsenting states in state courts was an unconstitutional abrogation of state sovereign immunity); *see also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (federal Trademark Remedy Clarification Act did not validly abrogate state sovereign immunity); *Kimel v. Florida Bd. of Regents*, ___ U.S. ___, 120 S.Ct. 631 (2000) (federal Age Discrimination in Employment Act did not validly abrogate states' sovereign immunity from suit by private individuals); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (the *Ex Parte Young* doctrine, a judicially created exception to state sovereign immunity, could not be applied in an action that implicated "special sovereignty interests").

Most notably for this case, the Supreme Court in *Alden* held that the States' immunity from suit

is a fundamental aspect of the sovereignty which the states enjoyed before ratification of the Constitution, and noted that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Alden*, 527 U.S. at 715. The Court also noted that states' sovereign immunity was merely "confirmed," not "established," by the Eleventh Amendment, and that the "fundamental postulates implicit in the constitutional design" are what courts must consider when evaluating a sovereign immunity claim:

> The more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the [Eleventh] Amendment clarified the only provisions of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush. *Alden*, 527 U.S. at 724.
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> * * *
>
> . . . The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design. *Alden*, 524 U.S. at 728-29 (emphasis added).

As Justice Rehnquist noted in his *Nevada v. Hall* dissent, one fundamental postulate implicit in the constitutional design is that an unconsenting state is not subject to suit in a sister state's forum. *Nevada v. Hall*, 440 U.S. at 432-433. Thus, the Supreme Court's recent sovereign immunity decisions direct courts to consider this fundamental principle. Consideration of this fundamental principle suggests that suits against states in a sister state's forum should be rare and unintrusive on sovereign responsibilities, to the extent that they should ever occur at all. This confirms that the Court should respect California's sovereignty by applying California's laws and dismissing this case under footnote 24 of *Nevada v. Hall*. Any other result would call into question *Nevada v. Hall's* continued vitality in light of the Supreme Court's more recent sovereign immunity decisions.

C. Constitutional Choice of law principles also required the District Court to apply California's governmental immunity and administrative exhaustion laws.

Constitutional choice of law principles also required the District Court to apply California's governmental immunity laws regarding tax administration to the entirety of the FTB's conduct, and the application of California's administrative exhaustion laws to the entirety of Hyatt's case. When faced with constitutional choice-of-law questions, the United States Supreme Court has invalidated the choice

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

of law of a state which had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction. Choice of a particular state's law must not be arbitrary or fundamentally unfair. *See, e.g., Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930) (nominal residence was inadequate to justify application of forum law); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936) (post-occurrence change of residence to the forum state was insufficient to justify application of forum law); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, *reh'g denied*, 450 U.S. 971 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-823 (1985).

A plaintiff's residence and place of filing the action are generally accorded little or no significance in the constitutional analysis because of the dangers of forum shopping. *Phillips Petroleum*, 472 U.S. at 820. Fairness and expectation of the parties are more important. *Id.* at 822. As in the Full Faith and Credit analysis, the threat of interference with the other state's capacity to fulfill its own sovereign responsibilities plays an important role, because the Full Faith and Credit Clause is one of the several constitutional provisions relevant to making choice of law determinations. *Allstate*, 449 U.S. at 323 (Stevens, J., concurring) (the Full Faith and Credit Clause will not invalidate a forum's choice of law "unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another state." (footnote omitted) (emphasis added)).

Even assuming that the FTB's acts involving Hyatt were tortious, the District Court must apply California's governmental immunity and administrative exhaustion laws as a constitutional choice of law matter. The FTB's minimal contacts with Nevada make the District Court's disregard of California's governmental immunity and administrative exhaustion laws fundamentally unfair. Although Hyatt attempts to portray FTB's contacts with Nevada as substantial with numerous references and averments, (App. Ex. 4 pp. 4-9, ¶¶ 10-23), FTB auditors spent only nominal time physically in Nevada on the Hyatt audits, and only nominal time on phone and mail contacts from California to Nevada to check Hyatt's claims. (*See* App. Ex. 8, Cox Aff. ¶ 34.) These contacts with Nevada are insignificant compared to the 624 total hours that the FTB spent trying to verify Hyatt's dubious residency claim for 1991. (*Id.*)

Reasonable parties' expectations compel the same conclusion. Any reasonable long-time California resident would expect that any FTB audit of his or her change of residency claim would be

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

under California law. No reasonable person would expect Nevada law to govern the FTB's tax audit process merely because a former California resident made a claim to have moved out of state. The only reasonable expectation of any person is that the entirety of FTB's actions, and the entirety of Hyatt's case, are subject to California's governmental immunity and administrative exhaustion laws. Furthermore, Nevada has no laws for the administration of income taxes, and thus there is no conflict between relevant Nevada and California laws.

Under these facts, Nevada's interest in this case is at most to provide a forum for Hyatt's convenience. On the other hand, California has an inherent sovereign interest in determining whether a long-time California resident remains liable for California state income taxes after he claims to have changed his residency to another state. Here, residency itself was being investigated under California's inherent sovereign power to tax. Applying California's governmental immunity laws regarding tax administration to the entirety of the FTB's conduct, and California's administrative exhaustion requirements to the entirety of Hyatt's case, accommodates the important constitutional principles of federalism upon which our country was founded.

D. <u>The Court should order dismissal of this case as a matter of comity</u>.

Even if the Court disagrees with all of the above, comity directs the Court to apply California's governmental immunity and administrative exhaustion laws and order dismissal of this case. Under the principle of comity, "the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect." *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 425 (1983). Comity is particularly appropriate where a lawsuit poses a threat to a state's "capacity to fulfill its own sovereign responsibilities," as it furthers our constitutional system of cooperative federalism. *See Nevada v. Hall*, 440 U.S. at 424 n.24. Comity is especially appropriate in state court cases involving tax controversies between another state and its present or former citizens. *See City of Philadelphia v. Cohen*, 184 N.E.2d 167, 169-70 (N.Y.), *cert. denied*, 371 U.S. 934 (1962) ("For our tribunals to sit in judgment of a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of [that other] State.").

As described above, California's laws specifically immunize the FTB from the tax-related torts that Hyatt claims. (*See supra* at pages 23-25.) Hyatt cannot dispute that his case concerns FTB acts

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

taken in connection with the administration of California's tax laws, a process in which California has "a special and fundamental interest," and that the FTB has not yet completed as to Hyatt. *ANR Pipeline*, 150 F.3d at 1193; *see supra* at page 14. Under California law, the FTB enjoys governmental immunity from liability for the tax-related torts that Hyatt alleges, and Hyatt's claims are also jurisdictionally barred by the doctrines of exhaustion of administrative remedies and the claims filing requirements under the California Torts Claims Act. (*See supra* at pages 23-25.) The FTB has also explained how Hyatt's case threatens the FTB's capacity to fulfill its sovereign responsibility to administer California's tax laws. (*See supra* at pages 26-27.) All of these factors militate in favor of extending comity to California by applying its governmental immunity and administrative exhaustion laws.

When analyzing whether to extend immunity as a matter of comity, courts have focused on whether the immunity laws of the defendant state were in conflict with that of the forum. Courts have extended immunity where the defendant state's immunity laws do not conflict with those of the forum state. *See Lee v. Miller County, Ark.*, 800 F.2d 1372, 1378 (5th Cir. 1986) (it is an abuse of discretion not to extend immunity as a matter of comity, where the defendant state would grant immunity and the forum state would grant either complete or partial immunity); *Clement v. State*, 524 N.E.2d 36, 42-43 (Ind. App. 1988) (Indiana extended immunity to Kentucky entities under Indiana's Tort Claims Act, as both states' immunity laws were identical and Indiana police officers would have been immune under same circumstances); *Schoeberlein v. Purdue University*, 544 N.E.2d 283 (Ill. 1989) (immunity extended as a matter of comity where defendant state and forum state immunity laws were similar); *see also University of Iowa Press v. Urrea*, 440 S.E. 2d 203, 204 (Ga. App. 1993).

The generally accepted rationale of the states, including Nevada, that have denied comity to another state is that a sister state's claim of immunity will not be recognized if the forum state permits recovery against itself under similar circumstances. *Mianecki*, 99 Nev. at 96, 658 P.2d 422 (Nevada agency committing same acts would have been liable under immunity statutes); *Schoeberlein*, 544 N.E. 2d at 288; *see Daughtry v. Arlington County, Va.*, 490 F. Supp. 307, 312-313 (D.D.C. 1980); *Head v. Platte Co., Mo.*, 242 Kan. 442, 749 P.2d 6, 9-10 (Kan. 1988); *Haberman*, 744 P.2d at 1066; *Biscoe*, 738 F.2d at 1357 (in determining whether to extend immunity to Virginia police department, the court looked to whether a District of Columbia police department would have been immune under D.C.

immunity laws for committing the same acts); *Morrison v. Budget Rent A Car Systems, Inc.*, 657 N.Y.S. 2d 721 (N.Y. App. 1997); *Struebin v. State*, 322 N.W. 2d 84, 87 (Iowa), *cert. denied,* 459 U.S. 1087 (1982) (Illinois limitations on liability not recognized in Iowa where Iowa permitted full compensation). In other words, would Nevada courts grant the FTB immunity if it was a Nevada state agency?

The analysis below confirms that California's immunity laws do not conflict with Nevada's own immunity laws, negating the generally accepted rationale for denying comity. The analysis below also shows that Nevada has a special interest in granting comity here, and that Hyatt's arguments below urging denial of comity are unpersuasive. Taken together, these considerations demonstrate that the Court should extend comity to California and order dismissal of this case.

(i) California's and Nevada's immunity laws do not conflict.

Nevada has waived immunity from liability and consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations. Nev. Rev. Stat. § 41.031. However, no action may be brought under Nev. Rev. Stat. § 41.031 against an officer or employee of the State, or any of its agencies, which is based upon the exercise, performance, or failure to exercise or perform, a discretionary function or duty on the part of the State or any of its agencies, whether or not the discretion involved is abused. Nev. Rev. Stat. § 41.032; *see also Foster v. Washoe County*, 114 Nev. 936, 941, 964 P.2d 788, 791-792 (1998).

Nevada's qualified waiver of immunity from liability and consent to civil actions was intended to provide relief for persons injured through negligence in performing or failing to perform non-discretionary or operational actions. It was not intended to give rise to a cause of action sounding in tort whenever a state official or employee makes a discretionary decision injurious to some person. *Hagblom v. State Dir. of Motor Vehicles*, 93 Nev. 599, 604, 571 P.2d 1172 (1977) (manner of conducting internal agency investigations immune as discretionary acts of the agency).

> A discretionary act [is] that 'which requires the exercise of personal deliberation, decision and judgment.' A ministerial act is an act performed by an individual in a prescribed legal manner in accordance with law, without regard to, or the exercise of, the judgment of the individual. *Foster*, 114 Nev. at 942, 964 P.2d at 792 (quoting *Pittman v. Lower Court Counseling*, 110 Nev. 359, 364, 871 P.2d 953, 956 (1994), *overruled on other grounds*, 1 P.3d 959 (Nev. June 9, 2000).)

See also Burgdorf v. Funder, 246 Cal. App. 2d 443, 54 Cal. Rptr. 805 (1966) (discretionary act requires

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

the exercise of judgment and choice); *Glickman v. Glasner*, 230 Cal. App. 2d 120, 40 Cal. Rptr. 719 (1964) (ministerial act is where law prescribes and defines duties with precision and certainty).

It is apparent that an investigation involves personal deliberation, decision, and judgment, and cannot be construed to be ministerial. *Foster*, 114 Nev. at 942, 964 P.2d at 792. Even though there may be internal departmental operating procedures, the nature of an investigation is such that it is inherently discretionary. *Foster*, 114 Nev. at 941-942, 964 P.2d at 792; *see also Travelers Hotel, Ltd. v. City of Reno*, 103 Nev. 343, 346, 741 P.2d 1353 (1987) (city officials' actions immune, even though ordinance required certain factors be considered when determining whether to issue a permit, because officials had discretion in balancing the various factors).

Hyatt alleged below that his tort claims are based on the FTB's operational acts in carrying out its audits of Hyatt. (App. Ex. 9 at 51.) But California law gave the FTB a wide range of powers to investigate situations such as Hyatt's change of residency claim. Cal. Rev. & Tax. Code §§ 17014, 19501, 19504 & 19545; Cal. Govt. Code § 11189. There is nothing in those enabling statutes that prescribes the manner in which audits must be conducted, or removes the ability of FTB employees to exercise judgment. (*See id.*) While the statutes may provide procedures that FTB auditors can use during audits, how FTB auditors proceed with individual cases is left to their sound discretion. (*See id.; see also* App. Ex. 14, FTB Reply Ex. I (Illia Affidavit).) Under *Foster*, Nevada's sovereign immunity laws apply to such discretionary actions, and thus there is no conflict between Nevada and California law. *See* Nev. Rev. Stat. § 41.032.

Since the actions alleged against the FTB would be immune under both California and Nevada immunity laws, the District Court should have extended comity to the FTB.

(ii) Nevada has a special interest in extending comity to the FTB in this case.

Nevada also has a special interest in extending comity to the FTB in this case. This is because whatever this Court allows the District Court to do to the FTB in this case, it will be doing to Nevada's own agencies. As previously discussed, *Mianecki* directs the Court to determine if Nevada would permit itself to be sued if the FTB was a Nevada agency. *Mianecki*, 99 Nev. at 96-97, 658 P.2d at 424. Accordingly, this Court cannot deny comity without first deciding that a Nevada agency doing what FTB did would be subject to Hyatt's tort claims.

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

Because Nevada has no income tax, it has no agency equivalent to the FTB. Instead of a personal income tax, Nevada taxes its gaming industry. Nevada's primary tax source is the gross gaming revenue tax imposed on casinos. Nev. Rev. Stat. §§ 463.370 et seq. The State Gaming Control Board ("GCB") and the Nevada Gaming Commission ("Commission") are charged with enforcing the Gaming Control Act, including protecting the state's revenues. Nev. Rev. Stat. §§ 463.160 et seq. The GCB and Commission are the Nevada agencies most analogous to the FTB.

The peculiar nature of the gaming industry presents numerous concerns and problems of fact determination, verification and control, the resolution of which must be readily available to cognizant authorities of this State. *See generally State of Nevada v. Glusman*, 98 Nev. 412, 425-26, 651 P.2d 639, 648 (1982); *appeal dismissed,* 459 U.S. 1192 (1983) (Nevada's interest in being able to conduct selective investigations outweighed privacy right of a dress shop owner operating his shop on the premises of a licensed gaming establishment). Accordingly, the GCB is given the authority to "make appropriate investigations" to ensure compliance with Nevada's gaming laws and regulations and as directed by the Commission. Nev. Rev. Stat. § 463.310. The power to investigate is not limited to gaming licensees or applicants, but also includes the power to investigate third parties, and is not limited to Nevada's territorial boundaries. *See, e.g., Glusman*, 98 Nev. at 417-18, 651 P.2d at 646-47; *State v. Pashos*, 88 Nev. 23, 24, 492 P.2d 1309 (1972) (GCB has power to issue administrative subpoenas directing officers of a union to appear before the GCB and testify concerning union activities in the gaming industry); Nev. Rev. Stat. § 463.1405(1) (authorizing GCB to investigate *all* persons "having a material involvement directly or indirectly with a licensed gaming operation").

Indeed, under Nev. Rev. Stat. § 463.140(4), the GCB may investigate *any* suspected violation of the Gaming Control Act, including illegal skimming of gaming revenues. *See also* Nev. Rev. Stat. § 463.160(1)(c). Such investigations can include interstate conspiracies, *see, e.g., United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985), *cert. denied,* 474 U.S. 980, as well as in-state conspiracies. *See, e.g., Trans-Sterling, Inc. v. Bible*, 804 F.2d 525 (9th Cir. 1986). Accordingly, the GCB sends its agents and investigators all around the country, even all around the world, to conduct the investigations necessary to perform Nevada's inherent sovereign function of regulating the Nevada gaming industry and protecting state revenues. Agents are dispatched whenever and wherever the gaming authorities

themselves determine it is appropriate to do so.

If Nevada's courts decline to extend comity to California in Hyatt's case, which arises out of the FTB's tax audits, then other forums will likely deny comity to Nevada in similar tort suits against the GCB for doing its job. That is a Pandora's Box that could cripple the State of Nevada's ability to regulate the Nevada gaming industry effectively, and protect state revenues. Therefore, even if this Court were not constitutionally required to apply California's laws that require dismissal, it should exercise its discretion and apply them as a matter of comity.

(iii) Hyatt's arguments below for denying comity are unpersuasive.

In the District Court below, Hyatt incorrectly interpreted *Nevada v. Hall*, *Mianecki,* and other cases concerning whether Nevada should extend comity to California in this case. (*See* App. Ex. 9 at 51-55.) Nothing in *Nevada v. Hall* addresses "whether a state court *should* refuse to extend immunity as a matter of comity, but only whether it *could* do so." *Lee,* 800 F.2d at 1377. Instead, "the United States Supreme Court in *Hall* specifically noted, 'It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability.'" (*Id.* (citing *Hall*).) Thus, if anything, *Nevada v. Hall* counsels the Nevada Court to grant the FTB comity in this case.

As to *Mianecki*, the denial of comity in that case was based on the Court's weighing of a sister state's policy favoring governmental immunity against Nevada's interest in protecting its citizens from "injurious operational acts committed within [Nevada's] borders by employees of sister states." *Mianecki*, 99 Nev. at 98. Here, Hyatt's case involves discretionary, not operational, acts, (*see supra* at pages 34-35), and Hyatt has hardly limited his case to "acts committed within [Nevada's] borders." Instead, Hyatt seeks damages from the FTB based on virtually every facet of the FTB's conduct involving Hyatt, most of which occurred wholly within California. (*See supra* at pages 17-18.) This tips the balance of interests described in *Mianecki* in favor of California's policy favoring governmental immunity.

Hyatt contends that to grant immunity in this matter would violate Nevada's public policy of protecting its citizens. (App. Ex. 9 at 53-55.) But the Nevada Supreme Court has recognized that not every situation will provide a remedy to Nevada citizens for tortious injuries. *Hagblom*, 93 Nev. at 604,

EXHIBIT 25

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

571 P.2d 1172 (state's qualified waiver of immunity from liability does not give rise to a cause of action sounding in tort when a state official or employee makes a discretionary decision injurious to some persons). In addition, other courts have recognized that the policy of giving redress for tortious injuries is often insufficient to override the extending of immunity. This is particularly true where, as here, the failure to recognize California's immunity would lead to forum shopping, would cause tension between the states, and would further degrade state sovereignty. *Newberry v. Georgia Dept. of Industry & Trade*, 336 S.E.2d 464 (S.C. 1985); *see also Schoeberlein*, 544 N.E. 2d at 286; *Reed,* 543 N.W. 2d at 109.

Hyatt knows that his case would be dismissed from a California court, and is trying to use the FTB's limited Nevada activity to forum shop. The District Court's denial of comity to the FTB was an endorsement of such forum shopping, and an endorsement of Nevada tribunals sitting in judgment of a controversy about taxation between California and its former citizen. As such, the District Court's denial of comity was improper. *See City of Philadelphia*, 184 N.E.2d at 169-70.

E. The District Court was also obligated to dismiss this case under Nevada's own administrative exhaustion and ripeness law.

The District Court also lacked jurisdiction under Nevada law to proceed with Hyatt's claims before Hyatt exhausts the California administrative process. Nevada applies its ripeness doctrine to preclude jurisdiction over claims based upon a plaintiff's anticipation of final administrative adjudication. *Resnick v. Nevada Gaming Com'n*, 104 Nev. 60, 65-66, 752 P.2d 229 (1988); *see also Public Service Com'n v. Eighth Judicial Dist. Court*, 107 Nev. 680, 683-85, 818 P.2d 396 (1991) (interlocutory review of agency determination "in any form" is precluded by the administrative exhaustion requirement). As previously discussed, Hyatt bases his tort claims upon actions taken by FTB personnel during the FTB's audits of his claim of change of residency. But the FTB has only issued Notices of Proposed Assessments that Hyatt is still protesting through the FTB's administrative process. (App. Ex. 8, Bauche Aff. ¶ 3, 5, 7 & Ex. B thereto.) As in *Resnick*, Hyatt is attempting to sue the FTB for matters that are still being adjudicated administratively, something that Hyatt should not be allowed to do.

Application of Nevada's own administrative exhaustion/ripeness law to preclude Hyatt's case is particularly appropriate because his claims arise out of a sister state's exercise of an inherent

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

sovereign function essential to its existence, taxation. *See Shell Petroleum N.V. v. Graves*, 709 F.2d 593, 597 (9th Cir. 1983). In *Shell*, a taxpayer brought a civil rights action against the FTB to enjoin it from assessing taxes based on a "unitary" business formula. As in this case, the FTB had merely issued notices of proposed assessments, and the taxpayer's formal protest had not reached final adjudication when the taxpayer sued the FTB. The *Shell* court affirmed dismissal of the case, in part because the controversy was still at the administrative stage and therefore not ripe. *Shell,* 709 F.2d at 597.

If the FTB were a Nevada administrative agency, this Court would not hesitate to dismiss Hyatt's case for lack of jurisdiction based on Hyatt's failure to exhaust his administrative remedies. The fact that the FTB is California's tax agency makes such a dismissal even more appropriate. "[T]he proper procedure for raising a claim of an illegal [tax] agency proceeding is as a defense in the enforcement proceeding itself," not an anticipatory action of the type that Hyatt brings here. *Stankevitz v. IRS*, 640 F.2d 205, 206 (9th Cir. 1981). Hyatt has not exhausted his administrative remedies with the FTB, and his case must therefore be dismissed under Nevada's administrative exhaustion/ripeness law.

3. At a minimum, the FTB is entitled to a Writ of Prohibition and Mandamus directing the District Court to limit the scope of this case.

In the alternative, and at a minimum, the FTB is entitled to a Writ of Prohibition and Mandamus limiting any trial of this action to the FTB's Nevada acts and contacts involving Hyatt, and directing the District Court to reconsider the FTB's summary judgment motion in light of this jurisdictional limitation.

The FTB is the alter ego of the sovereign State of California, and California has multiple laws barring Hyatt's common law tort claims concerning the FTB's tax-related conduct. (*See supra* at pages 23-25 (describing laws).) This Court must respect California's sovereignty and apply California's laws, at a minimum, to the California government's Hyatt-related conduct that occurred entirely within California. Choice of law cases require this to happen: what is more arbitrary, unfair, and contrary to expectations than telling a state government that its own laws do not apply to its official acts occurring entirely within its own state? *See, e.g., Phillips Petroleum Co.*, 472 U.S. at 821-822; *see also* App. Ex. 7 at 36-37. *Nevada v. Hall* requires it as a matter of Full Faith and Credit, by cautioning against one state interfering with another's "sovereign responsibilities." What is more sovereign than a state's tax

collection efforts on its own soil? *Nevada v. Hall*, 440 U.S. at 424 n.24; *see also* App. Ex. 7 at 32-35. If nothing else, comity also directs this result. California is entitled to at least the deference and respect of having its own sovereignty and laws recognized for California tax administration efforts within its own territory. *See, e.g., City of Philadelphia*, 184 N.E.2d at 169-70; *see also* App. Ex. 7 at 37-38.

All of these authorities, and Hyatt's prior statements about the scope of his case, at a minimum limit any trial of this action to the FTB's Nevada acts and contacts involving Hyatt. Under these authorities, the California government at a minimum has a sovereign right to administer its tax laws within California, and to direct tax-related inquires to other places outside Nevada, without a Nevada court's intervention. Thus, Hyatt has no right to a Nevada trial that includes litigation over FTB auditor correspondence with California doctors or businesses, FTB auditor trips to Hyatt's southern California neighborhood, FTB interviews of Californians, or any similar internal acts. (*See supra* at pages 17-18.) Hyatt also has no right to a Nevada trial on the FTB's alleged "intentional destruction" of parts of its audit file, its "disregard[]" and "bur[ial]" of facts allegedly favorable to Hyatt, or its allegedly inappropriate consideration of "'affidavits' [that] were not even affidavits" from Californians. (*See supra* at 18.) Hyatt also has no right to a trial about what an FTB attorney did or did not say to Hyatt's tax attorney in California, or about letters that the FTB sent to Japan when checking Hyatt's change of residency claim. (*See supra* at page 18.)

The District Court's suggestion that it can try FTB acts "in any number of places" that "affect[ed] [Hyatt] here in the state of Nevada," (App. Ex. 16 at 42-43), fails to acknowledge that Hyatt has no right to a Nevada trial on any of these acts. Instead, it would permit a Nevada trial on these and all variety of other tax-related acts subject to California's immunity laws, based on Hyatt's allegation that such acts injured him wherever he was. But such non-actionable conduct does not become actionable merely because Hyatt filed suit in a Nevada forum, or because Hyatt crossed the California state line. Instead, such conduct is the same whether or not Hyatt crossed that line, and the California government has a sovereign right to engage in such tax-related conduct involving a long-time California resident's change of residency claim without the threat of a Nevada trial.

Hyatt claimed below that there was no authority to support the FTB's assertion that California's sovereignty protects the FTB from a Nevada trial about its non-Nevada acts. But in addition to the

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

above authorities, a Supreme Court case that Hyatt himself cited to the District Court holds that the Full Faith and Credit Clause does not "enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequence of acts within it." *Pacific Employers Ins. Co. v. Industrial Accident Com'n*, 306 U.S. 493, 504-05 (1939) (cited in App. Ex. 9 at 50, 60) (refusing to apply Massachusetts law to an injury to a Massachusetts resident working in California). *Nevada v. Hall* qualifies this holding regarding the extension of California's immunity laws to the FTB's Nevada conduct where, as here, the FTB's conduct involved California's inherent sovereign responsibilities concerning taxation. *Nevada v. Hall*, 440 U.S. at 424 n. 24. But the *Pacific Employers* holding applies fully to Hyatt's improper attempt to project Nevada tort law into California, push California's own laws aside, and hold the California government liable under Nevada law for the FTB's non-Nevada conduct. The fact that Hyatt's case is a damages action does not matter, as "regulation" constituting improper projection "can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *see also United Farm Workers of America v. Arizona Agr. Employment Relations Bd.*, 669 F.2d 1249, 1256 (9th Cir. 1982).

Additional authorities, if any are needed, also support the FTB's claim that its non-Nevada conduct is not subject to liability in this Court. In *Reed v. University of North Dakota*, cited *supra* at page 28, a Minnesota court held that choice of law issues required it to apply North Dakota government immunity laws to the North Dakota acts of the North Dakota sovereign. *Reed*, 543 N.W.2d at 110-111. The *Reed* court also held that comity justified deference to North Dakota in such an action, in large part because the plaintiff was trying to hold North Dakota liable in Minnesota for the North Dakota acts of an agency of the North Dakota government:

> What we have here is an attempt to hale the North Dakota sovereign into Minnesota court and apply Minnesota law to negligence claims that arose in North Dakota. Such action not only raises concerns about interstate relations in a federal system, but also presents an affront to North Dakota's sovereignty since North Dakota law at the time of Reed's injury recognized the sovereign immunity of UND and its agents. Accordingly, we conclude Minnesota courts should not exercise jurisdiction here as a matter of comity. *Reed*, 543 N.W.2d at 111.

See also Flamer v. New Jersey Transit Bus Operations, Inc., 607 A.2d 260, 263-65 (Pa. Super. 1992) (applying New Jersey immunity laws to the New Jersey acts of a New Jersey government agency in a

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

Pennsylvania case); *Ramsden v. State of Ill.*, 695 S.W.2d 457, 459-460 (Mo. 1985) (where performance of contract "would have been in Illinois," only Illinois law could apply to Missouri resident's breach of contract action against branch of Illinois government, and comity required dismissal); *Simmons v. State of Montana and State of Oregon*, 206 Mont. 264, 288-291, 670 P.2d 1372, 1384-86 (Mont. 1983) (dismissing Oregon government agency from Montana negligence action on comity grounds, where Oregon's allegedly negligent acts occurred "within its boundaries" in Oregon).

None of the cases that Hyatt cited to the District Court hold to the contrary. Hyatt's reliance on various personal jurisdiction cases is misplaced, as not one of them involves a state government defendant, and Nevada's power to scrutinize the non-Nevada acts of another state's government is not a personal jurisdiction issue. (*See* App. Ex. 9 at 15-18.) *Nevada v. Hall* involved a California court's imposition of liability on a Nevada agency based on an accident "in California," not an accident in Nevada or anywhere else. *Nevada v. Hall,* 440 U.S. at 411. *Mianecki* also does not hold to the contrary, as it involved a Wisconsin parolee's criminal conduct *in Nevada,* and two negligence claims for failure to act *in Nevada*: (1) Wisconsin's failure to warn Nevada citizens in Nevada of a sex offender's propensities, and (2) Wisconsin failure to supervise the sex offender while he was within Nevada's borders. *Mianecki*, 99 Nev. at 95. Hyatt has no similar claims here, and nothing in *Mianecki* allows Hyatt to circumvent California law and impose Nevada liability on the California government for letters, interviews, telephone calls, and other supposed misdeeds that did not send anyone or anything into Nevada.

Nothing in *Biscoe v. Arlington County*, cited *supra* at pages 28-29, *Head v. Platte County, Mo.*, cited *supra* at page 33, or *Faulkner v. University of Tennessee,* 627 So.2d 362 (Ala. 1992), holds to the contrary either. (*See* App. Ex. 9 at 54-55 (Hyatt opposition citing these authorities).) *Biscoe* was a case against a Virginia county government about a District of Columbia car accident, in which the court explicitly noted that "the situation in this case, in which a Virginia county acted outside Virginia territory, obviously is wholly different from one in which a Virginia county has acted within its borders, or those of the state, and is sued in the courts of a sister state." *Biscoe*, 738 F.2d at 1358. *Head* involved a Missouri arrest warrant that was forwarded to Kansas and executed there, not acts of another state's government that started and ended outside the forum state, which are the type of acts that Hyatt wants

to litigate here. *Head*, 242 Kan. at 442-443, 749 P.2d 6. *Faulkner* was a case against a Tennessee state university involving "alleged acts associated with substantial commercial activities in Alabama," not acts that were independent of Tennessee's acts in Alabama. *Faulkner*, 627 So.2d at 364-366.

If the Court has any doubt about the correctness of the FTB's position, it should turn the context of this case around. It strains credulity to believe that Nevada would endorse the authority of California to hold the Nevada government liable in tort for acts within Nevada, or between Nevada and some other state. Hyatt's attempt to litigate the FTB's non-Nevada acts in Nevada, if allowed, is logically indistinguishable from such an intrusion on Nevada's sovereignty. Hyatt's attempt to subject the California government to a Nevada trial that extends beyond the FTB's Nevada acts and contacts involving Hyatt therefore should not be allowed.

CONCLUSION

The District Court's May 31, 2000 order is erroneous as a jurisdictional matter, as it allows Hyatt to continue his tax-related tort action against the California government in Nevada state court. To remedy this error, the Court should issue a Writ of Mandamus directing the District Court to dismiss this action for lack of subject matter jurisdiction. Alternatively, the Court should issue a Writ of Prohibition and Mandamus limiting any trial of this action to the FTB's Nevada acts and Nevada contacts concerning Hyatt, and directing the District Court to reconsider the FTB's summary judgment motion in light of this jurisdictional limitation.

DATED this 7th day of July, 2000.

McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS

By _____
THOMAS R.C. WILSON
JAMES C. GIUDICI
BRYAN R. CLARK
JEFF A. SILVESTRI
TODD J. DRESSEL
241 Ridge Street, 4th Floor
P.O. Box 2670
Reno, NV 89505-2670
(775) 788-2000
Attorneys for Petitioner Franchise Tax Board

McDONALD CARANO WILSON BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this writ petition and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an improper purpose. I further certify that the petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of July, 2000.

McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS

By _____
THOMAS R.C. WILSON
JAMES C. GIUDICI
MATTHEW C. ADDISON
BRYAN R. CLARK
JEFF A. SILVESTRI
TODD J. DRESSEL
241 Ridge Street, 4th Floor
P.O. Box 2670
Reno, NV 89505-2670
(775) 788-2000

Attorneys for Petitioner Franchise Tax Board

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

CERTIFICATE OF MAILING

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing **FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA'S PETITION FOR A WRIT OF MANDAMUS ORDERING DISMISSAL, OR ALTERNATIVELY FOR A WRIT OF PROHIBITION AND MANDAMUS LIMITING THE SCOPE OF THIS CASE** on this 7th day of July, 2000, by depositing same in the United States Mail, postage prepaid thereon to the addresses noted below, upon the following:

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

Donald J. Kula, Esq.
Riordan & McKinzie
300 South Grand Ave., 29th Floor
Los Angeles, California 90071-3109

Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
Hutchison & Steffen
8831 W. Sahara Ave.
Las Vegas, NV 89117

Peter C. Bernhard, Esq.
Bernhard & Leslie
3980 Howard Hughes Parkway
Suite 550
Las Vegas, NV 89109

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

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

54341.1

EXHIBIT 26

ORIGINAL

ORIGINAL

SEALED

Mark A. Hutchison (4639)
John T. Steffen (4390)
HUTCHISON & STEFFEN
Lakes Business Park
Las Vegas, Nevada 89117
(702) 385-2500

Peter C. Bernhard (734)
BERNHARD & LESLIE
3980 Howard Hughes Parkway
Suite 550
Las Vegas, Nevada 89109
(702) 650-6565

Attorneys for Plaintiff
GILBERT P. HYATT

FILED

JUL 10 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

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

Respondent,

and

GILBERT P. HYATT,

Real Party in Interest.

Case No. 35549

REAL PARTY IN INTEREST GILBERT P. HYATT'S ANSWER TO THE FTB'S PETITION FOR A WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, FOR WRIT OF PROHIBITION

CONFIDENTIAL INFORMATION TO BE FILED UNDER SEAL

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ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

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ATTORNEYS AT LAW
LAKES BUSINESS PARK
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LAS VEGAS, NEVADA 89117

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LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
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LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

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8831 WEST SAHARA AVENUE
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HUTCHISON & STEFFEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

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I. Issues presented.

The FTB's writ petition presents three separate discovery issues:

Deliberative-process privilege.

Should this Court judicially create for Nevada a new privilege – the deliberative-process privilege – that facilitates the suppression of otherwise discoverable information, and which exists in only a few states by statutory enactment, and, if so, can the privilege be asserted in this case where none of the terms under which it can be asserted in other states are present?

Attorney-client privilege.

Does the fact that Anna Jovanovich was an in-house attorney with the FTB render all documents she received, sent or drafted in regard to the Hyatt audits privileged where she also had a separate and non-legal, *i.e.*, "dual-role," within the FTB in regard to the Hyatt audits?

Protective order.

Should this Court interfere with the sound discretion of the district court, which was exercised after exhaustive review of a lengthy record and arguments and proposals from both parties, and overturn the protective order crafted by the discovery commissioner and adopted by the district court?

II. Summary of argument.

A. Brief introduction.

This case is a tort action that seeks redress for injuries to Hyatt resulting from the FTB's illegal and abusive conduct during its now seven-year investigation, surveillances and audit of Hyatt. This case is not about, nor does it in any way interfere with, the ongoing tax "protest" that is pending in California between the FTB and Hyatt. This case does not affect California's ability and right to assess and collect taxes from Hyatt or anyone else. In short, California's authority to tax is not at issue in the underlying case. Instead, the FTB's abusive and illegal

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conduct and tactics that took place in, were directed into, or caused injury to Hyatt in Nevada are at issue in this case.

The misconduct by the FTB, discussed in great detail below, included: (1) wholesale public dissemination of Hyatt's confidential and personal information, which Hyatt produced to the FTB only after it repeatedly promised to — and acknowledged that it was legally obligated to — not disclose such information; (2) assessment of a "fraud" penalty against Hyatt — thereby essentially doubling his assessed tax — despite admittedly ignoring or distorting all evidence supporting Hyatt's claim of Nevada residency for the period in question and considering primarily unsworn, unverified, and inferior evidence from sources biased against Hyatt, *e.g.*, Hyatt's ex-wife; and (3) threatened further public disclosure of Hyatt's private information if he did not "settle" with the FTB.

Discovery confirms Hyatt's allegations. In addition to significant admissions by FTB personnel in depositions of disclosures of Hyatt's confidential and personal information and breached promises of confidentiality, discovery has confirmed the conversation between Hyatt's tax representative and the FTB protest officer, Anna Jovanovich, during which she "suggested" that Hyatt settle the matter or be subject to further public disclosure of his private information. Discovery has also revealed that the FTB taught its auditors to "use" the fraud penalty as a "bargaining chip" to resolve ongoing audits and investigations.

Discovery has also uncovered a "whistle-blower" – Candace Les – who is a former FTB auditor. Ms. Les had only a tangential role in the Hyatt audits, but was a firsthand witness to some of the most egregious misconduct of FTB lead auditor Sheila Cox during the Hyatt audits. This included Cox's violation of confidentiality, Cox's obsession with trying to "get" Hyatt, Cox's perjury in this case with regard to her own conduct during the Hyatt audits, and Cox's explicit antisemitism towards Hyatt and racism towards others. Ms. Les also testified in deposition to the FTB's many improper tactics including: an FTB "project" to "research" wealthy Nevada residents; gaining access to gated communities of wealthy individuals – under false pretenses – for the ostensible purpose of finding prospects to audit; and the FTB's use of quotas and goals to encourage and reward auditors for tax dollars assessed instead of

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8831 WEST SAHARA AVENUE
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conducting accurate and neutral audits.

Discovery in the underlying tort action must therefore encompass the full scope of the FTB's conduct and activities during its seven-year investigation, surveillance, and audit of Hyatt. As the discovery commissioner explained, "the heart of the case is the process by which the FTB conducted this audit, including but not limited to those parts of the audit which intruded into the state of Nevada."[1]

More specifically, the discovery commissioner stated:

> [I]f there were any attempts to obtain taxes in some kind of fraudulent fashion as I believe would be the case if the attempt would have been made to say, you know, if you don't pay we are going to assess a fraud penalty on you, even though there is no fraud that we can determine legally, we are going to assess that fraud penalty on you if you don't settle with us. Now, in my view that would be an improper way of collecting taxes, but I think that you should be able to explore and find out whether or not that in fact happened.[2]

The FTB's writ petition, however, is limited to specific discovery rulings relating to discovery sought by Hyatt in support of his tort claims against the FTB.

B. The deliberative-process privilege does not exist in Nevada and is otherwise inapplicable to this case.

The deliberative-process privilege is a much more significant issue in this writ than is indicated by the two sets of documents (Carol Ford review notes — FTB 104117 through 104122 — and Monica Embry sourcing memo — FTB 100288 through 100292) — for which the privilege is asserted by the FTB. The FTB is using the deliberative-process privilege and its erroneous and prolific assertion to block legitimate discovery highly relevant to Hyatt's case. This narrow and limited statutory privilege has not been enacted or recognized in Nevada, and in any event has no application to the referenced documents or any other discovery request in this case for the following reasons:

(i) the underlying case *is not seeking* a direct review or reversal of an agency's policy level decision;

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[1] 11/9/99 Hearing transcript, p. 70, ln. 20 - p. 71, ln. 3. The transcript is attached as Exhibit 4 to the FTB's Writ Petition.

[2] *Id.*, p. 57, ln. 20 - p. 58, ln. 8.

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(ii) the underlying case *is seeking* to enforce a private right in regard to wrongful conduct on the part of the government agency;

(iii) the FTB has already given exhaustive testimony regarding its decision to assess Hyatt taxes;

(iv) revelation of the Ford notes and Embry memo will not disclose any governmental deliberative-process;

(v) the intent and purpose of the law governing the FTB is to allow taxpayers to obtain all information regarding their audits such as the decision and basis for assessment, which were never intended to be kept confidential; and

(vi) the scales tip in favor of Hyatt's need for the information more than the agency's need to keep it secret.

Hyatt therefore asks the Court to affirm the district court's rulings forbidding the FTB from asserting the non-existent, inapplicable deliberative-process privilege.

C. The attorney-client privilege cannot shield production of the subject documents because of Anna Jovanovich's dual roles.

The information that Hyatt seeks from Anna Jovanovich, the FTB's in-house attorney, includes how, when, and why she destroyed her extensive handwritten notes of the audit *after* this litigation began, and why she buried Hyatt-favorable facts in a 3,500 page dossier while emphasizing Hyatt-negative facts in a short executive summary that was *supposed* to but did not objectively summarize the record. The district court correctly adopted the discovery commissioner's finding that Anna Jovanovich was not acting as an attorney, but rather a decision-maker, and the documents that she reviewed, was copied on, or even helped draft are not protected by the attorney-client privilege.

Moreover, the documents the district court ordered to be produced do not seek nor give legal advice from an attorney. Most of these documents were disseminated to a wide range of non-attorneys, and apparently were not even marked confidential or privileged.

The FTB also otherwise waived any privilege that did attach to these documents by disclosing all or part of the information elsewhere and by having its key witness review the entire audit file, including the subject documents, to refresh her recollection in preparation for her deposition.

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8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

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LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

D. The crime-fraud exception to the attorney-client privilege also negates the FTB's right to assert the privilege.

An alternative basis for affirming the district court's ruling regarding the attorney-client privilege is the fact that Hyatt presented a *prima facie* case of wrongful conduct by the FTB, including its attempt to defraud Hyatt by trumping up a bogus tax assessment in the hopes of extracting a settlement. The FTB failed to disclose to this Court that the district court did not enter a finding *on this ground "at this time,"* because it was unnecessary given the findings described in subsections B & C above.

The FTB's fraudulent motives were demonstrated by its misrepresentations and false promises made to Hyatt and his representative to induce Hyatt to turn over secret and confidential information. Hyatt's "Supplemental Appendix re Gil Hyatt's Prima Facie Case of Fraud," filed as part of Hyatt's post-hearing briefing in the district court, sets forth in detail Hyatt's *prima facie* case for fraud.[3]

E. The FTB misrepresented the terms of the district court's protective order — an order that is fair, neutral, and allows the parties to fully prepare for trial in the underlying case.

Hyatt revised and modified his version of the proposed protective order in accordance with the discovery commissioner's suggestions and to accommodate certain FTB requests during a six-month period of discussions and negotiations between the parties concerning the terms of a protective order, during which time the discovery commissioner provided guidance through an informal telephone conference. The FTB, on the other hand, steadfastly refused to make any changes in its proposed version of the protective order and insisted that California law and FTB policy govern the protective order. The parties were therefore unable to stipulate to a protective order, and the discovery commissioner carefully crafted a protective order after a formal motion was filed by the FTB and arguments by the parties were heard.

The FTB has misrepresented material facts to this Court about to the protective order

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[3] *See* Exhibit 4, to Vol. II, of the accompanying Appendix of Exhibits filed with the Supreme Court in Support of Hyatt's Answer to the FTB's Writ Petition ("Appendix of Exhibits filed with the Supreme Court"). Hyatt's filings in the district court in conjunction with the two discovery motions underlying this writ petition are attached to such accompanying Appendix of Exhibits filed with the Supreme Court.

crafted by the discovery commissioner and adopted by the district court. The protective order *does not* prevent the FTB from presenting documents to necessary witnesses and otherwise preparing its defense. Also, the FTB's proposed "California" protective order was rightly rejected by the district court because it sought to interject this Nevada tort action, properly before the Nevada court, into the California tax-protest proceedings, which the FTB wrongfully seeks to intermingle to create jurisdictional issues. Moreover, and ironically, few documents have been designated by the parties as subject to the protective order and it is the FTB that is using the protective order to try to prevent Hyatt from using damaging discovery materials to the FTB in the tax-protest proceedings. This issue is hardly worthy of Supreme Court review.

III. Standard of review.

A. Writ relief is generally not available for discovery matters.

The general rule is that a writ is not available to challenge a discovery order.[4] Interference by an appellate court into the conduct of cases by trial courts is disruptive and seldom justified from the perspective of judicial economy. This Court has steadfastly refused to allow interlocutory appeal by writ, except in the most compelling of cases.

Thus, in *Schlatter v. District Court*,[5] this Courts lead case addressing the availability of writ relief from a discovery order, this Court made it clear that a writ is generally not available to second guess the discovery orders of the district courts. Specifically, this Court stated that "extraordinary relief may not be used to review alleged errors in discovery pertaining to matters within the court's jurisdiction."[6] Similarly, in *Clark County Liquor and Gaming Licensing Bd.*

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[4] *Diaz v. Eighth Judicial District Court*, 993 P.2d 50 (Nev. Adv. Op. No. 9, January 27, 2000); *Hetter v. Eighth Judicial District Court*, 110 Nev. 513, 515, 874 P.2d 762, 763 (1994); *Clark County Liquor and Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986); *Schlatter v. Eighth Judicial District Court*, 93 Nev. 189, 561 P.2d 1342 (1977); *Franklin v. Eighth Judicial District Court*, 85 Nev. 401, 455 P.2d 919 (1969); *Mears v. State*, 83 Nev. 3, 422 P.2d 230, *cert. denied*, 389 U.S. 888 (1967); *Pinana v. Second Judicial District Court*, 75 Nev. 74, 334 P.2d 843 (1959).

[5] 93 Nev. 189, 561 P.2d 1342 (1977).

[6] *Id.* at 193, 561 P.2d at 1344.

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LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

v. Clark,[7] this Court held that "[g]enerally, extraordinary writs are not available to review discovery orders." This Court noted that exceptions have been made to this general rule in only two situations: (1) where the discovery order required blanket discovery without regard to relevance; and (2) where the documents were privileged.

B. The necessary showing to obtain a writ of mandamus or writ of prohibition for a discovery order.

The FTB has sought alternatively a writ of mandamus or a writ of prohibition. To establish that a writ of mandamus is appropriate in this case, the FTB must demonstrate either: (1) that the district court had an absolute duty as a matter of law not to have entered the orders; or (2) that the district court manifestly abused its discretion in entering the orders.[8]

This Court found that an abuse of discretion in a discovery case only if the district court has issued a blanket order that is so broad that it is untethered to relevance, or if the district court has ordered the disclosure of privileged documents.[9] The Court has also declared that a writ will not issue unless the petitioner can demonstrate irreparable injury.[10] Therefore, to be entitled to a writ of mandamus, the FTB must establish that the district court's order requires the disclosure of privileged documents, and that the disclosure will irreparably damage the FTB.

On the other hand, to establish that a writ of prohibition is appropriate in this case, the FTB must demonstrate that the district court's order exceeded the court's jurisdiction. This Court has found district court orders to be in excess of jurisdiction if they require the carte blanche disclosure of non-relevant matters, or if they require the disclosure of privileged matters.[11] Again, the Court has limited its intervention to cases where the discovery order will

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[7] 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

[8] *Diaz v. Eighth Judicial District Court*, 993 P.2d 50, (Nev. Adv. Op. No. 9, January 27, 2000).

[9] *Clark v. Second Judicial District Court*, 101 Nev. 58, 692 P.2d 512 (1985); *Schlatter v. Eighth Judicial District Court*, 93 Nev. 189, 561 P.2d 1342 (1977).

[10] *Id.*

[11] *Wardleigh v. Second Judicial District Court*, 111 Nev. 345, 891 P.2d 1180 (1995); *State ex rel. Tidvall v. District Court*, 91 Nev. 520, 524, 539 P.2d 456, 458 (1975).

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8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

result in injury that cannot be repaired on appeal or otherwise.[12]

C. Writ review of an order regarding a discovery privilege should be deferential to the district court.

The Supreme Court has never addressed the standard of review in a writ proceeding for determining whether a document is actually privileged. Hyatt suggests that the standard of review should be deferential to the determination of the district court. On appeal, the factual determinations of the district court are afforded great deference, and will be overturned only if they are clearly erroneous.[13] The legal determinations of the district court are also afforded deference and are overturned only if unsupported by substantial evidence (mixed question of law and fact) or if they are wrong as a matter of law (pure questions of law).[14] In this case, the district court has carefully reviewed the contested documents, has issued an order carefully tailored to the discovery of only relevant documents, and has exercised the constitutional jurisdiction reposed in it. In its review of the district court's decisions, this Court should exercise the traditional restraint and deference that are characteristic of this Court's prior appellate decisions. This is, in essence, an appeal by writ, and such an appeal should be allowed only under the most compelling of circumstances.

D. There is no basis for writ relief for an order that results in an allegedly "overly-protective" protective order.

Concerning the FTB's challenge to the protective order, this Court should deny the request summarily. The FTB challenges a protective order entered by the district court that does not require the production of any documents by anyone. Instead, the order limits the uses — outside of this case — that the FTB or Hyatt can make of certain documents produced during discovery. This currently applies to a very small percentage of the universe of documents produced in this case. Moreover, the FTB is not precluded from using any means

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[12] *Id.*

[13] *Gibellini v. Klindt*, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994).

[14] *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993); *Jones v. Rosner*, 102 Nev. 215, 719 P.2d 805 (1986).

HUTCHISON & STEFFEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
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legally available to it in California to obtain these same few documents it seeks to use in the tax "protest."

More to the point, the protective order is not a blanket discovery order requiring the production of documents without respect to relevance, nor is it an order requiring the production of privileged documents. Indeed, it does not require the production of anything by anyone. The protective order is a garden variety discovery order that does not fit into any of the exceptions to the general rule that writ relief is **not** available to challenge a discovery order. The FTB will not be irreparably harmed by the protective order. There simply is no Nevada authority whatsoever supporting the proposition that a protective order limiting the dissemination of confidential documents can be challenged by writ, and such a precedent should not now be set by this Court.[15]

IV. Statement of facts.

A. The FTB's torts were directed against a long-term Nevada resident.

1. For good reason, Gil Hyatt is a very private person.

Gil Hyatt is and has been a Nevada resident since 1991.[16] He is and has been a private person.[17] Hyatt's profession and business require security and privacy. Hyatt is by trade an engineer, scientist, and inventor. He worked from the late 1960s to the 1990s in seclusion to conceive and patent some of the most revolutionary inventions in computer history.[18]

During 20 years of proceedings with the United States Patent Office, Hyatt persevered during hard times, living a frugal lifestyle. Despite a self-imposed and preferred anonymity

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[15] In the event the Court nonetheless desires to review and address the substance of the FTB's writ petition relative to the protective order, Hyatt sets forth in detail below his opposition to the FTB's arguments.

[16] Hyatt Affid., ¶ 2, 18, 77. (*See* Exhibit 12, to Vol. VIII, of the accompanying Appendix of Exhibits filed with the Supreme Court. Hyatt's affidavit was filed in the district court as part of Hyatt's Opposition to the FTB's Motion for Summary Judgment. Hyatt's opposition papers to the FTB's Motion for Summary Judgment are attached to Vols. VI and VIII of the accompanying Appendix of Exhibits filed with the Supreme Court.)

[17] Hyatt Affid., ¶ 6.

[18] Hyatt Affid., ¶¶ 80, 130-31.

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during two decades of work — with no government subsidies or research grants — he developed and eventually received patents on computer technology that helped create the personal computer industry.[19]

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

When the United States Patent Office finally issued certain of his pioneering patents in 1990, Hyatt became the subject of a flurry of media and public attention in California. Hyatt had been victimized in California by thefts of his intellectual property, and by a personal tragedy — the murder of his son, the perpetrator of which was never brought to justice by California authorities.

2. In 1991, Hyatt moved to Nevada, and eight years later he is still living and operating his business here, the place of his chosen domicile.

For professional and personal reasons, Hyatt began planning a move to Las Vegas in 1990. After substantial preparation, Hyatt left California and permanently moved to Las Vegas on September 26, 1991.[22]

Immediately after moving to Las Vegas, Hyatt sold his California house, leased and moved into a Las Vegas apartment, and shopped for a house to purchase.[23] He made the first of thirteen offers and counteroffers on Las Vegas houses on December 10, 1991, soon after his

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[19] Hyatt Affid., ¶¶ 80, 13.

[20] Hyatt Affid., ¶ 131.

[21] Hyatt Affid., ¶¶ 137.

[22] Hyatt Affid., ¶¶ 2, 18, 77.

[23] Hyatt Affid., ¶¶ 120, 182.

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move into his rented apartment.[24]

Shortly after his move to Las Vegas, Hyatt was diagnosed with a malignant cancer. He traveled to California a number of times to be examined by cancer specialists and undergo major surgery.[25] Each time Hyatt immediately returned to his home in Las Vegas.[26] The FTB has used the fact of Hyatt's decision to seek critical, life-saving medical treatment from trusted professionals in California as a basis for asserting he was a California resident during the six-month period for which his Nevada residency is disputed.[27]

Shortly after Hyatt's cancer surgery, escrow closed on his Las Vegas house (April 2, 1992) and he moved from his leased apartment into his new house.[28] Hyatt had formed a Las Vegas trust, with his Nevada CPA Michael Kern as trustee to protect his privacy, and he purchased his Las Vegas house through this trust so that his name would not appear on the public records. Hyatt intended to keep a "low profile" and his colleagues shielded his name from public records (utilities, property records and the like) so that his street address would remain private.[29]

One of the security measures Hyatt has employed is to keep his most sensitive documents in his private home-office. His ownership of the house in the Trust's name preserved his anonymity.[30]

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[24] Hyatt Affid., ¶ 28.

[25] Hyatt Affid., ¶ 24.

[26] Hyatt Affid., ¶ 2.

[27] Cox Narrative Report at H00054, H00059. (*See* exhibits to Hyatt's Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, of the accompanying Appendix of Exhibits filed with the Supreme Court. To avoid submitting a record that is any larger and more bulky than necessary, Hyatt has attached to the accompanying Appendix of Exhibits filed with the Supreme Court the exhibits and "appendices of exhibits" filed in the district court in regard to the discovery motions underlying the FTB's writ petition and Hyatt opposition to the FTB's summary judgment motion. As a result, certain references in the footnotes will require a double reference, first to the original filing in the district court and then to the accompanying Appendix of Exhibits filed with the Supreme Court. To avoid confusion and needless repetition, after the cited document(s) are identified in a footnote subsequent footnotes referencing the document(s) will not repeat references to the exhibit number(s).)

[28] Hyatt Affid., ¶¶ 16, 107.

[29] Hyatt Affid., ¶¶ 172, 176.

[30] Hyatt Affid., ¶¶ 130-38, 171- 72, 176.

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3. Hyatt's Nevada business prospered.

After Hyatt moved to Las Vegas, his licensing business started to blossom, and until the FTB destroyed his licensing program in 1995, his business was a significant success.[31] Hyatt's licensing program came to a halt after the FTB's disclosure of confidential and private information about Hyatt in direct contradiction to the FTB's repeated representations of confidentiality.

4. The FTB conducted an uncontrolled investigation, surveillance, and audit that invaded Hyatt's privacy and destroyed Hyatt's licensing business.

In 1993, *two years after* Hyatt moved to Nevada, an FTB employee read a news article about Hyatt.[32] Based upon nothing more, the FTB then commenced its efforts to secure substantial sums from Hyatt even though Hyatt had long since become a Nevada resident.

For seven years, the FTB has investigated, surveilled, and audited Hyatt and publicly disclosed his confidential information, including the location of his secret technology. The FTB investigated, questioned, demanded documents from, or surveilled Hyatt, his car, home, business associates, doctors, rabbis, lawyers, accountants, partners, friends, enemies, ex-wife, felon-brother, Las Vegas neighbors, former California neighbors, Las Vegas landlords, dating service, professional organizations, banks, mutual funds, postman, and even his trash man.[33] FTB audit-investigators brashly went to Hyatt's front porch to snoop at mail on the doorstep and recorded the timing, description, and quantity of his trash.[34]

This relentless assault on Hyatt's right to be left alone interfered with his contacts with Nevada public officials.[35]

Assigning the work to an inexperienced auditor who was handling her first residency

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[31] Hyatt Affid., ¶ 87.

[32] Shayer depo., pp. 67-68. (*See* exhibits to Hyatt's Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, of the accompanying Appendix of Exhibits filed with the Supreme Court).

[33] Cox Narrative Report at H00042-00049 and 00054-00060.

[34] Cox Progress Report H 00404 - 00406; Cox depo., Vol. IV, pp. 1077; C. Les depo., Vol. II, pp. 268-69, 40. (*See* exhibits to Hyatt's Appendix of Exhibits re Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, of the accompanying Appendix of Exhibits filed with the Supreme Court).

[35] Hyatt Affid., ¶¶ 32-33, 124.

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case,[36] the FTB concluded that Hyatt owed California a great deal of money. The invasion of privacy the FTB practiced in the course of its relentless pursuit of Hyatt included fraudulent promises and representations that it would keep Hyatt's secret information strictly confidential.[37] The FTB acknowledged that Hyatt had a significant concern regarding the protection of his privacy.[38] This is discussed in much greater detail below.

The greatest damage Hyatt suffered as a result of the FTB's breaches of confidentiality is the destruction of his patent licensing business. As part of its investigation, the FTB demanded from Hyatt and agreed to keep confidential copies of Hyatt's confidential agreements with his Japanese patent licensees, Hitachi and Matsushita.[39] Hyatt had promised his Japanese licensees these agreements would be strictly confidential. The licensing agreements with the Japanese licensees contained a confidentiality clause.[40]

The FTB, nonetheless, violated its obligation to keep the information confidential. The FTB communicated with the Japanese licensees making clear that Hyatt was under investigation by the FTB.[41] From the date of the FTB confidentiality breaches, Hyatt has obtained no new licensees. His royalty income from new licensees has since dropped to zero.[42]

5. The massive invasion of Hyatt's privacy was unnecessary and the FTB "investigation" was an outrageous sham.

The FTB conducted a biased investigation in which the lead auditor destroyed key evidence that supported Hyatt (*e.g.*, her contemporaneous handwritten notes and computer

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[36] Cox depo., Vol. IV p. 1125. (*See* exhibits to Hyatt's Appendix of Exhibits re Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, of the accompanying Appendix of Exhibits filed with the Supreme Court).

[37] Cowan Affid., ¶¶ 8-26. (*See* Exhibit 15, to Vol. VIII, of the accompanying Appendix of Exhibits filed with the Supreme Court. Cowan's affidavit was filed in the district court in opposition to the FTB's Summary Judgment motion.)

[38] Cowan Affid., ¶¶ 8-26.

[39] Cowan Affid., ¶¶ 8-26.

[40] Cowan Affid., ¶¶ 8-26.

[41] FTB 02143 and 02147. (*See* exhibits to Hyatt's Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit II, to Vol. VII, of the accompanying Appendix of Exhibits filed with the Supreme Court.)

[42] Hyatt Affid., ¶¶ 136, 162.

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records of bank account analysis) and relied heavily on three "affidavits" that do not remotely qualify as affidavits.[43] Even more outrageous is that the FTB disregarded, refused to investigate, and "buried" the facts favorable to Hyatt which it uncovered during its invasive audit. The FTB simply ignored:

- the current neighbors in Nevada who supported Hyatt's Nevada residency claim;
- the former neighbors in California who told of Hyatt's move to Nevada;
- the friends and business associates who told of Hyatt's move to Nevada;
- his adult son who witnessed Hyatt's move to Nevada;
- his Nevada rent, utilities, telephones, and insurance payments;
- his Nevada voter registration and driver's license;
- his Nevada home purchase offers and escrow papers; and
- his Nevada religious, professional, and social affiliations.[44]

The FTB only credited adversaries of Hyatt who have vengeful motives, such as his ex-wife and his estranged brother.[45] Even then, the FTB auditor misrepresented that she had "affidavits" from them when she did not have any such affidavits.

Part of the outrageous conduct of the FTB came from the FTB's lawyers. One of those lawyers, Anna Jovanovich, pointedly stated that high profile or wealthy taxpayers such as Hyatt typically settle the proceedings before litigation. Because they do not want to risk the public disclosure of their personal financial information being made public. She confirmed this in her own handwritten notes.[46] Hyatt clearly understood the unmistakable threat that any challenge to the FTB's demands would result in the dissemination of Hyatt's personal and financial information at subsequent administrative and court proceedings[47] and who knows where else.

6. Summary of Hyatt's tort claims against the FTB.

Hyatt's tort claims pending in the trial court consist of claims for invasion of privacy, abuse of process, fraud, negligent misrepresentation, and outrage.

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[43] Cox depo., Vol. II, pp. 341-42.

[44] Cox depo., Vol. I., pp. 168-69, Vol. VI, pp. 1618-1619; Hyatt Affid., ¶ 53.

[45] Hyatt Affid., ¶¶ 14, 140-141, 148, 175.

[46] Jovanovich depo., Vol. 1 pp. 230-33. (*See* exhibits to Hyatt's Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, of the accompanying Appendix of Exhibits filed with the Supreme Court.)

[47] Hyatt Affid., ¶¶ 13, 73.

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The various invasion of privacy claims asserted by Hyatt include a claim for violation of informational privacy based on the FTB's public dissemination of Hyatt's private and confidential information provided to the FTB in the context of the FTB audits with the clear understanding that the information was to be kept strictly confidential, as well as the more traditional claims for invasion of privacy such as intrusion upon seclusion, public disclosure of private facts, and false light. While alleged in various forms, Hyatt's invasion of privacy claims are all based on the FTB's mishandling and illegal and improper disclosures of Hyatt's private and confidential information. The legal and factual basis for the invasion of privacy claims are set forth in detail in Hyatt's opposition to the FTB's ill-fated motion for summary judgment.[48]

Hyatt's fraud and negligent misrepresentation claims are based on both the FTB's written and verbal, but, promises to keep Hyatt's private information confidential and the FTB's written, but false, promises to conduct a fair and unbiased audit of Hyatt. In reality, the FTB made its false promises in order to induce Hyatt's cooperation and production of voluminous documents so that it could develop a colorable claim against him. Salivating over the prospects of forcing Hyatt into a multi-million dollar settlement based upon a sham "audit" that trumped-up a multi-million dollar tax and penalty assessment, the FTB fraudulently ignored or distorted all of Hyatt's compelling proof of Nevada residency and fraudulently imposed a massive fraud penalty on Hyatt in an effort to bring him to his knees and a resulting settlement. All of this was done despite the fact that Hyatt was and is a demonstrably long-term resident of Nevada whose presence in the state is an added distinction of the type that Nevada has sought to entice to the Silver State in order to diversify its industrial base. But, the FTB is still trying to extort money from a bona fide Nevada resident from whom no money is owed to the State of California. The FTB therefore continues its course of harassment in an effort to compel Hyatt to agree to measures for avoiding a costly dispute. The legal and factual basis for these conclusions are set forth both in Hyatt's opposition to the FTB's motion for summary

[48] Hyatt's opposition papers to the FTB's Motion for Summary Judgment are attached as Exhibits 11 through 15, to Vols. VII and VIII, to the accompanying Appendix of Exhibits filed with the Supreme Court.

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judgment as well as the Hyatt Appendix re Crime-Fraud filed in conjunction with Hyatt's briefing on the discovery motion at issue in this writ petition.[49]

The FTB's abuse of process and outrage claims are also based on misconduct by the FTB during the course of the audits. The legal and factual basis of these claims are also set forth in Hyatt's opposition to the FTB's motion for summary judgment.

7. A whistle-blower has come forward during discovery and revealed FTB abuses and misconduct directed at Hyatt and apparently against other Nevada residents.

Discovery has also uncovered a "whistle-blower," former FTB residency auditor Candace Les, who worked eight years for the FTB.[50] She became, for a while, a close friend of Sheila Cox.[51]

In 1997 Les broke her friendship with Cox because, among other reasons, Cox was a racist.[52] Les testified that Cox would refer to Asian people, including Grace Jeng [Hyatt's Asian assistant], as "gooks."[53] Les was also upset that Cox referred to Hyatt by the antisemitic term "Jew bastard".[54]

In regard to confidentiality, despite the fact that Les had no role in the Hyatt audit and no need to know, Cox talked with Les about the Hyatt audit by name.[55] During their friendship, Cox disclosed to Les the details of the work she was doing on the Hyatt audit even though Les

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[49] Hyatt's Appendix re Crime-Fraud is attached as Exhibit 4, to Vol. II, of the accompanying Appendix of Exhibits filed with the Supreme Court.

[50] C. Les depo., p. 6. (*See* Exhibit 16, to Vol. IX, of the accompanying Appendix of Exhibits filed with the Supreme Court. Additionally, some of the most import testimony from Ms. Les is summarized in the Affidavit of Thomas K. Bourke, pp. 54-74, filed as part of Hyatt's opposition to the FTB's motion for summary judgment, *see* Exhibit 13, to Vol. VIII, of the accompanying Appendix of Exhibits filed with the Supreme Court.)

[51] *Id.*

[52] *Id.* at 10.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 7, 9.

had no official role in the audit.[56]

Les testified that Cox was *obsessed* with the Hyatt case,[57] and that she witnessed Cox go through Hyatt's mail and trash in Las Vegas.[58] Les testified that "I believe the Gil Hyatt case [sic] she was obsessed with. [. . .] talk about incessantly, inability to let go even after it was closed to the point where she created a real fiction in her head about it. . . ."[59] Les heard Cox say to her *husband* (another person with no need to know) that she was out to "get" Gil Hyatt.[60] Cox told Les "I'm going to get that Jew bastard."[61]

Les directly contradicted Cox's deposition testimony and portions of Cox's summary-judgment-motion affidavit. In essence Les has accused Cox of perjury.

More generally, Hyatt uncovered through Les startling and disturbing tactics engaged in by the FTB. Les's "self-evaluation," submitted as part of her review while working at the FTB, described targeting rich Nevada residents by sneaking into gated communities in Nevada for the purpose of determining if any residents used to live in California and might therefore be a candidate for an audit.[62] Les testified in deposition to a "discovery project" involving researching wealthy Nevada residents, a project approved and so named by upper management at the FTB.[63] Les also testified to having been informed of an FTB auditor disguising himself in order to obtain entry into a gated community, even though the FTB "officially" prohibited such conduct.[64]

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[56] *Id.* at 23.

[57] *Id.* at 63.

[58] *Id.* at 269, 273.

[59] *Id.* at 63.

[60] *Id.* at 998.

[61] *Id.* at 63.

[62] Candance Les "self-evaluation" at CL 03011. (*See* Exhibit 17, to Vol. IX, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[63] C. Les depo., pp. 329-30.

[64] C. Les depo., pp. 337-38, 897-98.

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Hyatt desires to complete discovery, including that related to Les' already damning testimony and documents.

8. Status of the tax "protest" in California.

On April 23, 1996, the FTB issued what it calls a proposed assessment against Hyatt for the 1991 tax year stating he owed several million dollars in California state income taxes for that year because it determined that Hyatt was a California resident for the entire 1991 tax year. In addition, the FTB's proposed assessment charged Hyatt a "fraud" penalty of an additional several million dollars for the 1991 tax year claiming his failure to pay taxes to California for the period in late 1991 — after he had moved to Nevada — was fraudulent. As was his right under California law, Hyatt filed a "protest" in June 1996 with the FTB challenging the assessment and penalty.

In regard to the 1992 tax year, the FTB gave notice to Hyatt on April 1, 1996 that an audit had been commenced for that year. Ultimately, the FTB issued a proposed assessment on August 14, 1997 for the 1992 tax year against Hyatt for several million dollars in taxes and fraud penalties asserting that Hyatt was still a California resident and therefore owed California state income taxes for the period through April 3, 1992, the date Hyatt closed escrow on his Nevada home. In so concluding, the FTB distorted the fact that Hyatt had been leasing and residing at an apartment in Nevada since October 1991. Hyatt timely filed a "protest" in response to the FTB's 1992 proposed assessment.

Filing a protest for both the 1991 and 1992 tax year assessments initiated what is called the "protest" stage under California law during which the FTB assigns a protest officer who reviews the audits, the evidence gathered during the audits, and in theory considers the taxpayer's arguments in response to the proposed assessment. The protest officer ultimately conducts a hearing and then decides whether to approve or amend the proposed assessment.

Until recently, the FTB has failed to take any action in the pending protests. The hearings for the respective protests were only recently set for this fall.

Only after the protest officer issues the final assessment — after the protest hearings — can a taxpayer commence an administrative appeal with the California State Board of

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Equalization ("BOE"). In the BOE administrative appeal, a taxpayer has his first due process rights in which an administrative hearing is conducted with the BOE sitting as a neutral decision maker.

In short, Hyatt timely filed protests to the FTB's proposed assessments of taxes and penalties.[65] The FTB, however, delayed his protests for *now almost four years*.[66] Meanwhile, interest compounds *daily* at almost *$5,000 per day, and the total amount now sought by the FTB from Hyatt exceeds $22 million*.

Nonetheless, the protests now pending in California and any future proceedings relating to the FTB's proposed assessments are not at issue in this case. This case in no way seeks to prevent the FTB from processing the protests or from assessing or collecting or attempting to collect California state income taxes from Hyatt or any other individual.

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B. Procedural history of the case.

1. Hyatt's initial complaint.

Hyatt filed the complaint in the underlying case in the District Court of Clark County on January 6, 1998, asserting a declaratory relief claim regarding his Nevada residency and a variety of tort claims including various forms of invasion of privacy and outrage. The complaint and a summons were served on the FTB.

2. The FTB's motion to quash, attempted removal to federal court, and Hyatt's successful motion to remand back to state court.

The FTB's initial response to Hyatt's complaint was to file a motion to quash service of process on February 5, 1998, claiming lack of personal jurisdiction. Shortly thereafter, on February 25, 1998, the FTB removed the case to the federal district court based on alleged diversity of citizenship.

Hyatt then filed a motion to remand to state court on March 4, 1998. After extensive

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[65] Cowan Affid., ¶¶ 31 and 34.

[66] Cowan Affid., ¶¶ 29.

briefing by both parties, the federal court granted Hyatt's motion to remand and ordered the case returned to the district court of Clark County because of the 11th Amendment barrier to federal jurisdiction.

The federal court therefore did not rule on the FTB's motion to quash. Instead, the case was remanded to the Eighth Judicial District Court in and for the County of Clark, and the motion to quash was set for hearing on July 27, 1998. Before the hearing, and after Hyatt had filed a compelling opposition highlighting the FTB's abusive conduct directed at or occurring in Nevada that resulted in injury to a Nevada resident, the FTB withdrew the motion to quash and submitted itself to the personal jurisdiction of the Nevada district court in relation to the causes of action set forth in Hyatt's complaint.

3. Hyatt's amended complaint and the FTB's answer.

On June 11, 1998, Hyatt filed an amended complaint that added some detail to his allegations and added claims for abuse of process, fraud, and negligent misrepresentation. The FTB then filed an answer on August 14, 1998 denying Hyatt's allegations and asserting affirmative defenses.

4. The FTB's ill-fated motions for judgment on the pleadings and then summary judgment.

After discovery proceeded for several months and Hyatt had begun receiving damaging admissions from FTB employees in depositions, the FTB filed a motion for judgment on the pleadings in February 1999 alleging that: (i) the district court lacked subject matter jurisdiction on various grounds including sovereign immunity, comity, failure to exhaust administrative remedies and various other related theories and (ii) Hyatt failed to allege facts sufficient to support the claims alleged in his amended complaint.

The district court denied the FTB's motion in regard to the tort claims alleged by Hyatt, specifically finding that it had subject matter jurisdiction of the tort claims under *Nevada v. Hall*[67] and *Mianecki v. Second Judicial District Court.*[68] The district court granted the motion

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[67] 440 U.S. 410 (1979).

[68] 99 Nev. 93, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983).

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in regard to Hyatt's declaratory relief claim on the grounds that the claim had invoked California law, and the court would cede to California the right to decide the issue of Hyatt's change of residency from California to Nevada under California law as it related to the already pending California tax protest.

In January, 2000, approximately a year after it filed its motion for judgment on the pleadings, the FTB filed a motion for summary judgment again arguing that the district court lacked subject matter jurisdiction and asserting the same grounds rejected by the district court a year earlier.

Hyatt argued, and the district court agreed that, similar to the FTB's past attempts to have the underlying case dismissed, the FTB was asserting an unfettered right to engage in whatever conduct it wanted to collect taxes, including the disregard for Nevada's sovereignty and the right to tortuously and injuriously impose itself on a bona fide Nevada resident. In denying the FTB's motion for summary judgment, the district court rejected the FTB's purported right to carte blanche in the name of its taxing power as directly contrary to both U.S. Supreme Court (*Nevada v. Hall*) and Nevada Supreme Court (*Mianecki*) precedent.

The five arguments asserted by the FTB in its summary judgment motion regarding subject matter jurisdiction (Full Faith and Credit, Comity) plus the FTB's claim of privilege in regard to its tortious conduct were all rejected by the district court just as they had been rejected previously in regard to the FTB's motion for judgment on the pleadings. Hyatt extensively briefed these issues in opposing the FTB's motion.[69] The following is a summary of the issues raised by the FTB and rejected by the district court:

Full Faith and Credit: The FTB's argument concerning Full Faith and Credit was directly addressed and disposed of by *Mianecki* and *Nevada v. Hall*. Nevada's strong self interest requires that it take jurisdiction of this case.

The FTB's attempt to squeeze within an asserted exception to *Nevada v. Hall* is based upon a false and very much disputed premise that the underlying case somehow interferes with

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[69] *See* pages 49-66 to Hyatt Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, in the accompanying Appendix of Exhibits filed with the Supreme Court.

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the FTB's taxing powers in California. The underlying case in no way impedes the FTB's tax collection effort where FTB personnel swore under oath at the outset of the case that it would not interfere with the protest. The FTB never complained during the protest that the case interferes with the protest and the FTB admitted that it renewed its efforts to process the protest after the district court dismissed the declaratory relief claim last year. Finally, according to the FTB protest officer there is an "ethical wall" around her so that she will not be influenced or in any way impeded by this Nevada litigation.[70]

Comity: The FTB argued that the district court should as a matter of comity decline to hear this case. This argument has been raised in virtually every motion the FTB has filed, both in federal and state court, and rejected on each occasion. Comity as an issue was definitively addressed in both *Mianecki* and *Nevada v. Hall*. It was California's refusal to give comity to Nevada that resulted in the holding in *Nevada v. Hall*, which in turn formed part of the basis for the Nevada Supreme Court's holding in *Mianecki*. California cannot expect comity if it does not give comity. Moreover, *Mianecki* accorded primacy to Nevada's obligation to protect the rights of its citizens.[71]

Choice of law: The FTB argued that under constitutional choice of law provisions the district court should recognize California's own governmental immunity laws. This argument was also disposed of by the holdings in *Mianecki* and *Nevada v. Hall* as the argument is based on the faulty premise that Nevada has no self interest in this case. *Mianecki* and *Nevada v. Hall* hold to the contrary, as do other Nevada and Supreme Court precedents. Nevada has a very strong self interest in this case in protecting a bona fide resident, Hyatt, from tortious conduct directed at him from an agency of another state.

Recent U.S. Supreme Court cases: The FTB argued that based on five sovereign immunity cases recently decided by the United States Supreme Court the underlying case should be dismissed. These cases, however, addressed a state's sovereign immunity *relative to*

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[70] *See* pages 50-52 to Hyatt Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[71] *See* pages 52-56 to Hyatt Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, in the accompanying Appendix of Exhibits filed with the Supreme Court.

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the federal government. None of them held, implied, hinted, or even questioned the holding in *Nevada v. Hall* that recognized that the courts of a forum state need not accord sovereign immunity to a sister state for its tortious conduct injuring a resident of the forum state. In fact, one of the recent sovereign immunity cases cited by the FTB reaffirmed and emphasized the vitality of *Nevada v. Hall*.[72]

Exhaustion of Administrative Remedies: The FTB argued that Hyatt should have exhausted administrative remedies pursuant to Nevada law. Nevada law applies to Nevada government agencies, not California government agencies. Moreover, there is no administrative remedy for the torts committed by the FTB against Hyatt.[73]

Privilege: Just as the FTB does not have immunity for torts committed against a Nevada resident, the district court found that the FTB is not privileged to engage in tortious conduct as part of its tax collection efforts against a Nevada resident.[74]

V. The district court's rulings were preceded by the discovery commissioner's extensive review and consideration of the documents at issue and the asserted privileges, and then a detailed recommendation.

The discovery commissioner held hearings on April 20, 1999 and May 5, 1999 in regard to Hyatt's motion to compel re missing, redacted, and sanitized documents from FTB's residency audit files of Hyatt and Hyatt's motion for an order compelling production of witness Anna Jovanovich for deposition testimony or her current address. The discovery commissioner's Report and Recommendation for each of the prior hearings was signed by the discovery commissioner on or about April 30, 1999 and October 26, 1999, respectively.[75]

At the May 5, 1999 hearing, after listening to the oral arguments of counsel, the

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[72] *See* pages 59-62 to Hyatt Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[73] *See* pages 63-66 to Hyatt Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[74] *See* pages 66-68 to Hyatt Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[75] *See* Exhibits 18 and 19, respectively, to Vol. IX, in the accompanying Appendix of Exhibits filed with the Supreme Court.

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discovery commissioner ordered post-hearing briefing in regard to certain documents the discovery commissioner had reviewed *in-camera*.[76] In addition, the district court ordered that the FTB provide a privilege log to Hyatt by May 21, 1999, of all Hyatt-specific documents to which the FTB was objecting and refusing to produce to Hyatt based on privilege. The discovery commissioner also ordered that the parties' respective post-hearing briefs address any new documents included on the FTB's privilege log to be produced May 26, 1999 and not previously addressed by the parties or the discovery commissioner.

On May 26, 1999, the FTB submitted a "First Supplemental" privilege log listing 29 Hyatt-specific documents to which it was objecting and refusing to produce based on asserted privileges. Hyatt submitted a post-hearing memorandum of points and authorities and additional supporting papers on June 1, 1999, addressing the issues raised by the discovery commissioner during the May 5, 1999 hearing as well as the new documents listed on the FTB's May 26, 1999 "First Supplemental" privilege log. In response, the FTB submitted its post-hearing memorandum of points and authorities and additional supporting papers on June 26, 1999. Hyatt then submitted a Post-Hearing Reply and supporting papers on July 19, 1999.[77]

In total, the number of pages in the briefs submitted by the parties, including the original briefing for the April 20, 1999 hearing and the May 5, 1999 hearing, and the post-hearing briefs, totaled in excess of 200 pages, and the number pages of exhibits submitted with these filings exceeded 1,000 pages. After several months of reading and evaluating the substantial briefs and exhibits submitted, the discovery commissioner held an additional hearing on November 9, 1999 during which he made his findings and recommendations that were adopted by the district court and are the subject of this writ petition.

Despite the extensive briefing below, which fully sets forth Hyatt's position, the FTB submitted none of Hyatt's briefs to this Court with its writ petition. Given that the discovery

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[76] The specific documents are identified in the discovery commissioner's Report and Recommendation of October 26, 1999, ¶ 8. (*See* Exhibit 19, to Vol. IX, of the accompanying Appendix of Exhibits filed with the Supreme Court.)

[77] Hyatt's motion papers, as well as post-hearing briefs and exhibits, submitted in regard to the motion to compel are attached as Exhibits 1through 8, to Vols. I through V, of the accompanying Appendix of Exhibits filed with Supreme Court.

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commissioner and the district court had the benefit of reviewing and considering Hyatt's substantial briefing and all exhibits submitted by Hyatt, the FTB's failure to provide this Court with any of Hyatt's briefs or exhibits is in direct violation of Nevada Rule of Appellate Procedure 21(a) that requires that "[t]he petition shall contain . . . copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition." The FTB's conduct in this respect was deceptive and sanctionable. Submission of Hyatt's briefs would have allowed the Court to dispose of this writ petition without any additional briefing or the expenditure of the Court's and the parties' time and resources.

Before entry of the protective order by the district court, the matter was extensively briefed by the parties and exhaustively reviewed and considered by the discovery commissioner.[78]

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VI. The deliberative-process privilege is not applicable, and statements to the contrary by the FTB are false and misleading.

The FTB asserts the deliberative-process privilege in its writ petition for two sets of documents (i) "notes" on the Hyatt audits by Carol Ford who acted as the "reviewer" on the Hyatt audit and who reviewed the work of Sheila Cox, the FTB auditor and perpetrator of much of the wrongful conduct alleged by Hyatt; and (ii) a Hyatt "sourcing" memo prepared by an FTB employee favorable to Hyatt and contrary to another "sourcing" memo that the FTB did produce.

Moreover, the FTB has been asserting the deliberative-process privilege throughout this litigation to stymie Hyatt's discovery efforts by instructing certain key witnesses, *e.g.* Carol Ford, not to answer questions during depositions which go to the heart of Hyatt's tort claims.[79]

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[78] Hyatt's opposition papers filed in regard to the protective order motion are attached Exhibits 8 and 9, to Vol. VI, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[79] Excerpts from the Ford, Embry, and Bauche deposition transcripts where they were instructed not to answer due to the deliberative-process privilege were attached to the Appendix of Exhibits in Support of Hyatt's Post-Hearing Memorandum, *see* Exhibit 5 , to Vol. II, in the accompanying Appendix of Exhibits filed in the Supreme Court.

The FTB has successfully shut down the discovery process with its constant and indiscriminate objections and instructions to witnesses not to answer based upon its now epidemic assertion of the "deliberative-process" privilege. In response to any deposition question for which the FTB expects a damaging answer, the FTB's attorneys object based upon the deliberative-process privilege. The height of absurdity was reached when the FTB instructed a witness not to answer based on the deliberative-process privilege when asked the following questions:

- "Did Sheila Cox tell you she had deliberately written the narrative in a one-sided way?"[80]
- "Did Sheila Cox tell you that she was deliberately exaggerating the strength of her evidence so that the Franchise Tax Board could assess large amounts of taxes and penalties against Mr. Hyatt?"[81]
- "Were you aware, in the records you saw, did you see any evidence of invasion of privacy of Mr. Hyatt?"[82]
- "Did you see any evidence of a deliberate attempt to make a demand for information to Nevada residents look like an official California subpoena."[83]
- In the records you saw, did you see any evidence of a deliberate fraud on Mr. Hyatt?"[84]

Hyatt compiled a video "highlight reel" for the discovery commissioner of some of the FTB's outlandish and abusive assertions of the deliberative-process privilege.[85] This includes excerpts from the deposition of Carol Ford regarding her "reviewer's notes" which are at issue in this motion and the deposition of Jeff McKenney who was instructed not to answer the above

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[80] McKenney depo., p. 202, lines 11-13. (Attached to the Appendix of Exhibits in Support of Hyatt Post-Hearing Memorandum, *see* Exhibit 5 , to Vol. II, in the accompanying Appendix of Exhibits filed in the Supreme Court.)

[81] *Id.* at 202, lines 4-10.

[82] *Id.* at 261, lines 13-17.

[83] *Id.* at 261, line 23 to page 262, line 3.

[84] *Id.* at 261, lines 18-22.

[85] A copy of the videotape was submitted to the district court attached as Exhibit 4 to the Supplemental Appendix of Exhibits in Support Hyatt's Post-Hearing Reply Memorandum, and that appendix is attached as Exhibit. 8 , to Vol. V, of the accompanying Appendix of Exhibits filed in the Supreme Court. The discovery commissioner reviewed and relied on the videotape, the excepts of which were approximately 15 minutes long.

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quoted questions. The discovery commissioner reviewed and relied on the videotape.[86] He concluded that "the deliberative-process privilege has been completely distorted as a result of any realization of what it was, *particularly in a case where the process of the audit is itself at issue in the case.*"[87]

The FTB's assertion of such privilege grew more brazen and almost indiscriminate as discovery proceeded.[88] Based on the deliberative-process privilege, the FTB has refused to produce almost all of the responsive documents to Hyatt's most recent document requests.[89]

Because of the significance of this issue, Hyatt will first provide a brief overview of the deliberative-process privilege and then a detailed discussion regarding its inapplicability to the specific circumstances in which the privilege has been asserted by the FTB.

A. Origin and general application of the privilege in "policy-level decisions."

The deliberative-process privilege essentially protects a governmental agency's "pre-decisional, deliberative-process" regarding *policy level decisions* which are quasi-legislative or quasi-judicial in nature where such governmental decisions are being subjected to *direct judicial review*. In short, if a lawsuit is *directly challenging* an agency decision or policy, the only relevant issue is whether the agency made the right decision — the manner or process used to come to such decision is not relevant in that litigation.

The deliberative-process privilege was derived from the executive privilege,[90] the purpose of which is to give the chief executive "the freedom 'to think out loud,' which enables

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[86] 11/9/99 Hearing transcript, p. 52, lns. 3-25 (*See* Exhibit 4 to the FTB's Writ Petition).

[87] *Id.*, p. 53, lns. 1-4 (emphasis added).

[88] See Exhibit 6 to Supplemental Appendix of Exhibits in Support Hyatt's Post-Hearing Reply Memorandum, and that appendix is attached as Exhibit 8, to Vol.5, of Hyatt's accompanying Appendix of Exhibits filed with the Supreme Court.

[89] *See, e.g.*, the FTB's Supplemental Request to Hyatt's Fourth Request for Production of Documents, attached to Supplemental Appendix of Exhibits in Support Hyatt's Post-Hearing Reply Memorandum, and that appendix is attached as Exhibit 8, to Vol. V, of the accompanying Appendix of Exhibits filed with the Supreme Court.

[90] The cases also use the term mental process privilege. The terms are used almost interchangeably. In *RLI Ins. Co. Group v. Superior Court*, 51 Cal. App. 4th 415, 59 Cal. Rptr. 2d 111 (1996), the court discusses and explains such terms. For the purposes of this motion, there is no substantive difference.

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him to test ideas and debate *policy* and personalities uninhibited by the danger that his tentative but rejected thoughts will become subjects of public discussion."[91]

The purpose of the deliberative-process privilege is similar to the executive privilege. "There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency and, thereby, improves the quality of *agency policy decisions*. Second, it protects the public from confusion that would result from premature exposure to discussions occurring before the *policies* affecting it had actually been settled upon. Third, it protects the integrity of the *decision-making process* itself by confirming that 'officials should be judged by what they decided[,] not for matters they considered before making up their minds.'"[92]

The FTB cited primarily to federal law in its discussion of the deliberative-process privilege. The privilege has been codified in federal statutes. Courts have interpreted "Exception 5" to the Federal Freedom of Information Act ("FOIA") to protect materials which would be protected under the deliberative-process privilege.[93]

Nevada does *not* have a statutory provision relating to the deliberative-process privilege, but executive privilege is recognized in Nevada. *Stinnett v. The State of Nevada*[94] applied the executive privilege in reversing the conviction of a defendant after finding that the defendant had a right to obtain and review documents which the State did not want to disclose. The Nevada Supreme Court, relying upon United States Supreme Court precedent, applied a balancing test weighing assertion of executive privilege against a demonstrated need for evidence in a pending trial.[95]

In California, the California Supreme Court has interpreted Section 6255 of the

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[91] *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1341, 283 Cal. Rptr. 893 (1991) (quoting Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1410 (1974) (emphasis added)).

[92] *Jordan v. United States Dept. of Justice*, 591 F.2d 753, 773 (D.C. Cir. 1978) (emphasis added).

[93] *EPA v. Mink*, 410 U.S. 73, 85-90 (1973); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980); 5 U.S.C. § 552(b)(5).

[94] 106 Nev. 192, 789 P. 2d 579 (1990).

[95] *Id.*

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California Public Records Act to include a deliberative-process privilege.[96] The privilege, however, is limited to actions in which the agency decision is directly challenged and sought to be overturned.[97]

The instant case is a tort action and seeks no relief relative to the tax proceedings in California. Indeed, the Court's rulings on April 7, 1999 denying the FTB's motion for judgment on the pleadings in regard to the tort claims and denying the FTB's motion for summary judgment was based upon this being a tort case.[98] The FTB also takes the position that this is a tort case and has so stated in objections during deposition.[99]

Additionally, the privilege cannot be expanded by the California courts. Rather, it is narrowly construed and limited by statute.

> [W]e are not at liberty to expand the scope of the common law privilege and to apply it in these proceedings to bar discovery would require an expansion. . . . [E]videntiary privileges spring exclusively from our Evidence Code. . . . The Evidence Code does not refer to either the mental process or deliberative-process privileges.[100]

As set forth in detail below, here the "decision" on which the FTB relies to assert the deliberative-process privilege was not a policy level, quasi-legislative, or quasi-judicial decision, but rather a proposed assessment of an individual's tax liability based upon an agency audit/investigation which, by law, is not even an administrative proceeding.[101]

The FTB witnesses instructed not to answer, or still to be deposed, *do not* set FTB

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[96] *Times Mirror Co. v. Superior Court,* 53 Cal.3d 1325, 1347, 283 Cal. Rptr. 893 (1991); *Rogers v. Superior Court,* 19 Cal. App. 4th 469, 23 Cal. Rptr. 2d 412, 416-18 (1993).

[97] *In re California Public Utilities Com'n,* 892 F.2d 778, 782 (9th Cir. 1989) ("California courts have never applied the 'deliberative-process' privilege to discovery requests in private litigation unrelated to review of agency action.").

[98] 4/7/99 Hearing transcript, at 55:5-8 and 56:12-16. (*See* Exhibit 21, to Vol. IX, of the accompanying Appendix of Exhibits filed with the Supreme Court).

[99] Ford Depo. excerpts. (*See* Exhibit 5, to Vol. II, and Exhibit 8, to Vol. 5, in the accompanying Appendix of Exhibits filed with the Supreme Court).

[100] *RLI Ins. Co. Group v. Superior Court,* 51 Cal. App. 4th 415, 437-38, 59 Cal. Rptr. 2d 111, 124-25 (1996) (holding that such privilege is limited based on prior California Supreme Court precedent limiting the application pursuant to statute).

[101] *See* discussion, *infra* at 28-33.

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policy. Tax policy is set by elected officials — the Board members — not by the staff, and certainly not by auditors.[102] Further, the one California statute upon which the FTB relies in support of the deliberative-process privilege is explicitly superceded by the California Information Practices Act of 1977 which gives an individual the right to access his/her own records.[103]

Additionally, the deliberative-process privilege has no application where, as here: (i) the government agency seeking to withhold the information is being accused of wrongdoing in the subject litigation; (ii) the governmental policy is not being directly reviewed or challenged in the subject litigation which raises no challenge to FTB regulations; and (iii) the privilege was not invoked by the head of the government agency after personal consideration.[104]

Finally, the deliberative-process privilege is waived, similar to other privileges, where the mental or deliberative-process has been revealed in sufficient detail. The government agency cannot "pick and choose" what it will and will not reveal about its process. As discussed in more detail below,[105] the FTB was required, and did reveal "how and why" it reached its assessment. In that regard, the FTB prepared and produced to Hyatt a 65 page Narrative Report for the 1991 audit and a 34 page Narrative Report for the 1992 audit. The very purpose of such Narrative Reports is to explain the FTB's "decision."[106] The FTB has also explained its assessments to Hyatt by allowing some witnesses to testify regarding the FTB's process. For example, Steve Illia, the head of the FTB's residency audit program, testified in deposition in this matter, and in an unrelated proceeding involving Candace Les, on the extensive details of the FTB audit process of the Hyatt audits.[107] The FTB thus has waived the

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[102] Ford depo., Vol. II, page 307-08.

[103] *See* discussion, *infra* at 33-34.

[104] *See* discussion, *infra* at 41-43.

[105] *See* discussion, *infra* at 39-41.

[106] Cox Narrative Reports.

[107] Illia depo. excerpts. (*See* Exhibit 5, to Vol. II, and Exhibit 8, to Vol. V, in the accompanying Appendix of Exhibits filed with the Supreme Court.) Transcript excerpts of hearing before the State Board of Personnel, In the Matter of the Appeal by Candace Les. (*See* Exhibit 27, Vol. III, in the accompanying Appendix of Exhibits filed with

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deliberative-process privilege — to the extent it applies at all.

B. The deliberative-process privilege is not applicable to the FTB's audit of Hyatt since its actions did not involve a policy-level decisions.

The deliberative-process privilege is applicable to documents generated or gathered by an agency which relate "to the process by which *policies* are formulated" or are "inextricably intertwined with 'policy-making processes'."[108] "The deliberative-process privilege is designed to protect materials reflecting deliberative-process or policymaking processes, and not 'purely factual, investigative matters.'"[109] Nor is it designed to protect from disclosure of the files of an individual.[110]

Indeed, the cases cited by the FTB regarding the deliberative-process privilege were seeking direct review of an agency quasi-legislative or quasi-judicial determination.[111]

The FTB's audit of Hyatt falls far short of a policy level action amounting to a quasi-legislative or quasi-judicial decision. Indeed, an FTB audit of a taxpayer does not even rise to the level of an "administrative proceeding." The FTB successfully campaigned to have the "protest" phase of its audits and investigations — the very phase at which Hyatt and the FTB now find themselves in the California tax "protest" — exempted from the California Administrative Procedures Act[112] on grounds that the "protest" phase is *not an administrative*

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the Supreme Court.)

[108] *Times Mirror*, 53 Cal. 3d. at 1342 (quoting *Jordan, supra*, 591 F.2d at 774; *Ryan v. Dept. of Justice*, 617 F.2d 781, 790 (D. C. Cir. 1980)).

[109] *Rogers v. Superior Court*, 19 Cal. App.4th 469, 478, 23 Cal. Rptr. 2d 412 (1993) (quoting *EPA v. Mink*, 410 U.S. 73, 89, 93 S.Ct. 827, 35 L.Ed.2d 119, 133 (1973).

[110] Cal. Civ. Code § 1798 *et seq.*

[111] *See, e.g., United States v. Morgan*, 313 U.S. 409, 422 (1941) (action directly challenging decision of the Secretary of Agriculture regarding maximum rates charged for certain services); *ISI Corp. v. United States*, 503 F.2d 558, 559 (9th Cir. 1974) (action by taxpayer directly appealing jury verdict denying refund of taxes); *Green v. Internal Revenue Service*, 556 F. Supp. 79, 84-85 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984) (action by tax protester seeking correction of IRS records and emphasizing that "policy making process of the Government are protected from disclosure by the (b) (5) exemption" the Freedom of Information Act); *Bank of America v. U.S.*, 78-2 USTC (CCH sec. 9493) (N.D. Cal. 1978); *Furman v. U.S.*, (83-2 USTC (CCH sec. 9739) (D.S.C. 1983).

[112] In California, administrative proceedings are governed by and must be conducted in accordance with the Administrative Procedure Act. Cal. Gov't Code § 11400. This statute sets forth the procedure to be followed in administrative "proceedings." It is intended to ensure due process to participants. *Id.*

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proceeding for which the targeted taxpayer need have adjudicative rights. Cal. Rev. & Tax. Code § 19044.. Rather, the protest phase is merely investigative and informal:

> [T]he general provisions of the Administrative Procedure Act do not apply to an oral deficiency assessment protest hearing, which is investigative and informal in nature.[113]

The FTB's torts against Hyatt were commenced during the FTB's "audits" and continue through the present. The documents being withheld and the deposition questions being objected to by the FTB on this ground all relate to conduct by the FTB either occurring in or directed against Hyatt in Nevada during the period of the audits, which are now closed. But, the deliberative-process privilege was not intended to and does not apply to the FTB's non-adjudicative, informal audits and protests. By statute these are non-adjudicative proceedings and in no way implicate any policy-level decisions. The relevant witnesses concede that they were not making policy.

C. The California Information Practices Act expressly supersedes California's limited, statutory deliberative-process privilege.

The only California statute cited by the FTB regarding the deliberative-process privilege is Section 6254(a) of the California Government Code which reads:

> [N]othing in this chapter [Chapter 3.5. Inspection of Public Records] shall be construed to require disclosure of records that are any of the following:
> (a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweigh the public interest in disclosure.

Yet, the subject documents and testimony are clearly different from the above listed items, being part of an individual's audit by the FTB.

More importantly, and unstated in the FTB's writ petition, Section 1798.70 of the California Civil Code expressly provides that the California Information Practices Act of

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[113] California Law Revision Commission Comments to Cal. Gov't Code § 11400 (emphasis added); *see also* Cal. Gov't Code § 11415.50 ("an adjudicative proceeding is not required for informal fact finding or an informal investigatory hearing, or a decision to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency . . . .").

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1977[114] supersedes Section 6254 of the California Government code:

> This chapter shall be construed to *supersede* any other provision of state law, *including Section 6254 or 6255 of the Government Code*, which authorizes any agency to withhold from an individual a record containing personal information which is otherwise accessible under the provisions of this chapter.[115]

The first of the FTB's three defective productions of its "audit" file was made to Hyatt prior to this litigation pursuant to a request by Hyatt under the California Information Practices Act of 1977, the California version of the Federal Privacy Act. In other words, the FTB accommodated a pre-litigation production to Hyatt, and the FTB did not and could not have objected under Section 6254. Now, however, the FTB is refusing to produce part of its audit file citing Section 6254. It cannot do this. Such documents are not protected by Section 6254 and should have been produced as part of the original Information Practices Act production.[116]

D. The deliberative-process privilege also does not apply because Hyatt has alleged government misconduct.

1. The FTB cannot block discovery of its misconduct by claiming it was "predecisional."

Because Hyatt has brought suit based on misconduct on the part of the FTB, the FTB cannot invoke the deliberative-process privilege. "[T]he deliberative-process privilege disappears altogether when there is any reason to believe government misconduct occurred."[117] Consequently, where documents sought may shed light on alleged government malfeasance, the privilege is "routinely denied."[118] The "public's interest in honest, effective government" demands that identifiable government misconduct not be shielded merely because it happens to

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[114] Cal. Civ. Code § 1798 *et seq.*

[115] Cal. Civ. Code §1798.70 (emphasis added).

[116] The FTB also cited Section 6254 and California case law as supporting its argument regarding the attorney-client privilege. The FTB's attempted use of Section 6254 is as inapplicable to the attorney-client privilege as it is to the deliberative-process privilege. See discussion, *supra* at 33-34.

[117] *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997); *Alexander v. FBI*, 186 F.R.D. 170, 177 (D.D.C. 1999).

[118] *Sealed Case*, 121 F.3d at 738; *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995).

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be pre-decisional and deliberative-process.[119]

In *Alexander*, plaintiffs brought suit against the FBI alleging that their privacy rights were violated when the FBI improperly handed over to the White House hundreds of FBI files of former political appointees from the Reagan and Bush Administrations.[120] Based upon their claim that the Government attempted to cover-up political motivations behind the release of this information, the plaintiffs sought certain documents and testimony regarding the FBI's decision to release the files to the White House. The FBI asserted the deliberative-process privilege and withheld such documents. The court held that the deliberative-process privilege was inapplicable.[121] The court reasoned that, based on plaintiffs' allegations of a political cover-up, statements of "high government officials" calling the handling of plaintiffs' files "irresponsible and inappropriate," and *evidence of the destruction of certain computer files*, the plaintiffs had sufficiently shown "any reason" to believe the information sought may shed light on government misconduct.[122]

In this case at the district court level, the FTB cited additional authority consistent with *Alexander*. The FTB cited *United States v. Board of Education of the City of Chicago*[123] for another proposition, but the case is squarely on point here. The case involved a dispute between the federal government and the Chicago School Board over enforcement of a consent decree. The federal government sought to withhold documents based upon the deliberative-process privilege. The court ultimately rejected the government's argument because the dispute centered on whether the board had acted appropriately, not whether it had made the right decision.

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[119] *Sealed Case*, 121 F.3d at 738; *Alexander*, 186 F.R.D. at 177-178; *see also Elson v. Bowen*, 83 Nev. 515, 522, 436 P.2d 12, 16 (1967) (analyzing an assertion of the executive privilege, the Supreme Court of Nevada held: "Government cannot break the law to enforce the law . . . and it follows that government should not be allowed to use the claims of executive privilege and departmental regulations as a shield of immunity for the unlawful conduct of its representatives.") (citations omitted).

[120] *Alexander*, 186 F.R.D. at 170.

[121] *Id.* at 177-178.

[122] *Id.* at 177 (emphasis added).

[123] 610 F.Supp. 695 (N.D. Ill. 1985) -- cited on page 29 of the FTB Post-Hearing Opposition.

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> Here, the decision making process is not "swept up into" the case, it is the case. The issue here is the deliberative-process. . . the Board alleges that the United States has violated its commitment; the government has conceded that its decision making process is relevant to this Court's decision on whether the consent decree was violated. . . .[124]

The court further explained that:

> The nature of this unique case is that the *"roads not taken" are as relevant as those taken.* The *recommendations rejected and options considered are exactly what the Court needs* to consider to fulfill its mandate of deciding whether the Secretary actually gave the Board "top of the list priority."[125]

Here, the FTB's conduct (*i.e.* its conduct in investigating, auditing, and surveilling Hyatt) is at issue, where the deliberative-process does not apply. Hyatt does not here challenge the assessment of taxes by the FTB, but instead challenges the conduct of the FTB's now seven-year investigation, audit, and surveillance of Hyatt. The Ford notes apparently cast light on Cox's conduct during the audit. The Ford notes are therefore discoverable in this case.

Similar to *Alexander* and *United States v. Board of Education of the City of Chicago*, the core of this case is Hyatt's allegations of extensive misconduct by the FTB. Hyatt has complained of a litany of torts and improper activities on the part of the FTB, including the FTB's false promises, fraudulent statements, fraudulent and oppressive actions, extortionist threats, disclosure of highly confidential information, the issuance of facially misleading and authoritative quasi-subpoenas to Nevada residents without authority, and the recent destruction of computer files. These claims are not fanciful; they have survived every conceivable motion by the FTB to avoid a Nevada trial on the merits, including motions to quash, for judgment on the pleadings, and for summary judgment. The documents Hyatt seeks, records of the FTB's activities during the relevant time period and deposition testimony having obvious relevance to Hyatt's claims. The claims for which the discovery is sought relate to the FTB's misconduct. The deliberative-process privilege invoked by the FTB therefore has no application and is being used by the FTB as a means of sequestering highly relevant discovery.

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[124] *Id.* at 700.

[125] *Id.* at 700 (emphasis added).

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2. The FTB's spoliation of evidence also prohibits it from invoking the deliberative-process privilege.

As in *Alexander*, there is evidence of destruction of computer files by the FTB. It is particularly ironic that the Ford documents that are the subject of this deliberative-process privilege issue are the last remnants of computer files that Ford admits in deposition to have destroyed at the direction of FTB attorney Bob Dunn[126] (she later changed her story about Dunn's involvement in the destruction of the computer files after a lunch break with FTB attorneys).[127] The district court admonished the parties not to destroy documents in response to Hyatt's motion for a protective order to prevent the FTB from any further destruction of documents.[128] This Ford-Dunn document destruction occurred in March 1999 [129] *after* the district court's admonition not to destroy documents. The discovery commissioner also admonished the FTB not to destroy documents prior to the Ford-Dunn computer file destruction.[130]

Anna Jovanovich then testified in deposition on May 26, 1999, to the intentional destruction of all protest file materials (except for some telephone notes) in October 1998 in her capacity as a lawyer consulting on this litigation to the California Attorney General. These were the only records of the two-year Hyatt protest, which now totals about three years without a single shred of her work on the protest remaining.[131]

This is not a mere suspicion of destruction of computer files as in *Alexander*, this is a pattern of destruction of documents by FTB in-house attorneys. Hence, for this additional reason, the deliberative-process privilege is not available to the FTB.

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[126] Ford depo., Vol. 2, pp. 262-63.

[127] Ford depo., Vol. 2, pp. 349-50.

[128] 3/3/99 Hearing transcript, at 32. (*See* Exhibit 20, to Vol. IX, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[129] Ford depo., Vol. II, pp. 262-63.

[130] 12/21/98 Hearing transcript, __. (Attached as Exhibit 5, to Vol. II, to the Appendix of Exhibits in Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, of the accompanying Appendix of Exhibits filed with the Supreme Court.)

[131] Jovanovich Depo, Vol. I, pp. 71-72, Vol. II, p. 241.

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E. The deliberative-process privilege does not apply because the present case is not a judicial review of an administrative agency decision.

The deliberative-process privilege is also inapplicable because its use is limited solely to situations where, unlike here, a court conducts direct judicial review of an administrative decision.[132] In cases outside the context of a challenge or review of an agency decision, sound public policy demands that "an agency should not be permitted to invoke the mental process privilege as a shield to permit an agency to develop a body of 'secret, working law.'"[133]

In *RLI*, the court distinguished between a court's review of an administrative agency's ruling (to which the privilege may apply) and cases arising in other contexts (to which the privilege did not apply):

> In every instance in which this privilege has been applied or otherwise relied upon in published authority in this state (including but not limited to the decisions cited by the Department), the privilege was used to prevent inquiry into the mental process underlying an administrative decision that was undergoing direct review by a court. That plainly is not the situation here and this distinction renders the doctrine inapplicable.[134]

The court further reasoned that this distinction was not simply academic, but was supported by sound policy reasons:

> Moreover, we believe there is good reason why the privilege has not been applied in cases like the present ones. As applied in this state, the [deliberative-process privilege] primarily rests upon the appropriate function and scope of judicial review of an administrative decision. The court's function is to review the decision, not the reasoning underlying it; therefore, inquiry into the mental process of the decision-maker is irrelevant, inefficient and thus prohibited.[135]

This is theoretically relevant because the FTB has continually urged this Court to believe that its $22 million "proposed assessment" against Hyatt is not a decision but merely a preliminary proposal for later decision. Of course, in either case it is not relevant to the instant

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[132] *RLI Ins. Co. Group v. Superior Court*, 51 Cal. App. 4th 415, 437, 59 Cal. Rptr. 2d 111 (1996); *In re California Public Utilities Commission*, 892 F.2d 778, 782 (9th Cir. 1989).

[133] *RLI*, 51 Cal. App. 4th at 438.

[134] 51 Cal. App. 4th at 437, emphasis in original.

[135] 51 Cal. App. 4th at 438.

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action because Hyatt is not contesting any assessment of tax, $22 million or otherwise, in this Nevada tort case.

Like the plaintiffs in *RLI,* Hyatt does not ask the trial court to conduct judicial review of any FTB decisions. Rather, Hyatt seeks redress for the tortious acts and misconduct committed by the FTB during its six-year investigation, audit, and surveillance of Hyatt. Unlike the judicial review cases to which the privilege has been applied, the reasoning behind the FTB's misconduct in carrying out the audit in the present case is relevant and directly at issue. As such, the FTB should not be allowed to cloak the highly deleterious auditing and protest processes employed against Hyatt under the veil of the deliberative-process privilege. Because this action is not a judicial challenge of an agency decision, the deliberative-process privilege would be unavailable even if it existed.

F. By its conduct the FTB has waived any deliberative-process privilege.

1. The Ford review notes criticizing the audit conducted by Cox.

The FTB has produced over 3,500 pages of audit workpapers showing day-by-day the FTB's massive intrusion into Hyatt's life and its one-sided and biased selection from these myriad of facts in deciding to tax and punish Hyatt. The FTB has produced over 70 pages of Narrative Reports on Gil Hyatt and two official determinations. In this litigation, the FTB has allowed volumes of testimony regarding its audit and investigation of Hyatt.

For some unknown reason, when Carol Ford was produced for deposition, the FTB would not let Ford testify regarding her work on the Hyatt audit or produce the notes of her work.[136] Yet, the FTB let Sheila Cox testify regarding her conversations and interactions with Ford regarding the audit.[137] The FTB also let Steve Illia, who is in charge of the residency audit group and who is Ford's boss, testify as to his conversations with Ford and other involvement regarding the audit.[138] A dozen other witnesses have also so testified. Indeed, Narrative

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[136] Ford Depo. excerpts. (*See* Exhibit 5, to Vol. II, and Exhibit 8, to Vol. V, of the accompanying Appendix of Exhibits filed with the Supreme Court).

[137] Cox depo., Vol. I, pp. 145-46.

[138] Illia depo., Vol. I, pp. 174-196.

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Reports prepared regarding the 1991 and 1992 tax year audits of Hyatt total 70 pages of detail of the FTB's alleged "deliberative-process" regarding how the audit was conducted and why the FTB came to its conclusion.[139]

By allowing so many others to testify on the same subject matter, the FTB has waived any right to assert the deliberative-process privilege in connection with the testimony and notes of Carol Ford, Penny Bauche, Monica Embry, and others. The FTB cannot capriciously invoke the privilege; and indeed the very capricious nature of the invocation of this privilege (as well as the way it was invoked — at the last minute and without any notice otherwise) indicates that the use of the privilege is for the purpose of stalling the litigation process and concealing the egregious behavior rather than the legitimate protection of the government's deliberative-process.

2. The undisclosed sourcing memos that determined the direction of the Hyatt audit.

Documents FTB 100288 and 100289-100929 consist of (a) a one page cover letter dated August 24, 1995 and (b) an 11 page Memorandum on Sourcing of Royalty Payments dated Aug. 21, 1995 by non-lawyer Monica Embry. The Embry memo is a direct response to a prior memorandum dated May 10, 1995 by non-lawyer Allen Shigemitsu. The Shigemitsu memo was produced by the FTB to Hyatt in 1996. First, the Embry memo was listed on the FTB supplemental privilege log, but asserted only the attorney-client privilege, not the deliberative-process privilege.[140] The FTB therefore has no right to assert the non-existent deliberative-process privilege after-the-fact in regard to the Embry memo.

Moreover, Shigemitsu's memo argued that Hyatt could be taxed on his royalty payments as California source income, as an alternative theory to the FTB's current theory of California residency. Shigemitsu stated in his memo:

> I believe that the royalties received by an inventor, who conceived and perfected the patent on his invention while a resident of California, is taxable to California as royalties paid on rights to use the patent, even if the inventor is no longer a resident of California . . . .

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[139] Cox Narrative Reports.

[140] FTB Writ Petition, Exh. 2, at 3.

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Shigemitsu also produced his legal research which the FTB produced at his deposition, and it was marked as a deposition exhibit without objection.[141]

Shigemitsu, a recipient of the subsequently withheld Embry memo, testified that the Embry memo was in direct response to his memo and asserted a contrary conclusion.[142] Shigemitsu also testified that he then wrote and distributed a reply memo dated June 6, 1996,[143] but this second Shigemitsu memo *has never been identified by the FTB on a privilege log nor produced to Hyatt.*

Having produced the original Shigemitsu memo, the FTB has waived any privilege that might otherwise have existed as to the Embry memo (FTB 100289-292). Regarding the cover letter (FTB 100288), the FTB waived any privilege that might otherwise attach to it and the underlying memo by producing it at Embry's deposition where it was marked as a deposition exhibit, and Embry was questioned about it *without objection by the FTB lawyers.*[144] This was a waiver that could not have been inadvertent.

All privileges have also been waived in regard to the second Shigemitsu memo. For the above reasons and for the additional reason that it was not listed in the privilege log. While it was never identified by the FTB, Shigemitsu acknowledged its existence under oath.[145] Hyatt respectfully requests that this Court affirm the district court's ruling ordering the production of the second Shigemitsu memo.

G. The deliberative-process privilege does not apply because it was not asserted by the head of the FTB after personal consideration.

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[141] *See* Exhibit 12 to the Appendix of Exhibits In Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[142] Shigemitsu depo., p. 56, lns. 4-8. (*See* Appendix of Exhibits In Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[143] Shigemitsu Depo, p. 27, lns. 6-15.

[144] Embry depo., pp. 191-94. (*See* Appendix of Exhibits In Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[145] Shigemitsu depo., p. 27, lns. 6-9.

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The deliberative-process privilege is also inapplicable to the present case because the agency head did not and apparently will not invoke the privilege. Only the agency head may assert the privilege after that officer's personal consideration of the matter.[146] This requirement exists "to insure that the privilege remains a narrow privilege which is not indiscriminately invoked."[147]

Thus, "courts have not permitted staff attorneys, especially those who are participating in the pending litigation, to assert the privilege on behalf of the agency."[148] The privilege may only be invoked if the agency head submits an affidavit or other statement demonstrating that he or she has reviewed the question of privilege and believes that disclosure of the material sought would genuinely threaten the public interest of efficient agency operations.[149]

The cases cited by the FTB confirm, rather than refute, that the deliberative-process privilege can only be invoked by the head of the agency. Citing *Coastal Corp. v. Duncan*,[150] the FTB acknowledges that the deliberative-process privilege can only be asserted by the head of an agency after careful consideration. The FTB, however, fails to mention in the lengthy *Coastal Corp.* discussion affirming that not only must the head of the agency make such a determination, but also that the agency head *cannot* delegate this duty to a subordinate nor can the agency's attorneys make such a determination. *Coastal Corp.* specifically rejected an agency's attempt to use an affidavit from a subordinate of the agency's head, even though the agency head had attempted to delegate that responsibility:

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[146] *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998); *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 517-18 (D. Del. 1980); *see also United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (In the context of military and state secrets privilege, the Court held, "[t]here must be formal claim of privilege, lodged by the head of the department which has control over the matter, after personal consideration by that officer . . . . ").

[147] *Rozet*, 183 F.R.D. at 665; *see also Coastal Corp*, 86 F.R.D. at 518 ("Requiring the agency head to claim the privilege assures the Court . . . that executive privilege has not been lightly invoked by the agency.")

[148] *Rozet*, 183 F.R.D. at 665; *see also Exxon*, 91 F.R.D. at 43 ("[T]he privilege should be invoked with consistency and only after careful consideration. . . . To permit any government attorney to assert the privilege would derogate both of those interests.").

[149] *See Exxon*, 91 F.R.D. at 44; *Coastal Corp.*, 86 F.R.D. at 517.

[150] 86 F.R.D. 514 (D. Del. 1980).

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> Requiring the agency head to claim the privilege assures the court, which must make the ultimate decision, that the executive privilege has not been lightly invoked by the agency, [citation omitted], and that in the considered judgment of the individual with an overall responsibility for the administration of the agency, the documents withheld are indeed thought to be privileged.[151]

The CEO of the FTB is Jerry Goldberg.[152] He is the agency head who is responsible for invoking the deliberative-process privilege. In this case, the FTB belatedly submitted an affidavit from someone other than the head of the FTB — Paul Usedum who subsequently left the FTB — in its attempt to invoke the deliberative-process privilege.[153] The FTB has presented no evidence that Goldberg is even aware that FTB attorneys have been indiscriminately asserting the deliberative-process privilege, much less affirmed its invocations in these discovery proceedings. Furthermore, this oversight cannot be cured by one of his subordinates attempting to "bless" such conduct with an affidavit.

The authorities cited by the FTB therefore establish the FTB's own failure to satisfy this rudimentary requirement for invoking the deliberative-process privilege in this case.

Because the FTB failed to follow the proper and necessary procedures for invoking the deliberative-process privilege, for this additional reason, the FTB is not entitled to withhold discovery on the grounds of this privilege.

H. The cases cited by the FTB do not distinguish, but rather support, Hyatt's arguments regarding the deliberative process privilege.

The cases cited by the FTB also recognize that the deliberative-process privilege is *only* intended for policy-level decisions. They provide no support for the FTB's "second vein" theory. *Maricopa Audubon Soc'y v. United States Forest Service* found that "Exemption 5" to the FOIA recognizes a limited deliberative-process privilege and applied it in that case because

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[151] *Id.* at 518.

[152] Dick depo., p. 26, lines 15-19. (*See* Supplemental Appendix of Exhibits filed in support of Hyatt's post-hearing reply brief, and that appendix is attached as Exhibit 8, to Vol. V, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[153] Declaration submitted by Paul Usedom, attached as Exhibit 22, to Vol. IX, of the accompanying Appendix of Exhibits filed with the Supreme Court.

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[the document at issue] involved "policy making decisions of the Forest Service. . . ."[154] The court further stated that the purpose of the deliberative-process privilege is to ensure the "frank discussion of legal or policy matters."[155]

Maricopa also repeated a cautionary note — from another federal case cited by the FTB — regarding over-classifying documents as "predecisional" for the purpose of protecting them under the deliberative-process privilege:

> Characterizing . . . documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word.[156]

The FTB here is seriously warping the entire deliberative-process privilege in order to avoid producing apparently damning documents that Hyatt has a right to obtain.

Maricopa also extensively quoted and cited a third federal case relied on by the FTB — *National Labor Relations Bd. v. Sears, Roebuck & Co.*[157] *Sears*, in discussing the basis for protecting "predecisional materials," focused on policy decisions made by an agency:

> The public is only marginally concerned with reasons supporting a *policy* which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a *policy* which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency *policy* actually adopted.[158]

The court in *Sears* further explained that "Exemption 5" to the FOIA was intended to protect the "agency's group thinking in the process of working out its policy and determining what its law shall be."[159] Both *Maricopa* and *Sears* are replete with references to "agency policy," making clear that it is "predecisional" documents pertaining to policy-level decisions which may be protected by the deliberative-process privilege. Indeed, the FTB's own

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[154] 108 F. 3d 1089, 1092 (9th Cir. 1997).

[155] *Id.*

[156] *Id.* at 1094, quoting *Coastal States Gas Corp. v. Dept. Of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

[157] 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed. 2d 29 (1975).

[158] 421 U.S. at 152 (emphasis added).

[159] *Id.* at 153.

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opposition recognizes that a "major" purpose of the privilege is "to protect prematurely disclosed policies or opinions before they are officially adopted as agency policy. . . ."[160] The FTB puts forth no authority that expands the deliberative-process privilege beyond policy-level decisions.

Additionally, the FTB does not dispute the fact that its auditors and reviewers in carrying out their duties of assessing taxes have no role in policy making. The highest-ranking FTB official to be deposed in this matter, Doug Dick, has so testified.[161] Anna Jovanovich also testified that auditors are not involved in FTB policy-making.[162]

Because the Ford notes merely relate to Hyatt alone and the FTB's decision to tax Hyatt — which is not a policy-level decision — the notes are not protected by the limited, statutory deliberative-process privilege.

I. Even if the deliberative-process privilege was applicable, this Court should still order disclosure based on Hyatt's substantial need for the documents.

Even if it were assumed for purposes of argument that the deliberative-process privilege *were* applicable to the present set of facts, which it is *not*, the FTB should still be required to disclose the documents that Hyatt seeks. The deliberative-process privilege is a qualified one, and "[a] litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure."[163] The Ninth Circuit has stated that among the factors to be considered in making this determination are: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank

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[160] FTB Post-Hearing opposition brief, page 27, quoting *Coastal States*.

[161] Dick depo., p. 62, lines 5-16.

[162] Jovanovich depo, pp.285-86.

[163] *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *see also In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997); *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998); *Principe v. Crossland Savings, FSB*, 149 F.R.D. 444, 448-49 (E.D.N.Y. 1993); *California First Amend. Coalition v. Superior Court*, 67 Cal. App. 4th 159, 172-173, 78 Cal. Rptr. 2d 847 (1998).

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and independent discussions regarding contemplated policies and decisions.[164] These factors weigh in favor of disclosure in the present case.

First, there can be no dispute that the documents sought are relevant to the matter. The documents comprise part of the FTB's audit files on Hyatt, which serve as a record of the FTB's activities for the six-year period of time in question — activities which form the basis for this suit. *Second*, the withheld information is not otherwise available to Hyatt. Hyatt is unaware of the contents of the redacted materials, and witnesses deposed to date are either unwilling or unable to testify as to the nature of the material withheld. *Third*, since the FTB is a party to this litigation and has a direct interest in the outcome of this suit, disclosure is favored.[165] *Fourth*, because of the extraordinary facts relating to only two audits of the same individual, disclosure of the requested documents in this litigation would not hinder frank and independent discussion regarding contemplated decisions and policies. Unlike cases of judicial review of an agency ruling, which because of their prevalent nature carry a legitimate risk that unlimited disclosure in cases of that type would eventually discourage candid deliberation within the agency, the present case is an atypical action based on government misconduct. "[I]n terms of a balancing test, the public value of protecting identifiable government misconduct is negligible."[166]

This is particularly true because the withheld documents involve an individual's audit with the overwhelmingly relevant issue that he is being accused of fraud by the FTB. Ford's review of the audit files was a major factor in the FTB's imposition of a fraud penalty against Hyatt. Her notes may well shed light on the FTB's fraud directed at Hyatt.

The FTB's interest in non-disclosure is diminished, if not obliterated, by the nature of Hyatt's claims, and is heavily outweighed by Hyatt's substantial need for the requested documents. There are very serious allegations made against the FTB in this case based upon its

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[164] Courts in other circuits have acknowledged a fifth factor: the seriousness of the litigation and the issues involved. *See Sealed Case, supra,* 121 F.3d at 737-38; *Principe,* 149 F.R.D. at 448-49. *Warner, supra,* 742 F.2d at 1161.

[165] *See Principe,* 149 F.R.D. at 449 ("Since the [government] has a direct interest in the outcome of the litigation, disclosure is favored.").

[166] *Alexander v. FBI,* 186 F.R.D. at 177 (D.D.C. 1999).

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treatment of Hyatt. Hyatt has suffered severe consequences due to the FTB's wrongful conduct. Therefore, even if the FTB could establish a *prima-facie* case that the deliberative-process privilege applies, a balancing of the relevant interests would still require the disclosure of the documents sought by Hyatt.

VII. The documents for which the FTB asserted the attorney-client privilege cannot be shielded from production for a myriad of reasons.

The party asserting the attorney-client privilege has the burden of establishing the applicability of the privilege.[167] The privilege is to be strictly construed because "[i]t is . . . an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."[168]

To invoke the privilege, a document must involve a communication between the client and the attorney for the purpose of seeking or providing very important legal advice.[169] "It is also clear that, where the attorney acts as a negotiator or business agent for his client, the confidential communications between them are *not* privileged."[170]

In general, factors which indicate a document is not privileged include:

(1) failing to mark document as confidential or privileged;

(2) sending the document to non-lawyers;

(3) sending the document to people who may be lawyers, but who hold management positions;

(4) the document merely provides updates on ongoing business developments; and

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[167] *Mahoney v. Superior Court*, 142 Cal. App. 3d 937, 940, 191 Cal. Rptr. 425 (1983); *United States v. Wilson*, 798 F.2d 509, 513 (1st Cir. 1986) (If privilege holder "fails to meet his burden as to any one element," the privilege cannot be invoked.)

[168] *SEC v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 680 (D. D. C. 1981) (citation omitted). *See also North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 515 (M.D.N.C. 1986) ("[T]he proponent must provide the court with enough information to enable the court to determine privilege, and the proponent must show by affidavit that precise facts exist to support the claim of privilege . . . .").

[169] *In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, 133 F.R.D. 515, 518 (N.D. Ill. 1990).

[170] *J. P. Foley & Co., Inc. v. Vanderbilt*, 65 F.R.D. 523, 526 (S. D. N. Y. 1974).

(5) the document it fails to provide specific requests for legal advice or *service.*[171]

In this case, the FTB documents for which the FTB asserts the attorney-client privilege are not protected from production because:

i) The FTB's purported in-house attorney – Anna Jovanovich – was *not* acting as an attorney giving legal advice on California law or any other law in reviewing, receiving, or creating any of the documents;

ii) The documents were widely distributed within the FTB to non-attorneys, and any privilege that could have been asserted was therefore waived;

iii) The FTB also waived any privilege that could have been asserted for the documents by having its key witness – its lead auditor Sheila Cox – review the entire audit file, including the documents subject to this motion, to refresh her recollection days prior to her deposition in this matter; and

iv) The crime-fraud exception to the attorney-client privilege is applicable to the documents because Hyatt has set forth a *prima facie* case of the FTB's fraudulent and criminal (relative to California privacy law conduct in regard to the Hyatt audit.

Additionally, the FTB's new argument (not asserted in the trial court) that Section 6254 of the California Government Code supports the assertion of the attorney-client privilege for the subject documents is erroneous for the same reasons explained above that Section 6254 does not support the assertion of the deliberative-process privilege in this case: (i) the FTB's misconduct, not the agency's decision is at issue;[172] and (ii) Section 1798.70 of the California Civil Code specifically supercedes Section 6254. Hyatt's prior discussion on Section 6254 will not be repeated here.

In sum, the district court correctly found that the documents at issue are not protected by the attorney-client privilege.

A. Anna Jovanovich was not acting as an attorney during the FTB audits of Hyatt, but rather had become "an integral part" of the audit process and the FTB's decision making during both the audit and Hyatt's subsequent protest.

A communication is not privileged merely because it was sent by, sent to, or copied to

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[171] *North Carolina Electric Membership Corp.*, 110 F.R.D. at 516-517.

[172] The one case the FTB cited in regard to Section 6254 and the attorney-client privilege – *Roberts v. City of Palmdale*, 5 Cal.4th 363, 20 Cal.Rtpr.2d 330 (1993) – involved a direct challenge to the city planning department's decision on a parcel map approved for development. There was allegation of governmental wrongdoing. Advice from the city attorney regarding the decision on the parcel map was therefore found to be protected by the attorney-client privilege.

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an attorney, *i.e.*, a communication made to or by an attorney acting in some other capacity is not privileged. For example, the seeking or rendering of business advice is not privileged even if sought from or rendered by an attorney. "[T]he critical factor in determining whether a document is protected by the attorney-client privilege is whether legal, as opposed to business, advice is sought and given."[173]

In regard to government agencies, a clear distinction is made between communications and work performed by the agency's attorney that is legal advice as opposed to that which is part of the adjudicative function of the agency. In *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, the First Circuit explained this key distinction in affirming an order requiring the government agency to produce correspondence between the agency and its attorneys:

> The court found as a fact, after in camera inspection of the disputed documents, that outside counsel had become an integral part of the adjudicative decision making process. Based on this factual finding, the court ruled that the attorney-client privilege did not apply because, when an administrative agency engaged in an adjudicative function delegates its responsibilities to outside counsel, then the work product generated by the firm is part of the adjudicative process itself and, hence, beyond the reach of the attorney-client privilege.
>
> [The agency] resists this analysis, pontificating that such a doctrine "would render the attorney-client privilege meaningless where state and local governments employ counsel and rely on their advice." . . . But this trumpeting misapprehends the tenor of the district court's ruling. The attorney-client privilege attaches only when the attorney acts in that capacity. [Citations omitted.] Here, the district court found, in substance, that [the Agency] delegated policymaking authority to its outside counsel to such an extent that counsel ceased to function as lawyers and began to function as regulators.[174]

Where an attorney working at an agency serves dual roles, the burden is on the agency to establish that the communications for which the attorney-client privilege is asserted were made by or to the attorney in her capacity as an attorney as opposed to her other role within the agency. In *Mobil Oil Corp. v. Dept. of Energy*,[175] the court ordered production of communications to and from the Department's General Counsel's office because the Department failed to establish that the communications were made primarily for securing legal

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[173] *United States v. IBM*, 66 F.R.D. 206, 210 (S.D.N.Y. 1974).

[174] *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995).

[175] 102 F.R.D. 1 (N.D.N.Y 1983).

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advice or legal services of some kind as opposed to the dual role of regulator and decision-maker that the General Counsel occupied.[176]

The showing by the agency of the applicability of the attorney-client privilege must be made with specific affidavits establishing that the communication was made by or to an attorney, not disclosed to third persons, and made for the purpose of giving or seeking legal advice.[177] This requirement is even more essential when the documents were generated by the government where many attorneys have functions other than the rendering of legal advice.[178]

In the present case, the district court found that Anna Jovanovich was intimately involved in conducting or supervising the audits and subsequently the Protest. It is for that reason that the district court found Ms. Jovanovich's documents, as opposed to Mr. Gould's, were not protected by the attorney-client privilege. Relevant to the district court's orders, the discovery commissioner explained:

> I think the case of Miss Jovanovich is unusual in that she has certainly played different roles in this litigation. I am wondering why her — how do you distinguish her advice from any kind of business advice that an attorney would be providing to run a business? Here it's the tax business, but how do you distinguish this from any other kind of business advice that would be discoverable as opposed to confidential attorney-client advice? I'm not sure that I see the confidentiality requirement served by the memos and other information supplied by Miss Jovanovich. She just seems to be a cog in the audit process along with all of the other people as opposed to running into some particular legal problem and then getting an opinion and then going on with the audit by, you know, a distinct and separate group of people. Here she seems to be an integral part of the process.[179]

The FTB made no showing in the motion heard by the discovery commissioner, the results of which were adopted by the district court, nor in its papers filed with this Court, to rebut the district court's adoptive findings, and has provided no persuasive evidence that the documents at issue were either received by, reviewed by, or created by Ms. Jovanovich as a result of her role as an attorney for the FTB and thus subject to the attorney-client privilege.

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[176] *Id.* at 9; *see also* page 10, n. 7.

[177] *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 520 (D. Del. 1980).

[178] *Id.* at 521.

[179] 11/ 9/99 Hearing transcript. (*See* Exhibit 4 to the FTB's Writ Petition.)

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B. The FTB's disclosure of all or a part of the subject documents waives the privilege for the entire communication.

The attorney-client privilege does not apply when a document is communicated simultaneously to legal and non-legal personnel. "[N]o protection attaches to a document prepared for simultaneous review by legal and non-legal personnel."[180] "[C]ourts continue to state the rule of implied waiver in absolute form – any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to all information related to the same subject matter."[181] The documents were sent to a number of non-lawyers, and many documents appear to be simply updating lawyers and non-lawyers alike in regard to the status of the audits.

Almost all of the documents at issue are notes regarding the progress of the audits or memos that are directed to non-attorneys or copied to non-attorneys. In such cases, the document itself is not a communication with an attorney seeking legal advice.

The discovery commissioner, for example, stated during the May 5, 1999 hearing (the second of three hearings before the discovery commissioner related to the subject documents) that FTB 100126 contains advice about the processing of Hyatt's tax claim and what should be done. This subject matter relates to the auditing "business" of the FTB, not to the seeking or rendering of legal advice. The analysis is similar for the other memos and notes on the progress and process of the audits. FTB 100126, 100139, 100209, 100218, 100401, and 100908-100909 are notes of progress of the audit, not attorney-client advice. The manner in which an audit is/will be conducted is not advice of an attorney, but is more akin to a manager being informed of a business plan or giving directions to carry out a business plan.

FTB 100288 and 100289-100292 are memos on sourcing. They are not written by an attorney and do not contain legal advice. Also, such documents were copied to many non-lawyers.

The FTB's privilege log did not identify the six people receiving copies of the

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[180] *United States v. IBM*, 66 F.R.D. at 213.

[181] *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988).

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documents. Rather, during the hearing on May 5, 1999 the discovery commissioner identified such individuals. In this regard, the FTB has not sustained its burden in establishing that all of the recipients "were reasonably necessary for the transmission of the communication" and fall within the required veil of confidentiality.[182]

FTB 101634-100645 and 101646-100656 are memos on the fraud penalty. They are not written by the attorney, Anna Jovanovich. Rather, she is copied on the document because she was overseeing the audit. The discussion of when and whether to impose a fraud penalty is not a legal question but is an internal audit question for the FTB, *i.e.,* under what circumstances does the FTB impose a fraud penalty?

Moreover, where an attorney is merely acting as a conduit for information the client intends to disclose, no privilege attaches to such communication.[183] Also, a mere recitation of facts cannot be privileged.[184] The purpose and intent of the FTB's "audit file" is to create a record of the FTB's actions and findings.[185] The audit file must be disclosed to the taxpayer after the audit and once the taxpayer files a "protest."[186]

C. The FTB waived the privilege when Sheila Cox reviewed the entire file to refresh her recollection and prepare for her deposition.

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[182] *SEC v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 681 (D. D. C. 1981) ("First, the communication must originate in confidence and must not be disseminated beyond those persons who need to know its contents.") (citation omitted).

[183] *In re Micropro Securities Litigation*, 1988 WL 109973, Fed. Sec. L. Rep. P 93, 986 (N.D. Cal. 1988); *In re 3 Com Corp. Securities Litigation*, 1992 WL 456813, Fed. Sec. L. Rep. P 97, 339 (N.D. Cal. 1992)("[B]ecause the documents were intended for publication, there was a lack of intent to maintain confidentiality, a requirement of privilege.").

[184] *State Farm Fire and Casualty Co. v. Superior Court*, 54 Cal. App. 4th 625, 639, 62 Cal. Rptr. 2d 834 (1997) (holding that the attorney-client privilege only protects disclosure of communications between the attorney and the client; it does not protect disclosure of underlying facts). *See North Carolina Electric Membership Corp.*, 110 F.R.D. at 517 ("Legal memoranda which summarize case law but contain no application to the client do not contain confidential client information and are thus not privileged.")

[185] FTB 03775. (*See* Exhibit 10 to the Appendix of Exhibits in Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[186] FTB 00852. (*See* Exhibit 11 to the Appendix of Exhibits in Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, of the accompanying Appendix of Exhibits filed with the Supreme Court.)

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The initial motion regarding the subject documents was heard on April 20, 1999 and was brought primarily due to the FTB's blanket waiver of any privileges relating to the subject documents resulting from Sheila Cox's use of and review of the entire audit files to prepare for her deposition.[187]

The week prior to the commencement of her Rule 30(b)(6) deposition, Cox spent two days preparing for the deposition by reviewing the FTB audit files on Hyatt. She spent one day in Sacramento reviewing the *original* files, and another day in Los Angeles reviewing a copy of the file in her attorney's office.[188] Cox acknowledged that the two day review adequately prepared her for her deposition. She testified that reviewing the entire file refreshed her recollection:

> Q. And based upon your review of the FTB file in Sacramento and in Mr. Leatherwood's office do you think that you are adequately prepared to testify today?
>
> A. Yes.
>
> Q. And do you think has that review helped you to refresh your memory about this audit that took place in 1994, '95 and '96?
>
> A. Yes.[189]

D. The specific documents at issue here for which the FTB asserts attorney-client privilege are not privileged for the myriad of reasons set forth above.

Sheila Cox's memos regarding assessment of fraud penalties (FTB 100634-100645 and 100646-101656) do not represent legal advice, but rather relate to how the audit was conducted and the internal FTB policies and procedures, as discussed above. Whether fraud is assessed against a "taxpayer" is not a legal decision or determination, but rather a matter of the FTB's evaluation of its investigative materials and how those materials are viewed under criteria

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[187] Hyatt's initial motion papers and reply papers filed in March and April of 1999 in regard to his motion to compel seeking the documents at issue in this writ petition are attached as Exhibits 1 and 2, respectively, to Vol. I, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[188] Cox depo., Vol. I, pp. 203-207.

[189] Cox depo., Vol. I, 209, lns. 10-18.

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contained within the FTB's internal policies and procedures.

Additionally, the FTB waived any privilege concerning the fraud penalties by allowing Cox to testify at length and without objection as to why and on what basis the fraud penalties were assessed against Hyatt.[190] Other witnesses have similarly testified on the assessment of fraud penalties against Hyatt.[191]

Moreover as discussed above, the Narrative Reports totaling 70 pages discuss how and why the FTB is asserting fraud against Hyatt. The Cox Fraud Memos now at issue discuss the same subject.

The FTB cannot assert that a certain document is privileged after giving voluminous testimony on the topic — particularly where the author of the document is the one who testified concerning its contents, conclusions, findings, etc. The FTB, therefore, waived any privilege which might have attached to the fraud memos (FTB 100634-100645 and 100646-101656).

E. The FTB's comity and choice-of-law arguments fail, again, as they have every time the FTB has raised them during this litigation.

The FTB suggests that the principles of comity and choice of law require the Court to find the documents in question are protected by the attorney-client privilege.[192] The absurdity of the FTB's position is that it acknowledges in its petition that there is no difference between Nevada's law and California's law on the attorney-client privilege.[193] There is no basis to therefore make a "choice of law" and no basis to defer to California's law under the principle of comity. More significantly, the FTB has repeatedly raised comity and choice of law in its ill-fated dispositive motions in the district court. Hyatt extensively briefed these issues in successfully opposing the FTB's motions. Hyatt refers the Court to his opposition brief to the

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[190] Cox Depo, Vol. II, pp. 287-88, Vol. IV, pp. 1032, 1581-82.

[191] Lou Depo, Vol. 3, p. 190, lns. 8-17. (Attached to Hyatt's Appendix of Exhibits in Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[192] FTB Writ Petition, p. 17, lns. 5 - 12.

[193] *Id.*, p. 16, ln. 17 - p. 17, ln. 3.

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FTB's summary judgment motion.[194] The FTB's reference to comity and choice-of-law is no more appropriate here – and the FTB cites no authority in support of its bald reference to comity and choice-of-law – than they were in the FTB's ill-fated dispostive motions.

F. The crime-fraud exception to the attorney-client privilege also prevents the FTB from asserting the attorney-client privilege.

In addition to the FTB's misapplication and waiver of the attorney-client privilege, the FTB perpetrated its fraud and other torts in substantial part by using the material for which it now asserts the attorney-client privilege. The material is therefore discoverable pursuant to the crime-fraud exception. Hyatt sets forth in the accompanying "Appendix re *Prima Facie* Showing of the FTB's Fraudulent Conduct" the *prima facie* showing necessary to invoke the crime-fraud exception. Below, Hyatt summarizes the law regarding the crime-fraud exception and outlines the *prima facie* showing set forth in the accompanying appendix.

1. The crime-fraud exception applies here.

Nevada has adopted the crime-fraud exception as codified at NRS § 49.115, which provides:

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

California has also enacted a crime-fraud exception with nearly identical wording, which provides an exception to the privilege "if the services of the lawyer were sought or obtained to enable or to aid anyone to commit or plan to commit a crime or fraud."[195] California case law interpreting the crime-fraud exception is therefore highly relevant to interpretation of Nevada's statute. A leading California case on the subject held:

> To invoke the Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a prima facie showing that the services of the lawyer "were sought or obtained"

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[194] *See* pages 50-62 of Hyatt's Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[195] Cal. Evid. Code § 956.

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> to enable or to aid anyone to commit or plan to commit a crime or fraud.[196]

In making a determination as to whether the crime-fraud exception is applicable, the court need only consider whether the moving party has made a *prima facie* showing. The court need not even consider any counter evidence presented by the opposing party.[197] Further, the showing by the moving party to establish a *prima facie* case of the crime-fraud need not establish wrongdoing beyond a reasonable doubt, but merely that the moving party had established each of the elements of the crime-fraud asserted.[198]

Additionally, parties seeking to invoke the crime-fraud exception need not establish that the attorney consulted was aware of the illicit purpose of the advice sought by his or her client:

> But the lawyer's innocence does not preserve the attorney-client privilege against the crime-fraud exception. The privilege is the client's, so "it is the *client's* knowledge and intentions that are of paramount concern to the application of the crime-fraud exception: the attorney need not know anything about the client's ongoing or planned illicit activity for the exception to apply."[199]

Since the crime-fraud exception requires only proof of a plan to commit a crime or fraud, Hyatt need not prove every element. In particular, Hyatt need not prove actual reliance or damages:

> We conclude that because section 956 applies where an attorney's services are sought to enable a party to plan to commit a fraud, the proponent of the exception need only to prove a false representation of a material fact, knowledge of its falsity, intent to deceive, and the right to rely.[200]

One issue that arises is the proximate relationship between the questioned communication and the crime or fraud. Nevada and California statutes do not require the

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[196] *State Farm Fire and Cas. Co. v. Superior Court,* 54 Cal. App. 4th 625, 643, 62 Cal. Rptr. 2d 834 (1997).

[197] *In re Grand Jury Proceedings (Doe),* 983 F.2d 1076 (9th Cir. 1993).

[198] *In re Grand Jury Proceedings,* 87 F.3d 377, 381 (9th Cir.), *cert. denied,* 519 U.S. 945 (1996) (holding that crime-fraud exception does not require a completed crime or fraud, but rather only the consultation of an attorney in contemplation of such crime-fraud and that the moving party need not establish the crime or fraud beyond a reasonable doubt).

[199] *United States v. Chen,* 99 F.3d 1495, 1504 (9th Cir. 1996), *cert. denied,* 520 U.S. 1167 (1997) (emphasis added); *see also In re Grand Jury Proceedings,* 87 F.3d at 379.

[200] *BP Alaska Exploration, Inc. v. Superior Court,* 199 Cal. App. 3d 1240, 1263, 245 Cal. Rptr. 682 (1988).

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purpose of the attorney-client communication to be commission of a crime or fraud in order to invoke the exception. It is sufficient under the Nevada and California statutes that the attorney's services "were sought or obtained to enable or aid" the client to commit or plan to commit a crime or fraud:

> A finding that the privileged material "reasonably relates" to the subject matter of the crime or fraud should suffice. . . . In this case, NWEC proved that the BPAE communications with counsel were made as part of the investigation that resulted in the fraudulent December 23 letter. This established the reasonable relationship between the subject matter of the fraud and the privileged communications.[201]

A U.S. District court interpreting a very similar Kansas statute arrived at the same conclusion:

> The Court holds that the memoranda in question must have a reasonable relation to the ongoing fraud to be discoverable under the crime or fraud exception.[202]

2. A sham or fraudulent governmental proceeding is a basis for invoking the crime-fraud exception.

Most significant for this case, the crime-fraud exception applies with equal force to government agencies. When an attorney's advice is related to an allegedly wrongful use of agency process, the attorney-client privilege is vitiated.[203]

In *Recycling Solutions*, plaintiff Recycling Solutions, Inc. ("RSI") lost a bid on a government contract offered by defendant D.C. Department of Public Works ("Public Works"). RSI believed that Public Works rejected its bid based on race or ethnic discrimination, and RSI appealed to the D.C. Contract Appeals Board. The Appeals Board upheld the appeal and directed Public Works to award the contract to RSI. Rather than do so, Public Works appealed the directive of the Contract Appeals Board and allowed another bidder to perform the contract. RSI brought suit alleging that Public Works's appeal was a calculated wrongful scheme to

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[201] *Id.* at 1268.

[202] *In re A. H. Robins Company, Inc.*, 107 F.R.D. 2, 15 (D. Kan. 1985).

[203] *Recycling Solutions, Inc. v. District of Columbia*, 175 F.R.D. 407, 410 (D.D.C. 1997).

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maintain Public Works's discriminatory award. In discovery, RSI sought documents related to Public Works's appeal, which Public Works denied based upon the attorney-client privilege.[204] RSI contended that the documents were discoverable under the crime-fraud exception because Public Works had employed the services of counsel in furtherance of the improper appeal.[205] The court agreed, and in ordering the production of documents related to Public Works's initiation and prosecution of its appeal, the court stated:

> The heart of plaintiffs' claims on these issues is that the former Director of [Public Works], in her official capacity, participated in an unlawful conspiracy with her co-defendants to discriminate against plaintiffs because of their race or ethnicity, and to that end, involved them in protracted and duplicitous litigation to disguise the true nature of the conspiracy. If she consulted with an attorney to facilitate the commission of the overt acts necessary in furtherance of such a conspiracy, the evidence of it may not be suppressed or concealed behind a privilege of any description known to this Court to apply upon the facts of this case.[206]

Here, the FTB's use of its attorneys to further its sham audit which had a predetermined purpose and conclusion are similarly abhorrent. It amounted to nothing less than an unlawful and fraudulent conspiracy to extort money from Hyatt. Advice of counsel, to the extent that it can even be categorized as legal advice, sought in order to perpetrate such conduct, cannot then be protected by asserting the attorney-client privilege.

3. Spoliation of evidence is a basis for invoking the crime-fraud exception.

Where, as here, there is spoliation of evidence, particularly with an attorney's knowledge and consent, the attorney-client privilege cannot be used to shield such conduct.

In *In re Sealed Case*,[207] the Synanon Church undertook "a massive and systematic program to destroy and alter subpoenaed evidence or evidence sought pursuant to civil discovery requests."[208] As part of a grand jury investigation, the government subpoenaed

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[204] *Id.* at 408.

[205] *Id.* at 409.

[206] *Id.* at 410 (emphasis added).

[207] 754 F.2d 395 (D.C. Cir. 1985).

[208] *Id.* at 400.

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Synanon's attorneys to testify regarding Synanon's alleged violations of federal law. The court held that the testimony was not protected under the attorney-client privilege.[209] The court reasoned that regardless of whether the attorneys knowingly participated in the document destruction program, allegations that the attorneys' representation and advice assisted Synanon in carrying out its wrongful scheme warranted application of the crime-fraud exception.[210]

The Ninth Circuit cited *Sealed Case* with approval in *United States v. Laurins*,[211] holding that "[o]bstruction of justice is an offense serious enough to defeat the privilege."[212]

The FTB's spoliation of evidence in this case with the assistance and direction of its in-house counsel is detailed below. The district court has considered significant argument and numerous discovery motions regarding the FTB's "sanitization" of its files. Such spoliation of evidence engaged in by the FTB's in-house counsel is sufficient grounds by itself in which to invoke the crime-fraud exception to the attorney-client privilege.

4. Discovery obtained to date by Hyatt establishes a *prima facie* showing of fraudulent conduct executed by the FTB with the advice of its counsel.

The fraud engaged in by the FTB consisted of both its one-sided, manipulated audits of Hyatt and its false promises and misrepresentations successfully calculated to induce Hyatt's cooperation in providing the FTB with highly sensitive and confidential material which the FTB would supposedly review and maintain in strict confidence. Moreover, the FTB and its in-house counsel engaged in, and continue to engage in, spoliation of evidence in an apparent and ongoing effort to cover-up their misconduct.

i. The one-sided fraudulent audit.

The FTB's auditor, Sheila Cox, fully acknowledged in deposition testimony that she focused exclusively on information obtained which could be construed as supporting the FTB's position. She completely and purposely ignored documentary evidence and witness statements

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[209] *Id.* at 400-402.

[210] *Id.*

[211] 857 F.2d 529, 540 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

[212] *See also State Farm Fire and Cas. Co.*, 54 Cal. App. 4th at 643-646.

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directly contrary to the FTB's preordained conclusion — that Hyatt was a California resident longer than he stated in his tax returns.[213] Cox neither investigated nor considered the most relevant information concerning the linchpin for tax assessment — residency. If she had, she would have had no choice but to conclude that Hyatt was a Nevada resident from September 26, 1991 to the present.

The FTB conducted a biased, pre-ordained "investigation" whereby the auditor, Sheila Cox, acknowledged in deposition that she destroyed key evidence that supported Hyatt (*e.g.*, her contemporaneous handwritten notes and computer records of bank account analysis).[214] The FTB disregarded, refused to investigate, ignored, and "buried" the facts favorable to Hyatt which it uncovered during its invasive audit. For example, the FTB simply ignored:

- Hyatt's current neighbors in Nevada who supported his Nevada residency claim;
- Hyatt's former neighbors in California who told of his move to Nevada;
- Hyatt's friends and business associates who knew of his move to Nevada;
- Hyatt's adult son who knew of his move to Nevada;
- Hyatt's 300 Nevada credit card charges;
- Hyatt's Nevada rent, utilities, telephones, and insurance payments;
- Hyatt's Nevada voter registration and driver's license;
- Hyatt's Nevada home purchase offers and escrow papers; and
- Hyatt's Nevada religious, professional, and social affiliations.[215]

The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages which supposedly detail the evidence in favor of its conclusion concerning Hyatt's residency as well as a basis for asserting a fraud penalty against Hyatt.[216] Based on the depositions conducted to date, Hyatt has learned that, in compiling such Narrative Reports, the FTB ignored

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[213] Hyatt Protest Letter. (*See* Exhibit 14 to the Cowan affid., and the Cowan affid. is attached as Exh. 15, to Vol. VIII, of the accompanying Appendix of Evidence filed in the Supreme Court.)

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

[215] Hyatt Protest Letter.

[216] Cox Narrative Reports.

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substantial evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt and contrary to the FTB's preordained conclusions.[217]

In preparing its Narrative Reports, the FTB never spoke with or interviewed Hyatt. The FTB also ignored and failed to interview the following individuals having information favorable to Hyatt: Grace Jeng, his long-time assistant; his adult son, Dan; and Barry Lee, his long-time business associate.[218] Instead, the FTB audited Miss Jeng and Barry Lee[219] to try to intimidate them and separate them from Hyatt.

Instead of speaking with Hyatt's son, Dan, with whom Hyatt had a close ongoing relationship and who visited with Hyatt in Las Vegas during April 1992, and at many times thereafter, the FTB interviewed and obtained "affidavits" from Hyatt's bitter and long-time divorced ex-wife, his estranged daughter, and his estranged brother. His ex-wife and estranged brother had filed or forced Hyatt into a number of frivolous, and on their part, unsuccessful litigations. Nevertheless, these three "affidavits" obtained by the FTB from such estranged relatives were the cornerstone of its case and were prominently featured in its Narrative Reports.[220] In addition, such "affidavits" were neither affidavits nor given under oath.[221] More importantly, the statements set forth in such "affidavits" were nothing more than vague and general attacks on Hyatt and provided no specific evidence supporting the FTB's residency conclusion despite the frequent references and significant reliance on the "affidavits" in the narrative report. The only specific statements set forth in such "affidavits" are by Hyatt's estranged daughter, Beth, and yet she specifically wrote at the end of her statement that she could not be held to what is stated in such affidavit in a court of law. This tragic estrangement, the product of a long-standing divorce, produced wild accusations neither credible nor subject to proof. The FTB both exploited and overlooked the obvious bias motivating its "key" witness.

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[217] Hyatt Protest Letter; Cox depo., Vol. V, pp. 1181, 1187-1188.

[218] Cox depo., Vol. I, 29, 168-169, 181.

[219] Cox depo., Vol. VI, p. 1460-61, Vol VIII, p. 2021.

[220] Cox Narrative Reports.

[221] Cox depo., Vol. III, p. 756, lns. 18-25.

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In other words, the cornerstone of the FTB's case crumbles upon even mild cross-examination.

ii. The $9 million fraud penalties and the FTB's urgency to settle.

Based upon its trumped up "investigation," the FTB not only assessed Hyatt taxes for a period after which he had moved to Nevada, it assessed Hyatt penalties for alleged fraud in regard to his Nevada residency. The penalties amounted to an additional 75% of the alleged taxes owed. Discovery has established that the FTB teaches its auditors to use the fraud penalty as a "bargaining chip" to obtain an "agreement" from the taxpayer to pay the assessed tax.[222]

Hyatt has alleged in his First Amended Complaint that the FTB instigated the audits of his tax returns to coerce a settlement from him and that Jovanovich boldly "suggested" to Hyatt's representative that settling at the "protest stage" would avoid Hyatt's personal and financial information being made public.[223] Hyatt has now confirmed in deposition testimony that Jovanovich, the FTB's protest officer, told Hyatt's tax representative that, if he did not settle at the outset of the protest stage,[224] it would be necessary for the FTB to engage in extensive additional requests for information from Hyatt as that is its practice "in high profile, large dollar" residency audits. In fact, Ms. Jovanovich testified that she told Hyatt's tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "of many unrelated facts and questions" related to Hyatt.[225] In short, Hyatt was told to settle this tax case or the privacy and confidentiality which he so valued would be lost and trumpeted from the housetops.

Jovanovich also testified that she understood Hyatt had a unique and special concern regarding his privacy.[226] Jovanovich testified that this was a topic of discussion among FTB

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[222] Ford depo., Vol. I, p. 128-29.

[223] First Amended Complaint, ¶ 56(g). (*See* Exhibit 1 to the FTB's Writ Petition.)

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

[225] Jovanovich's June 1997 note re Cowan telephone conversation. (*See* exhibits attached to Hyatt's Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, of the accompanying Appendix of Evidence filed with the Supreme Court.)

[226] Jovanovich depo., Vol. I, p. 125, lns. 20-24.

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auditors, such that the residency unit of the FTB fully understood Hyatt's unique desire for privacy and confidentiality.[227]

iii. The FTB's misrepresentations and false promises of confidentiality.

The FTB at the outset of its investigation made statements and freely gave assurances to Hyatt and his representatives that material turned over to the FTB would be kept strictly confidential. In that regard, the FTB made the following misrepresentations and false promises regarding confidentiality.

On June 17, 1993, at the commencement of the audit, FTB auditor Mark Shayer sent an initial contact letter to Gil Hyatt in Las Vegas, Nevada.[228] This document promised that Gil Hyatt could expect during an FTB audit:

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

Each of the above promises to Hyatt were false and violated by the FTB without hesitation or regard for the damage inflicted upon its victim.

In the same document, the FTB sent Hyatt its standard Privacy Notice, FTB Form #1131,[229] that represented to Hyatt that the FTB was subject to the California Information Practices Act of 1977 and was required to disclose "why we ask you for information." The FTB then disclosed that it might share information with the IRS and other governmental agencies, *but it omitted any mention that the FTB intended to also give the information to non-governmental third parties or even the general public at the discretion of its auditors.*

FTB auditors, including Sheila Cox, gave Hyatt's representatives, Mike Kern and

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[227] Jovanovich depo., Vol. 1, p. 126, lns. 4-8.

[228] *See* exhibits attached to Hyatt's Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11,to Vol. VII, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[229] *Id.*

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Eugene Cowan, promises and assurances of ***confidential*** treatment repeatedly during the audit. These were given both orally and in writing. For example, in his April 30, 1996 letter, Eugene Cowan referred to the fact that the FTB "has been fully informed of the taxpayer's desire to keep this matter confidential." Mr. Cowan further complained of the FTB's breach of "the confidential relationship that the FTB promised to maintain in handling this matter."[230]

Sheila Cox represented to Hyatt's tax attorney, Eugene Cowan, that the FTB followed the dictates of the FTB Security and Disclosure Manual. She delivered excerpts of that manual to him to induce him to arrange for her to copy confidential documents in Hyatt's possession. The Security and Disclosure Manual has many provisions designed to protect the privacy of taxpayers and the confidentiality of taxpayers and threatens criminal action for violation by FTB employees.[231]

The FTB holds itself out to taxpayers in its Mission Statement, its Strategic Plan, and in communications with the public to be fair and impartial in its dealings with taxpayers. It professes not to guard the revenue, but to interpret the law evenly and fairly with neither a state nor a taxpayer point of view. FTB personnel have testified to this in depositions.[232]

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

- intentionally disclosed Hyatt's Social Security Number to over 40 individuals and entities in California and Nevada, including four newspapers;
- intentionally disclosed Hyatt's secret Las Vegas address to third parties, including utility companies and newspapers in Las Vegas;
- intentionally disclosed portions of his confidential patent licensing agreements to Fujitsu and Matsushita, and the fact that the FTB was investigating Hyatt on taxes;

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[230] FTB 103584. Attached as Exhibit 17 to the Cowan Affid., and the Cowan Affid. is attached as Exhibit 15, in Vol. VIII, to the accompanying Appendix of Exhibits filed with the Supreme Court.

[231] Attached as Exhibit 4 to the Cowan Affid., and the Cowan Affid. is attached as Exhibit 15, in Vol. VIII, to the accompanying Appendix of Exhibits filed with the Supreme Court.

[232] Illia depo., Vol. II, p. 303, lns. 14-22.

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- intentionally disclosed to Hyatt's Las Vegas neighbors and his former La Palma neighbors that he was under investigation;
- intentionally disclosed to six Dr. Shapiros selected from the phone book that Hyatt was being investigated by the FTB;
- intentionally sent the 1991 Notice of Proposed Assessment (NPA) for several million dollars to Hyatt's former address, even though the auditor had the correct address (this misaddressed NPA was never found); and
- recklessly handled or deliberately mishandled the audit file and misplaced, lost, and destroyed, crucial parts of the audit file, including evidence that a California judge had declared Hyatt to be a Nevada resident and the Hyatt patent application and financial information regarding million dollar patent licenses with Japanese companies.

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

iv. The spoliation of evidence by FTB lawyers.

The FTB now tries to shield and literally bury its fraudulent, sham proceeding by assertions of attorney-client privilege. In addition to Jovanovich's involvement as set forth above, Jovanovich has recently testified that prior to retirement from the FTB in June of 1998, she was a member of the FTB litigation team defending this action.[233] Subsequent to her retirement, she has been retained by the FTB as a consultant to assist and handle the litigation.[234]

Jovanovich testified that after her retirement from the FTB, she maintained handwritten notes regarding her work on, and her role in, the Hyatt audits. These notes represent the only work done on the protest to date. Some of these notes were produced at her deposition. She testified, however, that she destroyed most of her notes in October of 1998 — approximately eight months *after* the litigation had started and many months after she began working as a lawyer on the litigation team defending the FTB.[235] In other words, despite being an attorney and assisting in the defense of this litigation, she directly engaged in spoliation of evidence highly relevant to this case.

Moreover, Jovanovich's testimony is not the only testimony that relates to spoliation of

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[233] Jovanovich depo., Vol. II, pp. 65-66.

[234] Jovanovich depo., Vol. II, pp. 8-10.

[235] Jovanovich depo., Vol. I, pp. 71-79.

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evidence. Carol Ford, the FTB reviewer on the Hyatt audits, testified that she printed out a hard copy of her notes from her computer, but then deleted such notes from her computer hard drive. She did this in approximately March of 1999 -- over a year after the litigation had commenced and after she had been served with a notice of deposition and request for documents. Incredibly, *Ford testified that she destroyed her computer records at the instruction of an FTB in-house attorney, Bob Dunn.*[236] During the same deposition, after a lunch break and discussion with FTB counsel, Ford offered to change her testimony to indicate that Dunn had not instructed her to destroy such notes. Nevertheless, Miss Ford's initial testimony was clear and unambiguous on this point, and the fact that she was instructed during the lunch break to recant her testimony is obvious.

In short, the FTB's fraudulent and sham audit of Hyatt (the largest residency audit ever), and assessment of now over $22 million in taxes, and penalties, and interest against him was assisted by the FTB in-house lawyers who are now apparently trying to cover up the fraud by spoilage of documents.

Hyatt's more detailed summary of evidence setting forth a *prima facie* showing of fraud and tortious conduct on the part of the FTB is set forth in the accompanying "Appendix re *Prima Facie* Showing of the FTB's Fraudulent Conduct." The crime-fraud exception therefore provides an alternative ground, in addition to those set forth in the above sections, for the Court to order production of the documents and testimony of witnesses now being withheld by the FTB based on the attorney-client privilege.

VIII. The work-product doctrine does not protect FTB 07381 from production.

In regard to one document (FTB 07381), the FTB asserts attorney work-product in addition to the attorney-client privilege. This document apparently pertains to conversations Ms. Jovanovich had on tax sourcing issues while working on the Hyatt audits.

As set forth above, the discovery commissioner found that Ms. Jovanovich was not acting as an attorney in regard to her role in the audits. Her "work" is therefore also not entitled

[236] Ford Depo, Vol. II, pp. 262-64.

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to protection under the work product doctrine for the same reason set forth above in regard to the attorney-client privilege.

Additionally, as discussed above, the FTB has waived any privilege that might have existed on the sourcing issue by its disclosure of the "first" Shigemitsu memo on such subject. This first memo set forth a position against Hyatt. The FTB can not now block discovery of documents contrary to or supporting its position on the sourcing issue. The district court's order requiring production of FTB 07381 was therefore correct.

IX. The district court properly ordered that the scope of discovery in this action is "the entire audit and assessment process performed by the FTB that was and is directed at" Hyatt.

The FTB's writ petition references and challenges "Finding No. 4" by the discovery commissioner that the scope of discovery in this action is "the entire audit and assessment process performed by the FTB that was and is directed at" Hyatt.[237] The discovery commissioner's explanation during the November 9, 1999 hearing best answers and rebuts the FTB's challenge:

> *Commissioner:* [I]f there were any *attempts to obtain taxes in some kind of fraudulent fashion* as I believe would be the case if the attempt would have been made to say, you know, *if you don't pay we are going to assess a fraud penalty on you, even though there is no fraud that we can determine legally, we are going to assess that fraud penalty on you if you don't settle with us.* Now, in my view that would be an improper way of collecting taxes, but I think that you should be able to explore and find out whether or not that in fact happened. If it did or if it did not happen.[238]
>
> ...
>
> I'm not sure however, Mr. Leatherwood, that in the zeal to collect taxes which the state of California is positive they are entitled to, and I don't think that's too strenuous of a word to use. I think that *all the investigation here that has been conducted has led a number of people in the tax collecting process* to be as competent as you are and as warm to the subject as you are, *that taxes are owed, that that thereby justifies procedures that may not be strictly within the rules to collect those*

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[237] FTB Writ Petition, p. 8, ln. 17 - p. 9, ln. 3.

[238] 11/9/99 Hearing transcript, p. 57, ln. 20 — p. 58, ln. 8 (emphasis added). (*See* Exhibit 4 to the FTB's Writ Petition.)

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taxes.

Mr. Leatherwood (the FTB's lead counsel): That didn't occur here.

Commissioner: Well, then *I think we need to find out what was done exactly and then let the jury or the judge decide if that occurred or not.*

Mr. Leatherwood: Well, they have taken 20-something depositions. They haven't found anything yet, and now –

Commissioner: Perhaps it's in these documents you don't want to turn over.

Mr. Leatherwood: Well, you have had a chance to review those documents.

Commissioner: ***I don't think you want my opinion on it Mr. Leatherwood.***[239]

The discovery commissioner concluded by stating:

Commissioner: I think everybody is in agreement there were only some few certain acts done in Nevada, investigation by the FTB on premises, so to speak, here as well as inquiring with various Nevada companies and other things, *but that in my view is only a part of the process* of collecting the tax from Mr. Hyatt, *and the process is what is under attack here*, and I think in my view, particularly *a state agency should feel that its process should be open to exploration in a case such as this* so that we have an open form of government.[240]

A. Nevada law allows a broad scope of discovery.

The discovery commissioner's finding, and the district court's subsequent order, is consistent with the broad scope of discovery permissible under Nevada law. Under the Nevada Rules of Civil Procedure, any matter that would bear on, or reasonably could lead to other matters that could bear on, any issue that is or may be in the case is relevant and discoverable.[241] To afford each party a fair opportunity to present its case at trial, the trial court must permit the parties to scrutinize all relevant evidence.[242]

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[239] *Id.* at p. 59, ln. 17 — p. 60, ln. 16 (emphasis added).

[240] *Id.* at p. 73, ln. 22 — p. 74, ln. 8 (emphasis added).

[241] *See Harrison v. Falcon Products, Inc.*, 103 Nev. 558, 746 P.2d 642 (1987); *Greenspun v. Eighth Judicial District Court*, 91 Nev. 211, 533 P.2d 482 (1975) both citing Nev. R. Civ. Proc. 26(b)(1).

[242] *Hickman v. Taylor*, 329 U.S. 495 (1947).

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The FTB has made clear its "position" that discovery in the underlying action should be limited to "Nevada acts." *The FTB, however, cites to no authority that limits discovery, or even suggests a limitation on discovery, based on a state's borders.* Such a proposition is absurd, particularly in a tort action alleging invasion of privacy and fraud, among other claims, where the acts constituting the torts may have taken place in multiple locations and may have been directed from one state to another. Moreover, the damage from the torts may have been experienced in a state separate from where the tortious conduct commenced.

B. Hyatt's tort claims cannot be "split."

Hyatt's tort claims cannot be split and divided by state borders such that the Nevada courts would have jurisdiction only over tortious acts in Nevada, but not the tortious conduct occurring in California that was directly related to and a proximate cause of the injuries suffered by Hyatt in Nevada. Indeed, as was the case in *Mianecki* — the controlling Nevada authority in regard to this case, the tortfeasor need not even have entered Nevada to be held liable for torts causing injury within Nevada. But in this case, the FTB did enter Nevada and engaged in tortious conduct inside and outside of Nevada causing injury to Hyatt in Nevada. It is hornbook law that a cause of action cannot be "split" with parts of a claim heard in one state while other parts of the claim are heard in another state.

> The wrongful act of defendant creates the plaintiff's cause of action. Policy demands that all forms of injury or damage sustained by the plaintiff as a consequence to the defendant's wrongful act be recovered in one action rather than in multiple actions.[243]

The FTB's rather bizarre and unprecedented argument, that the Court can only consider Nevada acts to determine the FTB's liability for the tort claims, would require that an aggrieved party must sue a tortfeasor in multiple locations in order to obtain full recovery. Again, there is no legal precedent for the FTB's attempted splitting of Hyatt's tort claims along state boundaries.

The FTB's bizarre argument that the torts should be divided by state boundary is contrary to the great weight of legal authority, which holds that a party can be held liable in the

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[243] *Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) (citing *Reno Club, Inc. v. Harrah*, 70 Nev. 125, 260 P.2d 304 (1953)).

forum state for the effects, *i.e.* the injuries to a resident in the forum state, caused by tortious conduct which took place *outside* the forum state.[244] Nevada courts are in accord.

Ridgon v. Bluff City Transfer & Storage Co. held that "since the defendants' acts allegedly injured [plaintiff] in Nevada, 'it is beyond dispute that [Nevada] has a significant interest in redressing injuries that actually occur within the state.'"[245] *Ridgon* explained that the Nevada Supreme Court has "previously held that physical presence within Nevada is not required" where consequences were suffered in Nevada.[246] *Ridgon* also cited the United States Supreme Court's holding that a defendant is liable in the forum state "whose only 'contact' with the forum was to knowingly cause injury in the forum state through a foreign act."[247]

The conduct of which Hyatt complains, regardless of where each act took place, is more than sufficient to hold the FTB liable in Nevada because Hyatt's injury occurred in Nevada. For example, *Fegert, Inc. v. Chase Commercial Corp.*[248] found it appropriate to hold a defendant liable in Nevada for claims arising from the alleged "harassment and pressuring" of a Nevada resident even though the defendant's only Nevada contact was hiring the attorneys who allegedly engaged in the harassment and pressuring.[249] *Fegert* cited prior U.S. Supreme Court precedent that "emphasizes the significance of the place where the brunt of the harm was suffered in deciding the propriety of exercising jurisdiction over an out of state defendant."[250] Causing harmful consequences in Nevada is sufficient grounds for holding a defendant liable in Nevada.[251]

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[244] *See, e.g., Calder v. Jones*, 465 U.S. 783, 787 (1984).

[245] 649 F. Supp. 263 (D. Nev. 1986) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984).)

[246] 649 F. Supp. at 266 (citing *Burns v. Second Jud. Dist Ct.*, 97 Nev. 237, 627 P.2d 403 (1981) and *Certain-Teed Products Corp. v. Second Jud. Dist. Ct.*, 87 Nev. 18, 479 P.2d 781, 784 (1971)).

[247] 649 F. Supp. at 267 (citing *Calder v. Jones*, 465 U.S. 783, 789-90 (1984)).

[248] 586 F. Supp. 933 (D. Nev. 1984).

[249] 586 F. Supp. at 936.

[250] 586 F. Supp. at 936 (citing *Calder*, 104 S.Ct. at 1487).

[251] *Jarstad v. Nat. Farmers Union Property and Casualty Co.*, 92 Nev. 380, 387, 552 P.2d 49 (1976).

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Courts in other states, including the FTB's home state of California, have held it sufficient to assert jurisdiction over non-residents who never set foot in the forum state but sent letters or placed telephone calls into the forum state causing injury to a resident in the forum state.

> [A]n individual may have contact with the forum state where he causes another to act whether or not the individual has himself contacted the state. Thus, Comment a to section 37 of the Restatement (2d), Conflict of Laws states: "A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere. The state may exercise judicial jurisdiction on the basis of such effects over the individual who did the act. . . ."[252]

Hyatt has found no reported case in which a court, with personal jurisdiction over a defendant for the claims alleged, limited the discovery, the evidence admissible at trial, or the recovery of the plaintiff by state boundaries.

C. Having personal jurisdiction over the FTB, the trial court has authority to provide full relief to Hyatt for the tort claims alleged regardless of where the tortious conduct occurred, and therefore discovery cannot be limited by state boundaries.

It is hornbook law that a court with personal jurisdiction over a defendant has full authority to address the claims at issue.

The Nevada Supreme Court held long ago in *Sweeney v. G.D. Schultes*[253] that once Nevada has personal jurisdiction over a non-resident defendant "the court [has] jurisdiction to proceed and grant any relief to which the plaintiff [is] entitled. . . ." *Sweeney* found that Nevada had jurisdiction over defendants who had made a general appearance despite an apparent mistake in the form of the summons. While the *Sweeney* decision dates back to 1885, the law

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[252] *Seagate Technology v. A.J. Kogyo Co.*, 219 Cal. App. 3d 696, 268 Cal. Rptr. 586, 589 (1990). *See also Schlussel v. Schlussel*, 141 Cal. App.3d 194, 198, 190 Cal. Rptr. 95 (1983) ("[P]lacing of criminal telephone call to California no different than shooting a gun into the state...."); *Rusack v. Harsha*, 470 F. Supp. 285, 292 (M.D. Pa. 1978) (holding that sending of defamatory letter into state and causing injury in state subjects defendant to jurisdiction); *Stifel v. Lindhorst*, 393 F. Supp. 1085, 1088 (M.D. Pa.), *aff'd*, 529 F.2d 512 (3d Cir. 1975), *cert. denied*, 425 U.S. 962 (1976) (holding that sending of defamatory letter into state and causing injury in state subjects defendant to jurisdiction).

[253] 19 Nev. 53, 57, 6 P. 44, *aff'd*, 19 Nev. 53, 8 P. 768 (1885).

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has not changed.[254]

Recent pronunciations on the issue from courts in other jurisdictions are entirely consistent with *Sweeney*.

> [T]he relief sought in the complaint is not the guiding factor because if jurisdiction attaches at all under the [long-arm] statute, the nonresident is before the Court for any and all relief that might be necessary to do justice between the parties by virtue of the fact that the jurisdiction conveyed by the statute is in personam jurisdiction.[255]

Federal courts also have concluded that, so long as they have personal jurisdiction over the defendant, the non-residency of the defendant is of no consequence and in no way limits the court's authority to grant relief.[256]

There is simply no authority that would allow the FTB to split Hyatt's tort claims by not allowing him to take necessary and relevant discovery outside of Nevada. As the discovery commissioner concluded:

> *Commissioner:* Well, because the way Nevada got involved in this was by acts done by the FTB in Nevada. Nobody disputes that certain acts were done in Nevada in the process of collecting this tax, or let's not say collecting. Nothing has been collected yet I guess, in assessing the tax, and that's what, that's why you are here. That's why you are here.[257]

As a result, "the entire audit and assessment process performed by the FTB that was and is directed at" Hyatt is at issue and subject to discovery.

X. The protective order crafted by the discovery commissioner does not in any way restrict or hinder the FTB in this litigation, and statements to the contrary by the FTB are false and misleading.

A. The protective order does not restrict or hinder the FTB in this litigation.

The FTB's petition repeatedly contends — falsely and in direct contradiction to the

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[254] Indeed, the *Sweeney* case despite its age is still cited in the annotations under Rule 4 of the Nevada Rules of Civil Procedure.

[255] *Gans v. M.D.R. Liquidating Corp.*, 1990 WL 2851 (Del. Ch. 1990).

[256] *Posner Laboratories, Inc. v. Pro-line Corp.*, 1978 U.S. Dist. Lexis 16334 at 7 (S.D.N.Y. 1978). *See also, Geo-Physical Maps, Inc. v. Toycraft Corp.*, 162 F. Supp. 141, 148 (S.D.N.Y. 1958).

[257] 11/9/99 Hearing transcript, p. 58, lns. 15-22. (*See* Exhibit 4 to the FTB's Writ Petition.)

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terms of the protective order — that the protective order imposes great burden and expense and would greatly restrict counsel's ability to use discovery materials in preparing the FTB's defense and conferring with their client.[258] The FTB gives no explanation as to how Hyatt's protective order in any way limits the FTB's counsel in preparing its defense for this case. The very paragraphs of the order cited to by the FTB say directly the opposite.[259]

The protective order specifically and affirmatively states that material designated under the protective order may be used for "*discovery, in preparation of discovery, in preparation for trial, trial, any appeals related to this action.*"[260] The intent of the district court's protective order is to allow the parties to use designated materials as necessary to prosecute and defend this case, but not to use materials designated under the protective order for other purposes.

The protective order specifically states that counsel for the FTB may disclose confidential material to FTB:

> the employees, officers, and board members to the extent necessary to assist FTB counsel in the defense of this action.[261]

The protective order therefore does not limit the way in which the FTB counsel defends this action. The only limitation that the protective order places on the FTB's right to use designated material is that the FTB must not disclose designated material outside of this litigation.

B. The FTB has misrepresented the scope and effect of the protective order.

In both the FTB's writ petition and its recent opposition to motion for clarification, the FTB misrepresents the scope and effect of the protective order. The FTB would have this Court believe that every document produced in this litigation, either by Hyatt or the FTB, falls within

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258 FTB Writ Petition, p. 7, lns. 2-9; p. 14, lns. 22-23, pp. 36-39.

259 FTB Writ Petition, p. 37, ln. 27, citing paragraphs 2(a) 3, 7, and 12 of the trial court's Protective Order. (*See* Exhibit 6 to the FTB's Writ Petition.)

260 Protective Order, ¶ 3(h). (*See* Exhibit 6 to the FTB's Writ Petition.)

261 Protective Order, ¶ 2 A(ii). (*See* Exhibit 6 to the FTB's Writ Petition.)

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the category of "Hyatt Confidential Information" or "FTB Confidential Information," as those terms are defined in the protective order, and therefore are subject to the terms of the protective order.[262] This is simply not true.

1. The FTB understands that the scope and effect of the protective order is extremely limited.

Only materials that are stamped or marked "Confidential — NV Protective Order" are subject to the terms of the protective order.[263] The protective order itself states in paragraph 4 of the Findings, at line 16, that material "so designated by the parties" is that which will be governed by the protective order. The protective order entered by the district court was specifically dictated by the discovery commissioner who combined previous portions of different drafts of the protective order, as well as added his own language in certain sections. The discovery commissioner's comments at the hearing on November 9, 1999, however, leave no doubt that materials must be specifically designated under the protective order in order to be subject to its terms. The most obvious example is the Discovery Commissioner's warning to both parties *not to over-designate* materials as subject to the protective order as he will sanction anyone who abuses the protective order.

> I want everybody to use their best efforts to not designate something as Confidential in the first place unless you are truly seeking to follow that.[264]

He then further stated:

> I think I addressed that in here, but as far as designating documents that are Confidential that should not be designated, that's going to go in effect as of the time of this recommendation from that point on. I'm not going to go back and say you shouldn't have. I'm not going to impose any penalties for prior conduct because we did not have this in place, this order in place prior to this.[265]

That the protective order is limited to the materials specifically designated by the parties is consistent with the numerous meet-and-confers prior to the November 9, 1999 hearing, the

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[262] FTB Writ Petition, pp. 36 - 39; FTB Opposition to Motion for Clarification, p. 9, lns. 5 - 7.

[263] Protective Order, p. 2, ln. 16, p. 3, lns. 9-11. (*See* Exhibit 6 to the FTB's Writ Petition.)

[264] 11/9/99 Hearing Transcript, p. 15, lns. 8-11. (*See* Exhibit 4 to the FTB's Writ Petition).

[265] 11/9/99 Hearing Transcript, p. 18, lns. 9-17. (*See* Exhibit 4 to the FTB's Writ Petition.)

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letters and prior drafts of the protective orders exchanged between counsel, and the briefs filed with the Court.[266]

Subsequent to the hearing, a draft of the "Report and Recommendation" regarding the protective order was circulated under cover letter from Hyatt's counsel dated November 22, 1999.[267] The letter explains that the term "Confidential — NV Protective Order" was inserted into the draft protective order to distinguish prior productions of documents which had been marked "confidential" and which would not be subject to the protective order, at least not without a party re-designating materials as "Confidential — NV Protective Order." Most revealing in regard to the FTB's misrepresentations to this Court is a comment from the FTB's writ petition where it acknowledges that its prohibition on using documents in other proceedings is limited to "documents designated 'NV Confidential' by Hyatt."[268]

Hyatt's designation of materials as "Confidential — NV Protective Order" in this case has been extremely limited. For example, certain selected documents were so designated as well as the transcript from Mike Kern's deposition. But the vast majority of the 14,000 plus documents produced by Hyatt and his associates that have been subpoenaed by the FTB have not been so designated.

The FTB has also used the "Confidential — NV Protective Order" designation on selected documents. Clearly the FTB understands that such a specific designation is necessary for a document to be subjected to the term of the protective order.

Ironically, the FTB is using the special designation to prohibit Hyatt form using damning materials that support the testimony of Candance Les, *i.e.*, the whistle-blower. The FTB has designated as "Confidential — NV Protective Order" the transcripts from the interview its investigator conducted of Ms. Les and her testimony in another legal proceeding in which she testified, consistent with her testimony in this case, regarding the wrongful conduct in the

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[266] *See* Exhibits 9 , to Vol. III, in the accompany Appendix of Exhibits filed with the Supreme Court.

[267] *See* Exhibit 24, to Vol. IX, in the accompany Appendix of Exhibits filed with the Supreme Court.

[268] FTB Writ Petition, p. 7, lns. 4-5.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

FTB in the Hyatt audit.[269]

2. Correspondence confirmed the limited scope and effect of the protective order.

The FTB cannot in good faith represent to this Court that the protective order is preventing it from preparing this case for trial, nor from using the vast majority of the discovery materials obtained in this litigation in the protest proceeding pending in California.

Hyatt informed the FTB in correspondence that he would designate relatively few documents under the protective order and that he would rely on the repeated representations of the FTB's Nevada counsel that materials produced in this litigation that are not designated pursuant to the protective order would still be protected as "confidential" pursuant to the FTB's own rules, regulations, policies and procedures.[270]

The only dispute therefore over the protective order is the neutral provision included by the Discovery Commissioner that requires materials that have been designated as "Confidential — NV Protective Order" not be used in other proceedings *without receiving permission of the opposing party* or obtaining such materials through whatever lawful means exist in regard to other proceedings. As set forth above, this involves a very limited subset of the discovery produced in this litigation, and it is the FTB that is using the provision to block damning materials from being used elsewhere.

C. The FTB misrepresents material facts regarding the protective order.

The FTB's statement that Hyatt produced no documents responsive to the FTB document requests prior to the entry of the protective order is false, misleading, and inflammatory. The FTB's petition failed to acknowledge that Hyatt produced over 14,000 pages of documents in this litigation prior to the district court issuing the protective order now disputed by the FTB. The FTB attempts to have this Court believe that the FTB received little discovery from Hyatt prior to the entry of the protective order, but most of Hyatt's 14,000-page

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[269] FTB 14465 and 14597 are the cover pages to the respective transcripts. (*See* Exhibit 23, to Vol. IX, in the accompanying Appendix of Exhibits filed with the Supreme Court).

[270] Letter dated December 14, 1999 from Hyatt counsel (*see* Exhibit 25, to Vol. IX, in the accompanying Appendix of Exhibits filed with the Supreme Court).

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

production of documents to the FTB was responsive to one or more of the FTB's document requests and was produced well before the protective order was issued.[271]

Hyatt diligently sought to resolve this protective-order issue through numerous meet-and-confers and with cooperative revisions of his initial protective order first submitted to the FTB on May 17, 1999, along with Hyatt's responses to the FTB document requests at issue here. The final version of Hyatt's protective order addressed almost every concern expressed by the FTB during the meet-and-confers and conformed strictly with the discovery commissioner's suggestions made during the September 24, 1999 telephone conference with counsel for the parties.[272]

Hyatt proposed a protective order based on Nevada law and procedure. Nevada, of course, looks first to Nevada court decisions, rules, and statutes for governing law.[273] In considering protective orders in discovery matters, Nevada courts have broad discretion in determining the form of relief.[274]

In contrast, the only FTB version of a protective order — the one proposed by the FTB in July 1999 — was never modified, not even after the telephone conference with the discovery commissioner on September 24, 1999. The FTB was unflinching and unwavering in its position that it will only accept a "California" protective order based upon California rules and

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[271] Hyatt has produced over 14,000 pages of documents since commencement of the litigation, most prior to the entry of the Protective Order. *See* Hyatt's detailed Index, attached as Exhibit 26, to Vol. IX, in the Appendix of Exhibits filed with the Supreme Court.

[272] *See* Hyatt's opposition to FTB's Motion to Compel, attached as Exhibit 9, to Vol. VI, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[273] *Dickson v. State,* 108 Nev. 1, 2, 822 P.2d 1122, 1123 (1992) ("While the dissent cites cases from other jurisdictions, we are bound to follow the law in Nevada."); Nev. R. Civ. P. 1 ("These rules govern the procedure in the district courts in all suits of a civil nature whether cognizable as cases at law or in equity....")

[274] *Monroe, Ltd. v. Central Telephone Co.*, 91 Nev. 450, 454, 538 P. 2d 152, 154 (1975) (stating that protective orders are "committed to the court's discretion"); *Turner v. Saka*, 90 Nev. 54, 62, 518 P. 2d 608, 613 (1974) (discovery matters and protective orders are within the court's discretion); *Maheu v. Eighth Judicial District Court,* 88 Nev. 26, 34, 493 P. 2d 709, 714 (1972) (same); Thomas W. Biggar et al., Nevada Civil Practice Manual § 1663 (3d ed. 1993) (stating that in the matter of protective orders, Nevada courts have "broad discretionary powers."). Nev. R. Civ. P. 37(a)(2) ("If the court denies the motion [to compel] in whole or in part, *it may make such protective order* as it would have been empowered to make on a motion made pursuant to Rule 26(c).") [emphasis added].

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LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

regulations and the FTB's own policies.[275] These are the same rules and regulations the FTB has been violating for seven years regarding Hyatt. Hyatt rejected the FTB's unfair ultimatum and suggested a protective order that is consistent with Nevada civil procedure and litigation practice in Nevada and that is consistent with the Discovery Commissioner's suggestions.

The need for limiting disclosure and dissemination of certain information produced in discovery to this litigation is evident by the highly sensitive technical, licensing, and patent information, highly personal large dollar-magnitude financial information, and other information about Hyatt, including the type of information previously revealed by the FTB to third parties, that forms part of the basis of Hyatt's invasion of privacy claims.

D. California law and FTB internal policy should not govern the protective order in this Nevada litigation.

The FTB's California protective order states that it would be governed by:

> 'California Revenue and Tax Code Sections 19542, 19547 and in accordance with the FTB's "need to know" internal policy, FTB legal branch confidentiality policies, the FTB security and disclosure manual and directives of the franchise tax board.[276]

Hyatt instead proposed, and the district court ruled, that the protective order be governed by Rule 26 of Nevada Rules of Civil Procedure, specifying that each party be allowed to use information designated by the other as confidential "for discovery, in preparation for discovery, for trial, and in preparation of trial, and any appeal related to this action." In other words, the parties can make whatever use of the confidential materials they deem necessary for prosecuting or defending the instant case.

1. The FTB has not produced the policies on which it asks this Court to base the protective order.

Nowhere in its proposed protective order nor in its correspondence during meet-and-confers, nor during telephone meet-and-confers, nor in its moving papers did the FTB even set forth what it understands the above-quoted California laws, rules, regulations, and internal policies require in regard to keeping material confidential. The FTB has never given Hyatt a

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[275] *Id.*

[276] FTB Protective Order, ¶ 3. (*See* Exhibit 6 to the FTB's Writ Petition.)

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ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

copy of the Legal Branch Confidentiality Policies, nor an unredacted copy of the Security and Disclosure Manual, nor other "directives" on which the FTB would base its order. Indeed, it would seem that the FTB is merely required to comply with its own self-serving "need to know" policy in determining what to keep confidential. Conveniently for the FTB, it would never be in violation of such a protective order as for any of its disclosures it may simply respond that the entities (which includes newspapers) "needed" to review the "confidential" materials.

2. The FTB had already failed to provide effective protection under California law.

California does provide for criminal penalties for FTB violations of confidentiality, but these provisions are toothless since the chief law enforcement officer of California — the Attorney General — is also in this case the FTB's counsel. In addition, the Attorney General's office has itself violated these criminal "protections" of confidentiality by revealing confidential information from Hyatt's audit file. It is not realistic to expect the Attorney General's office to police its own behavior. In addition, this Court has no jurisdiction to impose criminal sanctions under California law.

3. A neutral provision regarding use of "confidential" materials in other cases and proceedings is appropriate in this case.

The discovery commissioner's protective order addresses the possibility that the parties may want to use "confidential" information designated by the opposing side in other matters such as the California tax protest. The discovery commissioner's protective order requires that the party seeking to use confidential information in other proceedings use whatever legal means are available in such other proceedings to obtain the materials. The Nevada Court is therefore not put in the position of determining the appropriateness or inappropriateness, or whether to limit or expand, the use of "confidential" material in other proceedings over which it does not have jurisdiction.

This is the main issue in dispute concerning the protective order. The FTB insists that "confidential" materials gathered in this Nevada litigation also be deemed a part of the California tax case. If the Nevada district court were to make such a ruling it would (a) infringe upon and interfere with the unrelated California tax protest over which it has no jurisdiction; (b)

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

possibly give the FTB rights it may not otherwise have under California law; and (c) blur the entirely separate nature of this Nevada tort action and the California tax protest. Under California law and the FTB rules, regulations, and its own policies, the FTB cannot obtain in the California tax protest many of the "confidential" materials that will be produced in this Nevada litigation, i.e., documents well after the audit years. The district court's neutral provision on this point is therefore appropriate.

4. Materials submitted in the California tax protest are not protected from public disclosure.

California law on which the FTB wants to base the protective order does not accord Hyatt the protection sought through a protective order entered in this case. As explained below, materials submitted in the California tax protest and used by the FTB may ultimately become part of the public record.

In sum, the California tax proceeding is now at what the FTB calls the protest level wherein the FTB continues its investigation and revisits its determination.[277] Assuming, as is typically the case, the FTB rubber-stamps its assessment at the protest stage, Hyatt can finally appeal to a related entity, the California State Board of Equalization ("BOE").[278]

During the BOE appeal, the FTB may submit whatever it has gathered during the audit and protest in an attempt to support its findings during the BOE appeal. Once such materials are submitted to the BOE, the BOE may use such material in reaching a decision. The BOE's decision *is not kept* confidential nor is the basis of its decision or the documents submitted to the BOE kept confidential. Materials used by the FTB in the California tax proceeding may therefore become a matter of public record.

One recent example is the case of George Archer, a well known professional golfer on the PGA Senior Tour and a long-term Nevada resident. Mr. Archer was completely vindicated by the BOE after its finding that Mr. Archer was a resident of Nevada and that the FTB improperly assessed taxes against him. In pursuing Mr. Archer, a well respected senior golf

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[277] Cal.Rev.& Tax Code §§ 19041 & 19044.

[278] Cal.Rev. & Tax Code § 19045.

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LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

professional, the FTB made public certain parts of his private financial information and badgered him to the point where he even worried about the possible consequences of visiting his grandchildren who lived in California. "George Archer, a top professional golfer, asked the State Board of Equalization last Wednesday, 'Why has the Franchise Tax Board made my life a living hell for the last six years?''' ...and BOE Chair Johan Klehs admonished the FTB staff to stop hounding the beleaguered golfer."[279]

If the FTB is able to use any "confidential" materials from this Nevada litigation in the California tax protest, such materials may ultimately become part of the public record. For that reason, the district court correctly ruled that any "confidential" materials obtained in the Nevada litigation may not automatically be used in the California tax case. Rather, the decision as to whether any particular materials deemed "confidential" are appropriate for and may be used in the California tax protest must be left for determination in that proceeding.

5. The protective order does not interfere with the FTB's "government administration."

Without explanation, the FTB asserts that the protective order will interfere with "government administration." But documents designated under the protective order can be used by the FTB in defending this litigation. How then does the protective order interfere with "government administration?"

If the FTB, as a governmental agency, has the right to obtain the few designated materials for the California tax protest, it should not do so through this litigation. The district court properly avoided any ruling on the appropriateness of the "confidential" documents being used in the California tax protest. Nothing in the protective order prevents the FTB from obtaining "confidential" materials through whatever legal means the FTB has under California law.

In regard to imposing a burden, therefore, it is the FTB's desired "California" protective order that imposes the greatest burden on the parties and to the district court. By asking that the

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[279] Article in Caltaxletter dated September 6, 1999. (See exhibits attached to Hyatt's Opposition to the FTB's Motion to Compel , attached as Exhibit 9, to Vol. VI, in the accompanying Appendix of Exhibits filed in the Supreme Court.)

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ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

protective order be based upon California law and FTB policy and procedures, it is entirely unclear what limitations there are on "confidential" materials in this case and what control the district court would have over this process.

In sum, the FTB has failed to demonstrate how the protective order would cause it to suffer any burden whatsoever in this case.

XI. The FTB's opposition to the motion for clarification raised an issue not addressed in its writ petition, but it is a red herring that should be ignored by this Court as it was by the trial court.

The FTB's Opposition to Motion for Clarification of Stay Order of June 7, 2000 was in reality a tardy supplement to its writ petition. Instead of merely addressing the very focused issue of the scope of this Court's June 7, 2000 order, the FTB first improperly argued that both the scope of the discovery ordered by the district court and the protective order it entered exceeded the court's jurisdiction based on the principle of comity. The scope of discovery in this case and the protective were addressed in detail above.

Procedurally, this "supplement" to its writ petition was highly inappropriately and should therefore be rejected without further consideration. Substantively, the analogy used by the FTB is a classic red herring that is easily dismissed. Specifically, the FTB attempts to scare this Court, as it tried during the summary judgement motion in the district court, by "warning" that if FTB auditors are held accountable for tortious acts committed in, directed into, or injuring a resident of Nevada, the Nevada Gaming Control Board may also be subject to suit in other states when investigating applicants for gaming licenses.

But the Gaming Control Board is conducting permissive investigations of applicants who have voluntarily submitted applications and welcomed the Gaming Control Board to investigate their background. There can be no invasion of privacy in the Gaming Control Board's investigation when the investigation was permissive. Moreover, this Court would undoubtedly endorse as public policy that the Gaming Control Board should not be engaging in illegal and tortious conduct in carrying out its permissive investigations as the FTB is charged with in this case.

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LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

It is well established under both Nevada law and United States Supreme Court precedent that one state may not commit torts in or cause tortious injury in another state with impunity. Again, this issue was extensively briefed in the district court as part of Hyatt's opposition to the FTB's ill-fated summary judgment motion.[280]

In sum, *Nevada v. Hall* related to a claim of sovereign immunity based on comity and other principles *by Nevada in California courts*. The United States Supreme Court ruled that "Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an *agreement*, express or implied, between the two sovereigns, or in the *voluntary* decision of the second to respect the dignity of the first as a matter of *comity*."[281] *Nevada v. Hall* noted California's position: "the California courts have told us that whatever California law may have been in the past, *it no longer extends immunity to Nevada as a matter of comity*."[282]

In regard to Nevada's exercise of comity, *Mianecki v. District Court*[283] approved and adopted the rationale expressed by the California Supreme Court in *Hall v. University of Nevada*.[284] "We approve the reasoning of the California court and hold that where the injured party is a citizen of this state, injured in this state and sues in the courts of this state, there is no immunity, by law *or as a matter of comity*, covering a sister state's activities in this state."[285]

The reasoning in *Mianecki* applies to this case. The Nevada Supreme Court first recognized that "Nevada has a paramount interest in protecting its citizens . . . . ,"[286] and that comity cannot trump the rights of the citizens of Nevada. "'[I]n considering comity, there

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[280] See Exhibit 11, to Vol. VII of the accompanying Appendix of Exhibits filed with the Supreme Court.

[281] 440 U.S. 410, 415-16 (1979) (emphasis added).

[282] 440 U.S. at 418 (emphasis added).

[283] 99 Nev. 93, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983).

[284] 8 Cal. 3d 522, 105 Cal. Rptr. 355 (1972), *cert. denied*, 414 U.S. 820 (1973). *Mianecki* was consistent with the United States Supreme Court's holding in *Nevada v. Hall*, 440 U.S. 410 (1979).

[285] Mianecki 658 P.2d at 423-24 (emphasis added).

[286] *Id.* at 424.

HUTCHISON & STEFFEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction.'"[287] With these principles in mind, the *Mianecki* court held:

> [W]e believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore we hold that the law of Wisconsin *should not be granted comity where to do so would be contrary to the policies of this state.*[288]

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

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

Keeton v. Hustler Magazine, Inc.[289]

The FTB's tardy strawman argument, and continued assertion of comity, must be rejected by this Court just as has consistently been rejected by the district court.

XII. Conclusion.

Deliberative-process. The district court correctly found that the limited, and not well recognized, deliberative-process privilege is not applicable to this case. Specifically, the claims in dispute in this case relate to the FTB's misconduct, not review of an agency's policy-level decision, and the discovery being withheld has no overarching policy purpose because it relates directly and exclusively to the Hyatt audits. Moreover, the head of the FTB, Jerry Goldberg, failed to invoke the privilege. Finally, even if the privilege were applicable, since it is a limited,

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

[288] *Id.* at 425 (emphasis added).

[289] 465 U.S. 770, 776-777 (1984) (quoting *Leeper v. Leeper*, 319 A.2d 626, 629 (N.H. 1974) (quoting *Restatement (Second) of Conflict of Law* sec. 36, comment c (1971)).

HUTCHISON & STEFFEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

weak privilege, it still cannot be used to block discovery where – as here – the litigant's need for disclosure outweighs the government's limited right not to disclose.

Attorney-client privilege. The district court's order requiring production of the subject withheld documents based on the attorney-client privilege should be affirmed. First, the order is based on the discovery commissioner's finding – after an extensive review of the record – that Anna Jovanovich had a "dual-role" within the FTB and that she was acting in a non-legal capacity while assisting the FTB auditors. The FTB has made no showing that the district court abused its discretion in so ruling. Furthermore, the FTB's multiple-and-repeated waivers are controlling – from the Carol Ford testimony about her review, to the Allan Shigemitsu previously produced sourcing memo, to the Sheila Cox review of the entire audit file to refresh her recollection for her deposition. The FTB's conduct establishes that it has waived any privilege that might have attached to the subject documents.

Prima facie showing of crime-fraud. In addition, this district court's order requiring production of the subject documents being withheld based on the attorney-client privilege should be affirmed because Hyatt made the required prima facie showing in the district court for the crime-fraud exception to the attorney-client privilege. The FTB auditors repeatedly consulted with its lawyers for help in doing their sham audits in both: (1) identifying new third parties from whom to seek intrusive information about Hyatt and (2) drafting its extortionate and fictional audit narratives.

Protective order. The district court's protective order should be affirmed as the FTB has made no showing that the district court abused its discretion in entering the order after it was carefully considered and crafted by the discovery commissioner, based on input and drafts from both parties. The protective order is: (1) based on Nevada law, (2) protects a Nevada plaintiff, (3) governs Nevada litigation, (4) controls the conduct of attorneys who are either practicing in Nevada or admitted in Nevada pro hac vice, and (5) will be enforceable under clearly understood and published Nevada procedures and Nevada law. The protective order properly requires both sides to acquire the designated documents – currently few in number – in other forums under the rules of those forums in order to use them in those forums.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

This Court should reject, as did the district court, the California-form protective order that the FTB proposed to the district court because it relies on undisclosed rules, regulations, and directives from California and is therefore fatally uncertain and vague. To the extent the California-form protective order refers to the California criminal statute and internal California Franchise Tax Board policies, it is defective because this Court has no power to issue criminal sanctions based on California criminal law and because the FTB's internal policies have a large and highly discretionary "need to know" loophole.

The FTB also misrepresented to this Court the scope and effect of the protective order. The protective order will in no way prohibit or limit the FTB and its counsel from fully preparing this case for trial.

In sum, the protective order allows both sides full use of the designated materials to prosecute or defend this litigation while reasonably restricting for use solely in this litigation certain designated documents acquired under the protective order.

For the above reasons, the Petition for Writ should be denied in its entirety.

DATED this 7th day of July, 2000.

HUTCHISON & STEFFEN, LTD.

By: _____

Mark A. Hutchison, Esq.
John T. Steffen, Esq.
Hutchison & Steffen
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117

Peter C. Bernhard
BERNHARD & LESLIE
3980 Howard Hughes Parkway
Suite 550
Las Vegas, Nevada 89109

Attorneys for Gilbert P. Hyatt

HUTCHISON & STEFFEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

HUTCHISON & STEFFEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NEVADA 89117

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Hutchison & Steffen, and that on this 7th day of July, 2000, I served a true and correct copy of the foregoing **REAL PARTY IN INTEREST GILBERT P. HYATT'S ANSWER TO THE FTB'S PETITION FOR A WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, FOR WRIT OF PROHIBITION** via Federal Express delivery, in a sealed box(s) upon which postage was prepaid, to the addresses noted below, upon the following:

James W. Bradshaw, Esq.
McDonald, Carano, Wilson, McCune,
Bergin, Frankovich & Hicks
241 Ridge St., Fourth Floor
Reno, Nevada 89501

Felix E. Leatherwood, Esq.
California Attorney General
300 South Spring Street
Suite 5212
Los Angeles, California 90013

An employee of Hutchison & Steffen

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

EXHIBIT 27

BILL LOCKYER
Attorney General
RICHARD W. BAKKE
Supervising Deputy Attorney General
FELIX E. LEATHERWOOD, Admitted per SCR 42
GEORGE M. TAKENOUCHI, Admitted per SCR 42
THOMAS G. HELLER, Admitted per SCR 42
Deputy Attorneys General

THOMAS R. C. WILSON, ESQ.
Nevada State Bar # 1568
JAMES C. GIUDICI, ESQ.
Nevada State Bar #224
MATTHEW C. ADDISON, ESQ.
Nevada State Bar # 4201
BRYAN R. CLARK, ESQ.
Nevada State Bar #4442
McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS LLP
241 Ridge Street, 4th Floor
P.O. Box 2670
Reno, NV 89505-2670
(775) 788-2000
Attorneys for Defendant Franchise Tax Board

IN THE SUPREME COURT OF THE

STATE OF NEVADA

* * * * *

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, Honorable Nancy Saitta, District Judge, Respondent, and GILBERT P. HYATT, Real Party in Interest.	Case No.: 35549 **FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA'S REPLY IN SUPPORT OF ITS PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION** ***CONFIDENTIAL INFORMATION FILED UNDER SEAL***

The envelope attached to this document contains the (original) *Franchise Tax Board of the*

State of California's Reply in Support of Its Petition for Writ of Mandamus Ordering Dismissal, or in the Alternative, Writ of Prohibition. The reply contains information the subject of which may be precluded from public disclosure pursuant to the protective order entered by the District Court in this case. The protective order is one of the matters raised in the Franchise Tax Board's writ petition before this Court. A copy of the protective order is attached as Exhibit 6 to the Franchise Tax Board's writ petition.

DATED this 8 day of August, 2000.

McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS

By _____
THOMAS R.C. WILSON
JAMES C. GIUDICI
BRYAN R. CLARK
MATTHEW C. ADDISON
BRYAN R. CLARK
JEFF A. SILVESTRI
TODD J. DRESSEL
241 Ridge Street, 4th Floor
P.O. Box 2670
Reno, NV 89505-2670
(775)788-2000

Attorneys for Defendant Franchise Tax Board

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

CERTIFICATE OF MAILING

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing *Franchise Tax Board of the State of California's Reply in Support of Its Petition for Writ of Mandamus, Or in the Alternative, Writ of Prohibition* this 8 day of August, 2000, by depositing the same in the United States Mail, postage prepaid thereon, to the addresses listed below, upon the following:

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

Donald J. Kula, Esq.
Riordan & McKenzie
300 South Grand Avenue, 29th Floor
Los Angeles, CA 90071-3109

Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
Hutchison & Steffen
8831 W. Sahara Avenue
Las Vegas, NV 89117

Peter C. Bernhard, Esq.
Bernhard & Leslie
3980 Howard Hughes Parkway
Suite 550
Las Vegas, NV 89109

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

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

Lisa R.

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

BILL LOCKYER
Attorney General
RICHARD W. BAKKE
Supervising Deputy Attorney General
FELIX E. LEATHERWOOD, Admitted per SCR 42
GEORGE M. TAKENOUCHI, Admitted per SCR 42
THOMAS G. HELLER, Admitted per SCR 42
Deputy Attorneys General

THOMAS R. C. WILSON, ESQ.
Nevada State Bar # 1568
JAMES C. GIUDICI, ESQ.
Nevada State Bar # 224
BRYAN R. CLARK, ESQ.
Nevada State Bar #4442
JEFF A. SILVESTRI, ESQ.
Nevada State Bar # 5779
McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS LLP
241 Ridge Street, 4th Floor
P.O. Box 2670
Reno, NV 89505-2670
(775) 788-2000

Attorneys for Franchise Tax Board

IN THE SUPREME COURT OF THE

STATE OF NEVADA

* * * * *

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, Honorable Nancy Saitta, District Judge, Respondent, and GILBERT P. HYATT, Real Party in Interest.	Case No.: 35549 **FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA'S REPLY IN SUPPORT OF ITS PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION**

McDONALD CARANO WILSON McC BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

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McDONALD CARANO WILSON McC BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

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ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

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ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

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ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

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McDONALD CARANO WILSON McC BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

I. Introduction

On July 7, 2000, Respondent Gilbert P. Hyatt, (hereafter "Hyatt") filed his Answer to the Franchise Tax Board of the State of California's Petition for Writ of Mandamus, Or In The Alternative For Writ Of Prohibition in Case No. 35549 (hereinafter "FTB's Petition" or "Petition"). Hyatt's Answer consists of an 85 page brief and nine separate volumes of exhibits. Volume VII of Hyatt's Appendix of Exhibits in support of his Answer to the Petition is also his Opposition, filed in the district court on March 22, 2000, to the Franchise Tax Board's ("FTB") *Motion for Summary Judgment and Dismissal for Lack of Jurisdiction*, including virtually the entire tax audit file. Volume VIII consists of Hyatt's affidavit as well as the affidavits of his attorneys, Thomas K. Bourke and Eugene G. Cowan, and his CPA, Michael W. Kern, all of which were also filed with Hyatt's Opposition in the district court on March 22, 2000. Hyatt cites to those materials throughout his Answer to the Petition.

The district court's denial of FTB's *Motion for Summary Judgment and Dismissal for Lack of Jurisdiction* is now before this Court on the FTB's Petition for a Writ of Mandamus Ordering Dismissal, Or Alternatively For A Writ of Prohibition And Mandamus Limiting The Scope Of This Case, which was also filed on July 7, 2000, in Case No. 36390 (hereinafter "FTB's Second Writ"). By submitting as part of his Answer to the Petition the same evidence he submitted to the district court opposing FTB's subject matter jurisdiction motion, Hyatt has shown why the two writs should be consolidated before this Court. (See *Franchise Tax Board of the State of California's Motion to Consolidate Writ Petitions* filed by the FTB July 7, 2000 in both this case (No. 35549) and in Case No. 36390, and Hyatt's Opposition thereto filed July 13, 2000 in this case (No. 35549) only.) Obviously, if FTB's Second Writ is granted, this Petition will be moot. Consolidation advances judicial economy without any prejudice to Hyatt. But, Hyatt opposes consolidation. Accordingly, the FTB is seeking leave to reply to his opposition to consolidate concurrently with seeking leave to file this reply to his Answer to the Petition.

In any event, throughout his Answer and exhibits, Hyatt makes every effort to express negative and inflammatory statements against the FTB, the obvious intent of which is to prejudice and predispose this Court against the FTB. Most offensive are Hyatt's allegations of racial

McDONALD CARANO WILSON McC BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

discrimination and anti- Semitism within the FTB, which the FTB denies and which have absolutely nothing to do with what is before this Court. Such allegations add nothing to the merits of this Petition, and are not relevant to its consideration. FTB rejects Hyatt's spin and obfuscation as untrue, and refers the Court to the statement of facts set forth in FTB's Second Writ in Case No. 36390.

It is important to remember that while Hyatt treats his allegations as established fact, they are nothing more than allegations. Hyatt's Answer is replete with citations to his own affidavit and the affidavits of his representatives. FTB has not been able to depose Hyatt[1], and it has not been able to complete its depositions of two of his representatives or to commence that of a third. When Hyatt filed his affidavits in the district court to support his opposition to the FTB's *Motion for Summary Judgment and Dismissal for Lack of Jurisdiction*, the FTB filed formal Objections. Since Hyatt is now relying upon those improper affidavits to support his Answer to the Petition before this Court, FTB hereby renews its Objections. A copy of the FTB's Objections is attached hereto as Exhibit 1.

As shown in the FTB's Objections, Hyatt's "affidavits" are really nothing more than self-serving conclusory arguments in flagrant violation of Nev. R. Civ. P. Rule 56(e). The affidavits of Hyatt's attorneys, Eugene G. Cowan and Thomas K. Bourke, are particularly egregious and call into question Nevada Supreme Court Rule 178 concerning a party's lawyer performing as a witness.

Not only is Hyatt relying upon improper affidavits to support his Answer to the Petition, he is also attempting to obfuscate the real issues under a mountain of paper rather than presenting them in a succinct and cogent fashion to the Court. For example, in response to the FTB's *Motion for Summary Judgment and Dismissal for Lack of Subject Matter Jurisdiction* presented in the district court, Hyatt filed an opposition which included thousands of pages of exhibits. It appears he has now included his entire opposition as part of his exhibits in support of

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[1]Hyatt's deposition scheduled to begin on June 6, 2000 was canceled by Hyatt on or about June 1, 2000 for medical reasons. On June 7, 2000, this Court stayed all further proceedings in the district court.

McDONALD CARANO WILSON McC é BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

his Answer to the Petition before this Court. This Court is now faced with the task of filtering out the massive amount of irrelevant material improperly submitted by Hyatt, who is hoping the Court will simply give up and rule in his favor.

There is no stopping Hyatt in his efforts to smear the FTB. He will say whatever he thinks advances his position at the particular moment, regardless of the truth. For example, at page 38, lines 1-2 of his Answer, Hyatt tells this Court he is not contesting any tax assessment in what he calls "this Nevada tort case." Nothing could be further from the truth. The tax assessments are the central focus of Hyatt's First Amended Complaint before the district court. (See Exhibit 2.)

A. Hyatt's Termination of his California Residency.

Hyatt has asserted California nonresidency and a long-term residency in Las Vegas from September 25, 1991 to the present day as preclusive on its face of any tax audit issues. The audit addressed a much narrower issue of whether Hyatt remained a California resident under California law from September 25, 1991 to April 3, 1992. The FTB auditor, much maligned, slandered and libeled by Hyatt during this lawsuit, concluded in her audit report that Hyatt remained a California resident during this time. The auditor also concluded, based upon the facts she developed during the audit, that Hyatt intended to evade tax he knew he owed California; accordingly, she assessed a statutory civil fraud penalty for Hyatt's claimed period of California nonresidency.

The FTB's audit issues were, ultimately, limited to that six month period. During that period, Hyatt received tens of millions of dollars from contracts relating to one of his patents. A termination of Hyatt's California residency prior to October 1, 1991 is of critical importance to Hyatt, because it would allow him to avoid the statutory presumption of residency in California for the full year 1991 which arises upon nine months of residency in California (January 1 to September 30 of 1991). (Cal. Rev. & Tax Code §17016.) For that reason, the date and circumstances of terminating his California ties and moving his permanent residence to Las Vegas prior to October 1, 1991 were very important to Hyatt.

Hyatt's lack of candor and reluctance to disclose the facts and circumstances surrounding his alleged move from California required the auditor, consistent with her statutory duty

McDONALD CARANO WILSON McC . BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

under California law (see Cal. Rev. & Tax Code § 19501), to attempt to corroborate his claims of California nonresidency during that period. For that, Hyatt has accused the auditor of improper conduct, of having a fraudulent and extortive purpose, and of violating his "privacy" and "confidentiality."

Hyatt's Answer to FTB's January 27, 2000 Petition asserts misconduct of FTB by:

(a) "Assessment of a 'fraud' penalty against Hyatt - thereby essentially doubling his assessed tax - despite admittedly ignoring or distorting all evidence supporting Hyatt's claim of Nevada residency..." (Answer p. 2)

(b) "Salivating over the prospects of forcing Hyatt into a multi-million dollar settlement based upon a sham 'audit' that trumped up a multi-million dollar tax and penalty assessment, the FTB fraudulently ignored or distorted all of Hyatt's compelling proof of Nevada residency and fraudulently imposed a massive fraud penalty..." (Answer p. 15)

(c) "Cox [Sheila Cox, FTB's primary auditor on the Hyatt residency audit] neither investigated nor considered the most relevant information concerning the lynch pin for tax assessment-residency. If she had, she would have had no choice but to conclude that Hyatt was a Nevada resident from September 26, 1991 to the present." (Answer p. 59)

Hyatt claims that:

(d) "After substantial preparation, Hyatt left California and permanently moved to Las Vegas on September 26, 1991." (Answer p. 10)

(e) "Immediately after moving to Las Vegas, Hyatt sold his California house, leased and moved into a Las Vegas apartment,..." (Answer p. 10)

(f) "...escrow closed on his Las Vegas house (April 2, 1992) and he moved from his leased apartment into his new house." (Answer p. 11)

However, Hyatt stated on his California tax return for 1991, under penalty of perjury, that he had moved to Nevada on October 1, 1991, but later claimed that he had moved on September 24, 1991; a critical difference because of the aforementioned statutory presumption that arises on September 30. He failed to provide any documentation of any expenses of the move, although he was asked to do so several times. Hyatt also represented that he had rented an apartment in Las Vegas on October 20, 1991. Hyatt was asked and asked again where he had stayed or lived between September 24 and October 20, 1991. Again, Hyatt never provided any information or documentation to the auditor. His taxpayer representative would only state that he was researching that period and had found no receipts. At the same time, credit card information that the FTB had to request five

McDONALD CARANO WILSON McC & BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

times from Hyatt showed evidence of numerous dining charges in California, but Nevada dining charges on only one day from January 2, 1991 through March 16, 1992.

The circumstances of Hyatt's voter registration in July of 1994 raised additional questions. Hyatt executed under penalty of perjury a voter's registration declaration of residency at a residence property owned by his taxpayer representative. He in fact had never lived there and the declaration was false.

The foregoing, the failure to provide other requested information and other circumstances led the auditor to inquire independently to corroborate Hyatt's claim he became a California nonresident (on various dates) by severing his long established California ties while establishing new Nevada ties. (See FTB's Second Writ, at ¶ C pp. 7-14; and Exhibit 3 hereto (Affidavit of Sheila Cox).)

Because the auditor was forced by Hyatt's recalcitrance to independently verify the allegations of his 1991 California nonresident tax return, Hyatt now alleges in his First Amended Complaint ("FAC"):

> FAC ¶ 17:
>
> "Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident of Nevada should not be forced into a California forum to seek relief from the unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident. . . . 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 house in Las Vegas on April 3, 1992." (Emphasis added).
>
> FAC ¶ 30:
>
> "The FTB's assessment of taxes and a penalty for 1991 is based on the FTB's conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3, 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and precedents require it to consider. . . ." (Emphasis added).
>
> FAC ¶ 31:
>
> ". . . [T]he FTB ignored its own regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB has no authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to propound "quasi-subpoenas" to Nevada residents

and businesses, thereby seeking to coerce the cooperation of said Nevada residents and businesses through an unlawful and tortious deception, to reveal information about plaintiff. . . ". (Emphasis added).

Hyatt carries the same argument into his Answer to the Petition:

"The fraud engaged in by the FTB consisted of both its one-sided, manipulated audits of Hyatt and its false promises and misrepresentations successfully calculated to induce Hyatt's cooperation of providing the FTB with highly sensitive and confidential material which the FTB would supposedly review and maintain in strict confidence." (Answer at 58:15-18.)

"Cox neither investigated nor considered the most relevant information concerning the linchpin for tax assessment residency. If she had, she would have had no choice but to conclude that Hyatt was a Nevada resident from September 26, 1991 to the present." (Answer at 59:2-5. (Emphasis added).)

Because Hyatt is challenging the tax assessment, he broadly asserts:

"Discovery . . . must therefore encompass the full scope of the FTB's conduct and activities during its seven year . . . audit of Hyatt." (Answer at 3:2-4. (Emphasis added).)

Hyatt also quotes the Discovery Commissioner, in pertinent part:

". . . the heart of the case is the process by which the FTB conducted this audit, including but not limited to those parts of the audit which intruded into the State of Nevada . . . ". (Answer at 3:4-6. (Emphasis added).)

So just because the FTB viewed the evidence differently than Hyatt did, and did not accept as true Hyatt's unsubstantiated and self-serving assertions, is Hyatt allowed to sue for "extortion" and "fraud," and obtain discovery of whatever he wants of the FTB's internal documents and processes? Contrary to his statements to this Court, the audit and its resulting proposed assessment are clearly central to Hyatt's alleged "tort" claims.

B. Allegations of Extortionate Conduct.

Hyatt's Answer to the Petition additionally asserts misconduct in that FTB "threatened further public disclosure of Hyatt's private information if he did not 'settle' with the FTB." Hyatt asserts that during a "conversation between Hyatt's tax representative and the FTB protest officer, Anna Jovanovich,...she 'suggested' that Hyatt settle the matter or be subject to further public disclosure of his private information." (Answer p. 2.)

"Part of the outrageous conduct of...the FTB lawyers. One of those

McDONALD CARANO WILSON MC IE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

> lawyers, Anna Jovanovich, pointedly stated that a high profile or wealthy taxpayer such as Hyatt typically settled the proceedings before litigation. Because they do not want to risk the public disclosure of their personal financial information being made public. ... Hyatt clearly understood the unmistakable threat that any challenge to the FTB...would result in the dissemination of Hyatt's personal and financial information..." (Answer p. 14.)
>
> "...the FTB's use of its attorneys to further its sham audit which had a predetermined purpose and conclusion are similarly abhorrent. It amounted to nothing less than an unlawful and fraudulent conspiracy to extort money from Hyatt." (Answer p. 57.)

Under the FTB tax procedure, once an audit is completed and a proposed assessment issued the taxpayer can protest the conclusion, which requires by statute an independent, *de novo* review. The review protest may include additional requests for information and additional presentation of documents made by the taxpayer. (Cal. Rev. & Tax Code §§19044 and 19504.) Currently, in Hyatt's case, he has protested his proposed assessments and the FTB is waiting for information proposed by Hyatt's counsel. If, after the review protest, a taxpayer is unhappy with the results, the matter may be reviewed by the State Board of Equalization, and thereafter by the California Superior Court. (Cal. Rev. & Tax Code §§ 19046, 19381.)

Anna Jovanovich, an FTB attorney, was initially assigned as Protest Officer for Hyatt's matter after completion of the audit. In a conversation with the taxpayer's lawyer, Eugene Cowan of Los Angeles, who had very little experience in residency audits, she explained the process, including the availability of settlement, which is a part of the process by statute. (See, Cal. Rev. & Tax Code §§19044 and 19504.)

Contrary to Hyatt's ridiculous allegations, Anna Jovanovich did not explain the process, including the settlement avenue, as a way to keep the matter quiet or to threaten publicity of financial information if Hyatt did not settle. This would be a legal impossibility.

As a matter of fact and law, the executive officer or chief counsel of the FTB may submit a settlement proposal to the Attorney General of the State of California. The Attorney General reviews the recommendation and advises the executive officer or chief counsel of the FTB whether the recommendation is reasonable from an overall perspective. The recommendation is then submitted to the Franchise Tax Board, itself, together with the Attorney General's conclusions for

McDONALD CARANO WILSON McC ∴ BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

review and approval. Any settlement which reduces taxes or penalties in excess of $500 must be placed on file in the office of the executive officer as well as the chief counsel of the Franchise Tax Board *as a public record* of settlement. The public record shall include all of the following information:

(1) The name or names of the taxpayers who are parties to the settlement,

(2) The total amount of dispute,

(3) The amount agreed to pursuant to the settlement,

(4) A summary of the reasons why the settlement is in the best interest of the State of California,

(5) For any settlement approved by the Franchise Tax Board, the Attorney General's conclusion as to whether the recommendation of settlement was reasonable from an overall perspective. (Cal. Rev. & Tax Code § 19442.)

Hyatt's deliberately misleading allegations are shameful.

Other examples of how Hyatt is trying to predispose this Court against the FTB through his misleading spin and obfuscation include the following.

♦ Patent Licensing Business: At page 12, lines 2-3, Hyatt states FTB destroyed his patent licensing business. Again, this allegation is absurd on its face and, seemingly, a factual impossibility. The truth is:

a. the agreements with Fujitsu and Matsushita (Exhibits 4 and 5) both contained the identical ¶ 7.4 in which the parties agreed to keep strictly in confidence the terms and conditions of each agreement including the payment amount and would not divulge the same except: . . .

(b) to any governmental body; or
(c) as otherwise may be required by law; . . .

b. the Fujitsu agreement is effective October 24, 1991, and provided for a payment of $15 million dollars to Hyatt on or before October 31, 1991 by wire transfer to Union Bank trust account in Los Angeles, California; Hyatt signed it October 14, 1991. (Exhibit 4 at section 4.1);

c. the Matsushita agreement is effective November 14, 1991, and provided for a payment of $25 million dollars to Hyatt on or before November 15, 1991, by wire transfer to the same Union Bank trust account in Los Angeles; Hyatt signed it November 4, 1991. (Exhibit 5 at Section 4.1);

d. Hyatt is identified in both agreements as "an individual having a mailing address at P.O. Box 3357, Cerritos, California 90703," and any communication under either agreement was to be sent to Hyatt, care of a law firm in Los Angeles, California; (Exhibit 4 at pages 1 and 12; Exhibit 5 at pages 1 and 13-14);

McDONALD CARANO WILSON McC BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

e. FTB sent Fujitsu and Matsushita each a single page letter asking only for "what dates wire transfers were made to Gilbert P. Hyatt" pursuant to each company's agreement with him, "for the purpose of administering the California Personal Income Tax Law". (Exhibits 6 and 7);

f. Hyatt's licensing business collapsed because his patents were successfully challenged and, in effect, became worthless, which had nothing to do with the FTB's audit. (See, *Hyatt v. Boone,* 146 F.3d 1348 (Fed. Cir. 1998).)

♦ Confidential Information: Hyatt continually argues that the FTB disclosed "confidential information" to suggest his patents were jeopardized. The truth is:

a. an FTB auditor disclosed to third parties Hyatt's name, address, social security, number and the fact of a tax audit. She made these limited disclosures only as she deemed necessary to accomplish her statutory duty;

b. the IRS may disclose a taxpayer's name, address, and social security number during an audit. (Title 26 U.S.C. §§ 6103(b)(6); 6109(d); and 6103(h)(4));

c. FTB has the same authority to use Hyatt's name, address, and social security number. (Cal. Rev. & Tax Code §§ 19545 and 19549.)

♦ Targeting Wealthy Nevada Residents: At page 17, lines 12-14, Hyatt argues that the FTB targets "rich Nevada residents by sneaking into gated communities in Nevada for the purpose of determining if any residents used to live in California and might therefore be a candidate for an audit." The truth is:

a. such allegations are denied by the FTB, and are completely irrelevant and are made solely to inflame and prejudice the Court against the FTB;

b. substantial publicity surrounded the issuance of Hyatt's patents, including a newspaper article that attracted an FTB auditor's attention in 1993. The article reported that Hyatt lived in Las Vegas, but was involved in a California legal dispute with his ex-wife about earnings from recent patent awards. (Exhibit 8 at ¶ 8);

c. the FTB reviewed its records and found that Hyatt filed only a part-year income tax return with the State of California for 1991, in which he claimed to have severed his California residency on October 1, 1991; he reported $613,606.00 as California business income from total receipts of over $42 million for the full year. (Exhibit 9);

d. the decision to audit Hyatt was an exercise of an inherent sovereign function by the FTB as the alter ego of the State of California, *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 464 (1945), over which Nevada courts have no constitutional authority;

e. in any event, the FTB may investigate merely upon suspicion that the law is being violated, or even just because it wants assurance that the law is not being violated. (See e.g., *United States v. Morton Salt Co.,* 338 U.S. 632, 639, 642-43 (1950); *United States v. Powell,* 379 U.S. 48, 57 (1964).)

Hyatt's entire Answer is replete with such misleading spin and obfuscation of the truth. The issues presented in the Petition should be decided based on the law and the facts, not

McDONALD CARANO WILSON McC. BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

Hyatt's conclusory and self-serving allegations.

II. Deliberative Process Issues

A. Franchise Tax Board Properly Applied the Deliberative Process Privilege to a Limited Number of Internal Review Documents.

The FTB has invoked the deliberative process privilege with respect to six (6) documents, totaling ten (10) pages, including FTB 104117 through 104122 and FTB 100289 through FTB 100292. (Petition at 27). The five documents enumerated FTB 104117 through FTB 104122 contain Carol Ford's "review comments" and a non-binding recommendation to her supervisor, Penelope Bauche. Bauche utilized Ford's analysis and conclusions along with other materials in making her administrative decision whether to issue a Notice of Proposed Assessment to Hyatt. The review comments are clearly predecisional and deliberative, expressing the author's personal opinion on an underlying tax matter.

Such internal comments, proposals, recommendations and subjective administrative communications have received universal protection by the Courts. Indeed, the privilege is available when the document in question is "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *(Vaughn v. Rosen,* 523 F.2d 1136, 1143-1144 (D.C. Cir. 1975).) A casualty of unmitigated access to internal administrative documents is agency function and effectiveness. "'[A] government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation.'" *(Jordan v. United States Dept. of Justice,* 591 F.2d 753, 773 (D.C. Cir. 1978).)

The same rationale applies to the sixth document over which FTB claims the deliberative process privilege, the memorandum by Monica Embry (FTB 100288-100292). The document memorializes the "give- and- take" discussion between auditors and tax counsel on the viability of a sourcing theory for taxation of patent royalties. The document is "predecisional" because it precedes, in temporal sequence, the issuance of a formal agency decision (i.e. Notice of Action), and "deliberative" by illustrating the internal agency debate as to the merits and application of a principle of taxation. Courts have been particularly diligent in protecting such early agency

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McC BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

drafts from disclosure, *Lead Industries Association v. OSHA,* 610 F.2d 70, 86 (2d Cir. 1979), since the process by which a draft becomes a final document is part of the deliberative process. *(Russell v. Department of the Air Force,* 682 F.2d 1045, 1048-1049 (D.C. Cir. 1982).)

Hyatt resorts to specious rhetoric in making the belated claim that FTB has utilized the deliberative process privilege to obstruct discovery during certain FTB employee depositions. If Hyatt had a legitimate claim that improper tactics were being used at these depositions, a motion to compel oral answers at deposition should have been filed with the district court. Having elected not to do so, Hyatt cannot now cry "foul" and raise extraneous material not subject to FTB's original writ. The referenced deposition questions are irrelevant to the pending matter before this Court and should not be considered as a basis to deny the Petition.

Regardless, the assertion of the deliberative process privilege during Carol Ford's deposition was used to prevent Hyatt's access to the same privileged notes by another means. The same is true of the Bauche and Embry depositions because the questions were leading down the road to eliciting the contents of the Ford notes or the Embry/Gould sourcing memorandum. The assertion of the privilege objections during these depositions was entirely appropriate since FTB had asserted a privilege with respect to these documents and no judicial decision had been made.

B. The Deliberative Process Privilege Does Apply to Purely Factual Material.

Hyatt unduly constrains the scope of the common law deliberative process privilege by wrongly asserting that the privilege does not protect "purely factual, investigative matters." Answer at 31: 7-8. The Ninth Circuit specifically rejected the argument that any document containing factual material fell outside the deliberative process privilege:

> "Documents need not themselves be 'deliberative,' in the sense that they make nonbinding recommendations on law or policy, in order to qualify for the deliberative process privilege. " In some circumstances, even material that could be characterized as 'factual' would so expose the deliberative process that it must be covered by the [deliberative process] privilege."
>
> "Under this 'process-oriented' or 'functional' test that we adopt, documents containing nonbinding recommendations on law or policy would continue to remain exempt from disclosure. Factual materials, however, would likewise be exempt from disclosure to the extent that they reveal the mental processes of decision-makers."

National Wildlife Federation v. U.S. Forest Service, 861 F.2d. 1114, 1119 (9th Cir. 1988).

McDONALD CARANO WILSON McCUE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

The courts have readily acknowledged that the fact/opinion dichotomy is misleading, and have refused to apply it in a mechanical and unthinking manner. As one court has written, the privilege "is intended to protect the deliberative process of government, not just deliberative material." *(Mead Data Cent., Inc. v. U.S. Air Force,* 566 F.2d 242, 246 (D.C. Cir. 1977).) Accordingly, in some circumstances "the disclosure of even purely factual material may so expose the deliberative process ... that it must be deemed exempted by [5 United States Code] section 552(b)(5)." *(Mead Data Cent., Inc. v. U.S. Air Force, supra,* 566 F.2d at p. 256.) Many cases have held that the exemption applies to "purely factual material." *(Montrose Chemical Corporation of California v. Train,* 491 F.2d 63, 67-71 (D.C. Cir. 1974); *Lead Industries Ass'n v. Occup. S. & H. Admin.,* 610 F.2d 70, 85-86 (2d Cir. 1979); and *Russell v. Department of Air Force,* 682 F.2d 1565, 1568 (D.C. Cir. 1982).)

C. The Deliberative Process Privilege is Properly Invoked in the Non-Policy Making Context.

Because FTB's audit activities do not involve "a policy-level decisions (sic)" (Answer at 31:2-3), Hyatt wrongly argues that the deliberative process privilege does not apply. But, the privilege has been upheld in circumstances wholly apart from the policy making process. In *Brockway v. Department of the Air Force,* 518 F.2d 1184 (8th Cir. 1975), the father of an Air Force pilot sought disclosure of certain witnesses' statements concerning an airplane crash in which his son was killed. Although the information was completely factual and not made for the purpose of formulating policy, the court nevertheless held that confidentiality was necessary to prevent "inhibition of the free flow of information'" to the Air Force. (*Id.* at p. 1193.) "[W]ithout the assurances of confidentiality", the court concluded, the "flow of information to the Air Force" might be sharply curtailed, and the deliberative processes and efficiency of the agency greatly hindered. (*Id.* at pp. 1193-1194.)

Hyatt also ignores the Supreme Court of California's holding in *Times Mirror Company v. Superior Court,* 53 Cal.3d 1325 (1991). The Los Angeles Times sought information that was purely factual (schedules and appointment calendars over a five-year period). The Supreme Court held that releasing the material would compromise the deliberative process:

> "Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent." (*Id.* at 1343.)

Taken together, the holdings in *Brockway* and *Times Mirror* refute Hyatt's tortured notion that the deliberative process privilege can only be invoked in the most limited of circumstances (i.e. formulating policy).

This "self-critical analysis" version of the deliberative process privilege was also addressed in the original writ petition. (Petition at pp.31-32.) The second vein of this privilege is based on the judicial acknowledgment that government agencies need to have an environment where candor and freedom of thought are promoted. This form of the privilege would necessarily apply to the give-and-take discussions and personal opinions of all agency employees involved in the deliberative process. It is upon this expanded version of the privilege that FTB relies to prohibit the disclosure of the Carol Ford review notes, Documents 104117-104122, and the Embry/Gould "sourcing" memorandum, Documents 100288-100292.

Incidental to Hyatt's argued policy making limitation, Hyatt makes the ludicrous contention that the taxpayer "'protest' phase is *not an administrative proceeding* for which the targeted taxpayer need have adjudicative rights." (Answer at 30:17-32:1 (emphasis in original).) Hyatt misconstrues a purely technical exemption to the California Administrative Practices Act (see, Cal. Civ. Code §1798.70) to mean the taxpayer has no due process rights in the taxpayer's administrative protest proceeding. That plainly is not correct. The abundantly clear language of California Revenue & Tax Code, section 19044 provides: "The Franchise Tax Board *shall reconsider the assessment of deficiency* and *shall grant the taxpayer ... an oral hearing...*" (emphasis added).

The FTB protest proceeding is a complete *de novo* review of the auditor's proposed assessment performed by an assigned FTB lawyer as the protest officer. As part of the administrative review, the taxpayer can elect to present additional evidence at an oral hearing or rely on documents.

An administrative review does not end with FTB. Should the taxpayer disagree with

McDONALD CARANO WILSON McC BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

McDONALD CARANO WILSON McC. BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

the FTB's decision at the protest level, the taxpayer can appeal the decision for a second *de novo* review to the five member California State Board of Equalization, an agency separate and distinct from FTB. (Cal. Rev. & Tax Code §§ 19045 and 19046.)

The final decision of the State Board of Equalization represents the exhaustion of administrative remedies and, therefore, allows for California's courts to exercise jurisdiction over further conflicts. If the taxpayer is dissatisfied with the final State Board of Equalization decision, the aggrieved party can pursue judicial review in the form of a suit for refund or request a residency determination in a designated California Superior Court. (See, Cal. Rev. & Tax Code § 19381 and Cal. Civil Code §1060.5.) With two separate administrative reviews and eventual judicial oversight, the taxpayer's procedural due process rights are adequately preserved.

D. The California Information Practices Act Does Not Abridge or Limit the FTB's Claims of Privilege.

A faulty interpretation of Cal. Civil Code §1798.70 leads Hyatt to contend that the Information Practices Act ("IPA") "supersedes" the deliberative process privilege without explaining the consequence of this statutory construction. Taking Hyatt's argument to its logical conclusion, one must interpret the phrase in Section 1798, "supersede any other provision of state law", to abrogate the attorney/client privilege. (See, Cal. Evid. Code §§ 950 et. seq.) Evidence Code Section 950 protects the confidential communication, not necessarily the personal information communicated. Hyatt cites no case or statutory authority to support his novel contention that the drafters of the IPA intended to eviscerate either the attorney/client or deliberative process privileges.

In fact, the IPA actually strengthens, and does not derogate, the rights of litigants in protecting confidential communications. California Civil Code, section 1798.71 (Rights of litigants) reads:

> This chapter *shall not be deemed to abridge or limit the rights of litigants*, including parties to administrative proceedings, *under the laws, or case law, of discovery of this state.* (Emphasis added.)

The plain language of California Civil Code, section 1798.71 refutes any suggestion that FTB cannot raise appropriate privilege objections during any phase of discovery.

Hyatt's IPA discussion is also a red herring for three additional reasons. First, Hyatt

McDONALD CARANO WILSON McC BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

has not pled any statutory cause of action under the IPA in either the original or first amended complaint. Second, even if properly pled, FTB is permitted to disclose limited information to third parties to enforce its constitutional and statutory mandates. (See, California Civil Code § 1798.24 (p).) The subject audit falls within this statutory exemption and thus precludes Hyatt from exercising any remedy under this Act. Third, Hyatt's assertions offend California's constitution, Article XIII, section 32, and California Revenue & Taxation Code, section 19381, which respectively bar all legal or equitable proceedings against the State of California until the taxpayer has exhausted his administrative remedies. Hyatt's reliance on California law as a basis to compel production of documents or to proceed with this lawsuit is misplaced because he is barred under California law from advancing any legal proceeding against the FTB until he has completely exhausted his administrative remedies.

E. Hyatt Has Not Substantiated His Governmental Misconduct Claim.

Hyatt makes the further untenable argument that certain federal cases stand for the proposition that the deliberative process privilege evaporates on the unsubstantiated allegation of "governmental misconduct." (Answer at pp. 33-34.) The cases relied upon by Hyatt are easily distinguishable and provide no guidance to this Court in determining the privilege issues incident to FTB's writ.

In Re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997), was a criminal matter involving former Cabinet Secretary Michael Espy. The Office of Independent Counsel obtained the issuance of a grand jury subpoena directed to the White House Counsel's office. The Federal Circuit Court's holding primarily discussed the inadequacy of the lower court's explanation for denying OIC's motion to compel production of certain White House Counsel deliberative documents. The dispute was remanded to the District Court with instructions to reassess its original decision and consider OIC's need for the documents. The District Court was specifically admonished not to release the "purely deliberative portions of the documents" and limit production to those matters that directly related to alleged false statements made by Espy. *(Id.* at 761-762.)

Elson v. Bowen, 83 Nev. 515 (1967), has limited application to law enforcement misconduct and cannot be generalized to apply to Hyatt's informational privacy claims. FBI agents

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

were actual parties to a suit alleging a violation of a Nevada eavesdropping statute. One of the FBI agents refused to answer certain questions at deposition based on executive privilege and an internal DOJ regulation prohibiting disclosure. Unlike Hyatt, respondents made a key concession and "acknowledged they had no right to examine intra-departmental files and memoranda of the Department of Justice" and "specifically excluded these from their subpoena duces tecum." *(Id.* at 519.) The Court required an abbreviated disclosure based on the U.S. Attorney's refusal to participate in the Nevada case in any meaningful way while at the same time ordering the agents not to testify about certain matters. The Nevada Supreme Court concluded that the Attorney General was frustrating the exercise of the Court's power. Contrary to the conduct of federal authorities in the *Elson* case, FTB and its counsel have appropriately raised the deliberative process privilege in a limited, non-capricious manner.

Hyatt misstates the factual background and ultimately misapplies the holding in *Alexander v. FBI,* 186 F.R.D. 170 (D.D.C. 1999). The FBI did not withhold documents from disclosure. (Answer at p. 34:7-8.) The Department of Defense actually invoked the deliberative process privilege during the deposition of a Pentagon Public Affairs Officer. Private litigants sought to develop a connection between the motivations behind the Pentagon's release of information from Linda Tripp's personnel file and an alleged cover-up in the White House "filegate" scandal. Unlike Hyatt's conclusory fraud and extortion allegations, the District Court found that a sufficient factual showing had been made to suggest that Kenneth Bacon's answers to questions could "shed light" on a possible connection between the Pentagon release and the alleged "filegate" cover-up. (*Id.* at 179-180.)

Contrasted with the lower court *Alexander* decision, Hyatt has made no factual showing that governmental misconduct occurred during FTB's residency audit. Hyatt should receive the same treatment afforded to John Hinckley when the D.C. Circuit rejected Hinckley's request for access to internal Hospital Review Board records. (See, *Hinckley v. United States,* 140 F.3d. 277 (D.C. Cir. 1998).) Similar to Hyatt, Hinckley made the conclusory allegation that "the Hospital Review Board had improper motivations when it denied him a conditional release." The Board's improper motivation rested on "the mere fact his treatment team unanimously recommended his

McDONALD CARANO WILSON McC ⁞ BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

conditional release." (*Id.* at 285.) Rejecting Hinckley's contention that a sufficient showing had been made, the Court concluded that "[t]he deliberative process privilege would soon be meaningless, if all someone seeking the information otherwise protected under the privilege had to establish is that there is a disagreement within the governmental entity at some point in the decision making process." (*Id.* at 285.)

Lacking any evidence of misconduct, Hyatt falsely states that FTB instructed Carol Ford to delete a back-up computer file. Every relevant document or writing from Carol Ford continues to exist, while only the back-up file was deleted. As Hyatt grudgingly concedes, Carol Ford corrected her earlier mistaken testimony and confirmed that she was never instructed to destroy any documents or computer files and simply misunderstood a request for documents.

Similarly, Hyatt provides an unduly sinister portrayal of attorney Anna Jovanovich's destruction of her personal notes. Jovanovich created an index summary of the already produced Hyatt audit file as a reference guide. Her notes were never shared with anyone and were kept separately from the audit file. Jovanovich disposed of these purely ministerial notes out of a genuine concern for the privacy of the taxpayer. (See, Jovanovich deposition, Vol. I, pp. 71-81, attached hereto as Exhibit 10.)

F. The Deliberative Process Privilege Applies in Situations Where an Administrative Decision is not under Direct Judicial Review.

Hyatt unduly restrains the application of the deliberative process privilege to situations where " a court conducts a direct judicial review of an administrative decision." Answer at p. 37: 4-5). In making the unsupported proposition, Hyatt ignores a whole line of decisions that protect agency deliberative documents from disclosure to third parties not directly contesting an agency decision. In *Mapother v. Dept. of Justice,* 3 F.3d 1533 (D.C. Cir. 1993), a retired intelligence officer and a journalist lodged Freedom of Information Act ("FOIA") requests with the Justice Department seeking the "active file" that contained all documents relevant to the preparation of the Waldheim Report. Justice Department experts prepared the report in order to help the Attorney General decide whether to preclude Kurt Waldheim from entering the United States because of evidence he may have participated in Nazi war crimes. The Attorney General's decision

McDONALD CARANO WILSON MC E BERGIN FRANKOVICH & HICKS LLP
ATTORNEYS AT LAW
241 RIDGE STREET • P.O. BOX 2670
RENO, NEVADA 89505-2670
(775) 788-2000 • FAX (775) 788-2020

to bar Waldheim from entering the United States was neither under "direct judicial review" nor even contested by Waldheim. Nevertheless, the D.C. Court of Appeal found that the great bulk of the Waldheim Report was properly withheld under Exemption 5 of "FOIA", which protects documents covered by the deliberative process privilege. (*Id.* at 1535.)

A similar "FOIA" suit was brought by a college student and a veteran's group seeking a draft historical document entitled "Operation Ranchhand: the United States Air Force and Herbicides in Southeast Asia, 1961-1971." Notwithstanding the lack of any direct judicial review of an administrative decision, the D.C. Court of Appeal held that portions of the draft document were exempt from disclosure and protected by the deliberative process privilege. *(Russell v. Department of the Air Force,* 682 F.2d 1045, 1046-1047 (D.C. Cir. 1982).) The result in *Russell* was also consistent with the opinion in *Arthur Anderson & Co. v. Internal Revenue Service,* 679 F.2d 254 (D.C. Cir. 1982), wherein the same Court held that a preliminary draft of an IRS revenue ruling was protected by the deliberative process privilege where no administrative decision was under direct judicial review. The wealth of pertinent authority refutes Hyatt's untenable constraint on the deliberative process privilege.

In an effort to drain all significance from the deliberative process privilege, Hyatt overstates the holding in *RLI Ins. Co. v. Superior Court,* 51 Cal.App.4th 415 (1996). Hyatt notably omits any reference to the First Appellate District Court of Appeal's lack of discretion in interpreting the scope of the privilege. (*Id.* at 437-438.) Instead of reviewing the actual decision, Hyatt points to dictum for the proposition that the privilege "is *limited solely* to situations where ... a court conducts a judicial review of an administrative decision." (Answer at p. 37: 4-5 (emphasis added).)

RLI arose out of a dispute over the discoverability of certain evidence requested by two insurance companies in their rate rollback hearings under Proposition 103. The insurance companies sought to access records that were supposed to be maintained "in a public file available for inspection in the Department's San Francisco Office." (*Id.* at 424.) In a limited decision relating to multiple "Stipulation and Consent Orders," the First Appellate District Court of Appeal held that "it was an abuse of discretion to rule that these documents were 'settlement' documents and therefore irrelevant or under the protection of the regulation." (*Id.* at 434.) The Court found these