

IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT P. HYATT,

Appellants,

v.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Respondents.

Docket No. 84707

Electronically Filed
Oct 10 2022 11:10 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
**APPENDIX OF EXHIBITS TO
APPELLANT'S OPENING BRIEF
VOLUME 10 OF 42**

Mark A. Hutchison (Nev. Bar No. 4639)
Joseph C. Reynolds (Nev. Bar No. 8630)
HUTCHISON & STEFFEN, PLLC
10080 Alta Drive, Suite 200
Las Vegas, NV 89145
Telephone: (702) 385-2500

Pertter C. Bernhard (Nev. Bar No. 734)
PB CONSULTING, LLC
1921 Glenview Drive
Las Vegas, NV 89134
Telephone: (702) 513-9961

Donald J. Kula (Cal. Bar No. 144342) (pro hac vice)
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Los Angeles, CA 90067-1721
Telephone: (310) 788-990

Attorneys for Appellant Gilbert P. Hyatt

Chronological Index

Doc No.	Description	Date	Vol.	Bates Range	
1	Order of Remand	8/5/2019	1	AA000001	AA000002
2	Notice of Hearing	8/13/2019	1	AA000003	AA000004
3	Court Minutes re: case remanded, dated September 3, 2019	9/3/2019	1	AA000005	AA000005
4	Recorder's Transcript of Pending Motions	9/25/2019	1	AA000006	AA000019
5	FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party	10/15/2019	1	AA000020	AA000040
6	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 1	10/15/2019	1, 2	AA000041	AA000282
7	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 2	10/15/2019	2,3	AA000283	AA000535
8	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 3	10/15/2019	3,4	AA000536	AA000707

9	Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs, filed October 15, 2019	10/15/2019	4-7	AA000708	AA001592
10	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	10/15/2019	7-11	AA001593	AA002438
11	Exhibits 35-66 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	11-15	AA002439	AA003430
12	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	10/15/2019	15-19	AA003431	AA004403

13	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	10/15/2019	19-21	AA004404	AA004733
14	Correspondence re: 1991 state income tax balance, dated December 23, 2019	12/23/2019	21	AA004734	AA004738
15	Judgment	2/21/2020	21	AA004739	AA004748
16	Notice of Entry of Judgment	2/26/2020	21	AA004749	AA004760
17	FTB's Verified Memorandum of Costs	2/26/2020	21	AA004761	AA004772
18	Appendix to FTB's Verified Memorandum of Costs — Volume 1	2/26/2020	21, 22	AA004773	AA004977
19	Appendix to FTB's Verified Memorandum of Costs — Volume 2	2/26/2020	22, 23	AA004978	AA005234
20	Appendix to FTB's Verified Memorandum of Costs — Volume 3	2/26/2020	23, 24	AA005235	AA005596
21	Appendix to FTB's Verified Memorandum of Costs — Volume 4	2/26/2020	24, 25	AA005597	AA005802
22	Appendix to FTB's Verified Memorandum of Costs — Volume 5	2/26/2020	25, 26	AA005803	AA006001
23	Appendix to FTB's Verified Memorandum of Costs — Volume 6	2/26/2020	26, 27	AA006002	AA006250

24	Appendix to FTB's Verified Memorandum of Costs — Volume 7	2/26/2020	27, 28	AA006251	AA006500
25	Appendix to FTB's Verified Memorandum of Costs — Volume 8	2/26/2020	28, 29	AA006501	AA006750
26	Appendix to FTB's Verified Memorandum of Costs — Volume 9	2/26/2020	29, 30	AA006751	AA006997
27	Appendix to FTB's Verified Memorandum of Costs — Volume 10	2/26/2020	30, 31	AA006998	AA007262
28	Appendix to FTB's Verified Memorandum of Costs — Volume 11	2/26/2020	31-33	AA007263	AA007526
29	Appendix to FTB's Verified Memorandum of Costs — Volume 12	2/26/2020	33, 34	AA007527	AA007777
30	Appendix to FTB's Verified Memorandum of Costs — Volume 13	2/26/2020	34, 35	AA007778	AA008032
31	Appendix to FTB's Verified Memorandum of Costs — Volume 14	2/26/2020	35, 36	AA008033	AA008312
32	Appendix to FTB's Verified Memorandum of Costs — Volume 15	2/26/2020	36	AA008313	AA008399
33	Appendix to FTB's Verified Memorandum of Costs — Volume 16	2/26/2020	36, 37	AA008400	AA008591
34	Appendix to FTB's Verified Memorandum of Costs — Volume 17	2/26/2020	37	AA008592	AA008694

35	Plaintiff Gilbert P. Hyatt's Motion to Strike, Motion to Retax, and Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/2/2020	37, 38	AA008695	AA008705
36	FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008706	AA008732
37	Appendix to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008733	AA008909
38	FTB's Opposition to Plaintiff Gilbert Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/16/2020	38, 39	AA008910	AA008936
40	FTB's Notice of Appeal of Judgment	3/20/2020	39	AA008937	AA008949
41	Plaintiff Gilbert P Hyatt's Opposition to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/27/2020	39	AA008950	AA008974
42	Reply in Support of Plaintiff Gilbert P. P Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	4/1/2020	39	AA008975	AA008980
43	Court Minutes	4/9/2020	39	AA008981	AA008982
44	FTB's Reply in Support of Motion for Attorney's Fees	4/14/2020	39	AA008983	AA009012

45	Court Minutes re: motion for attorney fees and costs	4/23/2020	39	AA009013	AA009014
46	Recorder's Transcript of Pending Motions	4/27/2020	39	AA009015	AA009053
47	Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009054	AA009057
48	Notice of Entry of Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009058	AA009064
49	FTB's Supplemental Notice of Appeal	7/2/2020	39	AA009065	AA009074
50	Order Affirming in Part, Reversing in Part and Remanding	4/23/2021	39	AA009075	AA009083
51	Remittitur	6/7/2021	39	AA009084	AA009085
52	Hyatt Supplemental Memo in Support of Motion to Retax Costs and Supplemental Appendix	9/29/2021	39, 40	AA009086	AA009283
53	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 1	12/2/2021	40, 41	AA009284	AA009486
54	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 2	12/2/2021	41, 42	AA009487	AA009689
55	FTB's Supplemental Brief re Hyatt's Motion to Retax Costs	12/3/2021	42	AA009690	AA009710

56	Minute Order re Motion to Strike Motion to Retax Alternatively Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/10/2022	42	AA009711	AA009712
57	Order Denying Mtn to Strike Mtn to Retax Mtn for Ext of Time	4/6/2022	42	AA009713	AA009720
58	Hyatt Case Appeal Statement	5/6/2022	42	AA009721	AA009725
59	Hyatt Notice of Appeal	5/6/2022	42	AA009726	AA009728
60	Recorder's Transcript of Motion to Retax	1/25/2022	42	AA009729	AA009774
61	Recorder's Transcript Continued Motion to Retax	1/27/2022	42	AA009775	AA009795

Alphabetical Index

Doc No.	Description	Date	Vol.	Bates Range	
6	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 1	10/15/2019	1, 2	AA000041	AA000282
7	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 2	10/15/2019	2,3	AA000283	AA000535

8	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 3	10/15/2019	3,4	AA000536	AA000707
53	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 1	12/2/2021	40, 41	AA009284	AA009486
54	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 2	12/2/2021	41, 42	AA009487	AA009689
37	Appendix to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008733	AA008909
18	Appendix to FTB's Verified Memorandum of Costs — Volume 1	2/26/2020	21, 22	AA004773	AA004977
27	Appendix to FTB's Verified Memorandum of Costs — Volume 10	2/26/2020	30, 31	AA006998	AA007262
28	Appendix to FTB's Verified Memorandum of Costs — Volume 11	2/26/2020	31-33	AA007263	AA007526
29	Appendix to FTB's Verified Memorandum of Costs — Volume 12	2/26/2020	33, 34	AA007527	AA007777
30	Appendix to FTB's Verified Memorandum of Costs — Volume 13	2/26/2020	34, 35	AA007777	AA008032
31	Appendix to FTB's Verified Memorandum of Costs — Volume 14	2/26/2020	35, 36	AA008033	AA008312

32	Appendix to FTB's Verified Memorandum of Costs — Volume 15	2/26/2020	36	AA008313	AA008399
33	Appendix to FTB's Verified Memorandum of Costs — Volume 16	2/26/2020	36, 37	AA008399	AA008591
34	Appendix to FTB's Verified Memorandum of Costs — Volume 17	2/26/2020	37	AA008591	AA008694
19	Appendix to FTB's Verified Memorandum of Costs — Volume 2	2/26/2020	22, 23	AA004978	AA005234
20	Appendix to FTB's Verified Memorandum of Costs — Volume 3	2/26/2020	23, 24	AA005235	AA005596
21	Appendix to FTB's Verified Memorandum of Costs — Volume 4	2/26/2020	24, 25	AA005597	AA005802
22	Appendix to FTB's Verified Memorandum of Costs — Volume 5	2/26/2020	25, 26	AA005803	AA006001
23	Appendix to FTB's Verified Memorandum of Costs — Volume 6	2/26/2020	26, 27	AA006002	AA006250
24	Appendix to FTB's Verified Memorandum of Costs — Volume 7	2/26/2020	27, 28	AA006251	AA006500
25	Appendix to FTB's Verified Memorandum of Costs — Volume 8	2/26/2020	28, 29	AA006501	AA006750
26	Appendix to FTB's Verified Memorandum of Costs — Volume 9	2/26/2020	29, 30	AA006751	AA006997

14	Correspondence re: 1991 state income tax balance, dated December 23, 2019	12/23/2019	21	AA004734	AA004738
43	Court Minutes	4/9/2020	39	AA008981	AA008982
3	Court Minutes re: case remanded, dated September 3, 2019	9/3/2019	1	AA000005	AA000005
45	Court Minutes re: motion for attorney fees and costs	4/23/2020	39	AA009013	AA009014
10	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	10/15/2019	7-11	AA001593	AA002438
11	Exhibits 35-66 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	11-15	AA002439	AA003430
12	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	10/15/2019	15-19	AA003431	AA004403

13	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	10/15/2019	19-21	AA004404	AA004733
5	FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party	10/15/2019	1	AA000020	AA000040
36	FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008706	AA008732
40	FTB's Notice of Appeal of Judgment	3/20/2020	39	AA008937	AA008949
38	FTB's Opposition to Plaintiff Gilbert Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/16/2020	38, 39	AA008910	AA008936
44	FTB's Reply in Support of Motion for Attorney's Fees	4/14/2020	39	AA008983	AA009012
55	FTB's Supplemental Brief re Hyatt's Motion to Retax Costs	12/3/2021	42	AA009690	AA009710
49	FTB's Supplemental Notice of Appeal	7/2/2020	39	AA009065	AA009074
17	FTB's Verified Memorandum of Costs	2/26/2020	21	AA004761	AA004772
58	Hyatt Case Appeal Statement	5/6/2022	42	AA009721	AA009725
59	Hyatt Notice of Appeal	5/6/2022	42	AA009726	AA009728

52	Hyatt Supplemental Memo in Support of Motion to Retax Costs and Supplemental Appendix	9/29/2021	39, 40	AA009086	AA009283
15	Judgment	2/21/2020	21	AA004739	AA004748
56	Minute Order re Motion to Strike Motion to Retax Alternatively Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/10/2022	42	AA009711	AA009712
16	Notice of Entry of Judgment	2/26/2020	21	AA004749	AA004760
48	Notice of Entry of Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009058	AA009064
2	Notice of Hearing	8/13/2019	1	AA000003	AA000004
50	Order Affirming in Part, Reversing in Part and Remanding	4/23/2021	39	AA009075	AA009083
47	Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009054	AA009057
57	Order Denying Mtn to Strike Mtn to Retax Mtn for Ext of Time	4/6/2022	42	AA009713	AA009720
1	Order of Remand	8/5/2019	1	AA000001	AA000002
41	Plaintiff Gilbert P Hyatt's Opposition to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/27/2020	39	AA008950	AA008974

9	Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs, filed October 15, 2019	10/15/2019	4-7	AA000708	AA001592
35	Plaintiff Gilbert P. Hyatt's Motion to Strike, Motion to Retax, and Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/2/2020	37, 38	AA008695	AA008705
61	Recorder's Transcript Continued Motion to Retax	1/27/2022	42	AA009775	AA009795
60	Recorder's Transcript of Motion to Retax	1/25/2022	42	AA009729	AA009774
4	Recorder's Transcript of Pending Motions	9/25/2019	1	AA000006	AA000019
46	Recorder's Transcript of Pending Motions	4/27/2020	39	AA009015	AA009053
51	Remittitur	6/7/2021	39	AA009084	AA009085
42	Reply in Support of Plaintiff Gilbert P. P Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	4/1/2020	39	AA008975	AA008980

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPENDIX OF EXHIBITS TO APPELLANT’S OPENING BRIEF VOLUME 10 OF 42** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list.

DATED this 10th day of October, 2022.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC

1 In other words, the cornerstone of the FTB's case crumbles upon even mild cross-examination.

2 **ii. The \$9 million fraud penalties and the FTB's urgency to settle.**

3 Based upon its trumped up "investigation," the FTB not only assessed Hyatt taxes for a
4 period after which he had moved to Nevada, it assessed Hyatt penalties for alleged fraud in
5 regard to his Nevada residency. The penalties amounted to an additional 75% of the alleged
6 taxes owed. Discovery has established that the FTB teaches its auditors to use the fraud penalty
7 as a "bargaining chip" to obtain an "agreement" from the taxpayer to pay the assessed tax.²²²

8 Hyatt has alleged in his First Amended Complaint that the FTB instigated the audits of
9 his tax returns to coerce a settlement from him and that Jovanovich boldly "suggested" to
10 Hyatt's representative that settling at the "protest stage" would avoid Hyatt's personal and
11 financial information being made public.²²³ Hyatt has now confirmed in deposition testimony
12 that Jovanovich, the FTB's protest officer, told Hyatt's tax representative that, if he did not
13 settle at the outset of the protest stage,²²⁴ it would be necessary for the FTB to engage in
14 extensive additional requests for information from Hyatt as that is its practice "in high profile,
15 large dollar" residency audits. In fact, Ms. Jovanovich testified that she told Hyatt's tax
16 representative that in such cases the FTB will conduct an in-depth investigation and exploration
17 "of many unrelated facts and questions" related to Hyatt.²²⁵ In short, Hyatt was told to settle this
18 tax case or the privacy and confidentiality which he so valued would be lost and trumpeted from
19 the housetops.

20 Jovanovich also testified that she understood Hyatt had a unique and special concern
21 regarding his privacy.²²⁶ Jovanovich testified that this was a topic of discussion among FTB

22 ²²² Ford depo., Vol. I, p. 128-29.

23 ²²³ First Amended Complaint, ¶ 56(g). (See Exhibit 1 to the FTB's Writ Petition.)

24 ²²⁴ After the audit is completed and an assessment is made against the taxpayer, the taxpayer can file a protest
25 challenging the assessment. During the protest phase, a protest officer, in theory, impartially reevaluates the auditor's
26 conclusion.

27 ²²⁵ Jovanovich's June 1997 note re Cowan telephone conversation. (See exhibits attached to Hyatt's
28 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.

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

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.*

1 Eugene Cowan, promises and assurances of *confidential* treatment repeatedly during the audit.
2 These were given both orally and in writing. For example, in his April 30, 1996 letter, Eugene
3 Cowan referred to the fact that the FTB "has been fully informed of the taxpayer's desire to
4 keep this matter confidential." Mr. Cowan further complained of the FTB's breach of "the
5 confidential relationship that the FTB promised to maintain in handling this matter."²³⁰

6 Sheila Cox represented to Hyatt's tax attorney, Eugene Cowan, that the FTB followed
7 the dictates of the FTB Security and Disclosure Manual. She delivered excerpts of that manual
8 to him to induce him to arrange for her to copy confidential documents in Hyatt's possession.
9 The Security and Disclosure Manual has many provisions designed to protect the privacy of
10 taxpayers and the confidentiality of taxpayers and threatens criminal action for violation by FTB
11 employees.²³¹

12 The FTB holds itself out to taxpayers in its Mission Statement, its Strategic Plan, and in
13 communications with the public to be fair and impartial in its dealings with taxpayers. It
14 professes not to guard the revenue, but to interpret the law evenly and fairly with neither a state
15 nor a taxpayer point of view. FTB personnel have testified to this in depositions.²³²

16 The FTB's representations of confidentiality and fairness were false. The FTB did not
17 treat Gil Hyatt's personal information confidentially and did not treat him fairly. Instead, the
18 FTB:

- 19 • intentionally disclosed Hyatt's Social Security Number to over 40
20 individuals and entities in California and Nevada, including four
newspapers;
- 21 • intentionally disclosed Hyatt's secret Las Vegas address to third parties,
22 including utility companies and newspapers in Las Vegas;
- 23 • intentionally disclosed portions of his confidential patent licensing
24 agreements to Fujitsu and Matsushita, and the fact that the FTB was
investigating Hyatt on taxes;

25
26 ²³⁰ 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.

27 ²³¹ Attached as Exhibit 4 to the Cowan Affid., and the Cowan Affid. is attached as Exhibit 15, in Vol. VIII,
28 to the accompanying Appendix of Exhibits filed with the Supreme Court.

²³² Illia depo., Vol. II, p. 303, lns. 14-22.

- 1 • intentionally disclosed to Hyatt's Las Vegas neighbors and his former La
Palma neighbors that he was under investigation;
- 2 • intentionally disclosed to six Dr. Shapiros selected from the phone book
3 that Hyatt was being investigated by the FTB;
- 4 • intentionally sent the 1991 Notice of Proposed Assessment (NPA) for
5 several million dollars to Hyatt's former address, even though the auditor
had the correct address (this misaddressed NPA was never found); and
- 6 • recklessly handled or deliberately mishandled the audit file and
7 misplaced, lost, and destroyed, crucial parts of the audit file, including
8 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.

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

11 **iv. The spoliation of evidence by FTB lawyers.**

12 The FTB now tries to shield and literally bury its fraudulent, sham proceeding by
13 assertions of attorney-client privilege. In addition to Jovanovich's involvement as set forth
14 above, Jovanovich has recently testified that prior to retirement from the FTB in June of 1998,
15 she was a member of the FTB litigation team defending this action.²³³ Subsequent to her
16 retirement, she has been retained by the FTB as a consultant to assist and handle the litigation.²³⁴

17 Jovanovich testified that after her retirement from the FTB, she maintained handwritten
18 notes regarding her work on, and her role in, the Hyatt audits. These notes represent the only
19 work done on the protest to date. Some of these notes were produced at her deposition. She
20 testified, however, that she destroyed most of her notes in October of 1998 — approximately
21 eight months *after* the litigation had started and many months after she began working as a
22 lawyer on the litigation team defending the FTB.²³⁵ In other words, despite being an attorney
23 and assisting in the defense of this litigation, she directly engaged in spoliation of evidence
24 highly relevant to this case.

25 Moreover, Jovanovich's testimony is not the only testimony that relates to spoliation of

26 ²³³ Jovanovich depo., Vol. II, pp. 65-66.

27 ²³⁴ Jovanovich depo., Vol. II, pp. 8-10.

28 ²³⁵ Jovanovich depo., Vol. I, pp. 71-79.

1 evidence. Carol Ford, the FTB reviewer on the Hyatt audits, testified that she printed out a hard
2 copy of her notes from her computer, but then deleted such notes from her computer hard drive.
3 She did this in approximately March of 1999 — over a year after the litigation had commenced
4 and after she had been served with a notice of deposition and request for documents. Incredibly,
5 *Ford testified that she destroyed her computer records at the instruction of an FTB in-house*
6 *attorney, Bob Dunn.*²³⁶ During the same deposition, after a lunch break and discussion with
7 FTB counsel, Ford offered to change her testimony to indicate that Dunn had not instructed her
8 to destroy such notes. Nevertheless, Miss Ford's initial testimony was clear and unambiguous
9 on this point, and the fact that she was instructed during the lunch break to recant her testimony
10 is obvious.

11 In short, the FTB's fraudulent and sham audit of Hyatt (the largest residency audit ever),
12 and assessment of now over \$22 million in taxes, and penalties, and interest against him was
13 assisted by the FTB in-house lawyers who are now apparently trying to cover up the fraud by
14 spoilage of documents.

15 Hyatt's more detailed summary of evidence setting forth a *prima facie* showing of fraud
16 and tortious conduct on the part of the FTB is set forth in the accompanying "Appendix re
17 *Prima Facie* Showing of the FTB's Fraudulent Conduct." The crime-fraud exception therefore
18 provides an alternative ground, in addition to those set forth in the above sections, for the Court
19 to order production of the documents and testimony of witnesses now being withheld by the
20 FTB based on the attorney-client privilege.

21
22 **VIII. The work-product doctrine does not protect FTB 07381 from production.**

23 In regard to one document (FTB 07381), the FTB asserts attorney work-product in
24 addition to the attorney-client privilege. This document apparently pertains to conversations
25 Ms. Jovanovich had on tax sourcing issues while working on the Hyatt audits.

26 As set forth above, the discovery commissioner found that Ms. Jovanovich was not
27 acting as an attorney in regard to her role in the audits. Her "work" is therefore also not entitled
28

²³⁶ Ford Depo, Vol. II, pp. 262-64.

1 to protection under the work product doctrine for the same reason set forth above in regard to
2 the attorney-client privilege.

3 Additionally, as discussed above, the FTB has waived any privilege that might have
4 existed on the sourcing issue by its disclosure of the "first" Shigemitsu memo on such subject.
5 This first memo set forth a position against Hyatt. The FTB can not now block discovery of
6 documents contrary to or supporting its position on the sourcing issue. The district court's order
7 requiring production of FTB 07381 was therefore correct.

8
9 **IX. The district court properly ordered that the scope of discovery in this action is "the**
10 **entire audit and assessment process performed by the FTB that was and is directed**
11 **at" Hyatt.**

12 The FTB's writ petition references and challenges "Finding No. 4" by the discovery
13 commissioner that the scope of discovery in this action is "the entire audit and assessment
14 process performed by the FTB that was and is directed at" Hyatt.²³⁷ The discovery
15 commissioner's explanation during the November 9, 1999 hearing best answers and rebuts the
16 FTB's challenge:

17 *Commissioner: [I]f there were any attempts to obtain taxes in some*
18 *kind of fraudulent fashion as I believe would be the case if the attempt*
19 *would have been made to say, you know, if you don't pay we are going*
20 *to assess a fraud penalty on you, even though there is no fraud that we*
21 *can determine legally, we are going to assess that fraud penalty on you*
22 *if you don't settle with us. Now, in my view that would be an improper*
23 *way of collecting taxes, but I think that you should be able to explore*
24 *and find out whether or not that in fact happened. If it did or if it did*
25 *not happen.*²³⁸

26 ...

27 I'm not sure however, Mr. Leatherwood, that in the zeal to collect taxes
28 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

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.)

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

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).

1 The FTB has made clear its "position" that discovery in the underlying action should be
2 limited to "Nevada acts." *The FTB, however, cites to no authority that limits discovery, or even*
3 *suggests a limitation on discovery, based on a state's borders.* Such a proposition is absurd,
4 particularly in a tort action alleging invasion of privacy and fraud, among other claims, where
5 the acts constituting the torts may have taken place in multiple locations and may have been
6 directed from one state to another. Moreover, the damage from the torts may have been
7 experienced in a state separate from where the tortious conduct commenced.

8 **B. Hyatt's tort claims cannot be "split."**

9 Hyatt's tort claims cannot be split and divided by state borders such that the Nevada
10 courts would have jurisdiction only over tortious acts in Nevada, but not the tortious conduct
11 occurring in California that was directly related to and a proximate cause of the injuries suffered
12 by Hyatt in Nevada. Indeed, as was the case in *Mianecki* — the controlling Nevada authority in
13 regard to this case, the tortfeasor need not even have entered Nevada to be held liable for torts
14 causing injury within Nevada. But in this case, the FTB did enter Nevada and engaged in
15 tortious conduct inside and outside of Nevada causing injury to Hyatt in Nevada. It is hornbook
16 law that a cause of action cannot be "split" with parts of a claim heard in one state while other
17 parts of the claim are heard in another state.

18 The wrongful act of defendant creates the plaintiff's cause of action.
19 Policy demands that all forms of injury or damage sustained by the
20 plaintiff as a consequence to the defendant's wrongful act be recovered
21 in one action rather than in multiple actions.²⁴³

22 The FTB's rather bizarre and unprecedented argument, that the Court can only consider
23 Nevada acts to determine the FTB's liability for the tort claims, would require that an aggrieved
24 party must sue a tortfeasor in multiple locations in order to obtain full recovery. Again, there is
25 no legal precedent for the FTB's attempted splitting of Hyatt's tort claims along state
26 boundaries.

27 The FTB's bizarre argument that the torts should be divided by state boundary is
28 contrary to the great weight of legal authority, which holds that a party can be held liable in the

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)).

1 forum state for the effects, *i.e.* the injuries to a resident in the forum state, caused by tortious
2 conduct which took place *outside* the forum state.²⁴⁴ Nevada courts are in accord.

3 *Ridgon v. Bluff City Transfer & Storage Co.* held that "since the defendants' acts
4 allegedly injured [plaintiff] in Nevada, 'it is beyond dispute that [Nevada] has a significant
5 interest in redressing injuries that actually occur within the state.'"²⁴⁵ *Ridgon* explained that the
6 Nevada Supreme Court has "previously held that physical presence within Nevada is not
7 required" where consequences were suffered in Nevada.²⁴⁶ *Ridgon* also cited the United States
8 Supreme Court's holding that a defendant is liable in the forum state "whose only 'contact' with
9 the forum was to knowingly cause injury in the forum state through a foreign act."²⁴⁷

10 The conduct of which Hyatt complains, regardless of where each act took place, is more
11 than sufficient to hold the FTB liable in Nevada because Hyatt's injury occurred in Nevada. For
12 example, *Fegert, Inc. v. Chase Commercial Corp.*²⁴⁸ found it appropriate to hold a defendant
13 liable in Nevada for claims arising from the alleged "harassment and pressuring" of a Nevada
14 resident even though the defendant's only Nevada contact was hiring the attorneys who
15 allegedly engaged in the harassment and pressuring.²⁴⁹ *Fegert* cited prior U.S. Supreme Court
16 precedent that "emphasizes the significance of the place where the brunt of the harm was
17 suffered in deciding the propriety of exercising jurisdiction over an out of state defendant."²⁵⁰
18 Causing harmful consequences in Nevada is sufficient grounds for holding a defendant liable in
19 Nevada.²⁵¹

21 ²⁴⁴ See, *e.g.*, *Calder v. Jones*, 465 U.S. 783, 787 (1984).

22 ²⁴⁵ 649 F. Supp. 263 (D. Nev. 1986) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984).)

23 ²⁴⁶ 649 F. Supp. at 266 (citing *Burns v. Second Jud. Dist Ct.*, 97 Nev. 237, 627 P.2d 403 (1981) and *Certain-*
24 *Teed Products Corp. v. Second Jud. Dist. Ct.*, 87 Nev. 18, 479 P.2d 781, 784 (1971)).

25 ²⁴⁷ 649 F. Supp. at 267 (citing *Calder v. Jones*, 465 U.S. 783, 789-90 (1984)).

26 ²⁴⁸ 586 F. Supp. 933 (D. Nev. 1984).

27 ²⁴⁹ 586 F. Supp. at 936.

28 ²⁵⁰ 586 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).

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

²⁵² *Seagate Technology v. A.J. Kogyo Co.*, 219 Cal. App. 3d 696, 268 Cal. Rptr. 586, 589 (1990). See also *Schlüssel v. Schlüssel*, 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).

1 has not changed.²⁵⁴

2 Recent pronunciations on the issue from courts in other jurisdictions are entirely
3 consistent with *Sweeney*.

4 [T]he relief sought in the complaint is not the guiding factor because if
5 jurisdiction attaches at all under the [long-arm] statute, the nonresident
6 is before the Court for any and all relief that might be necessary to do
7 justice between the parties by virtue of the fact that the jurisdiction
8 conveyed by the statute is in personam jurisdiction.²⁵⁵

9 Federal courts also have concluded that, so long as they have personal jurisdiction over
10 the defendant, the non-residency of the defendant is of no consequence and in no way limits the
11 court's authority to grant relief.²⁵⁶

12 There is simply no authority that would allow the FTB to split Hyatt's tort claims by not
13 allowing him to take necessary and relevant discovery outside of Nevada. As the discovery
14 commissioner concluded:

15 *Commissioner:* Well, because the way Nevada got involved in this was
16 by acts done by the FTB in Nevada. Nobody disputes that certain acts
17 were done in Nevada in the process of collecting this tax, or let's not
18 say collecting. Nothing has been collected yet I guess, in assessing the
19 tax, and that's what, that's why you are here. That's why you are
20 here.²⁵⁷

21 As a result, "the entire audit and assessment process performed by the FTB that was and
22 is directed at" Hyatt is at issue and subject to discovery.

23 **X. The protective order crafted by the discovery commissioner does not in any way
24 restrict or hinder the FTB in this litigation, and statements to the contrary by the
25 FTB are false and misleading.**

26 **A. The protective order does not restrict or hinder the FTB in this litigation.**

27 The FTB's petition repeatedly contends — falsely and in direct contradiction to the
28

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.)

1 terms of the protective order — that the protective order imposes great burden and expense and
2 would greatly restrict counsel's ability to use discovery materials in preparing the FTB's
3 defense and conferring with their client.²⁵⁸ The FTB gives no explanation as to how Hyatt's
4 protective order in any way limits the FTB's counsel in preparing its defense for this case. The
5 very paragraphs of the order cited to by the FTB say directly the opposite.²⁵⁹

6 The protective order specifically and affirmatively states that material designated under
7 the protective order may be used for "*discovery, in preparation of discovery, in preparation for*
8 *trial, trial, any appeals related to this action.*"²⁶⁰ The intent of the district court's protective
9 order is to allow the parties to use designated materials as necessary to prosecute and defend this
10 case, but not to use materials designated under the protective order for other purposes.

11 The protective order specifically states that counsel for the FTB may disclose
12 confidential material to FTB:

13 the employees, officers, and board members to the extent necessary to
14 assist FTB counsel in the defense of this action.²⁶¹

15 The protective order therefore does not limit the way in which the FTB counsel defends
16 this action. The only limitation that the protective order places on the FTB's right to use
17 designated material is that the FTB must not disclose designated material outside of this
18 litigation.

19 **B. The FTB has misrepresented the scope and effect of the protective order.**

20 In both the FTB's writ petition and its recent opposition to motion for clarification, the
21 FTB misrepresents the scope and effect of the protective order. The FTB would have this Court
22 believe that every document produced in this litigation, either by Hyatt or the FTB, falls within
23

24 ²⁵⁸ FTB Writ Petition, p. 7, lns. 2-9; p. 14, lns. 22-23, pp. 36-39.

25 ²⁵⁹ FTB Writ Petition, p. 37, ln. 27, citing paragraphs 2(a) 3, 7, and 12 of the trial court's Protective Order.
26 (See Exhibit 6 to the FTB's Writ Petition.)

27 ²⁶⁰ Protective Order, ¶ 3(h). (See Exhibit 6 to the FTB's Writ Petition.)

28 ²⁶¹ Protective Order, ¶ 2 A(ii). (See Exhibit 6 to the FTB's Writ Petition.)

1 the category of "Hyatt Confidential Information" or "FTB Confidential Information," as those
2 terms are defined in the protective order, and therefore are subject to the terms of the protective
3 order.²⁶² This is simply not true.

4 **1. The FTB understands that the scope and effect of the protective order is
5 extremely limited.**

6 Only materials that are stamped or marked "Confidential — NV Protective Order" are
7 subject to the terms of the protective order.²⁶³ The protective order itself states in paragraph 4 of
8 the Findings, at line 16, that material "so designated by the parties" is that which will be
9 governed by the protective order. The protective order entered by the district court was
10 specifically dictated by the discovery commissioner who combined previous portions of
11 different drafts of the protective order, as well as added his own language in certain sections.
12 The discovery commissioner's comments at the hearing on November 9, 1999, however, leave
13 no doubt that materials must be specifically designated under the protective order in order to be
14 subject to its terms. The most obvious example is the Discovery Commissioner's warning to
15 both parties *not to over-designate* materials as subject to the protective order as he will sanction
16 anyone who abuses the protective order.

17 I want everybody to use their best efforts to not designate something as
18 Confidential in the first place unless you are truly seeking to follow that.²⁶⁴

19 He then further stated:

20 I think I addressed that in here, but as far as designating documents that are
21 Confidential that should not be designated, that's going to go in effect as of
22 the time of this recommendation from that point on. I'm not going to go
23 back and say you shouldn't have. I'm not going to impose any penalties
24 for prior conduct because we did not have this in place, this order in place
25 prior to this.²⁶⁵

26 That the protective order is limited to the materials specifically designated by the parties
27 is consistent with the numerous meet-and-confers prior to the November 9, 1999 hearing, the
28

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.)

1 letters and prior drafts of the protective orders exchanged between counsel, and the briefs filed
2 with the Court.²⁶⁶

3 Subsequent to the hearing, a draft of the "Report and Recommendation" regarding the
4 protective order was circulated under cover letter from Hyatt's counsel dated November 22,
5 1999.²⁶⁷ The letter explains that the term "Confidential — NV Protective Order" was inserted
6 into the draft protective order to distinguish prior productions of documents which had been
7 marked "confidential" and which would not be subject to the protective order, at least not
8 without a party re-designating materials as "Confidential — NV Protective Order." Most
9 revealing in regard to the FTB's misrepresentations to this Court is a comment from the FTB's
10 writ petition where it acknowledges that its prohibition on using documents in other proceedings
11 is limited to "documents designated 'NV Confidential' by Hyatt."²⁶⁸

12 Hyatt's designation of materials as "Confidential — NV Protective Order" in this case
13 has been extremely limited. For example, certain selected documents were so designated as
14 well as the transcript from Mike Kern's deposition. But the vast majority of the 14,000 plus
15 documents produced by Hyatt and his associates that have been subpoenaed by the FTB have
16 not been so designated.

17 The FTB has also used the "Confidential — NV Protective Order" designation on
18 selected documents. Clearly the FTB understands that such a specific designation is necessary
19 for a document to be subjected to the term of the protective order.

20 Ironically, the FTB is using the special designation to prohibit Hyatt from using
21 damning materials that support the testimony of Candance Les, *i.e.*, the whistle-blower. The
22 FTB has designated as "Confidential — NV Protective Order" the transcripts from the interview
23 its investigator conducted of Ms. Les and her testimony in another legal proceeding in which
24 she testified, consistent with her testimony in this case, regarding the wrongful conduct in the
25

26
27 ²⁶⁶ See Exhibits 9, to Vol. III, in the accompany Appendix of Exhibits filed with the Supreme Court.

28 ²⁶⁷ 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.

1 FTB in the Hyatt audit.²⁶⁹

2 **2. Correspondence confirmed the limited scope and effect of the protective**
3 **order.**

4 The FTB cannot in good faith represent to this Court that the protective order is
5 preventing it from preparing this case for trial, nor from using the vast majority of the discovery
6 materials obtained in this litigation in the protest proceeding pending in California.

7 Hyatt informed the FTB in correspondence that he would designate relatively few
8 documents under the protective order and that he would rely on the repeated representations of
9 the FTB's Nevada counsel that materials produced in this litigation that are not designated
10 pursuant to the protective order would still be protected as "confidential" pursuant to the FTB's
11 own rules, regulations, policies and procedures.²⁷⁰

12 The only dispute therefore over the protective order is the neutral provision included by
13 the Discovery Commissioner that requires materials that have been designated as "Confidential
14 — NV Protective Order" not be used in other proceedings *without receiving permission of the*
15 *opposing party* or obtaining such materials through whatever lawful means exist in regard to
16 other proceedings. As set forth above, this involves a very limited subset of the discovery
17 produced in this litigation, and it is the FTB that is using the provision to block damning
18 materials from being used elsewhere.

19 **C. The FTB misrepresents material facts regarding the protective order.**

20 The FTB's statement that Hyatt produced no documents responsive to the FTB
21 document requests prior to the entry of the protective order is false, misleading, and
22 inflammatory. The FTB's petition failed to acknowledge that Hyatt produced over 14,000
23 pages of documents in this litigation prior to the district court issuing the protective order now
24 disputed by the FTB. The FTB attempts to have this Court believe that the FTB received little
25 discovery from Hyatt prior to the entry of the protective order, but most of Hyatt's 14,000-page

26
27 ²⁶⁹ 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).

28 ²⁷⁰ 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).

1 production of documents to the FTB was responsive to one or more of the FTB's document
2 requests and was produced well before the protective order was issued.²⁷¹

3 Hyatt diligently sought to resolve this protective-order issue through numerous meet-
4 and-confers and with cooperative revisions of his initial protective order first submitted to the
5 FTB on May 17, 1999, along with Hyatt's responses to the FTB document requests at issue
6 here. The final version of Hyatt's protective order addressed almost every concern expressed by
7 the FTB during the meet-and-confers and conformed strictly with the discovery commissioner's
8 suggestions made during the September 24, 1999 telephone conference with counsel for the
9 parties.²⁷²

10 Hyatt proposed a protective order based on Nevada law and procedure. Nevada, of
11 course, looks first to Nevada court decisions, rules, and statutes for governing law.²⁷³ In
12 considering protective orders in discovery matters, Nevada courts have broad discretion in
13 determining the form of relief.²⁷⁴

14 In contrast, the only FTB version of a protective order — the one proposed by the FTB
15 in July 1999 — was never modified, not even after the telephone conference with the discovery
16 commissioner on September 24, 1999. The FTB was unflinching and unwavering in its position
17 that it will only accept a "California" protective order based upon California rules and

18
19
20 ²⁷¹ Hyatt has produced over 14,000 pages of documents since commencement of the litigation, most prior
21 to the entry of the Protective Order. See Hyatt's detailed Index, attached as Exhibit 26, to Vol. IX, in the Appendix
22 of Exhibits filed with the Supreme Court.

23 ²⁷² See Hyatt's opposition to FTB's Motion to Compel, attached as Exhibit 9, to Vol. VI, in the
24 accompanying Appendix of Exhibits filed with the Supreme Court.

25 ²⁷³ *Dickson v. State*, 108 Nev. 1, 2, 822 P.2d 1122, 1123 (1992) ("While the dissent cites cases from other
26 jurisdictions, we are bound to follow the law in Nevada."); Nev. R. Civ. P. 1 ("These rules govern the procedure in
27 the district courts in all suits of a civil nature whether cognizable as cases at law or in equity....")

28 ²⁷⁴ *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].

1 regulations and the FTB's own policies.²⁷⁵ These are the same rules and regulations the FTB
2 has been violating for seven years regarding Hyatt. Hyatt rejected the FTB's unfair ultimatum
3 and suggested a protective order that is consistent with Nevada civil procedure and litigation
4 practice in Nevada and that is consistent with the Discovery Commissioner's suggestions.

5 The need for limiting disclosure and dissemination of certain information produced in
6 discovery to this litigation is evident by the highly sensitive technical, licensing, and patent
7 information, highly personal large dollar-magnitude financial information, and other
8 information about Hyatt, including the type of information previously revealed by the FTB to
9 third parties, that forms part of the basis of Hyatt's invasion of privacy claims.

10 **D. California law and FTB internal policy should not govern the**
11 **protective order in this Nevada litigation.**

12 The FTB's California protective order states that it would be governed by:

13 'California Revenue and Tax Code Sections 19542, 19547 and in
14 accordance with the FTB's "need to know" internal policy, FTB legal
15 branch confidentiality policies, the FTB security and disclosure manual and
16 directives of the franchise tax board.²⁷⁶

17 Hyatt instead proposed, and the district court ruled, that the protective order be governed
18 by Rule 26 of Nevada Rules of Civil Procedure, specifying that each party be allowed to use
19 information designated by the other as confidential "for discovery, in preparation for discovery,
20 for trial, and in preparation of trial, and any appeal related to this action." In other words, the
21 parties can make whatever use of the confidential materials they deem necessary for prosecuting
22 or defending the instant case.

23 **1. The FTB has not produced the policies on which it asks this Court to base**
24 **the protective order.**

25 Nowhere in its proposed protective order nor in its correspondence during meet-and-
26 confers, nor during telephone meet-and-confers, nor in its moving papers did the FTB even set
27 forth what it understands the above-quoted California laws, rules, regulations, and internal
28 policies require in regard to keeping material confidential. The FTB has never given Hyatt a

²⁷⁵ *Id.*

²⁷⁶ FTB Protective Order, ¶ 3. (See Exhibit 6 to the FTB's Writ Petition.)

1 copy of the Legal Branch Confidentiality Policies, nor an unredacted copy of the Security and
2 Disclosure Manual, nor other "directives" on which the FTB would base its order. Indeed, it
3 would seem that the FTB is merely required to comply with its own self-serving "need to know"
4 policy in determining what to keep confidential. Conveniently for the FTB, it would never be in
5 violation of such a protective order as for any of its disclosures it may simply respond that the
6 entities (which includes newspapers) "needed" to review the "confidential" materials.

7 **2. The FTB had already failed to provide effective protection under California**
8 **law.**

9 California does provide for criminal penalties for FTB violations of confidentiality, but
10 these provisions are toothless since the chief law enforcement officer of California — the
11 Attorney General — is also in this case the FTB's counsel. In addition, the Attorney General's
12 office has itself violated these criminal "protections" of confidentiality by revealing confidential
13 information from Hyatt's audit file. It is not realistic to expect the Attorney General's office to
14 police its own behavior. In addition, this Court has no jurisdiction to impose criminal sanctions
15 under California law.

16 **3. A neutral provision regarding use of "confidential" materials**
17 **in other cases and proceedings is appropriate in this case.**

18 The discovery commissioner's protective order addresses the possibility that the parties
19 may want to use "confidential" information designated by the opposing side in other matters
20 such as the California tax protest. The discovery commissioner's protective order requires that
21 the party seeking to use confidential information in other proceedings use whatever legal means
22 are available in such other proceedings to obtain the materials. The Nevada Court is therefore
23 not put in the position of determining the appropriateness or inappropriateness, or whether to
24 limit or expand, the use of "confidential" material in other proceedings over which it does not
25 have jurisdiction.

26 This is the main issue in dispute concerning the protective order. The FTB insists that
27 "confidential" materials gathered in this Nevada litigation also be deemed a part of the
28 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)

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

²⁷⁷ Cal.Rev.& Tax Code §§ 19041 & 19044.

²⁷⁸ Cal.Rev. & Tax Code § 19045.

1 professional, the FTB made public certain parts of his private financial information and
2 badgered him to the point where he even worried about the possible consequences of visiting his
3 grandchildren who lived in California. "George Archer, a top professional golfer, asked the
4 State Board of Equalization last Wednesday, 'Why has the Franchise Tax Board made my life a
5 living hell for the last six years?'" ...and BOE Chair Johan Klehs admonished the FTB staff to
6 stop hounding the beleaguered golfer."²⁷⁹

7 If the FTB is able to use any "confidential" materials from this Nevada litigation in the
8 California tax protest, such materials may ultimately become part of the public record. For that
9 reason, the district court correctly ruled that any "confidential" materials obtained in the Nevada
10 litigation may not automatically be used in the California tax case. Rather, the decision as to
11 whether any particular materials deemed "confidential" are appropriate for and may be used in
12 the California tax protest must be left for determination in that proceeding.

13 **5. The protective order does not interfere with the FTB's "government**
14 **administration."**

15 Without explanation, the FTB asserts that the protective order will interfere with
16 "government administration." But documents designated under the protective order can be used
17 by the FTB in defending this litigation. How then does the protective order interfere with
18 "government administration?"

19 If the FTB, as a governmental agency, has the right to obtain the few designated
20 materials for the California tax protest, it should not do so through this litigation. The district
21 court properly avoided any ruling on the appropriateness of the "confidential" documents being
22 used in the California tax protest. Nothing in the protective order prevents the FTB from
23 obtaining "confidential" materials through whatever legal means the FTB has under California
24 law.

25 In regard to imposing a burden, therefore, it is the FTB's desired "California" protective
26 order that imposes the greatest burden on the parties and to the district court. By asking that the

27
28 ²⁷⁹ 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.)

1 protective order be based upon California law and FTB policy and procedures, it is entirely
2 unclear what limitations there are on "confidential" materials in this case and what control the
3 district court would have over this process.

4 In sum, the FTB has failed to demonstrate how the protective order would cause it to
5 suffer any burden whatsoever in this case.

6
7 **XI. The FTB's opposition to the motion for clarification raised an issue not addressed**
8 **in its writ petition, but it is a red herring that should be ignored by this Court as it**
9 **was by the trial court.**

10 The FTB's Opposition to Motion for Clarification of Stay Order of June 7, 2000 was in
11 reality a tardy supplement to its writ petition. Instead of merely addressing the very focused
12 issue of the scope of this Court's June 7, 2000 order, the FTB first improperly argued that both
13 the scope of the discovery ordered by the district court and the protective order it entered
14 exceeded the court's jurisdiction based on the principle of comity. The scope of discovery in
15 this case and the protective were addressed in detail above.

16 Procedurally, this "supplement" to its writ petition was highly inappropriately and
17 should therefore be rejected without further consideration. Substantively, the analogy used by
18 the FTB is a classic red herring that is easily dismissed. Specifically, the FTB attempts to scare
19 this Court, as it tried during the summary judgement motion in the district court, by "warning"
20 that if FTB auditors are held accountable for tortious acts committed in, directed into, or
21 injuring a resident of Nevada, the Nevada Gaming Control Board may also be subject to suit in
22 other states when investigating applicants for gaming licenses.

23 But the Gaming Control Board is conducting permissive investigations of applicants
24 who have voluntarily submitted applications and welcomed the Gaming Control Board to
25 investigate their background. There can be no invasion of privacy in the Gaming Control
26 Board's investigation when the investigation was permissive. Moreover, this Court would
27 undoubtedly endorse as public policy that the Gaming Control Board should not be engaging in
28 illegal and tortious conduct in carrying out its permissive investigations as the FTB is charged
with in this case.

1 It is well established under both Nevada law and United States Supreme Court precedent
2 that one state may not commit torts in or cause tortious injury in another state with impunity.
3 Again, this issue was extensively briefed in the district court as part of Hyatt's opposition to the
4 FTB's ill-fated summary judgment motion.²⁸⁰

5 In sum, *Nevada v. Hall* related to a claim of sovereign immunity based on comity and
6 other principles by *Nevada in California courts*. The United States Supreme Court ruled that
7 "Such a claim necessarily implicates the power and authority of a second sovereign; its source
8 must be found either in an *agreement*, express or implied, between the two sovereigns, or in the
9 *voluntary* decision of the second to respect the dignity of the first as a matter of *comity*."²⁸¹
10 *Nevada v. Hall* noted California's position: "the California courts have told us that whatever
11 California law may have been in the past, *it no longer extends immunity to Nevada as a matter*
12 *of comity*."²⁸²

13 In regard to Nevada's exercise of comity, *Mianecki v. District Court*²⁸³ approved and
14 adopted the rationale expressed by the California Supreme Court in *Hall v. University of*
15 *Nevada*.²⁸⁴ "We approve the reasoning of the California court and hold that where the injured
16 party is a citizen of this state, injured in this state and sues in the courts of this state, there is no
17 immunity, by law *or as a matter of comity*, covering a sister state's activities in this state."²⁸⁵

18 The reasoning in *Mianecki* applies to this case. The Nevada Supreme Court first
19 recognized that "Nevada has a paramount interest in protecting its citizens . . . ,"²⁸⁶ and that
20 comity cannot trump the rights of the citizens of Nevada. "[I]n considering comity, there
21

22 ²⁸⁰ See Exhibit 11, to Vol. VII of the accompanying Appendix of Exhibits filed with the Supreme Court.

23 ²⁸¹ 440 U.S. 410, 415-16 (1979) (emphasis added).

24 ²⁸² 440 U.S. at 418 (emphasis added).

25 ²⁸³ 99 Nev. 93, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983).

26 ²⁸⁴ 8 Cal. 3d 522, 105 Cal. Rptr. 355 (1972), *cert. denied*, 414 U.S. 820 (1973). *Mianecki* was consistent with
27 the United States Supreme Court's holding in *Nevada v. Hall*, 440 U.S. 410 (1979).

28 ²⁸⁵ *Mianecki* 658 P.2d at 423-24 (emphasis added).

²⁸⁶ *Id.* at 424.

1 should be due regard by the court to the duties, obligations, rights and convenience of its own
2 citizens and of persons who are within the protection of its jurisdiction."²⁸⁷ With these
3 principles in mind, the *Mianecki* court held:

4 [W]e believe greater weight is to be accorded Nevada's interest in
5 protecting its citizens from injurious operational acts committed within its
6 borders by employees of sister states, than Wisconsin's policy favoring
7 governmental immunity. Therefore we hold that the law of Wisconsin
8 *should not be granted comity where to do so would be contrary to the*
9 *policies of this state.*²⁸⁸

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

13 "A state has an especial interest in exercising judicial jurisdiction over
14 those who commit torts within its territory. This is because torts involve
15 wrongful conduct which a state seeks to deter, and against which it attempts
16 to afford protection, by providing that a tortfeasor shall be liable for
17 damages which are the proximate result of his tort."

18 *Keeton v. Hustler Magazine, Inc.*²⁸⁹

19 The FTB's tardy strawman argument, and continued assertion of comity, must be
20 rejected by this Court just as has consistently been rejected by the district court.

21 XII. Conclusion.

22 **Deliberative-process.** The district court correctly found that the limited, and not well
23 recognized, deliberative-process privilege is not applicable to this case. Specifically, the claims
24 in dispute in this case relate to the FTB's misconduct, not review of an agency's policy-level
25 decision, and the discovery being withheld has no overarching policy purpose because it relates
26 directly and exclusively to the Hyatt audits. Moreover, the head of the FTB, Jerry Goldberg,
27 failed to invoke the privilege. Finally, even if the privilege were applicable, since it is a limited,
28

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))).

1 weak privilege, it still cannot be used to block discovery where – as here – the litigant’s need for
2 disclosure outweighs the government’s limited right not to disclose.

3 **Attorney-client privilege.** The district court’s order requiring production of the subject
4 withheld documents based on the attorney-client privilege should be affirmed. First, the order is
5 based on the discovery commissioner’s finding – after an extensive review of the record – that
6 Anna Jovanovich had a “dual-role” within the FTB and that she was acting in a non-legal
7 capacity while assisting the FTB auditors. The FTB has made no showing that the district court
8 abused its discretion in so ruling. Furthermore, the FTB’s multiple-and-repeated waivers are
9 controlling – from the Carol Ford testimony about her review, to the Allan Shigemitsu
10 previously produced sourcing memo, to the Sheila Cox review of the entire audit file to refresh
11 her recollection for her deposition. The FTB’s conduct establishes that it has waived any
12 privilege that might have attached to the subject documents.

13 **Prima facie showing of crime-fraud.** In addition, this district court’s order requiring
14 production of the subject documents being withheld based on the attorney-client privilege
15 should be affirmed because Hyatt made the required prima facie showing in the district court for
16 the crime-fraud exception to the attorney-client privilege. The FTB auditors repeatedly
17 consulted with its lawyers for help in doing their sham audits in both: (1) identifying new third
18 parties from whom to seek intrusive information about Hyatt and (2) drafting its extortionate
19 and fictional audit narratives.

20 **Protective order.** The district court’s protective order should be affirmed as the FTB
21 has made no showing that the district court abused its discretion in entering the order after it
22 was carefully considered and crafted by the discovery commissioner, based on input and drafts
23 from both parties. The protective order is: (1) based on Nevada law, (2) protects a Nevada
24 plaintiff, (3) governs Nevada litigation, (4) controls the conduct of attorneys who are either
25 practicing in Nevada or admitted in Nevada pro hac vice, and (5) will be enforceable under
26 clearly understood and published Nevada procedures and Nevada law. The protective order
27 properly requires both sides to acquire the designated documents – currently few in number – in
28 other forums under the rules of those forums in order to use them in those forums.

1 This Court should reject, as did the district court, the California-form protective order
2 that the FTB proposed to the district court because it relies on undisclosed rules, regulations,
3 and directives from California and is therefore fatally uncertain and vague. To the extent the
4 California-form protective order refers to the California criminal statute and internal California
5 Franchise Tax Board policies, it is defective because this Court has no power to issue criminal
6 sanctions based on California criminal law and because the FTB's internal policies have a large
7 and highly discretionary "need to know" loophole.

8 The FTB also misrepresented to this Court the scope and effect of the protective order.
9 The protective order will in no way prohibit or limit the FTB and its counsel from fully
10 preparing this case for trial.

11 In sum, the protective order allows both sides full use of the designated materials to
12 prosecute or defend this litigation while reasonably restricting for use solely in this litigation
13 certain designated documents acquired under the protective order.

14
15 For the above reasons, the Petition for Writ should be denied in its entirety.

16
17 DATED this 7th day of July, 2000.

18
19 HUTCHISON & STEFFEN, LTD.

20
21 By: 

22 Mark A. Hutchison, Esq.
23 John T. Steffen, Esq.
24 Hutchison & Steffen
25 Lakes Business Park
26 8831 West Sahara Avenue
27 Las Vegas, Nevada 89117

28
Peter C. Bernhard
BERNHARD & LESLIE
3980 Howard Hughes Parkway
Suite 550
Las Vegas, Nevada 89109

Attorneys for Gilbert P. Hyatt

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

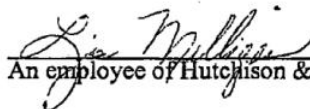

An employee of Hutchison & Steffen

TABLE OF AUTHORITIES

FEDERAL CASES

<i>In re A. H. Robins Company, Inc.</i> , 107 F.R.D. 2 (D. Kan. 1985)	57
<i>In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989</i> , 133 F.R.D. 515 (N.D. Ill. 1990)	47
<i>Alexander v. FBI</i> , 186 F.R.D. 170 (D.D.C. 1999)	34-37, 46
<i>Bank of America v. U.S.</i> , 78-2 USTC (CCH sec. 9493) (N.D. Cal. 1978)	32
<i>Calder v. Jones</i> , 465 U.S. 783 (1984)	70
<i>In re California Public Utilities Com'n</i> , 892 F.2d 778 (9th Cir. 1989)	29,37
<i>Coastal Corp. v. Duncan</i> , 86 F.R.D. 514 (D. Del. 1980)	41-42, 49
<i>Coastal States Gas Corp. v. Department of Energy</i> , 617 F.2d 854 (D.C. Cir. 1980)	29, 44
<i>EPA v. Mink</i> , 410 U.S. 73 (1973)	29, 31
<i>Exxon Corp. v. Department of Energy</i> , 91 F.R.D. 26 (N.D. Tex. 1981)	41-42
<i>FTC v. Warner Communications Inc.</i> , 742 F.2d 1156 (9th Cir. 1984)	45
<i>Fegert, Inc. v. Chase Commercial Corp.</i> , 586 F. Supp. 933 (D. Nev. 1984)	70
<i>Furman v. U.S.</i> , 83-2 USTC (CCH sec. 9739) (D.S.C. 1983)	32
<i>Geo-Physical Maps, Inc. v. Toycraft Corp.</i> , 162 F. Supp. 141 (S.D.N.Y. 1958)	72
<i>In re Grand Jury Proceedings</i> , 87 F.3d 377 (9th Cir.), cert. denied, 519 U.S. 945 (1996)	56

<i>In re Grand Jury Proceedings (Doe),</i> 983 F.2d 1076 (9th Cir. 1993)	56
<i>Green v. Internal Revenue Service,</i> 556 F. Supp. 79 (N.D. Ind. 1982), <i>aff'd</i> , 734 F.2d 18 (7th Cir. 1984)	32
<i>Hickman v. Taylor,</i> 329 U.S. 495 (1947)	68
<i>ISI Corp. v. United States,</i> 503 F.2d 558 (9th Cir. 1974)	32
<i>J. P. Foley & Co., Inc. v. Vanderbilt,</i> 65 F.R.D. 523 (S. D. N. Y. 1974)	47
<i>Jordan v. United States Department of Justice,</i> 591 F.2d 753 (D.C. Cir. 1978)	28, 31
<i>Keeton v. Hustler Magazine, Inc.,</i> 465 U.S. 770 (1984)	70, 84
<i>Maricopa Audubon Soc'y v. United States Forest Service,</i> 103 F.3d 1089 (9th Cir. 1997)	43-44
<i>In re Micropro Securities Litigation,</i> 1988 WL 109973, Fed. Sec. L. Rep. P 93, 986 (N.D. Cal. 1988)	52
<i>In re Martin Marietta Corp.,</i> 856 F.2d 619 (4th Cir. 1988)	51
<i>Mobil Oil Corp. v. Department of Energy,</i> 102 F.R.D. 1 (N.D.N.Y. 1983)	49
<i>National Labor Relations Board v. Sears, Roebuck & Co.,</i> 421 U.S. 132 (1975)	44
<i>Nevada v. Hall,</i> 440 U.S. 410 (1979)	21-23, 83
<i>North Carolina Electric Membership Corp. v. Carolina Power & Light Co.,</i> 110 F.R.D. 511 (M.D.N.C. 1986)	47, 52
<i>Posner Laboratories, Inc. v. Pro-line Corp.,</i> 1978 U.S. Dist. LEXIS 16334 (S.D.N.Y. 1978)	72
<i>Principe v. Crossland Savings, FSB,</i> 149 F.R.D. 444 (E.D.N.Y. 1993)	45-46
<i>Recycling Solutions, Inc. v. District of Columbia,</i> 175 F.R.D. 407 (D.D.C. 1997)	57-58

<i>Ridgon v. Bluff City Transfer & Storage Co.</i> , 649 F. Supp. 263 (D. Nev. 1986)	70
<i>Rusack v. Harsha</i> , 470 F. Supp. 285 (M.D. Pa. 1978)	71
<i>Ryan v. Dept. of Justice</i> , 617 F. 2d 781 (D.C. Cir. 1980)	31
<i>SEC v. Gulf & Western Industries, Inc.</i> , 518 F. Supp. 675 (D. D. C. 1981)	47,51
<i>In re Sealed Case</i> , 121 F.3d 729 (D.C. Cir. 1997)	34, 45
<i>In re Sealed Case</i> , 754 F.2d 395 (D.C. Cir. 1985)	58-59
<i>Stifel v. Lindhorst</i> , 393 F. Supp. 1085 (M.D. Pa.), <i>aff'd</i> , 529 F.2d 512 (3d Cir. 1975), <i>cert. denied</i> , 425 U.S. 962 (1976)	71
<i>Texaco Puerto Rico, Inc. v. Department of Consumer Affairs</i> , 60 F.3d 867 (1st Cir. 1995)	34, 48-49
<i>In re 3 Com Corp. Securities Litigation</i> , 1992 WL 456813, Fed. Sec. L. Rep. P 97, 339 (N.D. Cal. 1992)	52
<i>United States v. Board of Education of the City of Chicago</i> , 610 F. Supp. 695 (N.D. Ill. 1985)	35-36
<i>United States v. Chen</i> , 99 F.3d 1495 (9th Cir. 1996), <i>cert. denied</i> , 520 U.S. 1167 (1997)	56
<i>United States v. IBM</i> , 66 F.R.D. 206 (S.D.N.Y. 1974)	48, 50
<i>United States v. Laurins</i> , 857 F.2d 529 (9th Cir. 1988), <i>cert. denied</i> , 492 U.S. 906 (1989)	59
<i>United States v. Morgan</i> , 313 U.S. 409 (1941)	32
<i>United States v. Reynolds</i> , 345 U.S. 1 (1953)	41
<i>United States v. Rozet</i> , 183 F.R.D. 662 (N.D. Cal. 1998)	41-42, 45
<i>United States v. Wilson</i> , 798 F.2d 509 (1st Cir. 1986)	46

STATE CASES

<i>BP Alaska Exploration, Inc. v. Superior Court</i> , 199 Cal. App. 3d 1240, 245 Cal. Rptr. 682 (1988)	56-57
<i>Burns v. Second Judicial District Court</i> , 97 Nev. 237, 627 P.2d 403 (1981)	70
<i>California First Amend. Coalition v. Superior Court</i> , 67 Cal. App. 4th 159, 78 Cal. Rptr. 2d 847 (1998)	45
<i>Certain-Teed Products Corp. v. Second Judicial District Court</i> , 87 Nev. 18, 479 P.2d 781 (1971)	70
<i>Clark County Liquor and Gaming Licensing Board v. Clark</i> , 102 Nev. 654, 730 P.2d 443 (1986)	6-7
<i>Clark v. Second Judicial District Court</i> , 101 Nev. 58, 692 P.2d 512 (1985)	7
<i>Diaz v. Eighth Judicial District Court</i> , 993 P.2d 50 (Nev. Adv. Op. No. 9, January 27, 2000);	6-7
<i>Dickson v. State</i> , 108 Nev. 1, 822 P.2d 1122 (1992)	77
<i>Elson v. Bowen</i> , 83 Nev. 515, 436 P.2d 12 (1967)	34
<i>Franklin v. Eighth Judicial District Court</i> , 85 Nev. 401, 455 P.2d 919 (1969)	6
<i>Gans v. M.D.R. Liquidating Corp.</i> , 1990 WL 2851 (Del. Ch. 1990)	72
<i>Gibellini v. Klindt</i> , 110 Nev. 1201, 885 P.2d 540 (1994)	8
<i>Greenspun v. Eighth Judicial District Court</i> , 91 Nev. 211, 533 P.2d 482 (1975)	68
<i>Hall v. University of Nevada</i> , 8 Cal. 3d 522, 105 Cal. Rptr. 355 (1972), cert. denied, 414 U.S. 820 (1973)	83
<i>Harrison v. Falcon Products, Inc.</i> , 103 Nev. 558, 746 P.2d 642 (1987)	68

<i>Hetter v. Eighth Judicial District Court</i> , 110 Nev. 513, 874 P.2d 762 (1994)	6
<i>Jarstad v. National Farmers Union Property and Casualty Co.</i> , 92 Nev. 380, 552 P.2d 49 (1976)	70
<i>Jones v. Rosner</i> , 102 Nev. 215, 719 P.2d 805 (1986)	8
<i>Maheu v. Eighth Judicial District Court</i> , 88 Nev. 26, 493 P.2d 709 (1972)	77
<i>Mahoney v. Superior Court</i> , 142 Cal. App. 3d 937, 191 Cal. Rptr. 425 (1983)	46
<i>Mears v. State</i> , 83 Nev. 3, 422 P.2d 230, cert. denied, 389 U.S. 888 (1967)	6
<i>Mianecki v. Second Judicial District Court</i> , 99 Nev. 93, 658 P.2d 422, cert. dismissed, 464 U.S. 806 (1983)	21-23, 69, 83-84
<i>Monroe, Ltd. v. Central Telephone Co.</i> , 91 Nev. 450, 538 P.2d 152 (1975)	77
<i>Pinana v. Second Judicial District Court</i> , 75 Nev. 74, 334 P.2d 843 (1959)	6
<i>Reno Club, Inc. v. Harrah</i> , 70 Nev. 125, 260 P.2d 304 (1953)	69
<i>RLI Insurance Co. Group v. Superior Court</i> , 51 Cal. App. 4th 415, 59 Cal. Rptr. 2d 111 (1996)	28, 30, 37-38
<i>Roberts v. City of Palmdale</i> , 5 Cal. 4th 363, 20 Cal. Rptr.2d 330 (1993)	48
<i>Rogers v. Superior Court</i> , 19 Cal. App. 4th 469, 23 Cal. Rptr. 2d 412 (1993)	29, 31
<i>SIIS v. United Exposition Services Co.</i> , 109 Nev. 28, 846 P.2d 294 (1993)	8
<i>Schlatter v. Eighth Judicial District Court</i> , 93 Nev. 189, 561 P.2d 1342 (1977)	6-7
<i>Schlüssel v. Schlüssel</i> , 141 Cal. App. 3d 194, 190 Cal. Rptr. 95 (1983)	71
<i>Seagate Technology v. A.J. Kogyo Co.</i> , 219 Cal. App. 3d 696, 268 Cal. Rptr. 586 (1990)	71

<i>Smith v. Hutchins</i> , 93 Nev. 431, 566 P.2d 1136 (1977)	69
<i>State ex rel. Speer v. Haynes</i> , 392 So. 2d 1183 (Ala. Civ. App. 1979), rev'd on other grounds, 392 So. 2d 1187 (1980)	84
<i>State ex rel. Tidvall v. District Court</i> , 91 Nev. 520, 539 P.2d 456 (1975)	8
<i>State Farm Fire and Casualty Co. v. Superior Court</i> , 54 Cal. App. 4th 625, 62 Cal. Rptr. 2d 834 (1997)	52, 55, 59
<i>Stinnett v. The State of Nevada</i> , 106 Nev. 192, 789 P.2d 579 (1990)	29
<i>Sweeney v. G.D. Schultes</i> , 19 Nev. 53, 6 P. 44, <i>aff'd</i> , 19 Nev. 53, 8 P. 768 (1885)	71-72
<i>Times Mirror Co. v. Superior Court</i> , 53 Cal. 3d 1325, 283 Cal. Rptr. 893 (1991)	28-29, 31
<i>Turner v. Saka</i> , 90 Nev. 54, 518 P.2d 608 (1974)	77
<i>Wardleigh v. Second Judicial District Court</i> , 111 Nev. 345, 891 P.2d 1180 (1995)	8

FEDERAL STATUTES

5 U.S.C. § 552(b)(5)	29
----------------------------	----

STATE STATUTES

Cal. Evid. Code § 956	55
California Information Practices Act of 1977	30, 33, 63
Cal. Gov't Code § 6254	33-34, 48
Cal. Gov't Code § 6254 (a)	33
Cal. Gov't Code § 11400	32
Cal. Gov't Code § 11415.50	32
Cal. Rev. & Tax Code § 19041	80
Cal. Rev. & Tax. Code § 19044	32, 80
Cal. Rev. & Tax. Code § 19045	80

Cal. Civ. Code §1798, <i>et seq.</i>	32-33
Cal. Civ. Code §1798.70	33, 48
Nevada Civil Practice Manual § 1663 (3d ed. 1993)	77
Nevada Rule of Appellate Procedure 21(a)	25
Nev. R. Civ. P. 1	77
Nev. R. Civ. P. 26(b)(1)	68
Nev. R. Civ. P. 37(a)(2)	77
N.R.S. § 49.095	55
N.R.S. § 49.105	55
N.R.S. § 49.115	55

OTHER AUTHORITIES

Cox, <i>Executive Privilege</i> , 122 U. Pa. L. Rev. 1383 (1974)	28
---	----

EXHIBIT 27

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

5 THOMAS R. C. WILSON, ESQ.
Nevada State Bar # 1568
6 JAMES C. GIUDICI, ESQ.
Nevada State Bar #224
7 MATTHEW C. ADDISON, ESQ.
Nevada State Bar # 4201
8 BRYAN R. CLARK, ESQ.
Nevada State Bar #4442
9 McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS LLP
10 241 Ridge Street, 4th Floor
11 P.O. Box 2670
Reno, NV 89505-2670
12 (775) 788-2000
Attorneys for Defendant Franchise Tax Board

13
14 IN THE SUPREME COURT OF THE
15 STATE OF NEVADA

16 * * * * *

17 FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

18 Petitioner,

19 vs.

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

22 Respondent,

23 and

24 GILBERT P. HYATT,

25 Real Party in Interest.
26

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

27
28 The envelope attached to this document contains the (original) *Franchise Tax Board of the*

1 *State of California's Reply in Support of Its Petition for Writ of Mandamus Ordering Dismissal, or*
2 *in the Alternative, Writ of Prohibition.* The reply contains information the subject of which may be
3 precluded from public disclosure pursuant to the protective order entered by the District Court in
4 this case. The protective order is one of the matters raised in the Franchise Tax Board's writ
5 petition before this Court. A copy of the protective order is attached as Exhibit 6 to the Franchise
6 Tax Board's writ petition.

7 DATED this 8 day of August, 2000.

8 McDONALD CARANO WILSON McCUNE
9 BERGIN FRANKOVICH & HICKS

10
11 By 

12 THOMAS R.C. WILSON
13 JAMES C. GIUDICI
14 BRYAN R. CLARK
15 MATTHEW C. ADDISON
16 BRYAN R. CLARK
17 JEFF A. SILVESTRI
18 TODD J. DRESSEL
19 241 Ridge Street, 4th Floor
20 P.O. Box 2670
21 Reno, NV 89505-2670
22 (775)788-2000

23 Attorneys for Defendant Franchise Tax Board
24
25
26
27
28

CERTIFICATE OF MAILING

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing *Franchise Tax Board of the State of California's 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


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

1 BILL LOCKYER
Attorney General
2 RICHARD W. BAKKE
Supervising Deputy Attorney General
3 FELIX E. LEATHERWOOD, Admitted per SCR 42
GEORGE M. TAKENOUCHI, Admitted per SCR 42
4 THOMAS G. HELLER, Admitted per SCR 42
Deputy Attorneys General
5
6 THOMAS R. C. WILSON, ESQ.
Nevada State Bar # 1568
JAMES C. GIUDICI, ESQ.
7 Nevada State Bar # 224
BRYAN R. CLARK, ESQ.
8 Nevada State Bar #4442
JEFF A. SILVESTRI, ESQ.
9 Nevada State Bar # 5779
McDONALD CARANO WILSON McCUNE
10 BERGIN FRANKOVICH & HICKS LLP
241 Ridge Street, 4th Floor
11 P.O. Box 2670
Reno, NV 89505-2670
12 (775) 788-2000
13 Attorneys for Franchise Tax Board
14

15 IN THE SUPREME COURT OF THE
16 STATE OF NEVADA

17 * * * * *

18
19
20 FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

21 Petitioner,

22 vs.

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

25 Respondent,

26 and

27 GILBERT P. HYATT,

28 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**

TABLE OF CONTENTS

		<u>Page</u>
1		
2		
3	I. Introduction	- 2 -
4	A. Hyatt's Termination of his California Residency	- 4 -
5	B. Allegations of Extortionate Conduct	- 7 -
6	II. Deliberative Process Issues	- 11 -
7	A. Franchise Tax Board Properly Applied the Deliberative Process Privilege to a Limited Number of Internal Review Documents.	- 11 -
8	B. The Deliberative Process Privilege Does Apply to Purely Factual Material.	- 12 -
9	C. The Deliberative Process Privilege is Properly Invoked in the Non-Policy Making Context.	- 13 -
10	D. The California Information Practices Act Does Not Abridge or Limit the FTB's Claims of Privilege.	- 15 -
11	E. Hyatt Has Not Substantiated His Governmental Misconduct Claim.	- 16 -
12	F. The Deliberative Process Privilege Applies in Situations Where an Administrative Decision is not under Direct Judicial Review.	- 18 -
13	G. The Chief of the Audit Division Properly Invoked the Deliberative Process Privilege.	- 20 -
14	H. A Balancing of the Competing Interests Weighs Against Disclosing the FTB Documents.	- 21 -
15	I. Hyatt Has Not Established that FTB Waived its Deliberative Process Privilege.	- 22 -
16	III. Attorney-Client Privilege Issues and Attorney Work-Product Issues	- 23 -
17	A. Hyatt's Claims to the Individual Documents are Without Merit.	- 23 -
18	1. Business vs. Legal Advice	- 23 -
19	2. Waiver by Distribution	- 25 -
20	3. Waiver by Review Prior to Deposition	- 27 -
21	4. Intent to Publicly Disclose Documents	- 29 -
22	B. Hyatt's Argument Regarding The Crime-Fraud Exception To the Attorney-Client Privilege May Not Be Considered By This Court. ...	- 30 -
23	IV. The District Court erred in Permitting the Entry of The Protective Order	- 31 -
24		
25		
26		
27		
28		

TABLE OF CONTENTS

	<u>Page</u>
A. The District Court's Order That the Scope of the Discovery is "The Entire Audit and Assessment Process Performed by the FTB That Was and Is Directed at Hyatt" Was Improper.	- 31 -
B. The Protective Order Unfairly Hinders FTB's Ability to Prosecute This Litigation.	- 32 -
C. California law governing the FTB must be recognized in considering any protective order.	- 36 -

TABLE OF AUTHORITIES

Page(s)

Cases

<i>A.O. Smith v. Federal Trade Commission</i> , 403 F. Supp. 1000, 1116 n. 48 (D. Del. 1975).	- 21 -
<i>Alexander v. FBI</i> , 186 F.R.D. 170 (D.D.C. 1999)	- 17 -
<i>Arthur Anderson & Co. v. Internal Revenue Service</i> , 679 F.2d 254 (D.C. Cir. 1982)	- 19 -
<i>Brockway v. Department of the Air Force</i> , 518 F.2d 1184 (8 th Cir. 1975)	- 13 -, - 14 -
<i>Elson v. Bowen</i> , 83 Nev. 515 (1967)	- 16 -, - 17 -
<i>Ford Motor Co. v. Department of Treasury</i> , 323 U.S. 459, 464 (1945)	- 10 -, -27-
<i>Handgards, Inc. v. Johnson & Johnson</i> , 69 F.R.D. 451, 453 (1975)	- 25 -
<i>Hinckley v. United States</i> , 140 F.3d. 277 (D.C. Cir. 1998)	- 17 -, - 18 -
<i>Hyatt v. Boone</i> , 146 F.3d 1348 (Fed. Cir. 1998)	- 10 -
<i>In re 3 Com Corp. Securities Litigation</i> , 1992 WL 456813 (N.D. Cal. 1998)	- 29 -
<i>In re California Public Utilities Commission</i> , 892 F.2d 778 (9 th Cir. 1989)	- 20 -
<i>In re Martin Marietta Corp.</i> , 856 F.2d 619, 623 (4 th Cir. 1988)	- 26 -
<i>In Re Sealed Case</i> , 121 F.3d 729 (D.C. Cir. 1997)	- 16 -, - 21 -
<i>James Julian, Inc. v. Raytheon Co.</i> , 93 F.R.D. 138, 141-142 (D. Del. 1982)	- 26 -
<i>Jordan v. United States Dept. of Justice</i> , 591 F.2d 753, 773 (D.C. Cir. 1978).	- 11 -
<i>Lead Industries Association v. OSHA</i> , 610 F.2d 70, 86 (2d Cir. 1979)	- 12 -
<i>Lead Industries Ass'n v. Occup. S. & H. Admin.</i> , 610 F.2d 70, 85-86 (2d Cir. 1979)	- 13 -
<i>Mapother v. Dept. of Justice</i> , 3 F.3d 1533 (D.C. Cir. 1993)	- 18 -, - 19 -
<i>Mead Data Cent., Inc. v. U.S. Air Force</i> , 566 F.2d 242, 246 (D.C. Cir. 1977).	- 13 -
<i>Montrose Chemical Corporation of California v. Train</i> , 491 F.2d 63, 67-71 (D.C. Cir. 1974)	- 13 -
<i>National Wildlife Federation v. U.S. Forest Service</i> , 861 F.2d. 1114, 1119 (9 th Cir. 1988).	- 12 -
<i>RLI Ins. Co. v. Superior Court</i> , 51 Cal.App.4 th 415 (1996)	- 19 -, - 20 -
<i>Russell v. Department of Air Force</i> , 682 F.2d 1565, 1568 (D.C. Cir. 1982).	- 13 -

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Russell v. Department of the Air Force</i> , 682 F.2d 1045, 1048-1049 (D.C. Cir. 1982) . . .	- 12 -, -19-
<i>Times Mirror Company v. Superior Court</i> , 53 Cal.3d 1325 (1991)	- 13 -, - 14 -
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632, 639, 642-43 (1950)	- 10 -
<i>United States v. Rowe</i> , 96 F.3d 1294 (9 th Cir. 1996)	- 26 -
<i>Unites States v. Upjohn Co.</i> , 600 F.2d 1223, 1227, n.12 (6 th Cir. 1979)	- 28 -
<i>Upjohn Co. v. United States</i> , 449 U.S. 383 (1981)	-24, - 26 -, - 28 -
<i>Vaughn v. Rosen</i> , 523 F.2d 1136, 1143-1144 (D.C. Cir. 1975)	- 11 -
<i>Whitman v. Whitman</i> , 108 Nev. 949, 950, 840 P.2d 1232, 1233 (1992)	- 31 -
<i>Zenith Radio Corp. v. Radio Corp. of America</i> , 121 F. Supp. 792, 794 (D. Del. 1954)	- 25 -

Other Authorities

Cal. Rev. & Tax Code § 19442)	- 9 -
Cal. Civ. Code §1798.70	- 14 -
Cal. Civil Code §1798.70	- 15 -
Cal. Const., art. XIII, § 32	- 20 -
Cal. Evid. Code §§ 950 et. seq.	- 15 -
Cal. Rev. & Tax Code § 19381	- 20 -
Cal. Rev. & Tax Code § 19381 and Cal. Civil Code §1060.5	- 15 -
Cal. Rev. & Tax Code § 19501	- 5 -
Cal. Rev. & Tax Code §17016	- 4 -
Cal. Rev. & Tax Code §§ 19045 and 19046	- 15 -
Cal. Rev. & Tax Code §§ 19046, 19381	- 8 -
Cal. Rev. & Tax Code §§ 19545 and 19549	- 10 -
Cal. Rev. & Tax Code §§19044 and 19504	- 8 -
Cal. Rev. & Tax Code §§19044, 19504	- 8 -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Other Authorities

Page(s)

California Civil Code § 1798.24 (p) - 16 -
 California Civil Code, section 1798.71 - 15 -
 California Revenue & Tax Code, section 19044 - 14 -
 California Revenue & Taxation Code sections 19542 and 19547 - 38 -
 California Revenue & Taxation Code, section 19381 - 16 -
 California Revenue & Taxation Code, section 19552 - 38 -, - 39 -
 California's constitution, Article XIII, section 32 - 16 -
 E.D.C.R. 2.34(f) - 30 -
 Nev. R. Civ. P. Rule 56(e) - 3 -
 NRCp 30(b)(6) - 28 -
 NRS 483.082-483.245 - 35 -
 Title 26 U.S.C. §§ 6103(b)(6); 6109(d); and 6103(h)(4) - 10 -

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

1 discrimination and anti- Semitism within the FTB, which the FTB denies and which have absolutely
2 nothing to do with what is before this Court. Such allegations add nothing to the merits of this
3 Petition, and are not relevant to its consideration. FTB rejects Hyatt's spin and obfuscation as
4 untrue, and refers the Court to the statement of facts set forth in FTB's Second Writ in Case No.
5 36390.

6 It is important to remember that while Hyatt treats his allegations as established fact,
7 they are nothing more than allegations. Hyatt's Answer is replete with citations to his own affidavit
8 and the affidavits of his representatives. FTB has not been able to depose Hyatt¹, and it has not been
9 able to complete its depositions of two of his representatives or to commence that of a third. When
10 Hyatt filed his affidavits in the district court to support his opposition to the FTB's *Motion for*
11 *Summary Judgment and Dismissal for Lack of Jurisdiction*, the FTB filed formal Objections. Since
12 Hyatt is now relying upon those improper affidavits to support his Answer to the Petition before this
13 Court, FTB hereby renews its Objections. A copy of the FTB's Objections is attached hereto as
14 Exhibit 1.

15 As shown in the FTB's Objections, Hyatt's "affidavits" are really nothing more than
16 self-serving conclusory arguments in flagrant violation of Nev. R. Civ. P. Rule 56(e). The affidavits
17 of Hyatt's attorneys, Eugene G. Cowan and Thomas K. Bourke, are particularly egregious and call
18 into question Nevada Supreme Court Rule 178 concerning a party's lawyer performing as a witness.

19 Not only is Hyatt relying upon improper affidavits to support his Answer to the
20 Petition, he is also attempting to obfuscate the real issues under a mountain of paper rather than
21 presenting them in a succinct and cogent fashion to the Court. For example, in response to the
22 FTB's *Motion for Summary Judgment and Dismissal for Lack of Subject Matter Jurisdiction*
23 presented in the district court, Hyatt filed an opposition which included thousands of pages of
24 exhibits. It appears he has now included his entire opposition as part of his exhibits in support of
25

26 ¹Hyatt's deposition scheduled to begin on June 6, 2000 was canceled by Hyatt on or about
27 June 1, 2000 for medical reasons. On June 7, 2000, this Court stayed all further proceedings in the
28 district court.

1 his Answer to the Petition before this Court. This Court is now faced with the task of filtering out
2 the massive amount of irrelevant material improperly submitted by Hyatt, who is hoping the Court
3 will simply give up and rule in his favor.

4 There is no stopping Hyatt in his efforts to smear the FTB. He will say whatever he
5 thinks advances his position at the particular moment, regardless of the truth. For example, at page
6 38, lines 1-2 of his Answer, Hyatt tells this Court he is not contesting any tax assessment in what
7 he calls "this Nevada tort case." Nothing could be further from the truth. The tax assessments are
8 the central focus of Hyatt's First Amended Complaint before the district court. (See Exhibit 2.)

9 **A. Hyatt's Termination of his California Residency.**

10 Hyatt has asserted California nonresidency and a long-term residency in Las Vegas
11 from September 25, 1991 to the present day as preclusive on its face of any tax audit issues. The
12 audit addressed a much narrower issue of whether Hyatt remained a California resident under
13 California law from September 25, 1991 to April 3, 1992. The FTB auditor, much maligned,
14 slandered and libeled by Hyatt during this lawsuit, concluded in her audit report that Hyatt remained
15 a California resident during this time. The auditor also concluded, based upon the facts she
16 developed during the audit, that Hyatt intended to evade tax he knew he owed California;
17 accordingly, she assessed a statutory civil fraud penalty for Hyatt's claimed period of California
18 nonresidency.

19 The FTB's audit issues were, ultimately, limited to that six month period. During that
20 period, Hyatt received tens of millions of dollars from contracts relating to one of his patents. A
21 termination of Hyatt's California residency prior to October 1, 1991 is of critical importance to
22 Hyatt, because it would allow him to avoid the statutory presumption of residency in California for
23 the full year 1991 which arises upon nine months of residency in California (January 1 to September
24 30 of 1991). (Cal. Rev. & Tax Code §17016.) For that reason, the date and circumstances of
25 terminating his California ties and moving his permanent residence to Las Vegas prior to October
26 1, 1991 were very important to Hyatt.

27 Hyatt's lack of candor and reluctance to disclose the facts and circumstances
28 surrounding his alleged move from California required the auditor, consistent with her statutory duty

1 under California law (see Cal. Rev. & Tax Code § 19501), to attempt to corroborate his claims of
2 California nonresidency during that period. For that, Hyatt has accused the auditor of improper
3 conduct, of having a fraudulent and extortive purpose, and of violating his "privacy" and
4 "confidentiality."

5 Hyatt's Answer to FTB's January 27, 2000 Petition asserts misconduct of FTB by:

- 6 (a) "Assessment of a 'fraud' penalty against Hyatt - thereby essentially doubling his
7 assessed tax - despite admittedly ignoring or distorting all evidence supporting
8 Hyatt's claim of Nevada residency..." (Answer p. 2)
- 9 (b) "Salivating over the prospects of forcing Hyatt into a multi-million dollar settlement
10 based upon a sham 'audit' that trumped up a multi-million dollar tax and penalty
11 assessment, the FTB fraudulently ignored or distorted all of Hyatt's compelling proof
12 of Nevada residency and fraudulently imposed a massive fraud penalty..." (Answer
13 p. 15)
- 14 (c) "Cox [Sheila Cox, FTB's primary auditor on the Hyatt residency audit] neither
15 investigated nor considered the most relevant information concerning the lynch pin
16 for tax assessment-residency. If she had, she would have had no choice but to
17 conclude that Hyatt was a Nevada resident from September 26, 1991 to the present."
18 (Answer p. 59)

19 Hyatt claims that:

- 20 (d) "After substantial preparation, Hyatt left California and permanently moved to Las
21 Vegas on September 26, 1991." (Answer p. 10)
- 22 (e) "Immediately after moving to Las Vegas, Hyatt sold his California house, leased and
23 moved into a Las Vegas apartment,..." (Answer p. 10)
- 24 (f) "...escrow closed on his Las Vegas house (April 2, 1992) and he moved from his
25 leased apartment into his new house." (Answer p. 11)

26 However, Hyatt stated on his California tax return for 1991, under penalty of perjury,
27 that he had moved to Nevada on October 1, 1991, but later claimed that he had moved on September
28 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

1 times from Hyatt showed evidence of numerous dining charges in California, but Nevada dining
2 charges on only one day from January 2, 1991 through March 16, 1992.

3 The circumstances of Hyatt's voter registration in July of 1994 raised additional
4 questions. Hyatt executed under penalty of perjury a voter's registration declaration of residency
5 at a residence property owned by his taxpayer representative. He in fact had never lived there and
6 the declaration was false.

7 The foregoing, the failure to provide other requested information and other
8 circumstances led the auditor to inquire independently to corroborate Hyatt's claim he became a
9 California nonresident (on various dates) by severing his long established California ties while
10 establishing new Nevada ties. (See FTB's Second Writ, at ¶ C pp. 7-14; and Exhibit 3 hereto
11 (Affidavit of Sheila Cox).)

12 Because the auditor was forced by Hyatt's recalcitrance to independently verify the
13 allegations of his 1991 California nonresident tax return, Hyatt now alleges in his First Amended
14 Complaint ("FAC"):

15 FAC ¶ 17:

16 "Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona
17 fide resident of Nevada should not be forced into a California forum to seek
18 relief from the unjust and tortious attempts by the FTB to extort unlawful
19 taxes from this Nevada resident. . . . The FTB has arbitrarily, maliciously
20 and without support in law or fact, asserted that plaintiff remained a
21 California resident until he purchased and closed escrow on a new house in
22 Las Vegas on April 3, 1992." (Emphasis added).

23 FAC ¶ 30:

24 "The FTB's assessment of taxes and a penalty for 1991 is based on the FTB's
25 conclusion in the first instance that plaintiff did not become a resident of
26 Nevada until April 3, 1992, the date on which plaintiff closed escrow on a
27 new home in Las Vegas. In coming to such a conclusion, the FTB
28 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 pound "quasi-subpoenas" to Nevada residents

1 and businesses, thereby seeking to coerce the cooperation of said Nevada
2 residents and businesses through an unlawful and tortious deception, to reveal
information about plaintiff. . . ". (Emphasis added).

3 Hyatt carries the same argument into his Answer to the Petition:

4 "The fraud engaged in by the FTB consisted of both its one-sided,
5 manipulated audits of Hyatt and its false promises and
6 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.)

7 "Cox neither investigated nor considered the most relevant
8 information concerning the linchpin for tax assessment residency. If
9 she had, she would have had no choice but to conclude that Hyatt was
10 a Nevada resident from September 26, 1991 to the present." (Answer
at 59:2-5. (Emphasis added).)

11 Because Hyatt is challenging the tax assessment, he broadly asserts:

12 "Discovery . . . must therefore encompass the full scope of the FTB's conduct
13 and activities during its seven year . . . audit of Hyatt." (Answer at 3:2-4.
(Emphasis added).)

14 Hyatt also quotes the Discovery Commissioner, in pertinent part:

15 ". . . the heart of the case is the process by which the FTB conducted this
16 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).)

17 So just because the FTB viewed the evidence differently than Hyatt did, and did not
18 accept as true Hyatt's unsubstantiated and self-serving assertions, is Hyatt allowed to sue for
19 "extortion" and "fraud," and obtain discovery of whatever he wants of the FTB's internal documents
20 and processes? Contrary to his statements to this Court, the audit and its resulting proposed
21 assessment are clearly central to Hyatt's alleged "tort" claims.

22 **B. Allegations of Extortionate Conduct.**

23 Hyatt's Answer to the Petition additionally asserts misconduct in that FTB
24 "threatened further public disclosure of Hyatt's private information if he did not 'settle' with the
25 FTB." Hyatt asserts that during a "conversation between Hyatt's tax representative and the FTB
26 protest officer, Anna Jovanovich,...she 'suggested' that Hyatt settle the matter or be subject to further
27 public disclosure of his private information." (Answer p. 2.)

28 "Part of the outrageous conduct of...the FTB lawyers. One of those

1 lawyers, Anna Jovanovich, pointedly stated that a high profile or
2 wealthy taxpayer such as Hyatt typically settled the proceedings
3 before litigation. Because they do not want to risk the public
4 disclosure of their personal financial information being made public.
5 ... Hyatt clearly understood the unmistakable threat that any challenge
6 to the FTB...would result in the dissemination of Hyatt's personal and
7 financial information..." (Answer p. 14.)

8 "...the FTB's use of its attorneys to further its sham audit which had
9 a predetermined purpose and conclusion are similarly abhorrent. It
10 amounted to nothing less than an unlawful and fraudulent conspiracy
11 to extort money from Hyatt." (Answer p. 57.)

12 Under the FTB tax procedure, once an audit is completed and a proposed assessment
13 issued the taxpayer can protest the conclusion, which requires by statute an independent, *de novo*
14 review. The review protest may include additional requests for information and additional
15 presentation of documents made by the taxpayer. (Cal. Rev. & Tax Code §§19044 and 19504.)
16 Currently, in Hyatt's case, he has protested his proposed assessments and the FTB is waiting for
17 information proposed by Hyatt's counsel. If, after the review protest, a taxpayer is unhappy with
18 the results, the matter may be reviewed by the State Board of Equalization, and thereafter by the
19 California Superior Court. (Cal. Rev. & Tax Code §§ 19046, 19381.)

20 Anna Jovanovich, an FTB attorney, was initially assigned as Protest Officer for
21 Hyatt's matter after completion of the audit. In a conversation with the taxpayer's lawyer, Eugene
22 Cowan of Los Angeles, who had very little experience in residency audits, she explained the process,
23 including the availability of settlement, which is a part of the process by statute. (See, Cal. Rev.
24 & Tax Code §§19044 and 19504.)

25 Contrary to Hyatt's ridiculous allegations, Anna Jovanovich did not explain the
26 process, including the settlement avenue, as a way to keep the matter quiet or to threaten publicity
27 of financial information if Hyatt did not settle. This would be a legal impossibility.

28 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

1 review and approval. Any settlement which reduces taxes or penalties in excess of \$500 must be
2 placed on file in the office of the executive officer as well as the chief counsel of the Franchise Tax
3 Board *as a public record* of settlement. The public record shall include all of the following
4 information:

- 5 (1) The name or names of the taxpayers who are parties to the settlement,
- 6 (2) The total amount of dispute,
- 7 (3) The amount agreed to pursuant to the settlement,
- 8 (4) A summary of the reasons why the settlement is in the best interest of the State of
9 California,
- 10 (5) For any settlement approved by the Franchise Tax Board, the Attorney General's
11 conclusion as to whether the recommendation of settlement was reasonable from an
overall perspective. (Cal. Rev. & Tax Code § 19442.)

12 Hyatt's deliberately misleading allegations are shameful.

13 Other examples of how Hyatt is trying to predispose this Court against the FTB
14 through his misleading spin and obfuscation include the following.

15 ♦ Patent Licensing Business: At page 12, lines 2-3, Hyatt states FTB destroyed his patent
16 licensing business. Again, this allegation is absurd on its face and, seemingly, a factual
impossibility. The truth is:

- 17 a. the agreements with Fujitsu and Matsushita (Exhibits 4 and 5) both contained
18 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
19 and would not divulge the same except: . . .
 - 20 (b) to any governmental body; or
 - (c) as otherwise may be required by law; . . .
- 21 b. the Fujitsu agreement is effective October 24, 1991, and provided for a
22 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
23 signed it October 14, 1991. (Exhibit 4 at section 4.1);
- 24 c. the Matsushita agreement is effective November 14, 1991, and provided for
25 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);
- 26 d. Hyatt is identified in both agreements as "an individual having a mailing
27 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
28 firm in Los Angeles, California; (Exhibit 4 at pages 1 and 12; Exhibit 5 at
pages 1 and 13-14);

- c. 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

1 Hyatt's conclusory and self-serving allegations.

2 **II. Deliberative Process Issues**

3 **A. Franchise Tax Board Properly Applied the Deliberative Process Privilege to a**
4 **Limited Number of Internal Review Documents.**

5 The FTB has invoked the deliberative process privilege with respect to six (6)
6 documents, totaling ten (10) pages, including FTB 104117 through 104122 and FTB 100289 through
7 FTB 100292. (Petition at 27). The five documents enumerated FTB 104117 through FTB 104122
8 contain Carol Ford's "review comments" and a non-binding recommendation to her supervisor,
9 Penelope Bauche. Bauche utilized Ford's analysis and conclusions along with other materials in
10 making her administrative decision whether to issue a Notice of Proposed Assessment to Hyatt. The
11 review comments are clearly predecisional and deliberative, expressing the author's personal opinion
12 on an underlying tax matter.

13 Such internal comments, proposals, recommendations and subjective administrative
14 communications have received universal protection by the Courts. Indeed, the privilege is available
15 when the document in question is "a direct part of the deliberative process in that it makes
16 recommendations or expresses opinions on legal or policy matters." (*Vaughn v. Rosen*, 523 F.2d
17 1136, 1143-1144 (D.C. Cir. 1975).) A casualty of unmitigated access to internal administrative
18 documents is agency function and effectiveness. "[A] government agency cannot always operate
19 effectively if it is required to disclose documents or information which it has received or generated
20 before it completes the process of awarding a contract or issuing an order, decision or regulation."
21 (*Jordan v. United States Dept. of Justice*, 591 F.2d 753, 773 (D.C. Cir. 1978).)

22 The same rationale applies to the sixth document over which FTB claims the
23 deliberative process privilege, the memorandum by Monica Embry (FTB 100288-100292). The
24 document memorializes the "give- and- take" discussion between auditors and tax counsel on the
25 viability of a sourcing theory for taxation of patent royalties. The document is "predecisional"
26 because it precedes, in temporal sequence, the issuance of a formal agency decision (i.e. Notice of
27 Action), and "deliberative" by illustrating the internal agency debate as to the merits and application
28 of a principle of taxation. Courts have been particularly diligent in protecting such early agency

1 drafts from disclosure, *Lead Industries Association v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979), since
2 the process by which a draft becomes a final document is part of the deliberative process. (*Russell*
3 *v. Department of the Air Force*, 682 F.2d 1045, 1048-1049 (D.C. Cir. 1982).)

4 Hyatt resorts to specious rhetoric in making the belated claim that FTB has utilized
5 the deliberative process privilege to obstruct discovery during certain FTB employee depositions.
6 If Hyatt had a legitimate claim that improper tactics were being used at these depositions, a motion
7 to compel oral answers at deposition should have been filed with the district court. Having elected
8 not to do so, Hyatt cannot now cry "foul" and raise extraneous material not subject to FTB's original
9 writ. The referenced deposition questions are irrelevant to the pending matter before this Court and
10 should not be considered as a basis to deny the Petition.

11 Regardless, the assertion of the deliberative process privilege during Carol Ford's
12 deposition was used to prevent Hyatt's access to the same privileged notes by another means. The
13 same is true of the Bauche and Embry depositions because the questions were leading down the road
14 to eliciting the contents of the Ford notes or the Embry/Gould sourcing memorandum. The assertion
15 of the privilege objections during these depositions was entirely appropriate since FTB had asserted
16 a privilege with respect to these documents and no judicial decision had been made.

17 **B. The Deliberative Process Privilege Does Apply to Purely Factual Material.**

18 Hyatt unduly constrains the scope of the common law deliberative process privilege
19 by wrongly asserting that the privilege does not protect "purely factual, investigative matters."
20 Answer at 31: 7-8. The Ninth Circuit specifically rejected the argument that any document
21 containing factual material fell outside the deliberative process privilege:

22 "Documents need not themselves be 'deliberative,' in the sense that they make
23 nonbinding recommendations on law or policy, in order to qualify for the deliberative
24 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."

25 "Under this 'process-oriented' or 'functional' test that we adopt, documents
26 containing nonbinding recommendations on law or policy would continue to remain
27 exempt from disclosure. Factual materials, however, would likewise be exempt from
disclosure to the extent that they reveal the mental processes of decision-makers."

28 *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d. 1114, 1119 (9th Cir. 1988).

1 The courts have readily acknowledged that the fact/opinion dichotomy is misleading,
2 and have refused to apply it in a mechanical and unthinking manner. As one court has written, the
3 privilege "is intended to protect the deliberative process of government, not just deliberative
4 material." (*Mead Data Cent., Inc. v. U.S. Air Force*, 566 F.2d 242, 246 (D.C. Cir. 1977).)
5 Accordingly, in some circumstances "the disclosure of even purely factual material may so expose
6 the deliberative process ... that it must be deemed exempted by [5 United States Code] section
7 552(b)(5)." (*Mead Data Cent., Inc. v. U.S. Air Force*, *supra*, 566 F.2d at p. 256.) Many cases have
8 held that the exemption applies to "purely factual material." (*Montrose Chemical Corporation of*
9 *California v. Train*, 491 F.2d 63, 67-71 (D.C. Cir. 1974); *Lead Industries Ass'n v. Occup. S. & H.*
10 *Admin.*, 610 F.2d 70, 85-86 (2d Cir. 1979); and *Russell v. Department of Air Force*, 682 F.2d 1565,
11 1568 (D.C. Cir. 1982).)

12 **C. The Deliberative Process Privilege is Properly Invoked in the Non-Policy**
13 **Making Context.**

14 Because FTB's audit activities do not involve "a policy-level decisions (sic)"
15 (Answer at 31:2-3), Hyatt wrongly argues that the deliberative process privilege does not apply.
16 But, the privilege has been upheld in circumstances wholly apart from the policy making process.
17 In *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975), the father of an Air
18 Force pilot sought disclosure of certain witnesses' statements concerning an airplane crash in which
19 his son was killed. Although the information was completely factual and not made for the purpose
20 of formulating policy, the court nevertheless held that confidentiality was necessary to prevent
21 "inhibition of the free flow of information" to the Air Force. (*Id.* at p. 1193.) "[W]ithout the
22 assurances of confidentiality", the court concluded, the "flow of information to the Air Force" might
23 be sharply curtailed, and the deliberative processes and efficiency of the agency greatly hindered.
24 (*Id.* at pp. 1193-1194.)

25 Hyatt also ignores the Supreme Court of California's holding in *Times Mirror*
26 *Company v. Superior Court*, 53 Cal.3d 1325 (1991). The Los Angeles Times sought information
27 that was purely factual (schedules and appointment calendars over a five-year period). The
28 Supreme Court held that releasing the material would compromise the deliberative process:

1 "Disclosing the identity of persons with whom the Governor has met and consulted
2 is the functional equivalent of revealing the substance or direction of the Governor's
3 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.)

4 Taken together, the holdings in *Brockway* and *Times Mirror* refute Hyatt's tortured notion that the
5 deliberative process privilege can only be invoked in the most limited of circumstances (i.e.
6 formulating policy).

7 This "self-critical analysis" version of the deliberative process privilege was also
8 addressed in the original writ petition. (Petition at pp.31-32.) The second vein of this privilege is
9 based on the judicial acknowledgment that government agencies need to have an environment where
10 candor and freedom of thought are promoted. This form of the privilege would necessarily apply
11 to the give-and-take discussions and personal opinions of all agency employees involved in the
12 deliberative process. It is upon this expanded version of the privilege that FTB relies to prohibit the
13 disclosure of the Carol Ford review notes, Documents 104117-104122, and the Embry/Gould
14 "sourcing" memorandum, Documents 100288-100292.

15 Incidental to Hyatt's argued policy making limitation, Hyatt makes the ludicrous
16 contention that the taxpayer "'protest' phase is *not an administrative proceeding* for which the
17 targeted taxpayer need have adjudicative rights." (Answer at 30:17-32:1 (emphasis in original).)
18 Hyatt misconstrues a purely technical exemption to the California Administrative Practices Act (*see*,
19 Cal. Civ. Code §1798.70) to mean the taxpayer has no due process rights in the taxpayer's
20 administrative protest proceeding. That plainly is not correct. The abundantly clear language of
21 California Revenue & Tax Code, section 19044 provides: "The Franchise Tax Board *shall*
22 *reconsider the assessment of deficiency and shall grant the taxpayer ... an oral hearing...*"
23 (emphasis added).

24 The FTB protest proceeding is a complete *de novo* review of the auditor's proposed
25 assessment performed by an assigned FTB lawyer as the protest officer. As part of the
26 administrative review, the taxpayer can elect to present additional evidence at an oral hearing or rely
27 on documents.

28 An administrative review does not end with FTB. Should the taxpayer disagree with

1 the FTB's decision at the protest level, the taxpayer can appeal the decision for a second *de novo*
2 review to the five member California State Board of Equalization, an agency separate and distinct
3 from FTB. (Cal. Rev. & Tax Code §§ 19045 and 19046.)

4 The final decision of the State Board of Equalization represents the exhaustion of
5 administrative remedies and, therefore, allows for California's courts to exercise jurisdiction over
6 further conflicts. If the taxpayer is dissatisfied with the final State Board of Equalization decision,
7 the aggrieved party can pursue judicial review in the form of a suit for refund or request a residency
8 determination in a designated California Superior Court. (See, Cal. Rev. & Tax Code § 19381 and
9 Cal. Civil Code §1060.5.) With two separate administrative reviews and eventual judicial oversight,
10 the taxpayer's procedural due process rights are adequately preserved.

11 **D. The California Information Practices Act Does Not Abridge or Limit the FTB's**
12 **Claims of Privilege.**

13 A faulty interpretation of Cal. Civil Code §1798.70 leads Hyatt to contend that the
14 Information Practices Act ("IPA") "supersedes" the deliberative process privilege without
15 explaining the consequence of this statutory construction. Taking Hyatt's argument to its logical
16 conclusion, one must interpret the phrase in Section 1798, "supersede any other provision of state
17 law", to abrogate the attorney/client privilege. (See, Cal. Evid. Code §§ 950 et. seq.) Evidence Code
18 Section 950 protects the confidential communication, not necessarily the personal information
19 communicated. Hyatt cites no case or statutory authority to support his novel contention that the
20 drafters of the IPA intended to eviscerate either the attorney/client or deliberative process privileges.

21 In fact, the IPA actually strengthens, and does not derogate, the rights of litigants in
22 protecting confidential communications. California Civil Code, section 1798.71 (Rights of litigants)
23 reads:

24 *This chapter shall not be deemed to abridge or limit the rights of*
25 *litigants, including parties to administrative proceedings, under the*
laws, or case law, of discovery of this state. (Emphasis added.)

26 The plain language of California Civil Code, section 1798.71 refutes any suggestion that FTB cannot
27 raise appropriate privilege objections during any phase of discovery.

28 Hyatt's IPA discussion is also a red herring for three additional reasons. First, Hyatt

1 has not pled any statutory cause of action under the IPA in either the original or first amended
2 complaint. Second, even if properly pled, FTB is permitted to disclose limited information to third
3 parties to enforce its constitutional and statutory mandates. (See, California Civil Code § 1798.24
4 (p).) The subject audit falls within this statutory exemption and thus precludes Hyatt from exercising
5 any remedy under this Act. Third, Hyatt's assertions offend California's constitution, Article XIII,
6 section 32, and California Revenue & Taxation Code, section 19381, which respectively bar all legal
7 or equitable proceedings against the State of California until the taxpayer has exhausted his
8 administrative remedies. Hyatt's reliance on California law as a basis to compel production of
9 documents or to proceed with this lawsuit is misplaced because he is barred under California law
10 from advancing any legal proceeding against the FTB until he has completely exhausted his
11 administrative remedies.

12 **E. Hyatt Has Not Substantiated His Governmental Misconduct Claim.**

13 Hyatt makes the further untenable argument that certain federal cases stand for the
14 proposition that the deliberative process privilege evaporates on the unsubstantiated allegation of
15 "governmental misconduct." (Answer at pp. 33-34.) The cases relied upon by Hyatt are easily
16 distinguishable and provide no guidance to this Court in determining the privilege issues incident
17 to FTB's writ.

18 *In Re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), was a criminal matter involving
19 former Cabinet Secretary Michael Espy. The Office of Independent Counsel obtained the issuance
20 of a grand jury subpoena directed to the White House Counsel's office. The Federal Circuit Court's
21 holding primarily discussed the inadequacy of the lower court's explanation for denying OIC's
22 motion to compel production of certain White House Counsel deliberative documents. The dispute
23 was remanded to the District Court with instructions to reassess its original decision and consider
24 OIC's need for the documents. The District Court was specifically admonished not to release the
25 "purely deliberative portions of the documents" and limit production to those matters that directly
26 related to alleged false statements made by Espy. (*Id.* at 761-762.)

27 *Elson v. Bowen*, 83 Nev. 515 (1967), has limited application to law enforcement
28 misconduct and cannot be generalized to apply to Hyatt's informational privacy claims. FBI agents

1 were actual parties to a suit alleging a violation of a Nevada eavesdropping statute. One of the FBI
2 agents refused to answer certain questions at deposition based on executive privilege and an internal
3 DOJ regulation prohibiting disclosure. Unlike Hyatt, respondents made a key concession and
4 "acknowledged they had no right to examine intra-departmental files and memoranda of the
5 Department of Justice" and "specifically excluded these from their subpoena duces tecum." (*Id.* at
6 519.) The Court required an abbreviated disclosure based on the U.S. Attorney's refusal to
7 participate in the Nevada case in any meaningful way while at the same time ordering the agents not
8 to testify about certain matters. The Nevada Supreme Court concluded that the Attorney General
9 was frustrating the exercise of the Court's power. Contrary to the conduct of federal authorities in
10 the *Elson* case, FTB and its counsel have appropriately raised the deliberative process privilege in
11 a limited, non-capricious manner.

12 Hyatt misstates the factual background and ultimately misapplies the holding in
13 *Alexander v. FBI*, 186 F.R.D. 170 (D.D.C. 1999). The FBI did not withhold documents from
14 disclosure. (Answer at p. 34:7-8.) The Department of Defense actually invoked the deliberative
15 process privilege during the deposition of a Pentagon Public Affairs Officer. Private litigants sought
16 to develop a connection between the motivations behind the Pentagon's release of information from
17 Linda Tripp's personnel file and an alleged cover-up in the White House "filegate" scandal. Unlike
18 Hyatt's conclusory fraud and extortion allegations, the District Court found that a sufficient factual
19 showing had been made to suggest that Kenneth Bacon's answers to questions could "shed light"
20 on a possible connection between the Pentagon release and the alleged "filegate" cover-up. (*Id.* at
21 179-180.)

22 Contrasted with the lower court *Alexander* decision, Hyatt has made no factual
23 showing that governmental misconduct occurred during FTB's residency audit. Hyatt should receive
24 the same treatment afforded to John Hinckley when the D.C. Circuit rejected Hinckley's request for
25 access to internal Hospital Review Board records. (*See, Hinckley v. United States*, 140 F.3d. 277
26 (D.C. Cir. 1998).) Similar to Hyatt, Hinckley made the conclusory allegation that "the Hospital
27 Review Board had improper motivations when it denied him a conditional release." The Board's
28 improper motivation rested on "the mere fact his treatment team unanimously recommended his

1 conditional release." (*Id.* at 285.) Rejecting Hinckley's contention that a sufficient showing had
2 been made, the Court concluded that "[t]he deliberative process privilege would soon be
3 meaningless, if all someone seeking the information otherwise protected under the privilege had to
4 establish is that there is a disagreement within the governmental entity at some point in the decision
5 making process." (*Id.* at 285.)

6 Lacking any evidence of misconduct, Hyatt falsely states that FTB instructed Carol
7 Ford to delete a back-up computer file. Every relevant document or writing from Carol Ford
8 continues to exist, while only the back-up file was deleted. As Hyatt grudgingly concedes, Carol
9 Ford corrected her earlier mistaken testimony and confirmed that she was never instructed to destroy
10 any documents or computer files and simply misunderstood a request for documents.

11 Similarly, Hyatt provides an unduly sinister portrayal of attorney Anna Jovanovich's
12 destruction of her personal notes. Jovanovich created an index summary of the already produced
13 Hyatt audit file as a reference guide. Her notes were never shared with anyone and were kept
14 separately from the audit file. Jovanovich disposed of these purely ministerial notes out of a genuine
15 concern for the privacy of the taxpayer. (*See*, Jovanovich deposition, Vol. I, pp. 71-81, attached
16 hereto as Exhibit 10.)

17 **F. The Deliberative Process Privilege Applies in Situations Where an**
18 **Administrative Decision is not under Direct Judicial Review.**

19 Hyatt unduly restrains the application of the deliberative process privilege to
20 situations where "a court conducts a direct judicial review of an administrative decision." Answer
21 at p. 37: 4-5). In making the unsupported proposition, Hyatt ignores a whole line of decisions that
22 protect agency deliberative documents from disclosure to third parties not directly contesting an
23 agency decision. In *Mapother v. Dept. of Justice*, 3 F.3d 1533 (D.C. Cir. 1993), a retired
24 intelligence officer and a journalist lodged Freedom of Information Act ("FOIA") requests with the
25 Justice Department seeking the "active file" that contained all documents relevant to the preparation
26 of the Waldheim Report. Justice Department experts prepared the report in order to help the
27 Attorney General decide whether to preclude Kurt Waldheim from entering the United States
28 because of evidence he may have participated in Nazi war crimes. The Attorney General's decision

1 to bar Waldheim from entering the United States was neither under "direct judicial review" nor even
2 contested by Waldheim. Nevertheless, the D.C. Court of Appeal found that the great bulk of the
3 Waldheim Report was properly withheld under Exemption 5 of "FOIA", which protects documents
4 covered by the deliberative process privilege. (*Id.* at 1535.)

5 A similar "FOIA" suit was brought by a college student and a veteran's group seeking
6 a draft historical document entitled "Operation Ranchhand: the United States Air Force and
7 Herbicides in Southeast Asia, 1961-1971." Notwithstanding the lack of any direct judicial review
8 of an administrative decision, the D.C. Court of Appeal held that portions of the draft document were
9 exempt from disclosure and protected by the deliberative process privilege. (*Russell v. Department*
10 *of the Air Force*, 682 F.2d 1045, 1046-1047 (D.C. Cir. 1982).) The result in *Russell* was also
11 consistent with the opinion in *Arthur Anderson & Co. v. Internal Revenue Service*, 679 F.2d 254
12 (D.C. Cir. 1982), wherein the same Court held that a preliminary draft of an IRS revenue ruling was
13 protected by the deliberative process privilege where no administrative decision was under direct
14 judicial review. The wealth of pertinent authority refutes Hyatt's untenable constraint on the
15 deliberative process privilege.

16 In an effort to drain all significance from the deliberative process privilege, Hyatt
17 overstates the holding in *RLI Ins. Co. v. Superior Court*, 51 Cal.App.4th 415 (1996). Hyatt notably
18 omits any reference to the First Appellate District Court of Appeal's lack of discretion in interpreting
19 the scope of the privilege. (*Id.* at 437-438.) Instead of reviewing the actual decision, Hyatt points
20 to dictum for the proposition that the privilege "is *limited solely* to situations where ... a court
21 conducts a judicial review of an administrative decision." (Answer at p. 37: 4-5 (emphasis added).)

22 *RLI* arose out of a dispute over the discoverability of certain evidence requested by
23 two insurance companies in their rate rollback hearings under Proposition 103. The insurance
24 companies sought to access records that were supposed to be maintained "in a public file available
25 for inspection in the Department's San Francisco Office." (*Id.* at 424.) In a limited decision relating
26 to multiple "Stipulation and Consent Orders," the First Appellate District Court of Appeal held that
27 "it was an abuse of discretion to rule that these documents were 'settlement' documents and
28 therefore irrelevant or under the protection of the regulation." (*Id.* at 434.) The Court found these

1 documents were not under "any settlement umbrella," making the discussion about deliberative
2 process unnecessary to its decision. (*Id.* at 435.) Hyatt has not provided any comparable Nevada
3 authority interpreting executive privilege in such a truncated fashion, and none will be found.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hyatt's claims may be summarized as follows:

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

Each argument will be addressed in turn.

1. Business vs. Legal Advice

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

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

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

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

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

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

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

7 2. Waiver by Distribution

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

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

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

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

27
28 ²FTB has also claimed a deliberative process protection over these documents.

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

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

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

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

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

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

17 3. Waiver by Review Prior to Deposition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Petition, Exhibit 6, p.3-4.

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

///

//

//

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 California Revenue & Taxation Code sections 19542 and 19547 provide:

3 § 19542 - Disclosure of information from filed returns, reports or
4 documents as misdemeanor. Except as otherwise provided in this
5 article and as required to administer subdivision (b) of Section 19005,
6 it is a misdemeanor for the Franchise Tax Board or any member
7 thereof, or any deputy, agent, clerk, or other officer or employee of
8 the state (including its political subdivisions), or any former officer
9 or employee or other individual, who in the course of his or her
10 employment or duty has or had access to returns, reports, or
11 documents required to be filed under this part, to disclose or make
12 known in any manner information as to the amount of income or any
13 particulars (including the business affairs of a corporation) set forth
14 or disclosed therein.

15 § 19547 - Inspection of return or return information by legal
16 representative of State. In a matter involving tax administration
17 under this part, a return or return information shall be open to
18 inspection by the Attorney General or other legal representatives of
19 the state, if any of the following apply:

20 (a) The taxpayer is or may be a party to the proceeding, or the
21 proceeding arose out of, or in connection with, determining the
22 taxpayer's civil or criminal liability, or the collection of the
23 taxpayer's civil liability with respect to any tax imposed under Part
24 10 (commencing with Section 17001) or Part II (commencing with
25 Section 23001).

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

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

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

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

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

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

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

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

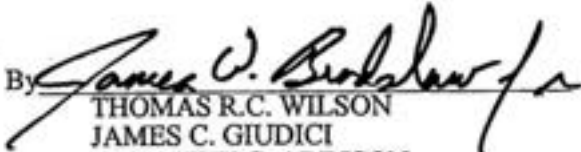
25 Hyatt's Answer raises the issue that if he appeals the FTB's final decision to the
26 California Board of Equalization ("BOE"), the matters included in the appeal may be disclosed in
27 these public proceedings. What Hyatt does not disclose is that he can request that the BOE seal
28 records which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

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

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

10 DATED this 8th day of August, 2000.

11 McDONALD CARANO WILSON McCUNE
12 BERGIN FRANKOVICH & HICKS

13 By 
14 THOMAS R.C. WILSON
15 JAMES C. GIUDICI
16 MATTHEW C. ADDISON
17 BRYAN R. CLARK
18 JEFF A. SILVESTRI
19 TODD J. DRESSEL
20 241 Ridge Street, 4th Floor
21 P.O. Box 2670
22 Reno, NV 89505-2670
23 (775) 788-2000

24 Attorneys for Petitioner Franchise Tax Board
25
26
27
28

CERTIFICATE OF MAILING

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

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

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

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

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


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

EXHIBIT 28

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35549

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Petitioner,

vs.

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

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest

FILED

SEP 13 2000

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

No. 36390

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Petitioner,

vs.

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

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest.

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

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

00-16084

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

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

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

Finally, on June 15, 2000, the real party in interest filed a motion for clarification of our June 7, 2000, stay order entered in Docket No. 35549.² Specifically, the real party in interest requests clarification as to whether we intended to temporarily stay all proceedings in the district court. In our June 7, 2000, order we temporarily stayed the

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

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

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

It is so ORDERED.

 C.J.
Rose

 J.
Maupin

 J.
Shearing

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

EXHIBIT 29

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) 788-1388

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

5 THOMAS R. C. WILSON, ESQ.
6 Nevada State Bar # 1568
JAMES C. GIUDICI, ESQ.
7 Nevada State Bar # 224
MATTHEW C. ADDISON, ESQ.
8 Nevada State Bar # 4201
BRYAN R. CLARK, ESQ.
9 Nevada State Bar #4442
McDONALD CARANO WILSON McCUNE
10 BERGIN FRANKOVICH & HICKS LLP
241 Ridge Street, 4th Floor
11 P.O. Box 2670
Reno, NV 89505-2670
12 (775) 788-2000
Attorneys for Franchise Tax Board

IN THE SUPREME COURT OF THE
STATE OF NEVADA

17 FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

18 Petitioner,

19 vs.

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

23 Respondent,

24 and

25 GILBERT P. HYATT,

26 Real Party in Interest.
27

FILED

DEC 28 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY CHIEF DEPUTY CLERK

Case No.: 36390
Consolidated with Case No. 35349

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

**CONFIDENTIAL INFORMATION
FILED UNDER SEAL**

SEALED

RECEIVED

DEC 26 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

The envelope attached to this document contains the Franchise Tax Board of the State of

00-22492

AA002204

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

5 THOMAS R. C. WILSON, ESQ.
Nevada State Bar # 1568
6 JAMES C. GIUDICI, ESQ.
Nevada State Bar # 224
7 MATTHEW C. ADDISON, ESQ.
Nevada State Bar # 4201
8 BRYAN R. CLARK, ESQ.
Nevada State Bar #4442
9 McDONALD CARANO WILSON MCCUNE
BERGIN FRANKOVICH & HICKS LLP
10 241 Ridge Street, 4th Floor
P.O. Box 2670
11 Reno, NV 89505-2670
(775) 788-2000
12 Attorneys for Petitioner Franchise Tax Board

13 IN THE SUPREME COURT OF THE
14 STATE OF NEVADA

15 * * * * *

16 FRANCHISE TAX BOARD OF THE STATE
17 OF CALIFORNIA,

18 Petitioner,

19 vs.

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

22 Respondent,

23 and

24 GILBERT P. HYATT,

25 Real Party in Interest.
26
27
28

Case No.: 35549/36390 (Consolidated)

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

TABLE OF CONTENTS

	<u>Page(s)</u>
INTRODUCTION	2
ARGUMENT	3
1. The Court is not obligated to accept Hyatt's unsupported spin.	3
2. Hyatt's claim in his Answer that his case "is a tort case, not a 'tax-related' case is just part of his "spin."	8
3. Thompson does not compel or support denial of the FTB's writ petition.	8
4. Hyatt confuses subject matter jurisdiction with personal jurisdiction.	10
5. Hyatt's Full Faith and Credit analysis is flawed.	11
A. <i>Nevada v. Hall</i> confirms, rather than rejects, the validity of the FTB's Full Faith and Credit argument.	11
B. <i>Mianeki</i> does not address the <i>Nevada v. Hall</i> exception and concerns a far different type of case.	12
C. Hyatt's intentional tort and operational act arguments miss the point. ...	14
D. Hyatt's cursory discussion of California's immunity and administrative exhaustion laws does not demonstrate that Hyatt's case should proceed.	16
E. Hyatt's analysis of the FTB's policies, procedures, and regulations does not justify denying Full Faith and Credit to California's laws.	19
F. Hyatt's analysis of the <i>Nevada v. Hall</i> exception is designed to mislead. .	22
G. The Supreme Court's recent sovereign immunity cases fully support the FTB's mandamus petition.	23
6. Hyatt's choice of law analysis is similarly flawed.	24
7. Hyatt's comity analysis is unpersuasive.	25
8. Hyatt's analysis of Nevada's administrative exhaustion laws displays Hyatt's hypocrisy.	27
9. Hyatt's response to the FTB's alternative writ petition is flawed.	29

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Ambassador Ins. Co. v. Feldman</i> , 95 Nev. 538, 598 P.2d 630 (1979)	27, 28
<i>Barr v. Matteo</i> , 360 U.S. 564, 571-72 and 576 (1959)	18
<i>Becerra v. County of Santa Cruz</i> , 68 Cal. App. 4 th 1450, 81 Cal. Rptr. 2d 165 (1998)	15
<i>Breliant v. Preferred Equities Corp.</i> , 112 Nev. 663, 668-69, 918 P.2d 314 (1996)	11, 29
<i>Conway v. Circus Circus Casinos, Inc.</i> , — Nev. —, 8 P.3d 837, 840 (2000)	15
<i>Downey v. Nix</i> , 1977 U.S. Dist. LEXIS 16276 (N.D. Ga. 1977)	21
<i>Faulkner v. University of Tennessee</i> , 627 So.2d 362 (Ala. 1992), cert. denied, 510 U.S. 1101 (1994)	27
<i>Franchise Tax Bd. v. Superior Court</i> , 164 Cal. App. 3d 526, 537, 210 Cal. Rptr. 605 (1985) ..	22
<i>Gans v. M.D.R. Liquidating Corp.</i> , 1990 WL 2851 (Del. Ch. Jan. 10, 1990)	30
<i>Gates v. Superior Court</i> , 32 Cal. App. 4 th 481, 510, 38 Cal. Rptr. 2d 489 (1995)	17
<i>Geo-Physical Maps, Inc. v. Toycraft Corp.</i> , 162 F. Supp. 141 (S.D. N.Y. 1958)	30
<i>Gibson vs. Reynolds</i> , 77 F.Supp. 629, 640 (D. Ark. 1948), <i>aff'd</i> 172 F.2d 95 (8 th Cir. 1949), cert. denied, 337 U.S. 925.	6
<i>Haines v. Askew</i> , 368 F. Supp. 369, 376 (M.D. Fla. 1973), <i>aff'd</i> , 417 U.S. 901 (1974)	6
<i>Harvey Lerer, Inc. v. Eighth Judicial Dist. Court</i> , 111 Nev. 1165, 901 P.2d 643 (1995)	9
<i>Hernandez v. City of Salt Lake</i> , 100 Nev. 504, 686 P.2d 251 (1984)	9
<i>Hyatt v. Boone</i> , 146 F.3d 1348 (Fed. Cir. 1998).	6
<i>Johnson v. District Director of IRS</i> , 1976 U.S. Dist. LEXIS 12148 (N.D. Ga. 1976)	21
<i>Kennecott Copper Corp. v. State Tax Com.</i> , 327 U.S. 573, 579-80 (1946)	18-20
<i>Lewis v. Second Judicial Dist. Court</i> , 113 Nev. 106, 930 P.2d 770 (1997).	9
<i>McKenzie v. Moeller</i> , 1976 U.S. Dist. LEXIS 14610 (E.D. Wis. 1976)	21
<i>Mianecki v. Second Judicial Dist. Court</i> , 99 Nev. 93, 658 P.2d 422 (1983)	9, 12-14, 24, 25
<i>Miller v. United States</i> , 66 F.3d 220, 222-23 (9 th Cir. 1995), cert. denied 517 U.S. 1103	21
<i>Mitchell v. Franchise Tax Bd.</i> , 183 Cal. App. 3d 1133, 228 Cal. Rptr. 750 (1986)	17

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Nevada v. Hall</i>	2, 9, 12, 22, 23
<i>NLRB vs. United Aircraft Corp.</i> , 200 F. Supp. 48, 51 (D. Conn. 1961), <i>aff'd</i> , 300 F.2d 442 (2d Cir. 1962).	6
<i>Norman E. Duquette Inc. v. Commissioner of Internal Revenue</i> , 110 F.Supp.2d 16, 20 (D.C. Cir. 2000)	22
<i>Posner Laboratories, Inc. v. Pro-line Corp.</i> , 1978 U.S. Dist. Lexis 16334 (S.D. N.Y. 1978) ..	30
<i>Resnick v. Nevada Gaming Com'n</i> , 104 Nev. 60, 65-66, 752 P.2d 229 (1988)	27
<i>Schaut v. First Federal Savings & Loan Ass'n of Chicago</i> , 560 F. Supp. 245, 246 (N.D. Ill. 1983), <i>appeal dismissed without opinion</i> , 735 F.2d 1366 (7th Cir. 1984))	23
<i>Smith v. Eighth Judicial Dist. Court</i> , 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997)	8
<i>Smith v. Reeves</i> , 178 U.S. 436, 438-39, 441 (1900)	18
<i>Snooks v. Ninth Judicial Dist. Court</i> , 112 Nev. 798, 799-804, 919 P.2d 1064, 1065-1067 (1996)	8
<i>Stankevitz v. IRS</i> , 640 F.2d 205 (9 th Cir. 1981)	21, 27
<i>State ex rel. Dep't of Transportation v. Thompson</i> , 99 Nev. 358, 662 P.2d 1338 (1983) ..	2, 8, 10
<i>State ex rel. Dep't Transp. v. Thompson</i> , 99 Nev. 358, 662 P.2d 1338 (1983)	8
<i>State v. Eighth Judicial Dist. Court</i> , 111 Nev. 1023, 899 P.2d 1121 (1995)	9
<i>Sweeney v. Schultes</i> , 19 Nev. 53, 54 (1885)	30
<i>Tenney v. Brandhove</i> , 341 U.S. 367, 377 (1951)	18
<i>United States v. De Luna</i> , 763 F.2d 897 (8th Cir. 1985), cert. denied, 474 U.S. 980	26
<i>Ward v. United States</i> , 973 F. Supp. 996 (D. Colo. 1997)	21
<i>Watson v. Housing Authority of City of North Las Vegas</i> , 97 Nev. 240, 242, 627 P.2d 405, 406-07 (1981)	10
<i>Zimmerman v. Spears</i> , 428 F. Supp. 759, 762 (W.D. Tex. 1977), <i>aff'd</i> 565 F.2d 310 (5 th Cir. 1977)	21

TABLE OF AUTHORITIES

Other Authorities

Page(s)

28 U.S.C. § 1367(c)	30
Cal. Civ. Code § 1798	20
Cal. Civ. Proc. Code § 1913	19
Cal. Civ. Proc. Code § 71	19
Cal. Code Regs., tit. 2, § 630(h)	18
Cal. Govt. Code § 905.2	18
Cal. Gov't Code § 26900 <i>et seq</i>	5
Cal. Gov't Code § 818.8	17
Cal. Gov't Code § 860.2	16, 17
Cal. Gov't. Code § 818	13
Cal. Rev. & Tax Code § 17016	4
Cal. Rev. & Tax Code § 19442.	7
Cal. Rev. & Tax Code § 21021	20
Cal. Rev. & Tax Code § 31	19
Cal. Rev. & Tax. Code § 17001	5
Cal. Rev. & Tax. Code § 19545	22
Cal. Rev. & Tax. Code § 21021	18
Cal. Rev. & Tax. Code § 21021.	19
Cal. Rev. & Tax. Code § 21021(a)	14
Cal. Rev. and Tax Code § 19503	15
Cal. Rev. and Tax. Code § 21021	3, 21
Nev. Rev. Stat. 34.320	9, 10
Nev. Rev. Stat. § 41.035	13
Title 26 U.S.C. § 7433	21

INTRODUCTION

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

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

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

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

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

11 ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Hyatt's rhetoric is misplaced.

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

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

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

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

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

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

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

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

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

4. Hyatt confuses subject matter jurisdiction with personal jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 //

27 //

28 //

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2
3
4
5

6
7
8
9
10
11
12
13
14

15
16
17
18
19
20
21
22
23

24
25
26
27
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 //

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

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

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

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

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

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

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

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

22 DATED this 26th day of December, 2000.

23 MCDONALD CARANO WILSON MCCUNE
24 BERGIN FRANKOVICH & HICKS LLP

25
26 By: 

27 THOMAS R.C. WILSON

28 Attorneys for Petitioner Franchise Tax Board

MCDONALD CARANO WILSON MCCUNE BERGIN FRANKOVICH & HICKS LLP

ATTORNEYS AT LAW
241 RIDGE STREET - P.O. BOX 2470
RENO, NEVADA 89505-2470
(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 A WRIT OF MANDAMUS ORDERING DISMISSAL, OR ALTERNATIVELY FOR A WRIT OF PROHIBITION AND MANDAMUS LIMITING THE SCOPE OF THIS CASE** on this 26th day of December, 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

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

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



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

EXHIBIT 30

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) 788-2000

1 BILL LOCKYER
Attorney General
2 RICHARD W. BAKKE
Supervising Deputy Attorney General
3 FELIX E. LEATHERWOOD, Admitted per SCR 42
GEORGE M. TAKENOUCHI, Admitted per SCR 42
4 THOMAS G. HELLER, Admitted per SCR 42
Deputy Attorneys General
5
6 THOMAS R. C. WILSON, ESQ.
Nevada State Bar # 1568
JAMES C. GIUDICI, ESQ.
7 Nevada State Bar # 224
MATTHEW C. ADDISON, ESQ.
8 Nevada State Bar # 4201
BRYAN R. CLARK, ESQ.
9 Nevada State Bar #4442
McDONALD CARANO WILSON McCUNE
10 BERGIN FRANKOVICH & HICKS LLP
241 Ridge Street, 4th Floor
11 P.O. Box 2670
Reno, NV 89505-2670
12 (775) 788-2000
Attorneys for Franchise Tax Board

IN THE SUPREME COURT OF THE
STATE OF NEVADA

17 FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

18 Petitioner,

19 vs.

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

23 Respondent,

24 and

25 GILBERT P. HYATT,

26 Real Party in Interest.
27

FILED

DEC 28 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY CHIEF DEPUTY CLERK

Case No.: 36390
Consolidated with Case No. 35549

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

**CONFIDENTIAL INFORMATION
FILED UNDER SEAL**

SEALED

RECEIVED

DEC 26 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

The envelope attached to this document contains the Franchise Tax Board of the State of

00-22492

AA002240

1 BILL LOCKYER
Attorney General
2 RICHARD W. BAKKE
Lead Supervising Deputy Attorney General
3 FELIX E. LEATHERWOOD, Admitted per SCR 42
GEORGE M. TAKENOUCHI, Admitted per SCR 42
4 THOMAS G. HELLER, Admitted per SCR 42
Deputy Attorneys General
5
6 THOMAS R. C. WILSON, ESQ.
Nevada State Bar # 1568
JAMES C. GIUDICI, ESQ.
7 Nevada State Bar # 224
MATTHEW C. ADDISON, ESQ.
8 Nevada State Bar # 4201
BRYAN R. CLARK, ESQ.
9 Nevada State Bar #4442
MCDONALD CARANO WILSON MCCUNE
10 BERGIN FRANKOVICH & HICKS LLP
241 Ridge Street, 4th Floor
11 P.O. Box 2670
Reno, NV 89505-2670
12 (775) 788-2000
Attorneys for Petitioner Franchise Tax Board

13 IN THE SUPREME COURT OF THE
14 STATE OF NEVADA

15 * * * * *

16 FRANCHISE TAX BOARD OF THE STATE
17 OF CALIFORNIA,

18 Petitioner,

19 vs.

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

22 Respondent,

23 and

24 GILBERT P. HYATT,

25 Real Party in Interest.
26
27
28

Case No.: 35549/36390 (Consolidated)

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

TABLE OF CONTENTS

	<u>Page(s)</u>
INTRODUCTION	2
ARGUMENT	3
1. The Court is not obligated to accept Hyatt's unsupported spin.	3
2. Hyatt's claim in his Answer that his case "is a tort case, not a 'tax-related' case is just part of his "spin."	8
3. Thompson does not compel or support denial of the FTB's writ petition.	8
4. Hyatt confuses subject matter jurisdiction with personal jurisdiction.	10
5. Hyatt's Full Faith and Credit analysis is flawed.	11
A. <i>Nevada v. Hall</i> confirms, rather than rejects, the validity of the FTB's Full Faith and Credit argument.	11
B. <i>Mianeki</i> does not address the <i>Nevada v. Hall</i> exception and concerns a far different type of case.	12
C. Hyatt's intentional tort and operational act arguments miss the point. ...	14
D. Hyatt's cursory discussion of California's immunity and administrative exhaustion laws does not demonstrate that Hyatt's case should proceed.	16
E. Hyatt's analysis of the FTB's policies, procedures, and regulations does not justify denying Full Faith and Credit to California's laws.	19
F. Hyatt's analysis of the <i>Nevada v. Hall</i> exception is designed to mislead. .	22
G. The Supreme Court's recent sovereign immunity cases fully support the FTB's mandamus petition.	23
6. Hyatt's choice of law analysis is similarly flawed.	24
7. Hyatt's comity analysis is unpersuasive.	25
8. Hyatt's analysis of Nevada's administrative exhaustion laws displays Hyatt's hypocrisy.	27
9. Hyatt's response to the FTB's alternative writ petition is flawed.	29

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Ambassador Ins. Co. v. Feldman</i> , 95 Nev. 538, 598 P.2d 630 (1979)	27, 28
<i>Barr v. Matteo</i> , 360 U.S. 564, 571-72 and 576 (1959)	18
<i>Becerra v. County of Santa Cruz</i> , 68 Cal. App. 4 th 1450, 81 Cal. Rptr. 2d 165 (1998)	15
<i>Breliant v. Preferred Equities Corp.</i> , 112 Nev. 663, 668-69, 918 P.2d 314 (1996)	11, 29
<i>Conway v. Circus Circus Casinos, Inc.</i> , — Nev. —, 8 P.3d 837, 840 (2000)	15
<i>Downey v. Nix</i> , 1977 U.S. Dist. LEXIS 16276 (N.D. Ga. 1977)	21
<i>Faulkner v. University of Tennessee</i> , 627 So.2d 362 (Ala. 1992), cert. denied, 510 U.S. 1101 (1994)	27
<i>Franchise Tax Bd. v. Superior Court</i> , 164 Cal. App. 3d 526, 537, 210 Cal. Rptr. 605 (1985) ..	22
<i>Gans v. M.D.R. Liquidating Corp.</i> , 1990 WL 2851 (Del. Ch. Jan. 10, 1990)	30
<i>Gates v. Superior Court</i> , 32 Cal. App. 4 th 481, 510, 38 Cal. Rptr. 2d 489 (1995)	17
<i>Geo-Physical Maps, Inc. v. Toycraft Corp.</i> , 162 F. Supp. 141 (S.D. N.Y. 1958)	30
<i>Gibson vs. Reynolds</i> , 77 F.Supp. 629, 640 (D. Ark. 1948), <i>aff'd</i> 172 F.2d 95 (8 th Cir. 1949), cert. denied, 337 U.S. 925.	6
<i>Haines v. Askew</i> , 368 F. Supp. 369, 376 (M.D. Fla. 1973), <i>aff'd</i> , 417 U.S. 901 (1974)	6
<i>Harvey Lerer, Inc. v. Eighth Judicial Dist. Court</i> , 111 Nev. 1165, 901 P.2d 643 (1995)	9
<i>Hernandez v. City of Salt Lake</i> , 100 Nev. 504, 686 P.2d 251 (1984)	9
<i>Hyatt v. Boone</i> , 146 F.3d 1348 (Fed. Cir. 1998).	6
<i>Johnson v. District Director of IRS</i> , 1976 U.S. Dist. LEXIS 12148 (N.D. Ga. 1976)	21
<i>Kennecott Copper Corp. v. State Tax Com.</i> , 327 U.S. 573, 579-80 (1946)	18-20
<i>Lewis v. Second Judicial Dist. Court</i> , 113 Nev. 106, 930 P.2d 770 (1997).	9
<i>McKenzie v. Moeller</i> , 1976 U.S. Dist. LEXIS 14610 (E.D. Wis. 1976)	21
<i>Mianecki v. Second Judicial Dist. Court</i> , 99 Nev. 93, 658 P.2d 422 (1983)	9, 12-14, 24, 25
<i>Miller v. United States</i> , 66 F.3d 220, 222-23 (9 th Cir. 1995), cert. denied 517 U.S. 1103	21
<i>Mitchell v. Franchise Tax Bd.</i> , 183 Cal. App. 3d 1133, 228 Cal. Rptr. 750 (1986)	17

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Nevada v. Hall</i>	2, 9, 12, 22, 23
<i>NLRB vs. United Aircraft Corp.</i> , 200 F. Supp. 48, 51 (D. Conn. 1961), <i>aff'd</i> , 300 F.2d 442 (2d Cir. 1962).	6
<i>Norman E. Duquette Inc. v. Commissioner of Internal Revenue</i> , 110 F.Supp.2d 16, 20 (D.C. Cir. 2000)	22
<i>Posner Laboratories, Inc. v. Pro-line Corp.</i> , 1978 U.S. Dist. Lexis 16334 (S.D. N.Y. 1978) ..	30
<i>Resnick v. Nevada Gaming Com'n</i> , 104 Nev. 60, 65-66, 752 P.2d 229 (1988)	27
<i>Schaut v. First Federal Savings & Loan Ass'n of Chicago</i> , 560 F. Supp. 245, 246 (N.D. Ill. 1983), <i>appeal dismissed without opinion</i> , 735 F.2d 1366 (7th Cir. 1984))	23
<i>Smith v. Eighth Judicial Dist. Court</i> , 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997)	8
<i>Smith v. Reeves</i> , 178 U.S. 436, 438-39, 441 (1900)	18
<i>Snooks v. Ninth Judicial Dist. Court</i> , 112 Nev. 798, 799-804, 919 P.2d 1064, 1065-1067 (1996)	8
<i>Stankevitz v. IRS</i> , 640 F.2d 205 (9 th Cir. 1981)	21, 27
<i>State ex rel. Dep't of Transportation v. Thompson</i> , 99 Nev. 358, 662 P.2d 1338 (1983) ..	2, 8, 10
<i>State ex rel. Dep't Transp. v. Thompson</i> , 99 Nev. 358, 662 P.2d 1338 (1983)	8
<i>State v. Eighth Judicial Dist. Court</i> , 111 Nev. 1023, 899 P.2d 1121 (1995)	9
<i>Sweeney v. Schultes</i> , 19 Nev. 53, 54 (1885)	30
<i>Tenney v. Brandhove</i> , 341 U.S. 367, 377 (1951)	18
<i>United States v. De Luna</i> , 763 F.2d 897 (8th Cir. 1985), cert. denied, 474 U.S. 980	26
<i>Ward v. United States</i> , 973 F. Supp. 996 (D. Colo. 1997)	21
<i>Watson v. Housing Authority of City of North Las Vegas</i> , 97 Nev. 240, 242, 627 P.2d 405, 406-07 (1981)	10
<i>Zimmerman v. Spears</i> , 428 F. Supp. 759, 762 (W.D. Tex. 1977), <i>aff'd</i> 565 F.2d 310 (5 th Cir. 1977)	21

TABLE OF AUTHORITIES

Other Authorities

Page(s)

28 U.S.C. § 1367(c)	30
Cal. Civ. Code § 1798	20
Cal. Civ. Proc. Code § 1913	19
Cal. Civ. Proc. Code § 71	19
Cal. Code Regs., tit. 2, § 630(h)	18
Cal. Govt. Code § 905.2	18
Cal. Gov't Code § 26900 <i>et seq</i>	5
Cal. Gov't Code § 818.8	17
Cal. Gov't Code § 860.2	16, 17
Cal. Gov't. Code § 818	13
Cal. Rev. & Tax Code § 17016	4
Cal. Rev. & Tax Code § 19442.	7
Cal. Rev. & Tax Code § 21021	20
Cal. Rev. & Tax Code § 31	19
Cal. Rev. & Tax. Code § 17001	5
Cal. Rev. & Tax. Code § 19545	22
Cal. Rev. & Tax. Code § 21021	18
Cal. Rev. & Tax. Code § 21021.	19
Cal. Rev. & Tax. Code § 21021(a)	14
Cal. Rev. and Tax Code § 19503	15
Cal. Rev. and Tax. Code § 21021	3, 21
Nev. Rev. Stat. 34.320	9, 10
Nev. Rev. Stat. § 41.035	13
Title 26 U.S.C. § 7433	21

INTRODUCTION

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

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

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

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

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

11 ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Hyatt's rhetoric is misplaced.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 //

27 //

28 //

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5

6
7
8
9
10
11
12
13
14

15
16
17
18
19
20
21
22
23

24
25
26
27
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 //

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

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

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

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

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

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

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

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

22 DATED this 26th day of December, 2000.

23 MCDONALD CARANO WILSON MCCUNE
24 BERGIN FRANKOVICH & HICKS LLP

25
26 By: 

27 THOMAS R.C. WILSON

28 Attorneys for Petitioner Franchise Tax Board

MCDONALD CARANO WILSON MCCUNE BERGIN FRANKOVICH & HICKS LLP

ATTORNEYS AT LAW
241 RIDGE STREET - P.O. BOX 2470
RENO, NEVADA 89505-2470
(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 A WRIT OF MANDAMUS ORDERING DISMISSAL, OR ALTERNATIVELY FOR A WRIT OF PROHIBITION AND MANDAMUS LIMITING THE SCOPE OF THIS CASE** on this 26th day of December, 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

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

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


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

EXHIBIT 31

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Petitioner,

vs.

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

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest.

No. 35549

FILED

JUN 13 2001

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

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Petitioner,

vs.

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

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest.

No. 36390

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

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

01-09900

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

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

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

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

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

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

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

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

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

⁴440 U.S. 410, 422, 424 n.24 (1979).

⁵99 Nev. 93, 96, 658 P.2d 422, 424 (1983).

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

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

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

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

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

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

¹⁰Id. at 1157, 946 P.2d at 167.

¹¹NRCF 56(e); see Bird v. Casa Royale West, 97 Nev. 67, 70-71, 624 P.2d 17, 19 (1991); see also Garvey v. Clark County, 91 Nev. 127, 130, 532 P.2d 269, 271 (1975).

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

¹³See, e.g., Barnettler v. Reno Air, Inc., 114 Nev. 441, 447-49, 956 P.2d 1392, 1396-97 (1998) (negligent misrepresentation and outrage), limited by Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000); PETA v. Bobby Berosini, Ltd., 111 Nev. 615, 628-36, 895 P.2d 1269, 1278-83 (1995) (invasion of privacy claims); Posadas v. City of Reno, 109 Nev. 448, 457, 851 P.2d 444-45 (1993) (abuse of process); M & R Investment Co. v. Mandarino, 103 Nev. 711, 718-19, 748 P.2d 1031, 1034 (1987) (continued on next page . . .

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

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

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

¹⁴continued
488, 493 (1987) (invasion of privacy claims); Star v. Rabello, 97 Nev. 124, 125-26, 625 P.2d 90, 92 (1981) (outrage).

¹⁵See Barnettler, 114 Nev. at 447-49, 956 P.2d at 1386-87.

¹⁶Although neither party addressed this issue in the petitions to this court, the record indicates that the issue of the absence of probative evidence was presented to the district court on the initial motion.

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

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

Maupin, C.J.
Maupin

Young, J.
Young

Shearing, J.
Shearing

Agosti, J.
Agosti

Rose, J.
Rose

Leavitt, J.
Leavitt

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

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

EXHIBIT 32

RECEIVED
CLERK OF SUPREME COURT

01 JUL -2 PM 12:52

1 Mark A. Hutchison (4639)
John T. Steffen (4390)
2 HUTCHISON & STEFFEN
Lakes Business Park
3 8831 West Sahara Avenue
Las Vegas, Nevada 89117
4 (702) 385-2500

5 Peter C. Bernhard (734)
Bryan Murray (7109)
6 BERNHARD & LESLIE
3980 Howard Hughes Parkway
Suite 550
7 Las Vegas, Nevada 89109
8 (702) 650-6565

9 Attorneys for Real Party in Interest
GILBERT P. HYATT

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

12 FRANCHISE TAX BOARD OF THE STATE
13 OF CALIFORNIA,

14 Petitioner,

15 vs.

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

18 Respondent,

19 and

20 GILBERT P. HYATT,

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

) Case No. 36390

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

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

TABLE OF CONTENTS

Page

I.	Issues presented.	1
A.	Did the Court overlook or misapprehend genuine, material facts at issue when it concluded “that there is no probative evidence to support Hyatt’s [tort] claims?”	1
B.	Did the Court overlook or misapprehend the law when it granted the FTB’s petition “on grounds other than those alleged in the petition?”	1
II.	Summary of argument and relief requested	1
III.	The Court has overlooked or misapprehended Hyatt’s substantial evidence of the FTB’s invasion of Hyatt’s privacy by its illegal disclosures of Hyatt’s private facts	1
A.	Elements of claim	1
B.	Supporting evidence	1
1.	Hyatt reasonably expected an audit by the FTB with no public disclosure of his private information	2
2.	The FTB unreasonably and illegally divulged Hyatt’s private facts	4
i.	The FTB wrongly disclosed the address of Hyatt’s secret research lab	4
ii.	The FTB wrongly disclosed Hyatt’s social security number	5
iii.	The FTB wrongly disclosed to Hyatt’s Japanese licensees that he was being investigated, thereby destroying Hyatt’s patent licensing business	5
IV.	The Court has overlooked or misapprehended substantial evidence of the FTB’s fraud	6
A.	Elements of claim	6
B.	Supporting evidence	6
1.	The one-sided fraudulent audit	6
2.	The \$9 million fraud penalty and the FTB’s urging Hyatt to settle	8
3.	Hyatt was damaged by the FTB’s fraud	9
V.	The Court overlooked or misapprehended the law when it granted the FTB’s petition “on grounds other than those alleged in the petition.”	10
VI.	Hyatt again requests leave to file an additional briefing specifically addressing the evidentiary support for his claims	10

I. Issues presented.

A. Did the Court overlook or misapprehend genuine, material facts at issue when it concluded “that there is no probative evidence to support Hyatt’s [tort] claims?”

B. Did the Court overlook or misapprehend the law when it granted the FTB’s petition “on grounds other than those alleged in the petition?”

II. Summary of argument and relief requested.

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

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

A. Elements of claim: (i) disclosure or publicity of private facts; and (ii) a reasonable expectation of privacy in regard to the disclosed facts.¹

B. Supporting evidence:

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

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

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

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

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

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

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

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

25 ² FTB Field Audit Manual, at FTB 3762 [Appdx., Exh. 1].

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

27 ⁴ FTB Disclosure Education Manual, at 11 [Appdx., Exh. 3].

28 ⁵ FTB Disclosure Education Manual, emphasis in original [Appdx., Exh. 3].

⁶ FTB Disclosure Education Manual, at 14 [Appdx., Exh. 3].

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

1 an absolute, reasonable expectation that his unique need for privacy would be strictly honored by the
2 FTB as stated verbally and in writing, and as required by its own rules. In its initial audit letter, the FTB
3 promised "confidential treatment of any personal and financial information from the auditor assigned to
4 you."⁸ In the same document, the FTB sent Hyatt its Privacy Notice, FTB Form #1131,⁹ that
5 represented to Hyatt that the FTB was subject to the California privacy act¹⁰ and was required to
6 disclose "why we ask you for information." The FTB indicated that it would only share information
7 with the IRS and other governmental agencies. *It uttered no hint that it intended to divulge Hyatt's*
8 *private information to non-governmental third parties at the unfettered discretion of its auditors.* It
9 nonetheless did so on a grand scale as summarized below.

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

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

24 ⁸ FTB Form #1131[*Appdx., Exh. 5*].

25 ⁹ FTB Form #1131 [*Appdx., Exh. 5*].

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

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

28 ¹² Cowan Affid., ¶¶ 9-26 [*Appdx., Exh. 6*].

¹³ Hyatt Affid., ¶¶ 18b, 131, 137 [*Appdx., Exh. 7*].

¹⁴ Hyatt Affid., ¶¶ 80, 130-31, 137 [*Appdx., Exh. 7*].

¹⁵ Hyatt Affid., ¶¶ 44, 67, 85, 86 [*Appdx., Exh. 7*].

1 such to the public.¹⁶ Security was so important to Hyatt that he even purchased the facility containing
2 his research lab and invaluable documents through the Kern trust¹⁷ to avoid public disclosure.

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

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

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

9 The FTB's disclosure of Hyatt's highly secret Las Vegas address to third parties was a calculated
10 outrage.¹⁸ Despite express assurances that it would not reveal Hyatt's secret information, the FTB
11 violated its own regulations and disclosed Hyatt's secret Las Vegas address to utility companies,
12 including Southwest Gas Corp., Silver State Disposal Service, and Las Vegas Valley Water District¹⁹
13 and to three separate newspapers.²⁰ As a result, Hyatt's painstaking care in locating, securing, and
14 protecting a secret facility was all for naught, as the FTB made it available to public knowledge, a fact
15 that is of the utmost concern and disgust to Hyatt for reasons that any reasonable person in his situation
16 would consider to be of compelling importance.²¹

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

23
24
25 ¹⁶ Hyatt Affid., ¶¶ 10-133, 137 [Appdx., Exh. 7].

26 ¹⁷ Michael Kern is a prominent Certified Public Accountant in Las Vegas.

27 ¹⁸ Portions of FTB 1991 tax year audit file: H01639, H01614, H01643, H01853, and FTB 01992 [Appdx., Exh. 8].

28 ¹⁹ Portions of FTB 1991 tax year audit file: H 01639, 01641, 01643 [Appdx., Exh. 9].

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

²¹ Hyatt Affid., ¶ 137-138 [Appdx., Exh. 7].

²² Hyatt Affid., ¶ 138 [Appdx., Exh. 7].

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

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

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

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

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

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

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

24
25 ²⁴ Portions of FTB 1991 tax year audit file [Appdx., Exh. 8].

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

27 ²⁶ Hyatt Affid., ¶ 138 [Appdx., Exh. 7].

28 ²⁷ Cowan Affid., ¶¶ 8-26 [Appdx., Exh. 6].

²⁸ FTB 02143 and 02147 [Appdx., Exh. 11].

²⁹ Hyatt Affid., ¶¶ 136, 162 [Appdx., Exh. 7].

³⁰ Cox Narrative Report, at H00039-00078, [Appdx., Exh. 13].

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

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

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

12 As summarized below, Hyatt has established that the lead auditor created false evidence – which
13 is a criminal offense under California law³² – and used it to try to extort a settlement from Hyatt.

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

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

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

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

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

27 ³² See, e.g., Cal. Rev. & Tax Code § 461, Cal. Pen. Code § 134.

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

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

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

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

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

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

- the current neighbors in Nevada who supported Hyatt's Nevada residency claim;
- the former neighbors in California who told of Hyatt's move to Nevada;
- the friends and business associates who knew of Hyatt's move to Nevada;
- the adult son who knew of Hyatt's move to Nevada;
- Nevada rent, utilities, telephones, and insurance payments of Hyatt;
- Nevada voter registration and driver's license of Hyatt;
- Nevada home purchase offers and escrow papers of Hyatt;
- Nevada religious, professional, and social affiliations of Hyatt; and
- Hyatt's changes of address from California to Nevada address.⁴²

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

24 ³⁶ Cox depo., pp. 168-69, 1618-19 [Appdx., Exh. 16].

25 ³⁷ Cowan Affid., Exhibit 14 thereto [Appdx., Exh. 6].

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

27 ³⁹ Les depo., p. 10 [Appdx., Exh. 17].

28 ⁴⁰ Maystead depo., pp. 182-84 [Appdx., Exh. 18].

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

⁴² Cowan Affid., Exhibit 14 thereto [Appdx., Exh. 6].

⁴³ Cox Narrative Report, at H00039-00078 [Appdx., Exh. 13].

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

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

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

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

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

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

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

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

28 ⁴⁷ H 00302-07 [Appdx., Exh. 19].

⁴⁸ Ford depo., pp. 128-29 [Appdx., Exh. 20].

⁴⁹ FTB H 08950 [Appdx., Exh. 21].

⁵⁰ Cowan Affid., ¶ 32 [Appdx., Exh. 6].

1 that Hyatt so valued would be lost.⁵¹

2 Specifically, she told Hyatt's tax representative that it would be necessary for the FTB to engage
3 in extensive additional requests for information from Hyatt as that is its practice "in high profile, large
4 dollar" residency audits. In fact, Ms. Jovanovich's own hand-written notes confirm that she told Hyatt's
5 tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "of
6 many unresolved facts and questions" related to Hyatt.⁵² Jovanovich also testified that she understood
7 Hyatt had a unique and special concern regarding his privacy⁵³ and that he was "paranoid" about his
8 privacy – an understanding shared among the FTB auditors and the FTB residency unit.⁵⁴

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

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

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

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

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

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

25 ⁵² Jovanovich notes from June 12, 1997 [Appdx., Exh. 24].

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

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

28 ⁵⁵ Hyatt Affid., ¶¶ 10-12 [Appdx., Exh. 7].

⁵⁶ Cowan Affid., ¶¶ 9-26 [Appdx., Exh. 6].

⁵⁷ Hyatt Affid., ¶ 136 [Appdx., Exh. 7].

⁵⁸ This Court has upheld a compensatory damages award for emotional distress "as a result of [a defendant's] fraudulent misrepresentations, concealment, and a bad faith course of conduct." See *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949, 958 (1998).

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

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

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

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

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

23 DATED this 2 day of July, 2001

HUTCHISON & STEFFEN

BERNHARD & LESLIE, CHTD.

By: 

Peter C. Bernhard, Esq.

Bryan Murray, Esq.

Attorneys for Gilbert P. Hyatt

26
27 ⁵⁹ Bourke Affidavit, ¶¶ 182, 183, and 186 [Appdx., Exh. 25].

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


1 **CERTIFICATE OF SERVICE**

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

7
8 Thomas R.C. Wilson, Esq.
9 McDonald, Carano, Wilson, McCune,
10 Bergin, Frankovich & Hicks
241 Ridge St., Fourth Floor
Reno, Nevada 89501

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

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

18
19 
20 An employee of Bernhard & Leslie
21
22
23
24
25
26
27
28

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

**Peter C. Bernhard (734)
Bryan Murray (7109)
BERNHARD & LESLIE
3980 Howard Hughes Parkway
Suite 550
Las Vegas, Nevada 89109
(702) 650-6565**

Attorneys for Real Party in Interest
GILBERT P. HYATT

IN THE SUPREME COURT OF THE
STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Petitioner,

VS.

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

Respondent,

and

GILBERT P. HYATT.

Real Party in Interest.

Case No. 36390

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

**CONFIDENTIAL INFORMATION TO
BE FILED UNDER SEAL**

1
2 Real party in interest Gil Hyatt attaches to his Petition for Rehearing this Appendix containing
3 copies of all exhibits cited in his petition. Each exhibit cited in the petition and attached hereto is from
4 the record before the Court. Copies of the cited exhibits have been compiled in this Appendix for the
5 convenience of the Court. The record cite for each attached exhibit is set forth in brackets¹ after the
6 description of the exhibit in the table of contents below.

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

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

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

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

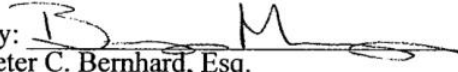
- 1
2 21. Skull and Crossbones cover page for Penalties Manual (H08950) [*Hyatt Appendix, Vol. VII,*
3 *Exh. 11, (Exhibit 22 thereto)*].
4
5 22. First Amended Complaint [*FTB Appendix Filed July 7, 2000, Vol. 1, Exh. 4*].
6
7 23. A. Jovanovich deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 30*
8 *thereto)*].
9
10 24. A. Jovanovich's hand-written notes of June 12, 1997 [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit*
11 *3 thereto)*].
12
13 25. T. Bourke Affidavit (excerpts and minus exhibits) [*Hyatt Appendix, Vol. VIII, Exh. 13*].
14
15 26. November 9, 1999 transcript excerpt from hearing by Discovery Commissioner [*Hyatt*
16 *Appendix, Vol. VII, Exh. 11 (Exhibit 5 thereto)*].
17
18 27. Gil Hyatt's Opposition to FTB's Motion for Summary Judgment [*Hyatt Appendix, Vol. VII,*
19 *Exh. 11*].
20
21 28. FTB Mission Statement [*Hyatt Appendix, Vol. III, Exh. 6 (Exhibit 19 thereto)*].
22
23
24
25
26
27
28

1 29. Appendix to Plaintiff Gil Hyatt's Post-Hearing Memorandum Containing Prima Facie
2 Showing of FTB Consultation with Attorneys to Further Future and Ongoing Extortion,
3 Breach of Confidentiality Statute, and Fraud ("Hyatt *Crime/Fraud* brief") [*Hyatt Appendix*,
4 *Vol. II, Exh. 4*].
5

6 DATED this 2 day of July, 2001.

7 HUTCHISON & STEFFEN, LTD.
8 Mark A. Hutchison, Esq.
9 John T. Steffen, Esq.
10 Lakes Business Park
11 8831 West Sahara Avenue
12 Las Vegas, Nevada 89117

13 BERNHARD & LESLIE, CHTD.

14 By: 
15 Peter C. Bernhard, Esq.
16 Bryan Murray, Esq.
17 3980 Howard Hughes Parkway, Suite 550
18 Las Vegas, Nevada 89109

19 Attorneys for Gilbert P. Hyatt
20
21
22
23
24
25
26
27
28

1
2 **CERTIFICATE OF SERVICE**

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

8 Thomas R.C. Wilson, Esq.
9 McDonald, Carano, Wilson, McCune,
10 Bergin, Frankovich & Hicks
241 Ridge St., Fourth Floor
Reno, Nevada 89501

11
12 Felix E. Leatherwood, Esq.
13 California Attorney General
300 South Spring Street
Suite 5212
Los Angeles, California 90013

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

18
19
20
21 
22 An employee of Bernhard & Leslie
23
24
25
26
27
28

EXHIBIT 33

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Petitioner,

vs.

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

Respondents,

and

GILBERT P. HYATT,

Real Party in
Interest.

No. 35549

FILED

JUL 13 2001

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

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Petitioner,

vs.

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

Respondents,

and

GILBERT P. HYATT,

Real Party in
Interest.

No. 36390

ORDER GRANTING MOTION IN PART, AND DIRECTING ANSWER

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

01-11919

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

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

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

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

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

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

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

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

It is so ORDERED.

Maupin, C.J.

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

EXHIBIT 34

RECEIVED
CLERK OF SUPREME COURT

01 JUL 23 PM 4:19

1 Mark A. Hutchison (4639)
John T. Steffen (4390)
2 HUTCHISON & STEFFEN
Lakes Business Park
3 8831 West Sahara Avenue
Las Vegas, Nevada 89117
4 (702) 385-2500

5 Peter C. Bernhard (734)
Bryan Murray (7109)
6 BERNHARD & LESLIE
3980 Howard Hughes Parkway, Suite 550
7 Las Vegas, Nevada 89109
(702) 650-6565

8 Attorneys for Real Party in Interest
9 GILBERT P. HYATT

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

12 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

13 Petitioner,

14 vs.

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

17 Respondent,

18 and

19 GILBERT P. HYATT,

20 Real Party in Interest.
21

Case No. 36390

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

**CONFIDENTIAL INFORMATION TO
BE FILED UNDER SEAL**

22 Pursuant to this Court's order, Petitioner Gil Hyatt submits this Supplement to his Petition for
23 Rehearing, timely filed on July 2, 2001 (the "Petition"). The Petition addressed the substantial evidence
24 supporting Hyatt's most significant invasion of privacy claim and his fraud claim. This Supplement first
25 demonstrates that there are material facts in dispute in regard to the four issues upon which the Court
26 based its order granting the FTB's petition and then discusses additional facts, evidence and law that the
27 Court overlooked or misapprehended in its order granting the FTB's petition.
28

TABLE OF CONTENTS

	<u>Page</u>
I. Genuine issues as to material fact exist as to the four conclusion reached by the Court in footnote 12 of the June 13 Order	1
A. Evidence of record shows that the FTB "produced false statements"	1
B. Evidence of record shows that the FTB publicized its investigation or findings outside the scope of the investigation	2
C. Evidence of record shows that the FTB did not comply with its internal operating procedures with regard to contacting individuals	3
D. Evidence of record shows that the FTB did more than "merely visit Hyatt's house and conduct its investigation through phone calls and letters"	3
II. Substantial, probative evidence supports Hyatt's invasion of privacy claims	5
A. Substantial evidence of the FTB's illegal disclosures of Hyatt's private facts	5
B. Substantial evidence of the FTB's intrusion upon Hyatt's seclusion	5
1. Elements of claim	5
2. Supporting evidence	5
C. Substantial evidence of the FTB's casting Hyatt in a false light	7
1. Elements of claim	7
2. Supporting evidence	7
III. Substantial evidence supporting Hyatt's abuse of process claim	8
A. Elements of claim	8
B. Supporting evidence	8
IV. The Court has overlooked or misapprehended the law in considering an issue never raised in the FTB's petition for extraordinary relief	10
V. The Court has overlooked or misapprehended its own standards regarding review of denials of summary judgment motions	11
VI. The Court has overlooked the law regarding the FTB's immunity in California for the conduct at issue has been overlooked or misapprehended	12
VII. Conclusion	14

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

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

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

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

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

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

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

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

⁵ Petition, at 3.

⁶ Petition, at 6-8.

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

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

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

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

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

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

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

17 12. Evidence of the FTB's publication of its investigation or findings outside the scope of its
18 investigation include:

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

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

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

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

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

28 ⁹ *Infra*, at 8-9.

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

¹¹ Lou Depo., p. 81 [Supp. Appdx., Exh. 44].

¹² Ford Depo., p. 90-92 [Supp. Appdx., Exh. 43].

¹³ *Infra*, at 7-8.

¹⁴ *Infra*, at 7-8.

¹⁵ Maystead Depo., pp. 182-84. [Appdx., Exh. 18].

¹⁶ Petition, at 9.

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

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

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

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

12 (2) Failure to notify Hyatt or obtain the requested information from Hyatt before disclosing
social security numbers and other confidential Hyatt information to individuals or businesses;¹⁹

13 (3) Failure to contact Hyatt before contacting third parties;²⁰

14 (4) Sending "Demands for Information" to individuals outside the State of California, absent
15 special circumstances;²¹

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

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

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

23 (1) Visits to Las Vegas apartment complexes and making records of questionable accuracy
24 regarding interviews with apartment managers;²³

25 ¹⁷ Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [Appdx., Exh. 10].

26 ¹⁸ Petition, at 6-8.

27 ¹⁹ Petition, at 5.

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

²¹ *Infra*, at 9-10.

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

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

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

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

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

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

7 (5) Initiating tax audits of close Hyatt associates;²⁸

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

10 (7) Vowing to "get that Jew bastard."³⁰

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

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

27 ²⁴ *Infra*, at 9-10.

28 ²⁵ Petition, at 6-8.

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

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

²⁸ Hyatt Affid., ¶ 164 [Appdx., Exh. 7].

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

³⁰ Les depo., p. 10 [Appdx. Exh. 17].

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

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

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

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

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

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

17 In addition to the evidence summarized in the Petition, affidavits and depositions have
18 established the following facts, which give rise to the inference that the FTB unreasonably intruded
19 upon Hyatt's seclusion. First, FTB auditor Sheila Cox made at least three trips to Las Vegas to
20 investigate Hyatt. During these visits, Cox contacted neighbors and other fellow Nevada residents with
21 whom Hyatt either in the past or in the future has had or might reasonably expect to have social or
22 business interactions, and she either disclosed or implied to them that Hyatt was under investigation in
23 California.³³ On one trip she took a colleague, Candace Les, on a covert visit to Hyatt's Las Vegas
24 home³⁴ — after the audit was over³⁵ — and took a trophy photograph of Les standing on Hyatt's
25 property in front of Hyatt's residence.³⁶ This corroborates Les' testimony that Cox was obsessive in her
26 zeal to "get" Hyatt, personalizing the audit in ways that were clearly not "standard" and should be found

27 ³¹ Nev. R. Civ. P. Rule 8(a).

28 ³² Petition, at 1-5.

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

³⁴ Les Depo., p. 42 [Appdx., Exh. 17].

³⁵ Les Depo., pp. 54 - 55 [Appdx., Exh. 17].

³⁶ Les Depo., pp. 264, 402 - 03 [Appdx., Exh. 17].

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

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

23 ³⁷ Les Depo., pp. 54 - 55 [Appdx., Exh. 17].

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

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

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

⁴¹ Cox Narrative Report [Appdx., Exh. 13].

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

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

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

7 **2. Supporting evidence:**

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

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

27 ⁴³ See *Restatement (Second) of Torts* § 652E (1977). Courts have held, however, that to recover for false light, the subject of
28 the publication need not necessarily be false. See, e.g., *Douglass v. Hustler Magazine*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*,
475 U.S. 1094 (1986) (reasoning that use of a photograph out of context was grounds for recovery on false light theory even
though photograph was not "false.")

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

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

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

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

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

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

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

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

18 **B. Supporting evidence:**

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

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

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

⁴⁹ Appdx., Exhs. 9-10.

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

26 ⁵¹ See, e.g., Hyatt Affid., ¶¶ 129, 143-44 [Appdx., Exh. 6].

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

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

28 ⁵⁴ FTB 01882, 01888, 01890, 01892, 01894, 01896, 01897, 01908, 01910, 01912, 01914, 01938, 01940, 01964, 01992, 02043, 02054, 02069, 02081, 02083, 02085, 02087, 02098, 02100, 02294, 02296 [Appdx., Exhs. 9-10].

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

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

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

27 ⁵⁵ FTB H 01715, 01716 [Supp. Appdx., Exh. 35].

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

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

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

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

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

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

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

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

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

27 ⁶⁰ Illia Depo., p. 248 [Appdx., Exh. 42]; Bauche Depo. p. 439 [Supp. Appdx., Exh. 40].

28 ⁶¹ 99 Nev. 358, 662 P.2d 1338 (1983).

⁶² Order, June 13, 2001, at 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 ⁶⁹183 Cal.App. 3d 1133, 228 Cal.Rptr.750 (1986).

25 ⁷⁰*Martinez v. City of Los Angeles*, 141 F.3d, 1373, 1379 (9th Cir. 1998) ("Here, [Plaintiff]'s allegations, go beyond the contention
26 that the LAPD officers acted improperly in deciding to seek his arrest. He alleges they acted negligently in conducting the
27 investigation . . . , and they caused his arrest and imprisonment in Mexico."); *see also Bell v. State*, 63 Cal.App. 4th 919, 929,
28 74 Cal.Rptr. 2d 541 (1998) (holding no immunity under Cal. Govt. Code § 821.6 to state investigators for conduct in executing
a search warrant). Section 821.6 of the California Government Code provides immunity for public employees for "investigating
or prosecuting any judicial or administrative proceeding."

29 ⁷¹The evidence is undisputed that this case has not interfered with the tax proceeding. Hyatt's Opp. to Mot. for Sum. Judg., pp.
30 55-56 [*Appdx. Exh. 27*] and Cowan affd., ¶¶ 43, 44 [*Appdx. Exh. 6*].

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

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

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

11 VII. Conclusion.

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

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

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

27 ⁷³ Order, June 13, 2001, n. 13.

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

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

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

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

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

21 DATED this 23 day of July, 2001

HUTCHISON & STEFFEN

22 BERNHARD & LESLIE, CHTD.

23 By:

Peter C. Bernhard, Esq.

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

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

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

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that I am an employee of Bernhard & Leslie, and that on this 23rd day of July,
4 2001, I served a true and correct copy of the foregoing **REAL PARTY IN INTEREST GILBERT P.**
5 **HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE**
6 **COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** via
7 regular mail, in a sealed box(s) upon which postage was prepaid, to the addresses noted below, upon the
8 following:

9 Thomas R.C. Wilson, Esq.
10 McDonald, Carano, Wilson, McCune,
11 Bergin, Frankovich & Hicks
12 241 Ridge St., Fourth Floor
13 Reno, Nevada 89501

14 Felix E. Leatherwood, Esq.
15 California Attorney General
16 300 South Spring Street
17 Suite 5212
18 Los Angeles, California 90013

19 Honorable Nancy Saitta
20 Department XVIII
21 Eighth Judicial District Court of the State of Nevada
22 in and for the County of Clark
23 200 S. Third Street
24 Las Vegas, NV 89155

25
26
27
28

An employee of Bernhard & Leslie

1 Mark A. Hutchison (4639)
John T. Steffen (4390)
2 HUTCHISON & STEFFEN
Lakes Business Park
3 8831 West Sahara Avenue
Las Vegas, Nevada 89117
4 (702) 385-2500

5 Peter C. Bernhard (734)
Bryan Murray (7109)
6 BERNHARD & LESLIE
3980 Howard Hughes Parkway
7 Suite 550
Las Vegas, Nevada 89109
8 (702) 650-6565

9 Attorneys for Real Party in Interest
GILBERT P. HYATT

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

12 FRANCHISE TAX BOARD OF THE STATE
13 OF CALIFORNIA,

14 Petitioner,

15 vs.

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

18 Respondent,

19 and

20 GILBERT P. HYATT,

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

) Case No. 36390

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

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

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

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

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

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

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

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

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

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

12 48. California Taxpayer's Association, *Caltaxletter*, Vol. XIV, No. 26, July 3, 2001, p. 3.
13

14 DATED this 23 day of July, 2001.
15

HUTCHISON & STEFFEN, LTD.

16 BERNHARD & LESLIE, CHTD.
17 

18 By: _____
Peter C. Bernhard, Esq.

19 Attorneys for Gilbert P. Hyatt
20
21 -
22
23
24
25
26
27
28

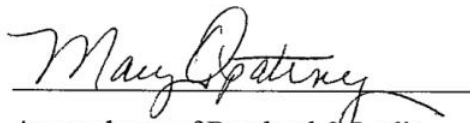
CERTIFICATE OF SERVICE

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

Thomas R.C. Wilson, 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

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


An employee of Bernhard & Leslie

1 Q. Were you ever involved that you can recall, in
2 such activity, resurrecting a tenant's file from
3 move-out storage?

4 A. Yes.

5 Q. What kind of occasion would that be?

6 A. When we needed to verify a previous residency
7 for another apartment community or mortgage company.

8 Q. Can you think of any other reasons that might
9 have been done?

10 A. No.

11 Q. Have you ever heard of Mr. Hyatt by
12 reputation?

13 A. No.

14 Q. Were you ever part of any media inquiry into
15 Mr. Hyatt's affairs?

16 A. No.

17 Q. Do you know Sheila Cox?

18 A. No.

19 Q. Do you know Sheila Semana?

20 A. No.

21 Q. Do you recall ever hearing those names?

22 A. Yes.

23 Q. On what occasion?

24 A. Few weeks ago from the private investigator.

25 Q. Okay. Let's look at Exhibit 523. Do you have

1 Q. Did you give the same answers to her that you
2 gave today?

3 A. Yes.

4 Q. Basically, you don't recall ever speaking with
5 Sheila Cox?

6 A. No, I don't.

7 Q. Did you ever talk with Sheila Cox over the
8 phone?

9 A. I don't recall.

10 Q. Did you ever promise Sheila Cox that you would
11 give her the file?

12 A. I don't recall any of that. It was just too
13 long ago.

14 Q. Did you ever tell Sheila Cox she couldn't have
15 the file?

16 A. I don't recall that. I don't believe I would
17 have said that, but I don't recall.

18 Q. Now, have you ever had any discussions with
19 Mr. Bradshaw, sitting there?

20 A. No, I don't believe so.

21 MR. BOURKE: Do we have that exhibit?

22 THE WITNESS: Also, my first knowledge of a
23 file missing is, was today. When it was mentioned
24 today. Andrea Boggs never mentioned that a file was
25 missing.

1 A. Yes, I did.

2 Q. Did you tell her you wouldn't take a thousand
3 dollars?

4 A. She didn't ask me that, but it was basically
5 towards the end of our conversation, and I felt at that
6 point that I did need to contact Mr. Chapin, because I
7 had been with the company a long time and that question
8 did raise some concerns with me.

9 Q. Did you feel that that question raised some
10 concerns about your reputation?

11 A. Yes, it did. And she was very aggressive.

12 Q. She was?

13 A. Yes, she was.

14 Q. What do you mean by that?

15 A. She was aggressive on the phone. She
16 basically didn't tell me who she was and what it was
17 regarding. I did request that she send me the fax
18 because I did want to know what this was all about. It
19 doesn't matter who it is, I need to know what this is
20 about before I set up a meeting unless it's a resident,
21 because that's what I'm at my job for. And we never did
22 set a meeting. I got the fax I believe that Friday and
23 she shows up Monday.

24 Q. So she showed up without an appointment?

25 A. She showed up without an appointment. She did

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

23

By: Bryan R. Clark / KAS 4:45pm
Bryan R. Clark, Esq.
2300 West Sahara Avenue, #10, Suite 1000
Las Vegas, Nevada 89102

SC 3/24/95



STATE OF CALIFORNIA

FRANCHISE TAX BOARD

13 N. GLENOAKS BLVD., SUITE 200
DURBANK, CA 91502-1170

DEMAND TO FURNISH
INFORMATION

Authorized by
California Revenue & Taxation Code
Section 19504 (formerly 19254 (a) and 26423 (a)*)

The People of the State of California to:

Las Vegas Sun
800 S. Valley View Blvd.
Las Vegas, Nevada 89153

In the Matter of:

Gilbert P. Hyatt

Social Security No.: 069-30-9999
or Corporation No.:
For the years:

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Las Vegas Sun during the period from 10/91 to the present. If yes, indicate the address that the subscription was sent to.
2. Was there a subscription to the Las Vegas Sun at 3225 S. Pecos apt. 237 during the period 11/91 - 4/92? If so, indicate the name of the person on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 3/24/95

Telephone: (818) 556-2942

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

STATE OF CALIFORNIA

FRANCHISE TAX BOARD

333 N. GLENOAKS BLVD., SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH
INFORMATION

Authorized by
California Revenue & Taxation Code
Section 19504 (formerly 19254 (a) and 26423 (a)*)

The People of the State of California to:

Las Vegas Sun
800 S. Valley View Blvd.
Las Vegas, Nevada 89153

In the Matter of:

Gilbert P. Hyatt

Social Security No.: 069-30-9999
or Corporation No.:
For the years:

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Las Vegas Sun during the period from 1991 to the present. If yes, please indicate the start and stop dates of service and the address that the subscription was sent to.
2. Indicate if there were any subscriptions to the Las Vegas Sun at 3225 S. Pecos Apt 237 during 1991-1992 and at 7335 Tara from 1992 to the present. If so, indicate the start and stop dates of service and the name(s) of the person(s) on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

CONFIDENTIAL
AA002337

STATE OF CALIFORNIA

FRANCHISE TAX BOARD

333 N. GLEN OAKS BLVD., SUITE 200
BURBANK, CA 91502-1170

**DEMAND TO FURNISH
INFORMATION**

Authorized by
California Revenue & Taxation Code
Section 19504 (formerly 19254 (a) and 26423 (a)*)

The People of the State of California to:

Times Orange County
Times Mirror Square
Room 410
Los Angeles, CA 90053

In the Matter of:

Gilbert P. Hyatt

Social Security No.: 069-30-9999
or Corporation No.:
For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Times Orange County during the period from 1991 to the present. If yes, please indicate the start and stop dates of service and the address that the subscription was sent to.
2. Was there a subscription to the Times Orange County at 7841 Jennifer Circle in La Palma during 1991 to the present? If so, indicate the start and stop dates of service and the name(s) of the person(s) on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox

Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

CONFIDENTIAL

AA002338

STATE OF CALIFORNIA

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD., SUITE 200
BURBANK, CA 91502-1170



DEMAND TO FURNISH INFORMATION

Authorized by
California Revenue & Taxation Code
Section 19504 (formerly 19254 (a) and 26423 (a)*)

The People of the State of California to:

Orange County Register
625 N. Grand Ave.
Santa Ana, CA 92701

In the Matter of:

Gilbert.P. Hyatt

Social Security No.: 069-30-9999
or Corporation No.:
For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the O.C. Register during the period from 1991 to the present. If yes, indicate the start and stop dates of service and the address that the subscription was sent to.
2. Was there a subscription to the O.C. Register at 7841 Jennifer Circle in La Palma during 1991 to present. If so, indicate the start and stop dates and the name of the person on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

508/17

**LAS VEGAS
REVIEW-JOURNAL**

Different Papers • Different Views

BUR AUG 17 1995 REC'D

August 15, 1995

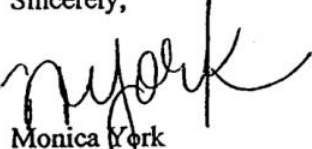
Sheila Cox
Franchise Tax Board
333 N. Glenoaks Blvd
Suite 200
Burbank CA 91502-1170

RE: Gilbert P. Hyatt

Dear Ms. Cox:

In response to your letter dated 8/4/95, please be advised that we do not have an account for Mr. Gilbert P. Hyatt. In response to item #2 - we do not have any subscriber at 3225 S. Pecos Apt. 237 or 7335 Tara.

Sincerely,



Monica York
Accounts Payable Supervisor

CONFIDENTIAL

H 01899

AA002340



1. The first part of the document is a list of the names of the members of the committee who have been appointed to the various sub-committees. The names are listed in alphabetical order of the last name.

32

2. The second part of the document is a list of the names of the members of the committee who have been appointed to the various sub-committees. The names are listed in alphabetical order of the last name.

3. The third part of the document is a list of the names of the members of the committee who have been appointed to the various sub-committees. The names are listed in alphabetical order of the last name.

DISTRICT COURT
CLARK COUNTY, NEVADA

**CERTIFIED
COPY**

GILBERT P. HYATT,

Plaintiff,

VS.

NO. A382999

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

Defendants.

DEPOSITION OF LOBO CHANG
LOS ANGELES, CALIFORNIA
MONDAY, NOVEMBER 29, 1999

REPORTED BY:

Jean F. Holliday

CSR No. 4535



15250 Ventura Boulevard, Suite 410 • Sherman Oaks, CA 91403
(800) 993-4GNG (4464) • FAX: (818) 995-4248

AA002342

14:37 1 A. I do not have a complete recollection
14:37 2 of their visit. After they came in the first thing
14:37 3 they did was to show me that one-page document, and I
14:38 4 didn't quite understand what they were saying but
14:38 5 from what I did understand, they were there looking
14:38 6 for some kind of information. So I figured these
14:38 7 people must be either from the State or the IRS
14:38 8 conducting an audit there. Then they showed me their
14:38 9 business cards. So one sat down, the other one
14:38 10 started walking around, and he asked me when I
14:38 11 started working there, where was I working, and I
14:39 12 told him that I started by working in Costa Mesa. At
14:39 13 that time I was the owner, and approximately three
14:39 14 years ago we changed the name of the owner to my
14:39 15 older brothers. I worked in Costa Mesa for a little
14:39 16 more than a year and then we went to another place
14:39 17 for like maybe four or five years and after that we
14:39 18 moved to a few other locations. Eventually we
14:40 19 settled in where we were.

14:40 20 Then he said he wanted to look into
14:40 21 the record of Hyatt, so I went to look for it. Well,
14:40 22 after I found it he saw it. I showed it to him as
14:40 23 well, and then they copied a telephone number and the
14:40 24 names and also the travel plans. Later on I realized
14:41 25 that they were not there auditing my books. They

SC 4/12/95



STATE OF CALIFORNIA
RANCHISE TAX BOARD
333 N. GLENOAKS BLVD., STE. 200
BURBANK, CA 91502-1170

(818) 556-2942

April 12, 1995

Nevada Governor Robert Miller
555 E. Washington Avenue
Las Vegas, Nevada 89101

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates Gilbert P. Hyatt visited your office and/or attended meetings or events to discuss international trade activity.

For your own convenience, you may make marginal notations on the extra copy of this letter and return it in the enclosed postage paid envelope.

Thank you for your valuable cooperation.

Sheila Cox
Tax Auditor
Telephone (818) 556-2942

AA002345

Sc 4/12/9



STATE OF CALIFORNIA
FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD., STE. 200
BURBANK, CA 91502-1170

(818) 556-2942

April 12, 1995

Nevada Senator Richard Bryan
300 S. Las Vegas Blvd.
Las Vegas, Nevada 89101

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates Gilbert P. Hyatt visited your office and/or attended meetings or events to discuss international trade activity.

For your own convenience, you may make marginal notations on the extra copy of this letter and return it in the enclosed postage paid envelope.

Thank you for your valuable cooperation.

Sheila Cox
Tax Auditor
Telephone (818) 556-2942

AA002346

PROGRESS REPORT

01 1997

TAXPAYER		Gilbert P. Hyatt				AUDITOR			
REPRESENTATIVE		Mike Kern / Eugene Cawson				TELEPHONE NO.			
						TELEPHONE NO.		702-384-1120	
DATE	INITIALS	ACTION TAKEN					TIME		
		DATE ASSIGNED	TAX YEAR(S)	MODEL NUMBER	ESTIMATED DATE OF COMPLETION		CURRENT HOURS	TOTAL TO DATE	
		DATE SCOOPED	EARLIEST STATUTE DATE	ESTIMATED HOURS TO COMPLETE AUDIT					
12/14/96	sc	Confidential appt. for today. — of Michael Hyatt — (John Lin will be accompanying me as a witness) Checked DMV for Lexis — (which may be under the name of Brace Terry — Nothing shown — Brace Terry's DMV record shows that she had a moving violation in 1993 Interviewed taxpayer's brother —					8	245	
12/14/96	sc	Organized and reviewed file (Need to request additional hours to complete case)					8	253	
12/14/96	sc	Continued organizing file					8	261	
1/5/97	sc	Mike Kern (rep from Las Vegas) called — he has not met deadline — He wants to know why we want checks — He said that it would be too expensive — He said that he will provide a letter from the governor — He wants to know if we will pay for copying checks — I told him that I will check on this and get back to him. Called Anne Torenovich in Legal and discussed the case with her briefly — She will call me back next week to discuss the case.					3	264	
					continued —				

FTB-100139

AA002348

UNCERTIFIED ROUGH DRAFT ONLY

1 DISTRICT COURT
2 CLARK COUNTY, NEVADA
3
4
5 GILBERT P. HYATT,)
6 Plaintiff,) Case No. A382999
7 VS.)
8 FRANCHISE TAX BOARD OF THE)
9 STATE OF CALIFORNIA,)
10 and DOES 1-100, inclusive,)
11 Defendants.)

12 DEPOSITION OF JAHNA ALVARADO
13 COSTA MESA, CALIFORNIA
14 THURSDAY, MAY 27, 1999
15
16
17
18
19
20