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 **APPENDIX OF EXHIBITS TO APPELLANT'S OPENING BRIEF** **VOLUME 12 OF 42**

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Chronological Index

Doc No.	Description	Date	Vo1.	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
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36	FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008706	AA008732
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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

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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
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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
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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 12 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

mandamus filed by the Board, the Nevada Supreme Court decided, on grounds of comity, to apply California immunity law to the negligence claim, Pet. App. 11-12, but declined to apply California immunity law to the intentional tort claims. Pet. App. 12-13. Noting that Nevada law does not immunize Nevada officials from liability for intentional torts, the court concluded that application of California law to deny redress to injured Nevada plaintiffs would "contravene Nevada's policies and interests in this case." Pet. App. 12.

This tort suit is one of two continuing disputes between respondent and the Board. The other dispute involves a residency tax audit initiated by the Board in 1993 with respect to the 1991 and 1992 tax years. The principal issue in that underlying tax matter turns on the date that respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income—on behalf of and under contract to U.S. Philips Corporation—from certain patented inventions.[1] For its part, the Board has concluded that respondent became a resident of Nevada six months later. The administrative proceedings relating to this six month dispute are being conducted in California, and are ongoing. *See* FTB Br. at 4.

This suit, in turn, concerns various tortious acts committed by the Board, including fraud, outrageous conduct, disclosure of confidential information, and invasion of privacy. *See generally* Pet. App. 49-90 (First Amended Complaint); J.A. 246-66 (Petition for Rehearing); J.A. 267-97 (Supplement to Petition

[1] In suggesting (FTB Br. 3) that the 1991 income in dispute amounts to "$40 million," the Board simply disregards the fact that respondent collected licensing income on behalf of U.S. Philips. The correct figure is less than half that ($17,727,743). *See* Cowan Affidavit Exh. 16 (Hyatt Appendix, Vol. VIII, Exh. 15) (Notice of Proposed Assessment). ("Hyatt Appendix" refers to appendices submitted to the Nevada Supreme Court in connection with the first petition for a writ of mandamus.)

for Rehearing). The evidence introduced at the summary judgment stage shows that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extort a tax settlement from Mr. Hyatt. This bad-faith effort relied on two primary courses of action. The first was to create a huge potential tax charge against respondent, largely by making false and unsupported claims and then embellishing them with the threat of large penalties. The second was to put pressure on respondent to settle the inflated claims by, among other things, releasing confidential information, while informing respondent that resistance to settlement would lead to a further loss of privacy and to public exposure.

The Board undertook this campaign against respondent after the State of California urged its tax officials to increase revenues in order to alleviate a pressing financial crisis. *See* J.A. 13 ("the demands for performance and efficiency in revenue production are higher than they have ever been"); *see also id.* 9-13, 15. Auditors knew that prosecution of large tax claims would provide recognition and an opportunity for advancement within the department. *See generally* J.A. 157-58. Indeed, large assessments, in and of themselves, would be advantageous, because the department evaluated its performance by the amount of taxes assessed. Some evidence suggests that California tax officials especially targeted wealthy taxpayers living in Nevada. *See* J.A. 174-75.

The Board also had a policy of using the threat of penalties to coerce settlements. *See* J.A. 164-67, 178-80. A memorandum regarding tax penalties, in fact, placed a picture of a skull and crossbones on its cover. *See* J.A. 16. A former Board employee testified in a deposition that a California tax official showed auditors how to use threatened penalties as "big poker chips" to "close audits" with taxpayers. *See* J.A. 165, 166. The largest, most severe penalty, and thus the biggest chip, was the seldom imposed penalty for fraud. *See* J.A. 158, 177-78.

Against this background Sheila Cox set her sights on Mr. Hyatt. As the evidence shows, her attempts to pursue a tax claim against Mr. Hyatt were, by any measure, extraordinary and offensive. *See* J.A. 161 (auditor Cox "created an entire fiction about [respondent]"). Referring to respondent, the auditor declared that she was going to "get that Jew bastard." J.A. 148, 168. According to evidence from a former Board employee, the auditor freely discussed information about respondent - - much of it false—with persons within and without the office. *See* J.A. 148-52. That information included, among other things, details about members of his family, his battle with colon cancer, a woman that the Board claimed to be his girlfriend, and the murder of his son. *See, e.g.*, J.A. 148, 168, 169, 170, 176; 283. The auditor also committed direct invasions of respondent's privacy. She sought out respondent's Nevada home, *see* J.A. 153, 174, 176, and looked through his mail and his trash. *See* J.A. 172. In addition, she took a picture of one of her colleagues posed in front of the house. *See* J.A. 44, 171. Her incessant discussion of the investigation eventually led the colleague to conclude that she was "obsessed" with the case. *See* J.A. 157.

Within her department Ms. Cox pressed for harsh action, including imposition of the rare fraud penalties. *See* J.A. 161, 162. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *See* J.A. 150, 159. Reflecting her obsession, she created a story about being watched by a "one-armed" man and insisted that associates of Mr. Hyatt were mysterious and threatening. *See* J.A. 151, 152, 161-62. She repeatedly spoke disparagingly about respondent and his associates. *See* J.A. 148, 152, 169-70.

The Board also repeatedly violated its promises of confidentiality, both internally and externally. *See, e.g.*, J.A. 149-50. Although Board auditors had agreed to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number

to third parties, *see* J.A. 19-43, including California and Nevada newspapers. *See* J.A. 34-36, 39-40, 40-43. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. *See* J.A. 24-27, 29-30. The Board also disclosed its investigation of respondent to respondent's patent licensees in Japan. *See* J.A. 256-57.

The Board was well aware that respondent, like many private inventors, had highly-developed concerns about privacy and security. *See* J.A. 175, 197-206. Far from giving these concerns careful respect, the Board sought to use them against him. In addition to the numerous information "Demand[s]" sent by the Board to third parties, one Board employee pointedly told Eugene Cowan, an attorney representing respondent, that "most individuals, particularly wealthy or famous individuals, compromise and settle with the FTB to avoid publicity, to avoid the individual's financial information becoming public, and to avoid the very fact of the dispute with the FTB becoming public." J.A. 212. In Mr. Cowan's view, "[t]he clear import of her suggestion was that famous, wealthy individuals settle with the FTB to avoid being, rightly or wrongly, branded a 'tax dodger.'" J.A. 212.

These deliberate acts caused significant damage to respondent's business and reputation. Because of the tortious Board actions, the royalty income received by respondent from new licensees "dropped to zero." J.A. 257.

Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts.[2] The Board sought summary judgment, arguing, *inter alia*, that the Full Faith and Credit Clause, U.S. Const., art IV, § 1, required the Nevada courts to apply California law and that, as a result, the

[2] In addition to his claims for damages, respondent sought a declaratory judgment that he had become a Nevada resident effective as of September 26, 1991. *See* Pet. App. 62-65. The district court dismissed this claim, and it is no longer part of the case.

Board was immune from liability for all claims. The Nevada trial court rejected this defense, as well as defenses of sovereign immunity and comity, without opinion.

The Board then sought a writ of mandamus from the Nevada Supreme Court, asking that the court order dismissal of the action "for lack of subject matter jurisdiction" or, alternatively, that it limit the action to what the Board termed "the FTB's Nevada acts and Nevada contacts concerning Hyatt." FTB Petition for Mandamus at 43. The Nevada Supreme Court initially granted a writ of mandamus directing the district court to enter summary judgment in favor of the Board, Pet. App. 38-44, concluding (on a ground neither asserted by the Board nor briefed by the parties) that respondent had not presented sufficient evidence to support his claims. Respondent sought rehearing, citing extensive evidence from the record that the Board had committed numerous negligent and intentional torts. *See* J.A. 246-97. After reviewing that evidence, the supreme court granted rehearing and vacated its prior order. *See* Pet. App. 6-7.

The Nevada Supreme Court then addressed whether the district court should have applied California law, reaching different conclusions based on the nature of respondent's claims. With respect to the one negligence claim made against the Board, the supreme court decided that "the district court should have refrained from exercising its jurisdiction . . . under the comity doctrine . . . ." Pet. App. 11. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," Pet. App. 12, it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." Pet. App. 12. It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Pet. App. 12.

The Nevada Supreme Court declined, however, to apply California immunity law to respondent's intentional tort claims. With respect to the full faith and credit argument, the court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Pet. App. 10. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Pet. App. 12. Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.[3]

SUMMARY OF ARGUMENT

I. This Court has held that "[t]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (internal quotation marks omitted). This longstanding respect for the States' traditional lawmaking authority directly reflects the fact that each State retains 'a residuary and inviolable sovereignty," *Printz v. United States*, 521 U.S. 898, 919 (1997) (internal quotation marks omitted), which includes the sovereign power to address harms occurring within its borders. While a State should properly take account of the interests of its sister States, the fact remains that full faith

[3] In its decision the Nevada Supreme Court apparently assumed that California law, if applicable, would provide immunity for the tortious acts committed by the Board. Pet. App. 10-13. *But see* pages 36-37 *infra* (discussing California law).

and credit doctrine does not "enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939). This principle holds even when the law of the sister State would provide immunity for its actions within the forum State. *See Nevada v. Hall*, 440 U.S. 410, 423-24 (1979).

The State of Nevada plainly was "competent to legislate" with respect to the torts at issue in this case. To meet that standard, a "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). Here, Nevada was both the State in which the injuries to respondent took place, *see Carroll v. Lanza*, 349 U.S. 408, 413 (1955), and the State in which respondent was a citizen at the time that the tortious conduct causing his injuries occurred. Moreover, Nevada has significant contacts with the defendant in this case: the Board not only engaged in improper actions that took place directly within Nevada, it conducted a broad tortious scheme that was specifically intended to have its harmful effects there. Nothing in the Full Faith and Credit Clause bars Nevada from applying its own law to that wrongdoing. In doing so, however, the State made a point of treating California as a co-equal sovereign, specifically examining whether Nevada would be liable for similar actions by its own officials and deciding to defer to California law, as a matter of comity, where it would not.

II. The Court should decline to adopt the "new" full faith and credit rule proposed by the Board. This rule—which would bar application of forum law "to the legislatively immunized acts of a sister State" when that law "interferes with the sister State's capacity to fulfill its own core sovereign responsibilities"—would work a wholly unjustified change in the States'

recognized legislative authority within our federal system. *See Bonaparte v. Tax Court*, 104 U.S. 592 (1881). Here, Nevada has decided that the interests in compensating injured tort victims and deterring intentional wrongdoing outweigh the benefits of providing immunity to state agencies, yet the proposed "new rule" would force Nevada to make the opposite choice, simply because California (the defendant in its courts) has done so. This preemption of Nevada law is directly contrary to the basic allocation of lawmaking authority among the several States. *See FERC v. Mississippi*, 456 U.S. 742, 761 (1982) ("having the power to make decisions and to set policy is what gives the State its sovereign nature").

Nothing in the history of the Full Faith and Credit Clause requires this anomalous result. The relevant debates show that the Framers, in providing for full faith and credit, were primarily concerned with the subject of inter-State respect for *judgments* —where the force of the Clause is considerably greater, *see Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998)—and the brief discussion regarding other States' *laws* was largely addressed to the issue of congressional power to declare their "effect." This lack of scrutiny to state laws was reinforced by the fact that Congress subsequently enacted legislation specifying the effect of judgments, but not of "public Acts." Similarly, the decisions of this Court, while not always charting a straight path, have now established that the Clause does not strip States of the fundamental authority to apply their own law regarding matters about which they are competent to legislate.

The "new rule" would also raise largely unanswerable questions about interpretation and application. These problems start with the very premise of the rule: although the Board asks this Court to declare that the interest in legislatively conferred sovereign immunity for one State always outweighs another State's interest in protecting its citizens, it offers no judicially cognizable basis for making that constitutional value judgment.

Furthermore, the rule would require essentially standardless determinations about what are "core sovereign responsibilities"—the Board itself admits that "there is no clear definition of what constitutes a core sovereign responsibility" (FTB Br. 32)—and what might "interfere" with a State's "capacity to fulfill" them. To apply the proposed rule would thus lead to just the sort of subjective, unguided decisions that led this Court to abandon the now-discredited "balancing test" in full faith and credit analysis.

It is not apparent, in fact, how the rule would be applied even in this case. Although the Board claims that it needs immunity in order to conduct its tax collection activities, it must acknowledge that, despite the Nevada litigation, the tax proceeding against respondent is continuing without interruption in California. Furthermore, the Nevada Supreme Court has already allowed the Board to assert immunity under California law for negligence and for any good-faith discretionary actions, which would appear to protect virtually all legitimate forms of investigation and enforcement. Other States are able to operate their tax systems without full immunity, and it appears that California itself permits some damage actions against the State for misconduct by its tax officials. *See* Cal. Government Code § 21021. Taking all this into account, it seems implausible for the Board to insist that immunity for intentional torts is critical to effective operation of the California tax system.

Finally, the "new rule" is unnecessary. Principles of comity have long protected States in the courts of other States, and they have continued to do so following the decision in *Nevada v. Hall*. State courts, in fact, have often done what the Nevada courts did here: they have assessed defendant States' claims of sovereign immunity by reference to the immunity of their own States, thereby treating defendant States as co-equal parts of "our constitutional system of cooperative federalism." *Hall*, 440 U.S. at 424 n. 24. Furthermore, if need be, States can obtain additional protection through agreements among

themselves or through legislation by Congress, which retains its express authority to legislate regarding the effect of "public Acts" under the Full Faith and Credit Clause.

III. The Court should reject the invitation of *amici curiae* Florida *et al.* to revisit that part of *Nevada v. Hall* holding that States lack sovereign immunity as of right in the courts of other States. In pressing this question, *amici* seek to raise an issue that is not within the Question Presented in the petition. *See* Pet. i. Rule 14.1(a) of the Rules of this Court precludes consideration of issues not encompassed in the Question Presented except in "the most exceptional cases." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (internal quotation marks omitted). This is not such a case.

Amici also have failed to demonstrate a good reason to depart from governing principles of *stare decisis*. *See Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Although their entire argument rests upon historical evidence that States accorded immunity to other States at the time of the Convention, this Court has already expressly recognized that fact in *Nevada v. Hall*. The Court also recognized, however, that the States granted this immunity as a matter of comity, not as a matter of absolute right, a fact that *amici* never successfully overcome. And, while *amici* seek to rely on the decision in *Alden v. Maine*, 527 U.S. 706 (1999), the Court in *Alden* explicitly acknowledged the difference between immunity in a sovereign's own courts and immunity in the courts of another sovereign, pointing out that the latter case "'necessarily implicates the power and authority of a second sovereign.'" *Id.* at 738 (quoting *Hall*, 440 U.S. at 416). The Court then reiterated: "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another . . . ." *Id.* at 738.

ARGUMENT

The Full Faith and Credit Clause does not require the Nevada courts to apply California law (here, its statutory defense of sovereign immunity) to intentional torts committed by California officials to harm a Nevada citizen in Nevada. Although the Clause provides "modest restrictions on the application of forum law," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), this Court has made clear that a State need not subordinate its own law with respect to matters about which it is "competent to legislate." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)). That test is readily satisfied here. The State of Nevada is fully competent to legislate regarding deliberate tortious acts that are intended to, and do, injure its citizens within its borders.

The Board does not actually take issue with this basic conclusion. Its sole argument is that this Court should announce a "new rule" under the Full Faith and Credit Clause barring application of forum law—even law that is unquestionably within the legislative jurisdiction of the forum State—"to the legislatively immunized acts of a sister State" when that law "interferes with the sister State's capacity to fulfill its own core sovereign responsibilities." FTB Br. at 13. But this "new rule" finds no basis in the history of the Full Faith and Credit Clause or in the precedent of this Court. Furthermore, in urging the creation of a novel constitutionally binding rule, the Board takes no account of the substantial protection already afforded to State defendants by the willingness of forum States to treat sister States as equal sovereigns, or of the opportunity for States to gain additional protection either through agreements among themselves or through action by Congress, which is given explicit authority to legislate under the Full Faith and Credit Clause. The "new rule" is thus both unsupported and unnecessary.

I. THE DECISION OF THE NEVADA SUPREME COURT NOT TO APPLY CALIFORNIA IMMUNITY LAW TO THE INTENTIONAL TORT CLAIMS IS PLAINLY CONSTITUTIONAL UNDER ESTABLISHED FULL FAITH AND CREDIT PRINCIPLES.

A. The Full Faith And Credit Clause Allows A State To Apply Its Own Law To A Subject Matter About Which It Is Competent To Legislate

Although the Board rests its entire argument on the Full Faith and Credit Clause, it never acknowledges, much less quotes, the governing full faith and credit standard applied by this Court. Just a few Terms ago, however, this Court reiterated what it has long held: that "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Pacific Employers*, 306 U.S. at 501); *see Sun Oil*, 486 U.S. at 722 (same). This standard makes clear that, while a forum State may not constitutionally apply its substantive law to matters with which it has only a marginal or inconsequential connection, *see Phillips Petroleum*, 472 U.S. at 818-19, it is free to protect its sovereign interests by applying its law to those matters over which it has legitimate substantive lawmaking authority.

This focus on legislative competence rests upon the recognition of two important principles. The first principle is that, upon formation of the National Government, the States retained "'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist, No. 39, at 245 (J. Madison)). *See Alden v. Maine*, 527 U.S. 706, 713-14 (1999); *Parker v. Brown*, 317 U.S. 341, 359-60 (1943); *Skiriotes v. Florida*, 313 U.S. 69 (1941). As this Court has recently noted, "the founding document 'specifically recognizes the States as sovereign entities,'" *Alden*, 527 U.S. at

713 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996)), "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714. The Tenth Amendment expressly sets forth that understanding, declaring that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amdt 10. "'These powers . . . remain after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.'" *Cook v. Gralike*, 531 U.S. 510, 519 (2001) (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819)).

The second principle is that the States are, in considerable part, defined by their territorial limits. "A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1869). For the most part, "the jurisdiction of a state is co-extensive with its territory, co-extensive with its legislative power." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) (internal quotation marks omitted). The sovereignty retained by the States thus leaves them with broad powers to govern with respect to persons and events within those territorial limits. *See Printz*, 521 U.S. at 920 ("[t]he Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens").

These principles have important consequences for the relations between States in our federal system. This Court has noted the general rule that "[e]very sovereign has the exclusive right to command within his territory . . . ." *Suydam v. Williamson*, 65 U.S. (24 How.) 427, 433 (1860); *see also Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) (recognizing

"autonomy of the individual States within their respective spheres"). Conversely, the Court has acknowledged, again as a general rule, that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). As we discuss later in greater detail, the Full Faith and Credit Clause was not meant to, and did not, change this basic division of lawmaking authority among the States. *See* pages 23-29 *infra*. Thus, as this Court has stated, "[f]ull faith and credit does not enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers*, 306 U.S. at 504-05; *see Nevada v. Hall*, 440 U.S. 410, 423-24 (1979).

These principles, taken together, establish that a State has no obligation to subordinate its legitimate interests to the contrary policies of another State. Although a State should always seek to minimize conflicts with the legal rules of another State, and must defer when its own substantive interests are not genuinely implicated, *see Phillips Petroleum*, 472 U.S. at 818, the Full Faith and Credit Clause does not compel one State to favor the interests of another State over its own interests. *See Sun Oil*, 486 U.S. at 727 (noting that "the forum State and other interested States" should have "the legislative jurisdiction to which they are entitled"). Indeed, the contrary rule, as Chief Justice Stone once observed, "would lead to the absurd result that, whenever the conflict [between the laws of two States] arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935). The Court has thus declared that "the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza*, 349 U.S. 408, 412 (1955).

The Court has held to these fundamental principles even when the "conflicting and opposed policy" is one that provides sovereign immunity to a defendant State. *See Hall*, 440 U.S. at 421-24. Although acknowledging that "in certain limited situations, the courts of one State must apply the statutory law of another State," *id.* at 421, the Court in *Hall* reiterated that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Id.* at 422. In that case, the California courts had chosen to apply California law, providing full redress for injuries incurred within its borders, despite efforts by Nevada to invoke the defense of partial sovereign immunity under Nevada law. *See id.* at 421-24. This Court upheld the right of California to choose its own law, noting that California had a "substantial" interest in granting relief to persons injured within its borders. *See id.* at 424 (quoting App. to Pet. for Cert. vii) ("California's interest is the . . . substantial one of providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents'").[4]

B. Nevada Is Competent To Legislate To Redress Harms Inflicted On A Nevada Resident In Nevada.

The central full faith and credit question, then, is whether Nevada was "competent to legislate" regarding the torts that are the subject matter of this lawsuit. To answer that question, it is

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[4] The Court in *Hall* noted that the application of California law "pose[d] no substantial threat to our constitutional system of cooperative federalism" and "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities," 440 U.S. at 424 n.24, adding that it "ha[d] no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Id.* Although the Board attempts to turn this footnote into a new constitutional restriction on the application of forum-state law, its argument is, as we later discuss, ungrounded in either the relevant history or precedent. *See* pages 21-41 *infra*.

necessary to look at the relationship between Nevada and the "persons and events," *Carroll v. Lanza*, 349 U.S. at 412, that are the basis of the several tort claims. At a minimum, "'for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum*, 472 U.S. at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)). Those contacts and interests are clearly present in this case.

To start with, and most basically, Nevada is the state in which the plaintiff suffered his injuries. Although the Board has claimed (wrongly) that respondent moved to Nevada after the date that he declared for tax purposes, even the Board cannot dispute that respondent was living in Nevada several years later—at the time of the tortious acts that caused the injuries—and that, indeed, respondent has been living there ever since. This Court has frequently noted the strong legislative interest possessed by a forum State that is also the site of the injury to be redressed. *See Carroll v. Lanza*, 349 U.S. at 413 ("[t]he State where the tort occurs certainly has a concern in the problems following in the wake of the injury"); *International Paper Co. v. Ouellette*, 479 U.S. 481, 502 (1987); *Pacific Employers*, 306 U.S. at 503; *Hall*, 440 U.S. at 423. Pointing out the "constitutional authority of [a] state to legislate for the bodily safety and economic protection of employees injured within it," *Pacific Employers*, 306 U.S. at 503, the Court has observed: "Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power." *Id.*

This viewpoint is anything but novel or unusual. In tort cases, like this one, traditional conflict-of-laws principles have long placed special emphasis on the law of the place of injury. *See* McDougal, American Conflicts Law § 121 at 449-51 (5th

ed. 2001); Restatement of Conflict of Laws § 377-383 (1934). Chief Judge Posner has recently made the same point, remarking that "[u]nder the *ancien regime* of conflict of laws . . . [t]he rule was simple: the law applicable to a tort suit was the law of the place where the tort occurred, more precisely the place where the last act, namely the plaintiff's injury, necessary to make the defendant's careless or otherwise wrongful behavior actually tortious, occurred." *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844 (7th Cir. 1999). More modern conflict-of-laws rules likewise give great, if not decisive weight, to the place of injury. *See* McDougal, American Conflicts Law §§ 124-125; Restatement (Second) of Conflict of Laws §§ 145, 146-47, 156-60, 162, 164-66 (1971).

The interest possessed by Nevada as the place of injury is reinforced by the fact that plaintiff was (and is) a Nevada citizen. While residence of the plaintiff is not a necessary point of contact, nor perhaps a sufficient one, *see Allstate Ins.*, 449 U.S. at 318-20 (plurality opinion); *id.* at 331 (Stevens, J., concurring in judgment); *id.* at 337 (Powell, J., dissenting), the connection between the State and its citizens does give Nevada an additional interest in assuring compensation whenever those citizens are injured. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens"). Of course, Nevada has a significant legislative interest in the physical and economic well-being of all persons within its borders, and a sovereign right and duty to protect them, but those concerns are stronger still when the injured party is a Nevada citizen *at the time of injury*, and thus more likely to remain in the State afterwards. Furthermore, insofar as the Board may be consciously singling out and targeting Nevada citizens, *see* page 3 *supra*, the State has an obvious interest in taking appropriate measures to assure their freedom from tortious harassment.

These contacts, by themselves, give Nevada a constitutional basis for applying its own law to the torts committed against respondent there. But, in addition, Nevada has significant contacts with the defendant and with its particular acts of misconduct. Although the Board argues as if its actions were only peripherally connected to Nevada, *see* FTB Br. 33-34 n.16, the evidence demonstrates that the Board deliberately took actions that either occurred in Nevada or were specifically intended to have their harmful effects there. *See* pages 2-5 *supra*. Thus, the Board, through its officials, engaged in bad-faith conduct seeking to exact revenues from a particular taxpayer who, it knew, was living in Nevada at the time, repeatedly disclosing confidential information to third parties within and without Nevada. Furthermore, at least one Board official physically invaded respondent's privacy, going to his Nevada house and looking through his mail and trash. These purposeful acts not only supply a basis for exercising personal jurisdiction over the Board, *see Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985),[5] they strengthen Nevada's territorial interest in assuring redress and give rise to important police power concerns about deterrence of wrongful behavior. Whatever the Board may be free to do in California, it cannot take actions in Nevada, or directly affecting Nevada, without becoming subject to the laws of that State. *See generally* Story, *Commentaries on the Conflict of Laws*, §§ 18-19 (2d ed. 1841).[6]

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[5] The Board initially sought to quash the complaint in this case for want of personal jurisdiction, but subsequently withdrew its motion. This case thus raises no question about the rules of personal jurisdiction as they might apply to State defendants.

[6] The Board does not, and could not, claim any expectation that Nevada would recognize complete immunity for its actions. More than a decade before, Nevada had made clear that it would allow compensation for individuals injured by certain acts of sister States, relying in part on the decision in *Nevada v. Hall*. *See Mianecki v. District Court*, 658 P.2d 422, 423-25, *cert. dismissed*, 464 U.S. 806 (1983).

These cumulative interests are more than sufficient to satisfy governing full faith and credit standards. But, in holding that Nevada law should be applied to the intentional tort claims, the Nevada Supreme Court took an additional step: it tailored its analysis to account for the fact that the defendant was a sister State. Thus, to determine whether to defer to California law, the supreme court looked, not to whether Nevada law provides for compensation when the injury is caused by private parties, but whether it does so when the injury is caused by Nevada government officials. Finding that Nevada law barred suits based on the discretionary acts of its own officials, the court concluded that, as a matter of comity, Nevada should apply the comparable California law ostensibly providing immunity for negligent acts of California employees. *See* Pet. App. 11-12. However, because Nevada law did not give absolute immunity to its own officials for intentional torts, the Court went on to conclude that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. More particularly, it decided that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.

The Nevada Supreme Court, by engaging in this comparative analysis, thus gave full regard for the fact that California is a sovereign State. In applying full faith and credit principles, its reference point was not the liability of private individuals for tortious conduct, but the liability *of the State itself.* In *Nevada v. Hall*, where the respective position of the two States was reversed, this Court noted with apparent approval that California (the forum State) had looked to its own immunity for similar torts in deciding whether to accord immunity to Nevada (the defendant State) under Nevada law. *See* 440 U.S. at 424. The Full Faith and Credit Clause requires no more.

II. THIS COURT SHOULD DECLINE TO ALTER FULL FAITH AND CREDIT DOCTRINE BY ADOPTING AN UNSUPPORTED NEW CONSTITUTIONAL RULE.

A. The Proposed "New Rule" Is Inconsistent With Full Faith And Credit History And Principles.

The Board dismisses these established full faith and credit principles, arguing that this Court should amend them by adopting a new constitutional rule. This "new rule," however, would work a striking revision of the retained sovereignty of the several States: by requiring immunity for a defendant State, no matter how wrongful its conduct in another State, it would strip away significant legislative authority from the forum States. In the exercise of its lawmaking authority, Nevada has determined that the interests of compensating injured persons and of deterring deliberate wrongdoing are more important than the benefits that might arise from according absolute governmental immunity. *See* Pet. App. 12-13. The "new rule" would order Nevada to make the opposite choice, simply because California (the source of the displacing law) has done so. The result would be to allow California to grant itself a license to act within Nevada's borders without being held accountable under Nevada law.

This redistribution of sovereign power is inconsistent with the most basic understandings of our federal system. That system is based upon a recognition that, having retained all sovereignty not surrendered in the Constitutional plan, *see* pages 13-14 *supra*, the individual States have the sovereign right to decide for themselves how to govern within their territorial boundaries. This Court has observed that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In keeping with that principle, the citizens of a State may decide

that their interests are best served by permitting what other States choose to prohibit, or by prohibiting what other States choose to permit. More particularly, a State may elect to strike a different balance than its neighbors between compensation for individual injury and governmental immunity from liability. "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982).

This Court has repeatedly acknowledged the importance of this lawmaking power. Indeed, the States' independent legislative role in the federal system is of such stature that, in those areas traditionally subject to state regulation, this Court has adopted a working presumption against preemption of state law. *See, e.g., Medtronic*, 518 U.S. at 485; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Although it is accepted that the Federal Government has broad power to restrict state lawmaking, the Court has nonetheless declared that construction of a federal statute begins "with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Any inquiry into federal preemption of state law is "guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

Given this understanding, it would be particularly anomalous to have a newly fashioned constitutional rule mandating preemption of state law *by the law of another State*. This Court has pointed out that "since the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil*, 486 U.S. at 727; *Phillips Petroleum*, 472 U.S. at 823; *Richards v. United States*, 369 U.S. 1, 15 (1962). It is entirely consistent with that principle, of course, to require a forum State to apply the law of

another State when the forum State has no substantive relationship to the subject matter of the proceeding: in that case, the forum State has no legitimate legislative authority in the first place. But it is very different to tell a State that it must set aside its law in favor of the law of a sister State—law resting on nothing more than a contrary assessment of the relevant interests—even though its own legislative jurisdiction over the matter is unquestioned. As this Court has recently observed, it is not the business of one State to "impose its own policy choice on neighboring States." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996).

It is true, of course, that the application of its own law by one State may have an effect on the sovereign responsibilities, even the "core sovereign responsibilities," of another State. But this Court has never held that this fact justifies the displacement of legitimate legislative authority. To the contrary, in *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), the Court expressly rejected an argument that the Full Faith and Credit Clause barred one State from taxing obligations issued by another State, stating: "No State can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another. Each State is independent of all the others in this particular." 104 U.S. at 594. The Court recognized that taxation of State debt obligations might affect the issuing State's ability to "borrow[] money at reduced interest" (*id.* at 595)—surely an "interference" with "core sovereign responsibilities"—but it nevertheless concluded that the Constitution provided no basis for suppressing the taxing power of another State. *See id.* ("States are left free to extend the comity which is sought, or not, as they please"). *See also State of Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924) ("[l]and acquired by one state in another state is held subject to the laws of the latter . . . .").

The Full Faith and Credit Clause would be, in fact, an extremely unlikely place to find a significant constitutional

limitation on state legislative authority. Although the Board is correct in saying that the Clause "'altered the status of the States as independent sovereigns,'" FTB Br. 23 (quoting *Estin v. Estin*, 334 U.S. 541, 546 (1948)); *see also Sun Oil*, 486 U.S. at 723 n.1, that general observation—which could be made about a number of constitutional provisions—says nothing about the particular way in which it did so. This Court has made clear, however, that the principal effect of the Full Faith and Credit Clause on the States as "independent sovereigns" was to require them to recognize other state *judgments*, not to reallocate their respective legislative powers. As a consequence, the Court has consistently made a distinction between "the credit owed to laws (legislative measures and common law) and to judgments." *Baker by Thomas*, 522 U.S. at 232. While emphasizing that "[r]egarding judgments . . . the full faith and credit obligation is exacting," 522 U.S. at 233, the Court has found a far less demanding obligation with respect to state laws, holding to the established principle that a State may apply its own law to matters on which it is competent to legislate. *See id.* at 232.[7]

This difference in treatment is well-grounded in the historical record. At the time that the Full Faith and Credit Clause was drafted, the attention of the Framers was primarily on the respect to be given to judgments of sister States. *See Nadelmann, Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 Mich. L. Rev. 33, 53-59 (1957); Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 Memphis State U. L. Rev. 1, 33-39 (1981); *see generally* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L.

[7] The obligation to respect sister-State judgments may, of course, impinge to some extent upon the legislative interests of a forum State. As we discuss, however, that more limited intrusion is supported by the relevant constitutional history combined with the ensuing legislation enacted by Congress pursuant to its powers under the Full Faith and Credit Clause. *See* pages 24-28 *infra*.

Rev. 1 (1945). This was the principal question that the States had confronted during colonial times and during the period governed by the Articles of Confederation (which contained its own full faith and credit provision), with various States having arrived at various solutions. *See* Nadelmann, 56 Mich. L. Rev. at 34-54; Whitten, 12 Memphis State U. L. Rev. at 19-31. The constitutional debate thus took place against a background of indecision about whether other-State judgments were to have only an assigned evidentiary value, or to be given the more authoritative status of domestic judgments. *See* Whitten, 12 Memphis State U. L. Rev. at 31-33.

The treatment of full faith and credit for state laws occupied a distinctly secondary position. The issue appears not to have caused any great controversy during the years preceding the Convention, and discussion of the "public acts" language in the draft Full Faith and Credit Clause was brief and largely unilluminating. *See* Nadelmann, 56 Mich. L. Rev. at 53-59; Whitten, 12 Memphis State U. L. Rev. at 33-39. The most directly relevant piece of the legislative record—a statement by James Wilson of Pennsylvania that "if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all independent Nations" (3 M. Farrand, The Records of the Federation Convention of 1787, at 488 (1911))—is, on its face, addressed to the question whether Congress should be given the power to prescribe the "effect" of the "public Acts, Records, and Judicial proceedings" covered by the draft Clause. William Samuel Johnson of Connecticut then observed that the proposed language "would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State." *Id.* The principal opposition to the proposal, raised unsuccessfully by Edmond Randolph of Virginia, addressed the same point about congressional authority, objecting that this "definition of the powers of the [National] Government was so loose as to give opportunities of usurping all the State powers." *Id.*

Wholly absent in the course of this discussion is any indication that the Full Faith and Credit Clause would necessarily "usurp[]" significant State powers by requiring the States to subordinate their otherwise-applicable substantive laws to the contrary laws of another State.[8]

The brevity (and opacity) of this debate is wholly out of keeping with the theory that, in the Full Faith and Credit Clause, the States were permanently ceding to each other part of their traditional, jealously guarded legislative authority. Furthermore, it appears that the Clause generated no subsequent debate among the States during the process of ratification. *See* Sumner, *The Full Faith and Credit Clause—Its History and Purpose*, 34 Oregon L. Rev. 224, 235 (1955). Having contended at great length over their surrender of certain legislative powers to the federal government, it is utterly implausible to think that the States would agree, in almost total silence, to accept a provision that required them to engage in subservience to the laws of their neighbors. This is especially so in light of the fact that the States had just endured a period in which distrust among the several States, and concern about the unfairness of certain state laws, had been widespread and, for the most part, well-warranted. *See generally* Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1447-48 (1987) (discussing the States' fractious relations under the Articles of Confederation); Sumner, 34 Oregon L. Rev. at 241 ("[a]t the time that the

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[8]Professor Whitten has argued that the historical evidence provides no basis for concluding that the Full Faith and Credit Clause ever compels States to subordinate their own laws. *See* Whitten, 12 Memphis State U. L. Rev. at 62-69. In his view, "the original meaning of the Full Faith and Credit Clause as applied to conflict-of-laws problems was a very narrow one: the clause directly required the states to admit the statutes of other states into evidence only as conclusive proof of their own existence and contents; it did not require the states to enforce or apply the laws of other states; Congress, however, was given exclusive authority under the second sentence of article IV, section 1 to establish nationwide choice-of-law rules for the states." *Id.* at 62-63.

delegates to the Constitutional Convention met there was no unity among the states. The states considered each other as foreign countries").

The Framers, of course, had some familiarity with conflict-of-laws principles, which had gradually become a part of the law of nations. *See generally*, Juenger, *A Page of History*, 35 Mercer L. Rev. 419 (1984). But, even if those emerging principles were properly looked to for an understanding of domestic full faith and credit doctrine, they would not support the "new rule" proposed by the Board: at the time of the Convention, no one would have seriously thought that the law of nations provided grounds for the forced displacement of legitimate forum-State law by the law of another State. The most noted early American commentator, Joseph Story, stressed, as "[t]he first and most general maxim or proposition" underlying the field of conflict of laws, "that every nation possesses an exclusive sovereignty and jurisdiction within its own territory." Story, *Commentaries on the Conflict of Laws*, § 18, at 25. This maxim, in turn, gave rise to another: "that whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." *Id.* § 23, at 30. Based on these maxims, Story reasoned that, while application of the law of another sovereign was often necessary to advance international commerce and relations, "[n]o nation can be justly required to yield up its own fundamental policy and institutions, in favour of those of another nation." *Id.* § 25, at 31. *See also* Nadelmann, 56 Mich. L. Rev. at 75-81.[9]

[9] The influential Dutch jurist, Ulrich Huber, likewise recognized that "a sovereign may refuse to recognize 'rights acquired' abroad if they would prejudice the forum's 'power or rights.'" Juenger, 35 Mercer L. Rev. at 435. Huber, in turn, had a great influence on English choice-of-law principles. *See id.* at 440.

It is thus not surprising that Congress, having been given express authority in the Full Faith and Credit Clause to declare the effect of properly authenticated "public Acts, Records, and judicial Proceedings," promptly enacted a statute that declared the effect of records and judicial proceedings, but *not* of public acts. *See* Act of May 26, 1790, 1 Stat. 122 (1790); Nadelmann, 56 Mich. L. Rev. at 60-61. This reticence, too, hardly fits with the notion that the Framers intended the Full Faith and Credit Clause to be a wide-ranging vehicle for limiting the States' capacity to establish and enforce their own laws within their own borders. Indeed, for more than 150 years, the federal statute continued to make no mention of the effect of "public Acts." *See* Nadelmann, 56 Mich. L. Rev. at 81-82. And, while the 1948 revision of the United States Code finally changed that, *see* Act of June 25, 1948, 62 Stat. 947 (1948); 28 U.S.C. § 1738, the generally accepted view is that this modification was not intended to reflect any substantive change, but was simply the result of a blunder by the revisers. *See* Whitten, 12 Memphis State U. L. Rev. at 61 ("[t]he revisers obviously did not have any idea what they were doing"); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 19 (1958) ("a notably footless piece of draftsmanship").

This Court, likewise, has generally been careful not to construe the Full Faith and Credit Clause to limit the legislative jurisdiction of the States. Without recounting that history in detail, it suffices to say that, prior to the early 20th century, the Court had largely regarded the Clause as a provision mandating respect for judgments, not as a command for States to defer to sister-State laws. *See* Jackson, 45 Colum. L. Rev. 7 (noting that "cases as to judgments . . . constitute the bulk of full faith and credit litigation"). Furthermore, even after the Court undertook to order forum States to apply the law of other States (under both the Full Faith and Credit Clause and the Due Process Clause), it did so infrequently, and primarily in cases reflecting

(if not stating) the basic proposition that a State *without* legislative jurisdiction may not apply its substantive law in preference to that of a State with legislative jurisdiction. *See* Currie, 26 U. Chi. L. Rev. at 76-77; *see also id.* at 19-76 (reviewing cases).

To be sure, the Court did not always avoid interference with the legislative authority of a forum State. Perhaps the most striking example was the decision in *Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932), where the Court held that the Full Faith and Credit Clause required a New Hampshire federal court to apply Vermont law in a tort suit filed by the estate of a Vermont worker killed in New Hampshire. That decision—which effectively barred New Hampshire from providing redress for an accidental death within its borders—seemingly did limit its authority with respect to an occurrence over which it undoubtedly had lawmaking power. But *Clapper* did not stand the test of time. Just seven years later, the Court in *Pacific Employers* "limited its holding to its facts," *Hall*, 440 U.S. at 423 n. 23, while announcing that a State need not "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." 306 U.S. at 501. That remains the standard recognized by this Court to the present day. *See Baker by Thomas*, 522 U.S. at 232; *Sun Oil*, 486 U.S. at 722; pages 13-16 *supra*.

B. The Proposed Rule Would Require Courts To Make Subjective, Largely Standardless Judgments.

The "new rule" proposed by the Board not only is ungrounded in history and precedent, but would raise a host of largely unanswerable questions. Although the Board seemingly has abandoned its position (FTB Reply to Brief in Opposition 4-6) that the Court should apply a "balancing test" to decide whether Nevada must apply California law, its current stance—by asking the Court to make a constitutional value judgment

about the benefits of state immunity versus the benefits of compensating individuals and deterring wrongful behavior—is really just a call for balancing in a different guise. Furthermore, the rule is open-ended in a way that will require elaborate, and essentially standardless, inquiries into what is to be categorized as "interfer[ence] [with a] sister State's capacity to fulfill its own core sovereign responsibilities."

The essential premise of the "new rule" is evident from its carefully constructed terms: that, under the Full Faith and Credit Clause, laws providing sovereign immunity for core sovereign actions must always trump the laws of States providing compensation for unlawful acts within their borders. But there is simply no basis on which to elevate *legislatively conferred* sovereign immunity into a position of constitutional supremacy. In *Nevada v. Hall*, of course, this Court held that the States have no inherent right to sovereign immunity in the courts of another State, finding that such immunity was neither recognized as a matter of right at common law, nor provided to States (at the expense of other sovereign interests) in the plan of the Convention. *See* 440 U.S. at 414-21, 424-27; *see also Alden*, 527 U.S. at 738-40. In light of that holding—which the Board has not challenged in either its petition or in its brief on the merits—it is totally implausible to think that the Framers, while making no grant of inter-State immunity as a matter of right, nevertheless intended to force States into recognizing legislatively created immunity defenses through the backdoor mechanism of the Full Faith and Credit Clause.[10] Unsurprisingly, the brief debates about the meaning and effect of the

[10]A group of States, appearing as *amici curiae*, does urge the Court to overrule *Nevada v. Hall* insofar as it held that the States do not have inherent immunity in the courts of other States. *See* Brief *Amici Curiae* Florida *et al.* at 1-19. As we discuss, *see* pages 41-45 *infra*, this issue is not within the Question Presented in this case, and, in any event, *amici* have provided no good reason either for disregarding *stare decisis* or for thinking that *Nevada v. Hall* was wrongly decided.

Clause contain no mention of sovereign immunity at all, much less compelled sovereign immunity in the courts of another State.

The Board also provides no authority from which the Court could declare that the interest in protecting States from liability is somehow intrinsically and invariably superior to the competing sovereign interests in compensating persons for their injuries and in deterring intentional torts. As a general matter, of course, the citizens of each individual State may decide for themselves that immunity for governmental misconduct is needed in order to fulfill the State's "core sovereign responsibilities," thereby subordinating claims for injuries suffered at government hands. The citizens of other States, however, are free to take a different view, concluding that immunity not only would leave injured persons without an effective remedy, but would remove an important incentive for government officials to refrain from acts of wrongdoing. The task of sorting out those competing interests is one that legislatures commonly undertake on a state-by-state basis, but there are no judicial tools available for determining, as a matter of constitutional law, which interest, or combination of interests, is more important.

This absence of judicially manageable standards, in fact, serves to explain why the Court no longer employs a balancing test as part of its general full faith and credit analysis. At one time, in cases decided during roughly a thirty-year period, the Court occasionally indicated that it would decide which of several state laws should apply, as a constitutional matter, "by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." *Alaska Packers Ass'n v. Industrial Accident Comm'n of California*, 294 U.S. 532, 547 (1935); *see also Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 73 (1954); *Hughes v. Fetter*, 341 U.S. 609 (1951). This forced selection of a particular state law, of course, is inconsistent with the now-accepted understanding

that more than one State can constitutionally exercise legislative jurisdiction over a particular matter. *See Phillips Petroleum*, 472 U.S. at 823; *Sun Oil*, 486 U.S. at 727. Even more basically, however, the balancing approach suffered from the fact that there is no such thing as a constitutional "scale of decision" that can measure the "weight" of competing legitimate state interests. *See* Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440, 472-73 (1982); *see also* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94, 112 (1976) (expressing concern that balancing courts "might simply assign weights, without any determinable standard, to justify the results of cases decided on other premises"). Thus, by the time of the decision in *Allstate Ins. Co. v. Hague*, the practice had fallen into disuse, and all eight participating Justices in that case, speaking in three different opinions, explicitly acknowledged that the Court had "abandoned the weighing-of-interests requirement." *Id.* at 308 n.10 (plurality opinion); *id.* at 322 n.6 (Stevens, J., concurring in judgment); *id.* at 339 n.6 (Powell, J., dissenting). Even in the reconfigured form of a "new rule," there is no reason to breathe life back into that "discredited practice." *See id.* at 339 n.6 (Powell, J., dissenting).

The terms of the proposed rule raise other troublesome questions as well. To begin with, it is not self-evident why the rule requires full faith and credit for "legislatively immunized acts," but not for other state laws that might bear on "core sovereign responsibilities." If the Full Faith and Credit Clause were meant to protect the activities of one State from interference by the laws of another State, it would seem to follow that the rule would extend beyond "legislatively immunized acts," to any acts important to state operations. The Board, in fact, seems to say so itself. *See* FTB Br. 37 (suggesting that its rule would apply to "any number of various programs that are vital to state interests"). That, of course, would raise several problems. First, it would cut an even wider

swath through the legislative jurisdiction of the several States, blocking them from applying their own laws in an ever-expanding number of cases. Second, it would seemingly require the overruling of *Bonaparte v. Tax Court*, where, as we have noted (*see* page 23 *supra*), the Court held that the Full Faith and Credit Clause does not require a State to defer to laws of another State making its debt obligations immune from taxation, even though its refusal to do so would obviously raise the borrowing costs to the issuing State and thereby interfere with the sovereign responsibility of obtaining necessary funds. *See* 104 U.S. at 595. At the very least, therefore, unless the "new rule" has been fashioned simply to fit this case, defendant States may regard it as just a first step towards displacement of any laws that they consider inhospitable to the conduct of their government operations.

It also seems that the proposed rule would permit state legislatures to confer binding immunity, not just on the State itself and its agencies, but on individual state officials and subdivisions, such as counties and cities. The terms of the rule are certainly broad enough to encompass such immunity, and, if the touchstone of the rule is to prevent interference with "core sovereign responsibilities," it rationally could apply to any official or entity designated to carry out important State functions, at least while acting under authority delegated from the State. It is true, of course, that the Eleventh Amendment and related doctrines of sovereign immunity do not typically extend protection to individuals and local governments, *see, e.g., Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 609 n.10 (2001), but the rule proposed by the Board does not—indeed, after *Nevada v. Hall*, could not—find a basis in historic doctrines of sovereign immunity. Rather, it rests on whatever immunity a state legislature chooses to grant with respect to "core sovereign responsibilities," a potentially far-reaching basis for nullifying other States' laws.

These uncertainties are modest, however, compared to the most basic problem with the "new rule": that, even if one can figure out what kinds of laws and entities are covered generally, there is still no standard by which to judge what might constitute "core sovereign responsibilities" or what might be thought sufficient to "interfere[]" with a State's "capacity to fulfill" them. *See* FTB Br. 32 ("there is no clear definition of what constitutes a core sovereign responsibility . . . ."). Every State possesses broad police powers, which are exercised in hundreds of ways, ranging from criminal investigations to state aid programs. Any action in furtherance of those powers could be thought, in one sense or another, to be necessary to the exercise of "core sovereign responsibilities," so that *any* threat of litigation with respect to *any* of them would be regarded as inhibiting state employees from carrying out their jobs. *See* FTB Br. 37 (complaining that "widespread application" of the decision below "could (and perhaps would) interfere with (and likely cripple) the States' ability to conduct any number of various programs that are vital to state interests, *each of which is a core sovereign responsibility*") (emphasis added). Alternatively, a State could argue that any significant award of damages would deprive the State of funds needed to meet its responsibilities, regardless of the particular state action (for example, a traffic accident) that gave rise to the lawsuit in question. If those kinds of arguments are to be accepted, it will mean that a State, just by granting itself immunity, could effectively do whatever it pleased within the borders of other States, without the prospect of being held to account, so long as it was somehow acting within one of its recognized powers. On the other hand, if the rule is to depend on a case-by-case examination of each State activity, and a further inquiry into the extent of possible interference caused by each lawsuit (or class of lawsuits) with respect to that activity, the courts applying the rule would face intractable questions of line-drawing comparable to, if not worse than, those presented by the now-departed weighing-of-interests test.

This case presents an example of just some of these difficulties. Although the Board emphasizes that States have a strong interest in conducting their tax programs, it does not explain, for purposes of understanding its rule, just what programs the States would not have a strong interest in conducting. Moreover, and in any event, this assertion about the importance of tax operations goes to only part of the proposed inquiry: the question, then, is whether the law of Nevada, if applied here, would seriously impede the capacity of California to collect its tax revenues. That seems unlikely if only because the California tax proceeding against respondent remains ongoing in California. Furthermore, the Nevada Supreme Court expressly held that the Board should be allowed immunity under California law for any negligent or good-faith discretionary acts, Pet. App. 11-12, a fact that the Board conspicuously ignores. As a result, Nevada law leaves California free to investigate and prosecute taxpayers in Nevada without any genuine concern that it will face liability for mere misjudgments or for actions amounting to nothing more than an abuse of discretion. The ultimate issue thus comes down, not to whether California can engage in the "normal procedures at its disposal," FTB Br. 33, but to whether California must have the latitude to commit intentional torts, or perhaps to have "breathing space" with respect to the commission of intentional torts, in order to operate its system of tax assessment and collection.

This idea is hard to credit for several reasons. First of all, many States are able to operate their tax systems without across-the-board immunity. While the Board cites to certain States that extend broad protection, FTB Br. 12 n.5, other States provide immunity that stops well short of shielding all misconduct. *See, e.g.*, ARIZ. REV. STAT. § 12.820.01 (2002); OHIO REV. CODE ANN. 2743.02 (Anderson 2002); WASH. REV. CODE § 4.92.090 (2002). Furthermore, many States allow personal suits against state officials for intentional or malicious wrongdoing. *See, e.g.*, ARK. CODE ANN. § 19-10-305(a) (2002); FLA. STAT.

§ 768.28 (2002); MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b) (2002). The existence of that liability, which obviously acts as a deterrent to tortious acts by State employees, strongly suggests that the States do not regard such behavior as essential to their operations. *See Biscoe v. Arlington County*, 738 F.2d 1352, 1360-61 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (recognition of personal liability for individual officials casts doubt on justification for governmental immunity).

An equally compelling reason to doubt the need for total immunity is that California itself allows actions against the State for misconduct by its tax officials. Thus, the curiously worded immunity statute relied on by the Board, California Government Code § 860.2 (Pet. Br. App. 1-2), applies only to "instituting" proceedings and actions and to acts with respect to the "interpretation or application of any law relating to a tax." *Id.* The California Supreme Court has not construed this language, but even broadly construed, it would hardly seem to cover all operational torts committed by state tax officers. More importantly, other sections of the Code expressly allow a taxpayer to "bring an action for damages," *see* California Government Code § 21021 (FTB Br. App. 11), whenever Board employees have recklessly disregarded published procedures. *Id.* As the Board recognizes, FTB. Br. 11 n.4, this statute would be meaningless if the California immunity statute barred all tax-related claims.[11] Taken as a whole, therefore, the tolerance of various damage actions under the laws of many States, combined with the availability of state-law actions even under

[11] This provision also demonstrates that, contrary to the theory of *Amici Curiae* National Governors Association, *et al.*, an action for damages is not a "collateral[]attack" on administrative tax proceedings. *Id.* at 11. As previously noted, the tax case against respondent is continuing unabated in California. *See* page 2 *supra*; FTB Br. 4.

California law, severely undercuts the Board's position that total immunity is necessary to operation of an effective tax system.[12]

Finally, we note that the "new rule" urged by the Board is utterly boundless: the rule would compel Nevada to recognize immunity for any acts related to core sovereign responsibilities—no matter how despicable or abusive—as long as California was willing to immunize them. Under the terms of the rule, California officials would be able to assert immunity for assaulting Nevada citizens as part of a police investigation, or subjecting those under investigation to libel in Nevada newspapers. Indeed, while the behavior in this case is bad enough, the rule would permit Board auditors, instead of just going through respondent's mail and garbage, to enter his house and rummage through his drawers and files, all without concern that Nevada could order the State to provide compensation for those acts. Or investigators could expressly threaten respondent with further disclosure of his personal and professional information if he persisted in his unwillingness to settle the inflated tax claims, again without fear of exposing the Board to liability. Perhaps the Board thinks this is all well and good, but it is a truly remarkable proposition that, in the face of such actions, the Constitution would render Nevada powerless to apply its own laws and provide relief.

C. The Proposed Rule Is Unnecessary.

The rule proposed by the Board rests, at bottom, on a simple policy argument: that, unless this Court reads its proposed rule into the Full Faith and Credit Clause, state courts will seriously

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[12] If the Board is ultimately advancing only a right to require observance of California law with respect to the *forum*, its full faith and credit argument grows weaker still. This Court has held that the Clause does not bar a State from disregarding a forum selection provision, even when the court is applying the substantive law of another State. *See Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965).

interfere with the fundamental operations of sister States. The Board disregards, however, the many sources of protection already available to shield States from genuine disruption.

In the first place, principles of comity, as they have for centuries, continue to provide strong assurance that private suits will not unduly interfere with government operations. Because States have never had immunity as of right in the courts of other States, *see Hall*, 440 U.S. at 414-21, it is the doctrine of comity—both before and after formation of the Republic—that has given them protection in state courts other than their own. *Id.* As has long been the case among sovereign nations, *see Hilton v. Guyot*, 159 U.S. at 163-66, sovereign States have traditionally applied the doctrine of comity with a healthy regard for the sovereignty of their sister States. *See Hall*, 440 U.S. at 417-18. This tendency is naturally reinforced by a well-developed self-interest, grounded in the awareness that other States, as equal sovereigns, have the power to grant or withhold comity in their own right.

This regard for the sovereignty of sister States has continued even after the decision in *Nevada v. Hall*. Although many States then expressed concern about uncertainties arising from that decision, *see* Brief of West Virginia *et al. Amici Curiae* in Support of Petition for Rehearing, No. 77-1337 (Oct. Term 1977), at 2-10, recent history shows that state courts have continued to dismiss suits against their sister States. *See, e.g., Reed v. University of North Dakota*, 543 N.W.2d 106 (Minn. Ct. App. 1996); *University of Iowa Press v. Urrea*, 440 S.E.2d 203 (Ga. Ct. App. 1993). Moreover, in cases where state courts have agreed to hear claims against another State, the forum court has often done what the Nevada Supreme Court did below: looked to the immunity of the forum State in determining what acts of the defendant State would be subject to suit. *See, e.g., McDonnell v. Illinois*, 748 A.2d 1105, 1107 (N.J. 2000); *Struebin v. Iowa*, 322 N.W.2d 84, 86 (Iowa), *cert. denied*, 459 U.S. 1087 (1982); *Morrison v. Budget Rent A Car*

Systems, 230 A.D.2d 253, 268 (N.Y. App. Div. 1997); *see also Head v. Platte County*, 749 P.2d 6, 10 (1988) (suit against municipality with state-law immunity). This practice, of course, makes it highly improbable that a defendant State would be exposed to liability that genuinely imperils legitimate government activity. While the States grant themselves different degrees of immunity for government actions, few States are likely to subject themselves to state-law suits that will prevent them from carrying out critical governmental functions.

This history of consideration for defendant States also addresses the concern, expressed by the dissenting Justices in *Hall*, that a forum State would treat a defendant State "just as it would treat any other litigant." *Nevada v. Hall*, 440 U.S. at 428 (Blackmun, J., dissenting). Under traditional principles of comity, and certainly under a practice of looking to forum-State immunity, it will simply not be the case that "State A can be sued in State B on the same terms as any other litigant can be sued." *Id.* at 429 (Blackmun, J., dissenting). As the cases cited by the Board themselves demonstrate, and the decision below confirms, state courts are fully capable of recognizing the sovereign interests of other States, using their own sovereign interests as a benchmark. *See Guarini v. New York*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987); *Xiomara Mejia-Cabral v. Eagleton School*, Mass. Super. LEXIS 353, 10 Mass. L. Rep. 452 (Mass. Sup. Ct. 1999). By regarding state defendants as sovereigns of equal stature, not as private litigants, States are thereby according them the respect to which they are entitled in "our constitutional system of cooperative federalism." *Hall*, 440 U.S. at 424 n.24.

The States also have more formal methods of assuring protection for themselves. If two States have concerns about possible liability in each other's courts, they may arrange between themselves to provide immunity on a reciprocal basis. (This kind of agreement would not alter the federal-state balance and should not require approval by Congress. *See Cuyler v.*

Adams, 449 U.S. 433, 440-41 (1981)). Or, if a number of States share the same overall viewpoint about the need for immunity, they may enter into a larger multi-State agreement, similar to the agreement that established the Multistate Tax Commission. *See generally United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978). These agreements would have the advantage of allowing the signatory States to decide for themselves what legislative authority they are willing to surrender within their borders in return for recognition of more expansive sovereign immunity in the courts of other States. At the same time, the agreements would not force unwilling States to give up their legislative authority, as the constitutional rule advocated by the Board necessarily would do.

In addition to these avenues, the Full Faith and Credit Clause itself provides another: the possibility of legislative action by Congress, declaring the "effect" of state immunity laws in other States. *See Sun Oil*, 486 U.S. at 729 ("it can be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause"). The Clause, of course, contains an express grant of power to Congress to declare the "effect" of public acts in state courts. As the national legislative body, Congress is well-positioned to consider the competing interests of all States, including (but not limited to) the interest of defendant States in avoiding burdens on their government operations. *See generally Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1988). Moreover, unlike a constitutional holding that would freeze the rights of forum and defendant States, any congressional legislation addressing inter-State immunity could thereafter be amended, if and when circumstances so dictated.

These alternative methods offer significant safeguards for State defendants, all without permitting one State to unilaterally preempt the legislative jurisdiction of another State merely by passing a law to immunize itself. This Court has previously declined the invitation to "embark upon the enterprise of

constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable." *Sun Oil Co.*, 486 U.S. at 727-28. It should decline that invitation here as well.

III. THIS COURT SHOULD REJECT THE INVITATION OF *AMICI CURIAE* TO OVERRULE *NEVADA V. HALL*.

The Florida *et al. amici curiae* brief raises an issue that the Board does not raise: that the States have inherent sovereign immunity in the courts of other States and that this Court should overrule that part of *Nevada v. Hall* holding to the contrary. This question is not set out in the Question Presented in the petition, nor is it fairly included therein. *See* Sup. Ct. Rule 14.1(a). Rule 14.1(a) of the Rules of this Court plainly states that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court," and this Court has said that it will depart from the rule "'only in the most exceptional cases.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (quoting *Yee v. Escondido*, 503 U.S. 519, 535 (1992)). *See also Taylor v. Freeland & Krontz*, 503 U.S. 638, 646 (1992) (Rule 14.1(a) "helps to maintain the integrity of the process of certiorari"). Here, the Board could not have been more clear, in setting forth the Question Presented, that the only question it was raising was whether the Full Faith and Credit Clause required the Nevada courts to apply Section 860.2 of California Government Code. *See* Pet. i. This is a very different question, answered by reference to wholly different historical materials and case law, than the question *amici* now seek to raise. *Amici* may believe that the Board presented the wrong question, but they are not free to redraw the case to their liking.[13]

[13] The issue that *amici* now want to raise was not, in fact, included in the Question Presented in the States' own *amici curiae* brief filed at the certiorari stage. *See* Brief *amici curiae* of Oregon *et al.* at i.

We nonetheless will briefly address their arguments, which fall far short of making a case for reconsidering, let alone overruling, *Nevada v. Hall*. "Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (quoting *Welch v. Texas Dep't of Highways*, 483 U.S. 468, 494 (1987)). Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," 502 U.S. at 202, the Court has emphasized that it "will not depart from the doctrine of *stare decisis* without some compelling justification." *Id.* There is no "compelling justification" here.

The principal argument made by *amici* is based on historical evidence that, at the time of the Convention, independent sovereigns traditionally accorded immunity to other sovereigns in their courts. *See* Brief *Amici Curiae* Florida, *et al.* 5-12. But this argument offers nothing new: this Court explicitly recognized this practice of granting immunity in *Nevada v. Hall*, discussing the same principal authority (*The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)) that *amici* now address. *See* 440 U.S. at 417. What the Court in *Hall* also pointed out, however, and what *amici* only briefly try to refute, is the unimpeachable evidence that sovereigns extended this immunity, not as a matter of absolute right, but as a matter of comity. *See* 440 U.S. at 416-17. Chief Justice Marshall made this plain in *The Schooner Exchange* itself (11 U.S. (7 Cranch) at 136), and this Court has held to that view ever since. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("[a]s *The Schooner Exchange* made clear, . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution"). Moreover, as further proof that immunity among co-equal sovereigns is extended as a matter of comity not right, it is unquestioned that the United States (the sovereign

extending immunity in *The Schooner Exchange*) has since significantly, and unilaterally, *reduced* the amount of immunity that it grants to foreign sovereigns, exercising its own sovereign right to decide the legal consequences of acts within the scope of its legislative competence. *See* 28 U.S.C. §§ 1602 *et seq.*; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). All this history and experience is simply incompatible with an attempt to revive the already-rejected theory that immunity in the courts of other sovereigns could be demanded as a matter of absolute privilege.

Amici also rely heavily on the *Alden* decision, which held that States have sovereign immunity in their own courts even with respect to certain federal claims. *See* 527 U.S. at 711-61. But *amici* simply disregard the parts of the decision that undermine their position. Thus, *amici* do not deal with, or even acknowledge, the fact that the Court in *Alden* expressly distinguished the absolute right of a sovereign to immunity in its own courts from its lack of sovereign immunity in the courts of another sovereign. 527 U.S. at 738-40. Quoting (rather than rejecting) *Nevada v. Hall*, the Court recognized that a claim of immunity in another State "'necessarily implicates the power and authority of a second sovereign.'" *Id.* at 738 (quoting *Hall*, 440 U.S. at 416). For that reason, the Court said, "its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.'" *Id.* The Court then reiterated what it had previously determined: that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another . . . ." 527 U.S. at 738.[14]

[14] This statement in *Alden* addresses the proper question: whether the Constitution *granted* States a right to absolute immunity in other States'

The Court in *Alden*, in fact, placed great emphasis on just the point that we make here: that, after formation of the Union, the individual States retained much of their preexisting sovereignty. 527 U.S. at 713-15. Whatever else that sovereignty encompasses, it naturally includes, first and foremost, the residual lawmaking authority necessary for the sovereign to govern within its sovereign limits. As the Court noted in *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136, "[a]ny restriction upon [the jurisdiction of a nation within its own territory], deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . . ." Reflecting this understanding, and the terms of the Tenth Amendment, the Court has quite correctly expressed its "reluctance to find an implied constitutional limit on the power of the States . . . ." *Alden*, 527 U.S. at 739.

To be sure, the decision in *Alden* detailed considerable evidence that the States, at the time of the Convention, had great concerns about their vulnerability to suit in the newly created federal courts. But that concern cannot be extrapolated wholesale into an equivalent concern about suits in the courts of other States. The States' worries about suit in the courts of the National Government were based, not just on the fact that it was to be a new sovereign with its own system of courts, but on the fact that, under the constitutional plan, it was to be a *superior* one. As a consequence, the principles of mutual comity that had traditionally assured reciprocal immunity among co-equal sovereigns—like the States themselves—would be out of balance: at common law, a superior sovereign had immunity *as of right* in the courts of a lesser one. *See Hall*, 440 U.S. at 414-15. That problem, arising out of the particular problem caused

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courts. In so doing, it effectively disposes of the back portion of *amici's* argument, which is based on the erroneous notion that sovereign immunity as of right did exist before formation of the Union, and thus asks whether it was *abrogated* in the Constitutional plan. *See* Brief *amici Curiae* Florida *et al.* at 12-18.

by creation of a federal sovereign imbued with supremacy over State sovereigns, had nothing to do with the terms of the States' continuing sovereign relations with one another.

In short, *amici* are treading old ground. The States did not have immunity as of right in each other's courts, and nothing in the Constitution, or the plan of the Convention, mandated it by diminishing the States' legislative sovereignty within their own borders. *See Alden*, 527 U.S. at 738. Even if the question were properly before the Court, therefore, there is no reason to revisit *Nevada v. Hall*.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted,

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EXHIBIT 45

No. 02-42

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of The State Of Nevada

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

ARGUMENT

Respondent Hyatt seeks to minimize the extraordinary challenge to cooperative federalism that is presented by this dispute. It bears remembering that this case is about a former California resident who moves to Nevada and then uses the *Nevada* courts to pass judgment on *California's* decision to tax him for his *California* income.[1]

In this Court, petitioner Franchise Tax Board has urged that existing conflicts-of-law methodology is inadequate to address the question of the extent to which the Full Faith and Credit Clause requires Nevada courts to apply California's Government Code section 860.2. The Board argues that existing methodology defers to the *interests* of the forum State over the non-forum State, without regard for the *effects* of the choice of law on the

[1] The BRIEF FOR RESPONDENT GILBERT P. HYATT [Resp. Br.] contains too many factual errors to list; however, some of the more egregious bear mention. For example, Hyatt has alleged that the audit and decisions to issue the NPAs were motivated by the religious prejudice of the third auditor; however, the decision to audit Hyatt was made in 1993, by the first auditor. Record at Vol. 3, # 11, Cox Aff. ¶ 3. Moreover, no auditor made the decision to issue the NPAs; other Board personnel made those decisions after reviewing the final audit report. Record at Vol. 3, # 11, Bauche Aff. ¶¶ 4 and 6. It is also worth noting that in the first proceedings before the Nevada Supreme Court Hyatt accused the Board of "snoop[ing] at mail on the doorstep and record[ing] the timing, description, and quantity of his trash." Record at Vol. 6, # 28, p. 10, lines 10-12. After the Nevada Supreme Court originally granted the Board's writ and found that the Board's "investigative acts were in line with a standard investigation to determine residency status for taxation pursuant to its statutory authority" (Cert. App. 42-43), Hyatt increased the level of accusations, claiming instead that the Board's auditor "looked through his mail and his trash." Resp. Br. at 4. These two examples alone illustrate that Hyatt appears willing to claim (or allege) anything in order to breathe life into his lawsuit.

non-forum State. Such an approach is constitutionally adequate in dealing with suits over traffic accidents caused by agents of the non-forum State while driving in the forum State. *Nevada v. Hall*, 440 U.S. 410 (1979). It is wholly inadequate to deal with suits about official conduct by agents of the non-forum State carried out in the non-forum State and in the forum State in implementation of a core governmental function such as collection of tax debts owed by the plaintiff to the non-forum State.

The Board accordingly urges adoption of a different choice-of-law rule, to apply when suit is brought against the non-forum State or its agents based on activities in implementation of a core governmental function of the non-forum State. Such a rule – based as it is on the potential for interference by the forum State with the non-forum State's capacity to fulfill its own sovereign responsibilities (*see Nevada v. Hall*, 440 U.S. at 424 n.24) – would refer, not to the forum State's *interest* in the choice of law, but rather to the *effects* of the choice on the non-forum State's ability to function as a co-equal sovereign government. It would, in short, require the forum State to give full faith and credit to the non-forum State's own statutes limiting liability for injuries caused by the core sovereign activities that are the subject of the litigation.

A. When the effect of the forum State's policy preference is interference with the defendant State's capacity to function as a co-equal sovereign, a superficial consideration of the forum State's legislative competence will not suffice to dispose of the choice-of-law issue.

Hyatt's argument proceeds from a faulty premise. Hyatt first observes that, in resolving a choice-of-law

question, the Full Faith and Credit Clause allows a State to apply its own law to a subject matter about which it is competent to legislate – a proposition with which the Board generally has no dispute. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 721 (1988), citing *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). Hyatt next asserts that "[t]he central full faith and credit question, then, is whether Nevada was 'competent to legislate' regarding torts that are the subject matter of this lawsuit." Resp. Br. at 16.

But this Court has never suggested that the inquiry over a forum State's prerogative to ignore a defendant-State's statutory liability limits is merely a matter of confirming the forum State's legislative competency over the conduct giving rise to the alleged liability. It is clear, for example, that in *Nevada v. Hall*, this Court accepted California's rejection of Nevada's liability limitations, not only because California's choice of law rested on a legitimate policy preference about matters over which California has undisputed legislative competency, 440 U.S. at 424, but more importantly, because California's choice did not threaten to interfere with Nevada's capacity to fulfill its own sovereign responsibilities. *See* 440 U.S. at 424 n.24. Hyatt's assertion that Nevada enjoys legislative competency to enact and enforce its tort law does not end the inquiry; at best, it would be merely a beginning.

In any event, it is facetious for Hyatt to argue that nothing is at issue here other than Nevada's legislative competence to define the respective rights and liabilities of persons in their interpersonal interactions. The "person" before the Nevada court as a defendant is, after all, a co-equal sovereign State, and the "interaction" at issue is nothing less than the sister-State's effort to investigate a

possibly fraudulent evasion of tax obligations by the plaintiff based on his prior residency in the defendant State. To be sure, Hyatt's allegations may sound in tort, but those vague allegations *patently* concern the conduct of the critical governmental function of investigating, assessing, and collecting taxes from a delinquent taxpayer – hardly the subject of tort jurisprudence.

What is really at issue here is not mere adjudication of alleged torts, but rather Hyatt's effort to have the Nevada courts supervise and pass judgment upon the manner in which California's taxing agency investigates whether Hyatt has evaded his tax obligation to California.

B. Contrary to Hyatt's assertion, the Board does not seek a cession of *Nevada's* legislative jurisdiction over torts. Rather, the Board seeks an end to Nevada's usurpation of *California's* legislative jurisdiction to limit the kinds of remedies that California taxpayers have to challenge a tax investigation and audit.

Hyatt argues at great length that the Board's proposed rule is inconsistent with full faith and credit history and principles, that it "would strip away significant legislative authority from the forum States," Resp. Br. at 21, and that it suggests that, in the Full Faith and Credit Clause, "the States were permanently ceding to each other part of their traditional, jealously guarded legislative authority." Resp. Br. at 26. The argument rests entirely on Hyatt's own baseless contention that the "legislative authority" truly in question is Nevada's authority to legislate *tort laws*.

The Board does not take issue with Hyatt's lengthy argument to the effect that the Full Faith and Credit Clause was never intended to work a cession of legislative jurisdiction by the States *inter se*. But the argument misses the point. This case is not about compelling a *cession* of the forum-State's legislative sovereignty; it is rather about *usurpation* of the defendant-State's legislative sovereignty.

In order effectively to carry out investigation, assessment, and collection of delinquent taxes, California has deliberately immunized its tax officials from liability for alleged injury caused by acts incidental to the assessment or collection of taxes. Specifically, California Government Code § 860.2 provides that "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 [or] (b) An act or omission in the interpretation or application of any law relating to a tax."[2]

This is not to say that California taxpayers have no means to challenge what they believe to be an unwarranted investigation or assessment. Indeed, a California taxpayer, including Hyatt, has all of the following remedies for challenging an audit investigation: (1) a complete review of the tax assessment at the protest stage,[3] (2) an

[2] The statute has been broadly construed by California courts. *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228 Cal.Rptr. 750 (1986) (statute bars suit for alleged interference with business and credit, slander to title, denial of due process, and punitive damages based on allegedly willful, wanton and malicious behavior).

[3] Cal. Rev. & Tax Code §§ 19041, 19044.

EXHIBIT 45

independent administrative review by the five-member State Board of Equalization,[4] (3) a taxpayer's cause of action for a tax agency's failure to follow published procedures,[5] and (4) a de novo judicial review of administrative tax determinations of California residency without the necessity of prepaying the tax.[6]

What an individual taxpayer may not do, however, is sue the Board on the ground that the investigation is injurious – at least such a suit may not be brought in California courts. What Hyatt wants is the right to move to Nevada and sue the Board *there*. The net effect of Nevada's willingness to entertain Hyatt's suit against the Board is nothing short of an usurpation by the Nevada courts of *California's* legislative jurisdiction to limit the kinds of remedies that California taxpayers have to challenge a tax investigation and audit.

C. Hyatt's proffered "contacts" purporting to support Nevada's choice of law are manifestly insufficient as a basis for a choice-of-law decision that results in litigation that interferes with California's capacity to carry out an essential governmental function.

Hyatt acknowledges that Nevada's choice of its own immunity policy over California's statutory liability limits must be based on "a significant contact or significant aggregation of contacts, creating state interests, such that

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[4] Cal. Rev. & Tax Code §§ 19045-47.

[5] Cal. Rev. & Tax Code § 21021.

[6] Cal. Rev. & Tax Code § 19381; Cal. Civ. Proc. Code § 1060.5.

choice of law is neither arbitrary nor fundamentally unfair." Resp. Br. at 17. Hyatt asserts that such contacts are present here, but the contacts in this case manifestly cannot justify Nevada's intrusion into California's administration of California taxes.

1. Hyatt's residency in Nevada cannot reasonably justify that State's interference with California's tax collection efforts, because it is precisely Hyatt's move to Nevada that prompted the tax audit in the first instance.

First, Hyatt erroneously asserts as a sufficient "contact" that "Nevada is the State in which the plaintiff suffered his injuries." *Id.* But, as a threshold matter, a plaintiff's residence and place of filing the action are generally accorded little or no significance in the constitutional analysis because of the danger of forum shopping. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985). Fairness and reasonable expectation of the parties are more important to the analysis. *Id.* at 822. In this case, both fairness and reasonable expectation favor California. Fairness, because only 3% of the activities occurred in Nevada. JA at 237. Reasonable expectation, because: (1) Hyatt was a long-time resident of California, where he worked for many years developing the computer technology that resulted in his receipt of $40 million in income in late 1991 (JA at 48); (2) Hyatt claimed he terminated his California residency just before receipt of that $40 million; and (3) given the suspicious circumstances, Hyatt had every reason to expect that his non-residency claim would be investigated by California agents enforcing California law.

Furthermore, the facts of this case dramatically confirm this Court's concern that reliance on residency as a justification for choice-of-law invites forum shopping. Indeed, it is Hyatt's evident position that this Court's full faith and credit jurisprudence guarantees Nevada's prerogative to serve as a sanctuary for "tax refugees" from California who, solely by virtue of moving (or claiming to have moved) their residence across the state line, may not only avoid the payment of future California income taxes, but may also acquire the standing to sue their former State in Nevada to impede the collection of past taxes due and owing.

2. Even if it existed, Nevada's official hostility to California tax practices would not justify an assertion of the prerogative to supervise the California taxing agency in those practices.

Hyatt asserts as a substantial "contact" the fact that the Board "deliberately took actions that either occurred in Nevada or were specifically intended to have their harmful effects there." Resp. Br. at 19. Hyatt also avers that Nevada may be concerned about "targeting" of Nevada residents by California tax officials. *See* Resp. Br. at 18. In effect, Hyatt suggests that Nevada's hostility to California tax practices would justify Nevada's assertion of judicial supervision over the California taxing agency.

Of course, the State of Nevada is not before the Court. Nor has Nevada itself chosen to appear as amicus curiae to support Hyatt's use of its courts.

In any event, the law is quite contrary to Hyatt's view. Nearly a half-century ago, the Court recognized that full faith and credit would be properly invoked to restrain "any

policy of hostility to the public Acts [of another state]." *Carroll v. Lanza,* 349 U.S. 408, 413 (1955). And, as Justice Stevens noted in his concurring opinion in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 323 n.10 (1981), in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

Of course the Board deliberately took actions in Nevada, and of course the Board took actions in California with the intent of effecting a result in Nevada. Hyatt, himself, brought about the tax audit by moving *to Nevada*. If Hyatt fails to cooperate with California tax officials in *California*, then those officials obviously have little alternative but to follow his trail into *Nevada* or forego collection of taxes due and owing. Hyatt's preferences to the contrary notwithstanding, there is no evidence of any official objection by the State of Nevada to California's tax investigations in Nevada, much less of the Board's investigation of Hyatt in particular. And even if there were, such an objection would not be a constitutionally sufficient basis for Nevada's refusal to give full faith and credit to California's statutory structure for its tax collection processes. There are other, more appropriate means for addressing such political issues, e.g., interstate compact negotiations.

D. Hyatt is less than candid in suggesting that California's tax-collection efforts are unaffected by the proceedings in the Nevada courts.

Hyatt makes the misleading assertion that "despite the Nevada litigation, the tax proceeding against respondent is continuing without interruption in California."

Resp. Br. at 10. While the Board will concede that it is attempting to press forward with its investigation despite Hyatt's effort to hamper and derail that investigation, that is hardly the whole of the picture.

The Nevada litigation interferes with the California tax process, first and foremost, by chilling the activities of the Board's auditors and investigators. Because the Nevada courts have resolved to inquire into the whole of California's tax assessment and auditing process (JA at 137-138), every action taken by every Board employee in furtherance of the investigation against Hyatt threatens to become the subject of additional discovery and additional alleged injury.

The interference is analogous to that described in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), wherein this Court held that taxpayers could not sue for damages under 42 U.S.C. § 1983, based upon a property tax assessment. The Court's explanation that a suit for damages "would 'in every practical sense operate to suspend collection of state taxes,'" *ibid.*, fully recognizes that a suit for money damages amounts to a collateral attack on the taxing process. The Court observed:

> Thus, a judicial determination of official liability for the acts complained of, even though necessarily based upon a finding of bad faith, would have an undeniable chilling effect upon the actions of all County officers governed by the same practicalities or required to implement the same policies. There is little doubt that such officials, faced with the prospect of personal liability to numerous taxpayers, not to mention the assessment of attorney's fees under 42 U.S.C. § 1988, would promptly cease the conduct found to have

> infringed petitioners' constitutional rights, whether or not those officials were acting in good faith. In short, petitioners' action would "in every practical sense operate to suspend collection of the state taxes . . . ," *Great Lakes*, 319 U. S., at 299, a form of federal-court interference previously rejected by this Court on principles of federalism.

454 U.S. at 115. No lesser chilling effect results from Hyatt's sweeping action for damages in the Nevada courts.

Furthermore, the Nevada courts' refusal to dismiss Hyatt's tort action has placed the Board in the untenable position of having to comply with outrageous discovery demands or risk sanction of its attorneys and default judgment against the State. And indeed, discovery has been oppressive. Hyatt's trial attorneys have taken 315 hours of deposition testimony from 24 witnesses, have made 329 separate document demands from the Board (which have produced over 17,000 pages of documents), and have made 340 additional document demands to deposed witnesses. Record at Vol. 3, # 11, Ex. 8, pp. 420-422. It is disingenuous for Hyatt to suggest that the Board's tax proceedings in California have not been adversely affected by having to make employees available for depositions and by having to spend hundreds of hours of employee-time marshaling documents for response to document-production demands in the Nevada courts.

Finally, as a direct result of Hyatt's Nevada litigation, the administrative tax process in California has been effectively placed on hold, despite the Board's efforts to

advance it.[7] Specifically, complying with the protective order of the Nevada court, the Board subpoenaed documents and deposition testimony relevant to Hyatt's claims. App. 8. Then, again complying with the protective order of the Nevada court, the Board attempted to enforce the subpoena duces tecum in Sacramento Superior Court, an attempt which Hyatt has opposed by filing his Opposition to Subpoena. App. 1-27. Remarkably, Hyatt has opposed the Board's subpoena on the grounds that California courts must extend full faith and credit to the Nevada protective order, and must accordingly block the Board's access to the relevant tax information.[8] Hyatt's actions in opposing the Board's subpoenas have impeded the progress of the administrative proceedings and are directly contrary to the statements that he makes in his brief filed in this Court, where he claims that "despite the Nevada litigation, the tax proceeding against respondent is continuing without interruption in California." Resp. Br. at 10. The matter is still under submission before the California courts at this time.

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[7] In order to illustrate that Hyatt – despite his contrary representations to this Court – is using the Nevada lawsuit to interfere with the administrative tax proceedings pending in California, the Board has attached the following document as an appendix to this brief:

App. 1-27: Respondent Gilbert P. Hyatt's Response and Opposition to the OSC re FTB's Petition for Order to Compel Compliance with Administrative Subpoena (hereafter referred to as "Opposition to Subpoena").

[8] Hyatt argued that the court in California must accord the protective order full faith and credit, claiming that: "under the Full Faith and Credit Clause, the Nevada protective order is entitled to all the respect and solemnity of any other judicial ruling from a sister state or another California court[.]" App. 26-27.

E. The rule urged by the Board is reasonable, workable, and limited in scope.

This Court's expression of concern in *Nevada v. Hall* has directly led to the following rule as urged by the Board:

> A forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities.

Cf. Nevada v. Hall, 440 U.S. at 424 n.24.

1. If the rule can be said to involve a "balancing of interests," it is a balancing, not of the parochial interests of one State against those of another, but rather a balancing of the parochial interests of one State against a national, constitutional interest in cooperative federalism.

Hyatt complains that the Board's rule is merely a return to a discredited "balancing of interests" methodology for resolving choice-of-law issues. It is not. Whereas the former balancing-of-interests analysis balanced the interests of the forum State against the interest of the non-forum State,[9] the Board's rule reflects a balancing of the interests

[9] *See Alaska Packers Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 547 (1935).

of the forum-State against the interest of the Union, reflected in a system of cooperative federalism.[10]

Thus, the Board has repeatedly pointed out that its test looks to the *effect* of the choice-of-law decision on the capacity of the defendant State to carry out core sovereign responsibilities. Where, as was the case in *Nevada v. Hall*, the forum State's policy preference can reasonably be said to work no interference with the defendant State's basic capacity to function as a co-equal sovereign, that preference does not offend the mandate of the Full Faith and Credit Clause. But where, as in the instant case, the forum State's policy preference impedes critical tax collection efforts of a co-equal sovereign State, then the Board's rule would require that the parochial interests of the forum State yield to the constitutionally contemplated system of co-equal sovereign States.

The application of this rule prevents a forum State from assuming through its judicial system what amounts to a supervisory role over a sister State's core governmental functions. The rule requires nothing more than that State courts extend full faith and credit to the scope of scrutiny permitted by the acting State in the conduct of its

[10] However, that balancing occurred in the formulation of the rule, not in the application. No consideration is given the interests of the forum State in the application of the rule because, once the rule's elements have been met, the forum State must give "faith" to its sister State's conduct in carrying out its own core governmental functions; cooperative federalism requires no less. In the last analysis, there are certain state functions whose operation falls entirely within the acting State's responsibility. Legislative acts structuring those core sovereign responsibilities are entitled to truly *full* faith and credit under the Full Faith and Credit Clause.

core governmental functions. If the acting State has constitutionally valid immunity statutes that prevent its own courts from interfering in the governmental process, then the forum State must respect that limitation.

2. The Board's new rule has standards sufficiently well-described to enable courts to apply it.

Hyatt claims that the Board's rule is essentially standardless. While the Board acknowledges that there is no bright-line test for a "core governmental responsibility," it is not standardless because States would be able to identify such a responsibility by reference to their own essential operations. All States, for example, collect revenue by one device or another. The assessment and collection of state personal income taxes are the lifeblood of the California government because it is the means by which government is able to function.

That taxes are clearly a core function is supported by ample authority. For example, the ability of the State to assess and collect taxes is so important that the California Constitution bars "any court" from issuing a "legal or equitable process . . . to prevent or enjoin the collection of any tax." Cal. Const., art. XIII, § 32. Federal law similarly mandates that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. In fact, as pointed out earlier, this Court has held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal court." *Fair Assessment*, *supra*, 454 U.S. at 116. And, in a similar vein, this Court

has recognized "the vital interest of the government in acquiring its lifeblood, revenue" (*Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 21 (2000)) in holding that – despite bankruptcy statutes to the contrary – a debtor bears the burden of proof on a tax claim in bankruptcy court when the substantive law creating the tax obligation puts the burden on the taxpayer.

Although these authorities do not define a "core" sovereign process, they clearly illustrate that tax systems and processes are core. Here, the determination of residency is a foundational step in the collection of state personal income taxes. No State can effectively carry out its tax administration without being able freely to review and investigate a taxpayer's claims, even when they involve a claimed change of residency.

Likewise, all States exercise their law enforcement powers for the preservation of the health, safety, and welfare of their citizens. It is reasonable to characterize tax assessment and collection and law enforcement as core governmental functions, while the same may not be true for recruiting for a state university football team. The difficulty of drawing a bright line is less important than assuring that all processes that clearly are core are protected under the Full Faith and Credit Clause.

In addition, hypothetical difficulties in applying the rule are insignificant when compared to the harm to cooperative federalism – protected by the Full Faith and Credit Clause – that will occur if the Board's rule (or one having the same effect) is not adopted. As explained above, Hyatt's lawsuit is not limited to acts in Nevada, but intrudes into all aspects of California's decisions and actions in auditing Hyatt and assessing taxes against him.

Finally, despite the absence of a bright-line test, this Court has made similar types of determinations in various other settings. For example, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1977), a five-member majority of this Court held that the Coeur d'Alene tribe could not employ the *Ex parte Young*, 209 U.S. 123 (1908) exception to the Eleventh Amendment in a suit against the State of Idaho because the subject matter of the suit (ownership of the submerged lands and beds of Lake Coeur d'Alene) implicated Idaho's "special sovereignty interests," despite the fact that no attempt was made to *define* the term. *Id.* at 281, 287-288. And, in *Maine v. Taylor*, 477 U.S. 131 (1985), the Court held that Maine's statutory ban on the importation of live baitfish did not unconstitutionally burden interstate commerce, in part because the ban "serves *legitimate local purposes*[.]" *Id.* at 151 (emphasis added). In each of these cases, the court employed the test without attempting to define the universe of situations that would come within it. Likewise, here, the core-sovereign-function test is workable without having to describe every circumstance in which it might apply.

3. This Court did not reject the Board's proposed rule in *Bonaparte v. Tax Court*.

Hyatt also claims that the Board's rule has been impliedly rejected by this Court in *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), a case that rejected the argument that full faith and credit barred a State from taxing the obligation of another State. According to Hyatt, *Bonaparte* involved "'interference' with 'core sovereign responsibilities,'" and since full faith and credit did not bar that, it should not bar Nevada's refusal here to apply California law. However, *Bonaparte* did not involve a lawsuit against

a defendant State that had raised the issue of applying its own immunity statute. Moreover, it only resulted in trimming a benefit to the non-forum State, it did not involve the type of interference with the tax *process* that exists in this case.

4. The Board's new rule is necessary.

Hyatt asserts that the Board's rule is unnecessary because of the protection already afforded to sister State defendants through comity, interstate compacts, and Congressional action. Any notion that a new rule is unnecessary because of comity, interstate compacts, and Congressional action is put to rest by the fact that this case is ongoing. Moreover, a new rule is necessary because current choice-of-law methodology does not remotely contemplate the cynical use of a State's judicial processes by a plaintiff against his former State of citizenship, to interfere with an ongoing governmental investigation of the plaintiff by the defendant State – especially when that investigation concerns tax obligations that were incurred during the time of plaintiff's former citizenship. In such a context, it is obviously insufficient simply to look at the face of the complaint and consider whether the forum State is competent to legislate in the general area of law encompassed by the allegations. Such an approach ignores the inescapable fact that plaintiff seeks to elevate the status of the forum court to that of a judge over the governmental investigation that is being conducted against plaintiff by the defendant sister State.

Furthermore, the Board's rule is necessary because this case cries out for full faith and credit protection. There must be a solution other than mere reliance on a

forum State's willingness to grant comity, because – as this case shows – comity is no solution. Both the type and amount of interference that the Board has detailed above illustrate that Nevada's refusal to extend full faith and credit has resulted in exactly the evils that Justice Stevens commented on in his concurring opinion in *Allstate*, where he explained that the Full Faith and Credit Clause "would be invoked to restrain 'any policy of hostility to the public Acts' of another State," and would prevent the "parochial entrenchment on the interests of other States." *Allstate Insurance Co. v. Hague*, *supra*, 449 U.S. at 323 n.10 (Stevens, J., concurring).[11]

[11] This Court held long ago that " . . . no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit." *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Court reverse the order of the Nevada Supreme Court.

Respectfully submitted,

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EXHIBIT 46

Supreme Court of the United States
FRANCHISE TAX BOARD OF CALIFORNIA, Petitioner,
v.
Gilbert P. HYATT, et al.
No. 02-42.

Argued Feb. 24, 2003.
Decided April 23, 2003.

Taxpayer, former California resident who had moved to Nevada, brought state-court action in Nevada against California tax collection agency, alleging negligent misrepresentation, invasion of privacy, fraud and other torts in connection with agency's assessments and penalties for tax year for which taxpayer filed as part-year California resident. The Nevada Supreme Court denied in part agency's petition for writ of mandamus, ordering Clark County District Court to dismiss negligence claim for lack of jurisdiction but finding that intentional tort claims could proceed to trial. Certiorari was granted, 537 U.S. 946, 123 S.Ct. 409, 154 L.Ed.2d 289. The United States Supreme Court, Justice O'Connor, held that Nevada court was not required to extend full faith and credit to California statute conferring complete immunity on California agencies.

Affirmed.

West Headnotes

[1] States 360 5(2)

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) k. Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States. Most Cited Cases

Whereas Full Faith and Credit Clause is exacting with respect to final judgment rendered by court with adjudicatory authority over subject matter and persons governed by judgment, it is less demanding with respect to choice of laws; Clause does not compel state to substitute statutes of other states for its own statutes dealing with subject matter concerning which it is competent to legislate. U.S.C.A. Const. Art. 4, § 1.

[2] States 360 5(2)

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) k. Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States. Most Cited Cases

Nevada court hearing intentional tort action brought by Nevada resident against California tax collection agency based at least in part on conduct occurring in Nevada was not required to extend full faith and credit to California statute conferring complete immunity on California agencies; Nevada high court's determination that affording immunity to foreign state's agency would contravene Nevada's policy of protecting its citizens from injurious intentional torts committed by sister states' government employees relied on contours of Nevada's own sovereign immunity as benchmark and did not exhibit policy of hostility to public acts of California. U.S.C.A. Const. Art. 4, § 1; West's Ann.Cal. Const. Art. 3, § 5; West's Ann.Cal.Gov.Code §§ 820, 860.2; West's NRSA 41.031.

[3] States 360 191.1

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 k. In General. Most Cited

Cases
Constitution does not confer sovereign immunity on states in courts of sister states.

[4] States 360 ⚿5(2)

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) k. Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States. Most Cited Cases
Full Faith and Credit Clause does not require state to apply second state's sovereign immunity statutes where such application would violate first state's own legitimate public policy. U.S.C.A. Const. Art. 4, § 1.

****1684** Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Hyatt's (hereinafter respondent) "part-year" 1991 California income-tax return represented that he had ceased to be a California resident and had become a Nevada resident in October 1991, shortly before he received substantial licensing fees. Petitioner California Franchise Tax Board (CFTB) determined that he was a California resident until April 1992, and accordingly issued notices of proposed assessments for 1991 and 1992 and imposed substantial civil fraud penalties. Respondent filed suit against CFTB in a Nevada state court, alleging that CFTB had directed numerous contacts at Nevada and had committed negligence and intentional torts during the course of its audit of respondent. In its motion for summary judgment or dismissal, CFTB argued that the state court lacked subject matter jurisdiction because full faith and credit and other legal principles required that the court apply California law immunizing CFTB from suit. Upon denial of that motion, CFTB petitioned the Nevada Supreme Court for a writ of mandamus ordering dismissal. The latter court ultimately granted the petition in part and denied it in part, holding that the lower court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles, but that the intentional tort claims could proceed to trial. Among other things, the court noted that Nevada immunizes its state agencies from suits for discretionary acts but not for intentional torts committed within the course and scope of employment and held that affording CFTB statutory immunity with respect to intentional torts would contravene Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister States' government employees.

Held: The Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, does not require Nevada to give full faith and credit to California's statutes providing its tax agency with immunity from suit. The full faith and credit command "is exacting" with respect to a final judgment rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, *Baker v. General Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580, but is less demanding with respect to choice of laws. The Clause does not compel a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it ***489** is competent to legislate. *E.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722, 108 S.Ct. 2117, 100 L.Ed.2d 743. Nevada is undoubtedly competent to legislate with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders. CFTB argues unpersuasively that this Court should adopt a "new rule" mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would interfere with the State's capacity to fulfill its

own sovereign responsibilities. The Court has, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve ****1685** conflicts between overlapping laws of coordinate States. See, *e.g.*, *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026. However, this balancing-of-interests approach quickly proved unsatisfactory and the Court abandoned it, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308, n. 10, 322, n. 6, 339, n. 6, 101 S.Ct. 633, 66 L.Ed.2d 521, recognizing, instead, that it is frequently the case under the Clause that a court can lawfully apply either the law of one State or the contrary law of another, *Sun Oil Co. v. Wortman, supra*, at 727, 108 S.Ct. 2117. The Court has already ruled that the Full Faith and Credit Clause does not require a forum State to apply a sister State's sovereign immunity statutes where such application would violate the forum State's own legitimate public policy. *Nevada v. Hall*, 440 U.S. 410, 424, 99 S.Ct. 1182, 59 L.Ed.2d 416. There is no constitutionally significant distinction between the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereign function. States' sovereignty interests are not foreign to the full faith and credit command, but the Court is not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. *Carroll v. Lanza*, 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183. The Nevada Supreme Court sensitively applied comity principles with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis. Pp. 1687-1690.

Affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Bill Lockyer, Attorney General of the State of California, Manuel M. Medeiros, State Solicitor, David S. Chaney, Senior Assistant Attorney General, Wm. Dean Freeman, Lead Supervising Deputy Attorney General, Felix E. Leatherwood, Deputy Attorney General, Counsel of Record, Los Angeles, CA, for petitioner.

Gilbert P. Hyatt, Mark A. Hutchison, Hutchison & Steffen, Las Vegas, NV, Donald J. Kula, Riordan & McKinzie, Los Angeles, CA, ***490** H. Bartow Farr, III, Counsel of Record, Farr & Taranto, Washington, DC, Peter C. Bernhard, Bernhard, Bradley & Johnson, Las Vegas, NV, for respondents.

For U.S. Supreme Court briefs, see:2002 WL 31827845 (Pet.Brief)2003 WL 181170 (Resp.Brief)2003 WL 469130 (Reply.Brief)

Justice O'CONNOR delivered the opinion of the Court.

We granted certiorari to resolve whether the Nevada Supreme Court's refusal to extend full faith and credit to California's statute immunizing its tax collection agency from suit violates Article IV, § 1, of the Constitution. We conclude it does not, and we therefore affirm the judgment of the Nevada Supreme Court.

I

Respondent Gilbert P. Hyatt (hereinafter respondent) filed a "part-year" resident income tax return in California for 1991. App. to Pet. for Cert. 54. In the return, respondent represented that as of October 1, 1991, he had ceased to be a California resident and had become a resident of Nevada. In 1993, petitioner California Franchise Tax Board (CFTB) commenced an audit to determine whether respondent had underpaid state income taxes. *Ibid.* The audit focused on ***491** respondent's claim that he had changed residency shortly before receiving substantial licensing fees for certain patented inventions related to computer technology.

At the conclusion of its audit, CFTB determined that respondent was a California resident until April 3, 1992, and accordingly issued notices of proposed assessments for income taxes for 1991 and 1992 and imposed substantial civil fraud penalties. *Id.*, at

56-57, 58-59. Respondent ****1686** protested the proposed assessments and penalties in California through CFTB's administrative process. See Cal. Rev. & Tax.Code Ann. §§ 19041, 19044-19046 (West 1994).

On January 6, 1998, with the administrative protest ongoing in California, respondent filed a lawsuit against CFTB in Nevada in Clark County District Court. Respondent alleges that CFTB directed "numerous and continuous contacts ... at Nevada" and committed several torts during the course of the audit, including invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation. App. to Pet. for Cert. 51-52, 54. Respondent seeks punitive and compensatory damages. *Id.*, at 51-52. He also sought a declaratory judgment "confirm[ing][his] status as a Nevada resident effective as of September 26, 1991," *id.*, at 51, but the District Court dismissed the claim for lack of subject matter jurisdiction on April 16, 1999, App. 93-95.

During the discovery phase of the Nevada lawsuit, CFTB filed a petition in the Nevada Supreme Court for a writ of mandamus, or in the alternative, for a writ of prohibition, challenging certain of the District Court's discovery orders. While that petition was pending, CFTB filed a motion in the District Court for summary judgment or, in the alternative, for dismissal for lack of jurisdiction. CFTB argued that the District Court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity, and administrative exhaustion all required that the District Court apply California law, under which:

> ***492** "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 [or]
>
> "(b) An act or omission in the interpretation or application of any law relating to a tax." Cal. Govt.Code Ann. § 860.2 (West 1995).

The District Court denied CFTB's motion for summary judgment or dismissal, prompting CFTB to file a second petition in the Nevada Supreme Court. This petition sought a writ of mandamus ordering the dismissal of the case, or in the alternative, a writ of prohibition and mandamus limiting the scope of the suit to claims arising out of conduct that occurred in Nevada.

On June 13, 2001, the Nevada Supreme Court granted CFTB's second petition, dismissed the first petition as moot, and ordered the District Court to enter summary judgment in favor of CFTB.App. to Pet. for Cert. 38-43. On April 4, 2002, however, the court granted respondent's petition for rehearing, vacated its prior ruling, granted CFTB's second petition in part, and denied it in part. *Id.*, at 5-18. The court held that the District Court "should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles" but that the intentional tort claims could proceed to trial. *Id.*, at 7.

The Nevada Supreme Court noted that both Nevada and California have generally waived their sovereign immunity from suit in state court and "have extended the waivers to their state agencies or public employees except when state statutes expressly provide immunity." *Id.*, at 9-10 (citing Nev.Rev.Stat. § 41.031 (1996); Cal. Const., Art. 3, § 5; and Cal. Govt.Code Ann. § 820 (West 1995)). Whereas Nevada has not conferred immunity on its state agencies for intentional torts committed within the course and scope of ***493** employment, the court acknowledged that "California has expressly provided [CFTB] with complete immunity." App. to Pet. for Cert. 10 (citing Cal. Govt.Code Ann. § 860.2 (West 1995) and *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 228 Cal.Rptr. 750 (1986)). To determine which State's law should apply, the court applied principles of comity.

****1687** Though the Nevada Supreme Court recognized the doctrine of comity as "an accommodation

policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations," the court also recognized its duty to determine whether the application of California law "would contravene Nevada's policies or interests," giving "due regard to the duties, obligations, rights and convenience of Nevada's citizens." App. to Pet. for Cert. 11. "An investigation is generally considered to be a discretionary function," the court observed, "and Nevada provides its [own] agencies with immunity for the performance of a discretionary function even if the discretion is abused." *Id.*, at 12. "[A]ffording [CFTB] statutory immunity for negligent acts," the court therefore concluded, "does not contravene any Nevada interest in this case." *Ibid.* The court accordingly held that "the district court should have declined to exercise its jurisdiction" over respondent's negligence claim under principles of comity. *Id.*, at 7. With respect to the intentional torts, however, the court held that "affording [CFTB] statutory immunity ... does contravene Nevada's policies and interests in this case." *Id.*, at 12. Because Nevada "does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment," the court held that "Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees" should be accorded ***494** greater weight "than California's policy favoring complete immunity for its taxation agency." *Id.*, at 12-13.

We granted certiorari to resolve whether Article IV, § 1, of the Constitution requires Nevada to give full faith and credit to California's statute providing its tax agency with immunity from suit, 537 U.S. 946, 123 S.Ct. 409, 154 L.Ed.2d 289 (2002), and we now affirm.

II

[1] The Constitution's Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Art. IV, § 1. As we have explained, "[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." *Baker v. General Motors Corp.*, 522 U.S. 222, 232, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). Whereas the full faith and credit command "is exacting" with respect to "[a] final judgment ... rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment," *id.*, at 233, 118 S.Ct. 657, it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel " 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' " *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939)).

The State of Nevada is undoubtedly "competent to legislate" with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders. " '[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.' ***495** " *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (quoting ****1688***Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (plurality opinion)); see 472 U.S., at 822-823, 101 S.Ct. 633. Such contacts are manifest in this case: the plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada, Brief for Petitioner

33-34, n. 16. See, *e.g.*, *Carroll v. Lanza*, 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183 (1955) ("The State where the tort occurs certainly has a concern in the problems following in the wake of the injury"); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, *supra*, at 503, 59 S.Ct. 629 ("Few matters could be deemed more appropriately the concern of the state in which [an] injury occurs or more completely within its power").

[2] CFTB does not contend otherwise. Instead, CFTB urges this Court to adopt a "new rule" mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would "interfer[e] with a State's capacity to fulfill its own sovereign responsibilities." Brief for Petitioner 13 (internal quotation marks omitted).

We have, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932) (holding that the Constitution required a federal court sitting in New Hampshire to apply a Vermont workers' compensation statute in a tort suit brought by the administrator of a Vermont worker killed in New Hampshire). This balancing approach quickly proved unsatisfactory. Compare *Alaska Packers Assn. v. Industrial Accident Comm'n of Cal.*, 294 U.S. 532, 550, 55 S.Ct. 518, 79 L.Ed. 1044 (1935) (holding that a forum State, which was the place of hiring but not of a claimant's domicile, could apply its own law to compensate for an accident in another State, because "[n]o persuasive reason" was shown for requiring application of the law of the State where the ***496** accident occurred), with *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, *supra*, at 504-505, 59 S.Ct. 629 (holding that the State where an accident occurred could apply its own workers' compensation law and need not give full faith and credit to that of the State of hiring and domicile of the employer and employee). As Justice Robert H. Jackson, recounting these cases, aptly observed, "it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution." Full Faith and Credit-The Lawyer's Clause of the Constitution, 45 Colum. L.Rev. 1, 16 (1945).

In light of this experience, we abandoned the balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause. *Allstate Ins. Co. v. Hague*, 449 U.S., at 308, n. 10, 101 S.Ct. 633 (plurality opinion); *id.*, at 322, n. 6, 101 S.Ct. 633 (STEVENS, J., concurring in judgment); *id.*, at 339, n. 6, 101 S.Ct. 633 (Powell, J., dissenting). We have recognized, instead, that "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil Co. v. Wortman*, *supra*, at 727, 108 S.Ct. 2117. We thus have held that a State need not "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, *supra*, at 501, 59 S.Ct. 629; see *Baker v. General Motors Corp.*, *supra*, at 232, 118 S.Ct. 657; *Sun Oil Co. v. Wortman*, *supra*, at 722, 108 S.Ct. 2117; *Phillips Petroleum Co. v. Shutts*, *supra*, at 818-819, 105 S.Ct. 2965. Acknowledging this shift, CFTB contends that this case demonstrates the need for a new rule under the Full Faith and Credit Clause that will protect "core sovereignty" interests as ****1689** expressed in state statutes delineating the contours of the State's immunity from suit. Brief for Petitioner 13.

We disagree. We have confronted the question whether the Full Faith and Credit Clause requires a forum State to ***497** recognize a sister State's legislatively recaptured immunity once before. In *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), an employee of the University of Nevada was involved in an automobile accident with California residents, who filed suit in Califor-

nia and named Nevada as a defendant. The California courts refused to apply a Nevada statute that capped damages in tort suits against the State on the ground that "to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery." *Id.,* at 424, 99 S.Ct. 1182.

[3] We affirmed, holding, first, that the Constitution does not confer sovereign immunity on States in the courts of sister States. *Id.,* at 414-421, 99 S.Ct. 1182. Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of petitioner's *amici* States, see Brief for State of Florida et al. as *Amici Curiae* 2, to do so. See this Court's Rule 14.1(a); *Mazer v. Stein,* 347 U.S. 201, 206, n. 5, 74 S.Ct. 460, 98 L.Ed. 630 (1954) ("We do not reach for constitutional questions not raised by the parties").

[4] The question presented here instead implicates *Hall's* second holding: that the Full Faith and Credit Clause did not require California to apply Nevada's sovereign immunity statutes where such application would violate California's own legitimate public policy. 440 U.S., at 424, 99 S.Ct. 1182. The Court observed in a footnote:

> "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Id.,* at 424, n. 24, 99 S.Ct. 1182.

***498** CFTB asserts that an analysis of this lawsuit's effects should lead to a different result: that the Full Faith and Credit Clause requires Nevada to apply California's immunity statute to avoid interference with California's "sovereign responsibility" of enforcing its income tax laws. Brief for Petitioner 13.

Our past experience with appraising and balancing state interests under the Full Faith and Credit Clause counsels against adopting CFTB's proposed new rule. Having recognized, in *Hall,* that a suit against a State in a sister State's court "necessarily implicates the power and authority" of both sovereigns, 440 U.S., at 416, 99 S.Ct. 1182, the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada, were we to deem this lawsuit an interference with California's "core sovereign responsibilities." We rejected as "unsound in principle and unworkable in practice" a rule of state immunity from federal regulation under the Tenth Amendment that turned on whether a particular state government function was "integral" or "traditional." *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546-547, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). CFTB has convinced us of neither the relative soundness nor the relative practicality of adopting a similar distinction here.

Even were we inclined to embark on a course of balancing States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause, ****1690** this case would not present the occasion to do so. There is no principled distinction between Nevada's interests in tort claims arising out of its university employee's automobile accident, at issue in *Hall,* and California's interests in the tort claims here arising out of its tax collection agency's residency audit. To be sure, the power to promulgate and enforce income tax laws is an essential attribute of sovereignty. See *Franchise Tax Bd. of Cal. v. Postal Service,* 467 U.S. 512, 523, 104 S.Ct. 2549, 81 L.Ed.2d 446 (1984) ***499** " '[T]axes are the life-blood of government' " (quoting *Bull v. United States,* 295 U.S. 247, 259-260, 55 S.Ct. 695, 79 L.Ed. 1421 (1935)). But the university employee's educational mission in *Hall* might also be so described. Cf. *Brown v.*

Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("[E]ducation is perhaps the most important function of state and local governments").

If we were to compare the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereign function, we would be left to ponder the relationship between an automobile accident and educating, on one hand, and the intrusions alleged here and collecting taxes, on the other. We discern no constitutionally significant distinction between these relationships. To the extent CFTB complains of the burdens and expense of out-of-state litigation, and the diversion of state resources away from the performance of important state functions, those burdens do not distinguish this case from any other out-of-state lawsuit against California or one of its agencies.

States' sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. *Carroll v. Lanza,* 349 U.S., at 413, 75 S.Ct. 804. The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis. See App. to Pet. for Cert. 10-13.

In short, we heed the lessons learned as a result of *Bradford Elec. Light Co. v. Clapper,* 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932), and its progeny. Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.

The judgment of the Nevada Supreme Court is affirmed.

It is so ordered.

U.S.Nev.,2003.
Franchise Tax Bd. of California v. Hyatt
538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702, 71 USLW 4307, 03 Cal. Daily Op. Serv. 3364, 2003 Daily Journal D.A.R. 4281

END OF DOCUMENT

EXHIBIT 47

Supreme Court of the United States

No. 02-42

FRANCHISE TAX BOARD OF CALIFORNIA,

Petitioner

v.

GILBERT P. HYATT, ET AL.

ON WRIT OF CERTIORARI to the Supreme Court of Nevada.

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

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

April 23, 2003

EXHIBIT 48

DISTRICT COURT

CLARK COUNTY, NEVADA

COPY

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	CASE NO. A382999 DEPT. NO. X

TRANSCRIPT OF PROCEEDINGS

BEFORE THOMAS W. BIGGAR, DISCOVERY COMMISSIONER

Taken on Friday, September 30, 2005

At 10:00 a.m.

At 200 South Third Street
Las Vegas, Nevada

Reported by: John L. Nagle, CCR 211

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Also present: Gilbert P. Hyatt
Michael Kern

COMMISSIONER BIGGAR: Okay. Who wants to go first?

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

COMMISSIONER BIGGAR: Okay.

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

COMMISSIONER BIGGAR: Right.

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

COMMISSIONER BIGGAR: Okay.

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

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

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

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

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

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

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

You were not very happy with what was

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

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

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

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

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

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

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

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

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

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

MR. HUTCHISON: Well, you are interrupting.

MR. GIUDICI: There's a lot of hearsay

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

COMMISSIONER BIGGAR: Go ahead, Mr. Hutchison.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER BIGGAR: What should I do about that?

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

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

MR. HUTCHISON: Sure, they could.

COMMISSIONER BIGGAR: -- in the California court?

MR. HUTCHISON: Absolutely.

COMMISSIONER BIGGAR: And they did that?

MR. HUTCHISON: Absolutely.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

next month, the protest officers had.

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

No. We need to take discovery.

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

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

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

And it was based on residency, and now

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

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

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

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

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

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

COMMISSIONER BIGGAR: Move on to the --

MR. HUTCHISON: -- portion.

COMMISSIONER BIGGAR: Let me hear about Toman.

MR. HUTCHISON: How about the Japanese

companies?

COMMISSIONER BIGGAR: Okay.

MR. HUTCHISON: Is that okay?

COMMISSIONER BIGGAR: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER BIGGAR: Plenty of time in

this case, fortunately.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So those are the three areas.

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

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

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

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

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

COMMISSIONER BIGGAR: All right. Well,

you got the points and authorities?

MR. HUTCHISON: Yes, your Honor.

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

MR. HUTCHISON: Right.

COMMISSIONER BIGGAR: -- by computer.

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

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

MR. HUTCHISON: Yes, your Honor.

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

MR. HUTCHISON: Did we get the tapes?

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

Mr. Bradshaw, maybe you can --

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

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

MR. GIUDICI: Yeah.

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

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

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

MR. GIUDICI: Okay.

COMMISSIONER BIGGAR: Who is going to address any --

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

COMMISSIONER BIGGAR: All right.

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

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

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

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

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

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

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

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

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

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

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

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

record for you.

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

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

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

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

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

done by this date.

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

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

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

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

say.

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

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

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

I haven't gotten anything like that. They

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

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

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

MR. GIUDICI: The delay?

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

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

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

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

MR. GIUDICI: The decision-making?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GIUDICI: The process.

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

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

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

protest proceeding.

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

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

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

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

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

In all due respect, your Honor, you are

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Is that not what you're arguing?

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

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

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

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

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

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

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

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

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

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

constitutional authority of any Nevada court to intrude into.

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

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

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

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

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

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

MR. GIUDICI: Right.

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

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

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

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

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

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

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

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

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

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

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

MR. GIUDICI: Yeah.

COMMISSIONER BIGGAR: All right?

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

COMMISSIONER BIGGAR: We'll do that.

MR. GIUDICI: Okay.

COMMISSIONER BIGGAR: Now, let me see.

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

COMMISSIONER BIGGAR: Okay. Okay. Briefly.

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

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

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

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

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

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

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

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

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

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

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

MR. HUTCHISON: Okay.

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

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

caused the delay.

MR. HUTCHISON: Right.

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

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

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

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

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

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

MR. HUTCHISON: Right.

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

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

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

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

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

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

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

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

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

MR. HUTCHISON: Okay.

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

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

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

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

COMMISSIONER BIGGAR: Yes.

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

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

MR. HUTCHISON: Well --

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

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

COMMISSIONER BIGGAR: Protest officers,

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

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

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

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

COMMISSIONER BIGGAR: Right.

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

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

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

COMMISSIONER BIGGAR: I don't think we

need any further comments.

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

MR. BRADSHAW: Process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BERNHARD: They are.

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

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

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

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

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

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

COMMISSIONER BIGGAR: I didn't realize you did.

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

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

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

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

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

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

MR. HUTCHISON: What's the point?

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

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

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

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

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

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

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

MR. HUTCHISON: Good and bad.

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

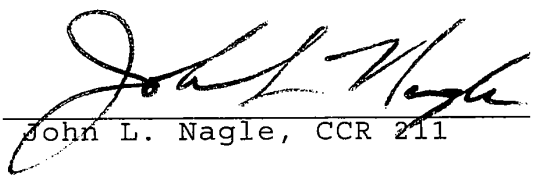
I do -- it's just when I get a stack of significant -- you know, high stack, I really need to have them a few days before the hearing in order to be able to review them and everything, especially if they're more in-camera documents, but we will discuss that, and I expect that exchange of information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

Thank you, gentlemen.

MR. HUTCHISON: Thank you.

*****

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



John L. Nagle, CCR 211

10-1-05

Date

Concordance Report

Unique Words: **1,104**
Total Occurrences: **3,755**
Noise Words: **384**
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Case Insensitive

Noise Word List(s): **NOISE.NOI**

Cover Pages = **2**

Includes **ALL** Text Occurrences

Dates **ON**

Includes Pure Numbers

Possessive Forms **ON**

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11th [1]
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12 [1]
8:19
15 [1]
35:4
17th [2]
56:13, 15
18th [3]
56:14, 16; 59:10
1990s [1]
17:10
19th [2]
56:13, 17

****2****

20 [1]
57:10
2000 [7]
3:25; 6:16; 8:25; 36:6; 39:8; 40:5
2001 [2]
26:16; 36:6
2002 [3]
6:19; 7:14; 27:15
211 [1]
59:25
24/7 [1]
58:1
26 [1]
19:16

****4****

4 [2]
5:11; 28:3
40 [1]
35:5
4th [1]
28:7

****5****

5 [3]
5:11; 27:14; 28:4
50 [1]
30:20
5th [2]
8:25; 22:3

****6****

62 [1]
28:16
63 [1]
28:2

****7****

7 [2]
26:12, 13

****8****

890 [1]
26:14

****9****

90 [1]
16:8
97 [1]
16:8

****A****

able [7]
7:18; 17:7; 18:9; 33:15; 43:14; 46:3; 59:15
absolutely [4]
10:10, 12; 38:18; 44:11
abuse [4]
4:12; 15:16; 29:20; 34:20
accelerate [1]
56:1
accelerating [1]
56:6
accept [1]
44:13
accepting [2]
38:17; 54:2
according [1]
55:14
accrue [1]
7:22
accumulating [1]
4:6
accurate [1]
59:22
act [1]
55:14
acting [1]
53:11
action [2]
5:2; 10:18
actions [2]
12:11; 49:18
adamantly [1]
40:10
added [1]
11:24
addition [1]
31:17
additional [5]
11:24; 12:19, 20; 28:8; 52:15
address [7]
10:17; 23:11, 13; 24:14; 25:25; 26:1; 34:12
administrative [4]
6:14; 7:12; 37:22; 54:24
admissible [1]
50:4
advantage [1]
7:24
advantageous [1]
43:13
advantages [1]
4:3
advice [1]
47:8
advisor [1]
9:15
advocating [1]
58:21
affirmed [1]
46:14
ag's [1]
57:13
agencies [1]
18:3
agree [10]
28:21; 32:12; 40:5, 6, 7, 8; 42:8, 9; 58:18; 59:4
agreement [1]
36:14
agreements [1]
9:13
aiming [1]
36:11
allegation [1]
16:18
allegations [2]
6:2; 53:25
alleged [1]
39:3
allegedly [2]
12:16; 51:4
alleges [1]
33:7
allow [4]
31:8; 32:13; 43:11; 50:9
allowed [3]
13:1; 32:21; 35:15
amazed [2]
38:18; 57:24
amended [1]
33:13
analysis [2]
12:18; 22:21
analyze [1]
28:10
animosity [2]
57:16; 58:16
anna [2]
8:2; 33:10
answer [2]
10:2; 49:15
answers [1]
21:25
anybody [1]
48:18
anyway [2]
45:10; 57:1
anywhere [1]
28:22
apologize [3]
26:23; 27:3; 57:3
appalled [1]
57:22
apparently [3]
27:23; 41:1; 47:8
appear [2]
10:14; 14:17
appeared [1]
3:24
appears [2]
11:23; 27:9
appellate [2]
10:25; 47:11
applies [1]
22:21
appropriate [3]
11:19; 49:16, 18
april [4]
27:14; 28:3, 4
area [1]
45:21
areas [1]
23:3
aren't [3]
10:14; 18:14; 37:19
argue [15]
12:6; 15:5; 23:23; 29:17, 18; 31:6; 32:13, 24; 33:1, 24; 35:15; 43:14; 49:9; 52:4; 53:10
argued [2]
11:13; 42:24
arguing [12]
23:16; 29:17; 31:8; 35:9; 37:2, 3; 40:12; 43:19; 46:25; 47:1, 21; 49:13
argument [24]
15:18, 20; 23:5; 28:20; 31:6, 13; 32:20, 21, 22; 34:14, 21; 36:3; 37:14; 42:23; 43:18; 47:12; 48:13; 49:5; 50:16; 51:3; 52:13; 53:9; 54:19; 56:20
arguments [3]
4:18; 5:18; 46:25
arrived [1]
30:15
aside [1]
13:16
asking [4]
7:18; 9:10; 19:20, 21
aspersions [1]
57:17
asserted [1]
33:11
assessed [2]
4:6; 15:8
assessment [3]
12:4, 24; 33:8
assets [1]
17:21
association [1]
35:2
assume [1]
24:7
assure [1]
55:9
attempt [1]
55:11
attest [1]
59:22
attorney [2]
30:13; 57:11
attorneys [3]
27:11; 38:9, 13
attributed [1]
35:6
audit [12]
12:11; 14:24; 16:13, 14; 19:20; 20:25; 21:13, 18, 21; 29:24; 36:22; 53:24
audited [2]
17:12; 18:1

EXHIBIT 49

0064
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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	Case No. : A 382999 Dept. No. : X Docket No. : R **FTB'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ONGOING CALIFORNIA ADMINISTRATIVE PROTEST PROCESS** **FILED UNDER SEAL BY ORDER OF THE DISCOVERY COMMISSIONER DATED FEBRUARY 22, 1999** **Hearing Date:** **Hearing Time:**

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

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

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

Dated this 4th day of November, 2005.

McDONALD CARANO WILSON LLP

By _____

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NOTICE OF MOTION

TO: All Parties and Their Counsel of Record:

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

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

Dated this 4th day of November, 2005.

McDONALD CARANO WILSON LLP

By _____

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POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

1) Nevada will not assert jurisdiction over Plaintiff's claim for declaratory relief to determine his residency, finding a lack of subject matter jurisdiction, and thus committing the question of his residency to the sole discretion of the State of California. See April 16, 1999 Partial Judgement on the Pleadings, Exhibit 1.

2) Nevada will not assert jurisdiction over the discretionary acts taken by California's agents, finding that Nevada accords immunity to its own agents for such acts and therefore should accord comity to California on that basis. See April 4, 2002, Nevada Supreme Court Order Granting Petition for Rehearing, Vacating Previous Order, Granting Petition for Writ of Mandamus in Part in Docket No. 36390 and Granting Petition for Writ of Prohibition in Part in Docket No. 35549, Exhibit 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. RELEVANT PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

IV. LEGAL DISCUSSION

A. Standard of Review.

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

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

2. Summary Judgment Under NRCP 56.

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

> We now adopt the standards employed in Liberty Lobby, Celotex, and Matsushita. Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. **The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant.** A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.
>
> While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. The non moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." The non moving party '"is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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> The FTB issued notices of proposed assessments in 1996 and 1997 (for each of the respective partial years in dispute – 1991 and 1992, respectively), and to this day has failed to issue a final determination so that Hyatt can pursue his administrative remedies. The FTB's pursuit of Hyatt is best demonstrated by the subpoena at issue in this proceeding. It was issued nine years after the FTB commenced the audits and five years after Hyatt filed the last of his two protests formally contesting the proposed assessments (footnote omitted).
>
> Indeed, the formal hearings for the protests for the respective tax years in dispute were conducted by the FTB protest office in September and October 2000 (footnote omitted). After over a year passed with no decision and little activity on the protest, the FTB informed Hyatt's tax representative that the proceedings were on hold indefinitely pending the outcome of the tort action against the FTB in Nevada (footnote omitted). Before and since that admission by the FTB, Hyatt has repeatedly requested that the FTB bring the protest to a conclusion by issuing its conclusions for each year at issue (footnote omitted).
>
> Moreover, the FTB issued the administrative subpoena in July of 2002 (footnote omitted) As discussed below, this was only a few months after the Nevada Supreme Court issued a definitive order in April 2002 allowing Hyatt's Nevada tort case to proceed to trial. This was almost a year after Hyatt's tax representative had confirmed that he had produced all information requested by the FTB (footnote omitted). The time of the subpoena in-and-of-itself calls into question whether the intended purpose was to try and justify FTB delays in not concluding the tax protest proceedings.

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

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

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

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

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

> Hyatt makes numerous factual assertions that the FTB staff handling his audit are evil, vindictive, malicious people who are out to get him. He argues the California court's order compelling the enforcement of the administrative subpoena should be reversed because FTB pursued the administrative subpoena for an improper purpose. He cites *United States v. Powell,* (1964) 379 U.S. 48, 13 L. Ed. 2d 112, which said a court could refuse to enforce an administrative subpoena brought for an improper purpose, "such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the Court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitation for ordinary deficiencies has run or that the records in question have already been examined." *(Id. at p. 58.)*
>
> Here, Hyatt makes no such showing in his opening brief on appeal. *California Rules of Court, Rule 14*, requires that "each brief must...support any reference to a matter in the record by a citation to the record." (*See City of Lincoln v. Barringer* (2002) 102 Cal. App. 4th 1211, 1239-1240 & fn. 16.)
>
> In the argument portion of his opening brief on appeal, Hyatt gives only three citations to the record, none of which shows evidence of abuse of process. The first two citations are to declarations of two attorneys representing FTB in the Nevada litigation, attesting in support of the petition to enforce the administrative subpoena that Hyatt had not voluntarily agreed that the documents disclosed in the Nevada litigation could be used in the administrative protest. On appeal, Hyatt merely argues that these two lawyers were well-acquainted with the documents and could have provided specificity and insight into why they were relevant to the administrative protest. The third citation to the record is to a memorandum of points and authorities filed by Hyatt in the trial court. Such a memorandum constitutes argument, not evidence, and in any event is only cited in Hyatt's appellate brief to support the assertion that FTB refused to meet and confer with Hyatt . . .
>
> > "'It is the duty of a party to support the arguments in its brief by appropriate references to the record, which includes providing exact page citations.' [Citations.] If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived. [Citation.]" (*Duarte v. Chino Community Hospital* (1999) 72 Cal. App.4th 849, 856.)
>
> We need not further address Hyatt's contention regarding abuse of process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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V. CONCLUSION

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

Dated this 4th day of November, 2005.

McDONALD CARANO WILSON LLP

By _____

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CERTIFICATE OF SERVICE

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

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

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

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	Case No. : Dept. No. : Docket No. :	A 382999 X R **AFFIDAVIT OF JEFFREY A. SILVESTRI**

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

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

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

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

. . .

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

JEFFREY A. SILVESTRI

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

NOTARY PUBLIC in and for said County and State

KAREN A. SUROWIEC
Notary Public State of Nevada
No. 99-38821-1
My appt. exp. Nov. 3, 2007

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EXHIBIT 50

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CLERK

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiffs,

v.

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

Defendants.

Case No.: A382999

Dept. No.: X

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

Date of Hearing: September 30, 2005
Time of Hearing: 10:00 a.m.

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

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NATURE OF ACTION AND APPEARANCES

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

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

DISPUTE RESOLUTION CONFERENCE DATE: September 30, 2005

APPEARANCES:

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

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

I.

FINDINGS

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

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

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

II.

RECOMMENDATIONS

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

Hyatt's Motion to Compel Protest Officers' Depositions

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

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

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

Hyatt's Motion to Compel Goldberg and Toman Depositions

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

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The FTB's Motion for a Protective Order

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

Dated this 20th day of October, 2005.

DISCOVERY COMMISSIONER

Submitted by:
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Approved as to form:

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By: _____
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NOTICE

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

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

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

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

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

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

SHIRLEY R. PARRAGUIRRE

By: Marisa Masciletti for
Deputy Clerk

MARY DAIGLE

Case Name: *Hyatt v. Franchise Tax Board*
Case Number: A382999

ORDER

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

_____ The parties having waived the right to object thereto,

✓ cd No timely objections having been filed thereto,

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

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

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

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

Dated this 7th day of Nov ✓, 2005.

DISTRICT COURT JUDGE

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EXHIBIT 51

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiffs,

v.

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

Defendants.

Case No.: A382999

Dept. No.: X

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

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

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

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

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TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

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

1. Introduction.

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

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

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

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

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

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

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

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

2. Summary of argument.

Post-complaint bad faith conduct of the FTB

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

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

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

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

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

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

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

[2] First Amended Complt., ¶ 20.

[3] FTB Motion, at 4:24-26.

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

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

California subpoena proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] *See* Exhibit 2 to FTB Motion.

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

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

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

[11] *Id.*, at 34-36, 38-47.

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

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

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

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

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

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

[13] *Id.*

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

[15] *Id.* at 22.

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

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

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

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

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

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

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

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

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[19] *Id.*

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

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

[22] *Id.* at 7-8.

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

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

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

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

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

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

[24] 538 U.S. at 497.

[25] 440 US. 410 (1979).

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

[27] *Hyatt*, 538 U.S. at 497-99.

[28] *Hyatt*, 538 U.S. at 499.

[29] *Id.*

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

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

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

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

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

[30] FTB Motion, at 11.

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

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

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

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

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

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

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

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[32] *Id.* at 11-12.

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

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

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

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

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

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

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

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

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

The FTB, primarily through Cox's actions, disregarded, refused to investigate, ignored, and "buried" the facts favorable to Hyatt that 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, utility, telephone, 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;
- changes of address from California to Nevada address.[41]

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

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

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

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

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

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

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

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

In preparing its Narrative Reports, the FTB never spoke with or interviewed Hyatt nor did it schedule the required closing conference for Hyatt and his tax representatives, but instead prematurely closed the audits.[43] The FTB also ignored and failed to interview the following individuals having information favorable to Hyatt: Grace Jeng, his long-time assistant; Helene Schlindwein, his long-time friend; Dan Hyatt, his adult son; and Barry Lee, his long-time business associate.[44] Instead, the FTB audited Miss Jeng and Barry Lee's company[45] to try and intimidate them and separate them from Hyatt.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[51] *See* H 08950, attached hereto as Exhibit 20.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[62] *See, e.g.,* First Amended Complt., ¶ 20.

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

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

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

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

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

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

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

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[64] *Id.*

[65] *Id.*

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

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referred Eric to you. Eric said he would be calling you.[67]

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

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

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

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

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

[68] *Id.*

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

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

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

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12:2 - 13:12, 14:25 - 15:12)[72]

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

> Here's what my problem is. They [Plaintiff] are arguing, and they want to argue, and they'll want to argue at trial that a part and parcel of the persecution of Mr. Hyatt's by the FTB, as they would characterize it, the Tax Board's abuse in regard to him, would be this failure to reach a decision in the protest -- at the protest level for X number of years, and however they will characterize it, whenever they want to start counting, from when the audit started or when the first report was made or whenever they want to say.
>
> And they're going to be talking about years and years and years, and they're going to be saying this is unprecedented and it's never happened before. Your position is obviously no, that's not right. You know, and we have all of these good reasons, but they're going to say, well, they want to say that, and they want to produce this e-mail, and they want to produce this memo, and they want to give us these lines, but they don't want to let us talk to any of these witnesses because they have privileged information and their attorneys, so they can't talk about these procedures.
>
> Now, to me, that is -- we have arrived at an unfair impasse here. I think they're entitled to make this claim, because I think any reasonable person would say, "I've never seen -- you've never given me any documents -- you've never given me -- look, Mr. Commissioner, you know, here's 50 other cases that took this long. Here's their names and so forth. And if you want to check details on them, you can see that many cases the last ten years or seven years or eight years at this level, and it's not unusual"
>
> I haven't gotten anything like that. They haven't gotten anything like that. If they got something like that, I think that would be puncturing their balloon and they wouldn't have much to say.
>
> But, you know, I would think that -- I'm certainly not making a decision, but that a judge would let them argue that as part of their argument.[73]

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

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

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

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

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> I mean we're not talking about forcing them to make some decision on some multimillion dollar case in two weeks. We're talking about years here that nothing has happened.
>
> So, you know, that's -- you want to argue and talk about good faith all the time, and its very difficult for me to swallow it, given what I see as happening taking place by your client [the FTB].[74]

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

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

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

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

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

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

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

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

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

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

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

[78] P 00267, attached hereto as Exhibit 34.

[79] *Id.*

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

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

Amnesty offer

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

Publication of expected recovery from Hyatt

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

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

[81] *See* the Amnesty assessment H 025602 – 025606 attached hereto as Exhibit 36.

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

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

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

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

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

> In my view, and I believe I said before, that the audit -- the audit process I have difficulty in separating the audit from the protest, and I base that upon the fact that I don't find that the audit and the protest are sufficiently different in nature that it's one of the bases for the reason that Anna Jovanovich's actions as well now, when I've had you produce this information concerning what's holding up the protest.
>
> I agree with the plaintiffs and the case citations, which they have, plus all the law that flows out of that, that we aren't [at] a true administrative hearing at this time, or at least anything where there's a -- any kind of impartial officer or anything.
>
> You know, the protest officer and the auditor are in effect doing the exact same thing. Its just they -- one person makes a determination, and then you file a protest, and then the second person makes a determination.
>
> But the second person, you know, has been actively working as a part of the initial audit and giving advice. So until we come to a new -- which apparently in California, and the way the process is set up, would not come until the Board of Equalization review, you know, we're still in the audit process.
>
> That's the way I've got to view this case, and so when the argument is made by the FTB that I'm setting certain parameters on discovery and limiting it to the audit process of Hyatt, that's true in most instances,

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> because the bulk of the complaint certainly has to do with the initial audit process and the intrusions, alleged intrusions, into the plaintiff's life particularly in Nevada.
>
> But as a part of the continuing audit process, I mean, there's been no end to it. There's been no determination to, you know, this is our final work on it, pay or appeal. You know, its still --
>
> We're still in the investigative phase, as evidenced by the FTB's current argument that the reasons for -- there's been no decision there because they still haven't gotten information from Mr. Hyatt. I mean that's part of the argument as to why we've been X number of years finishing the "protest."
>
> So that's why I feel as though if at any time during this case, whenever, there had been a decision by part 2 of the FTB process that says no, you owe this much, pay, you know, or appeal to the next, you know step, which would in effect be encompassed in the administrative hearing statute, and then -- or then on to court, you know, I could then say to the FTB, you know, it's done now, and it's over and, you know, you're off the hook, but I can't say that at this time.
>
> So when you're complaining about, no, the discovery is going on and on, well, I am trying to fashion discovery parameters that would go to their actions . . .[83]

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

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

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

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

[84] Documents produced or on a privilege log bate numbered P 00001 – P 11370.

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

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

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

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

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

[85] Jovanovich notes, attached hereto as Exhibit 22.

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

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and courts have no authority to break new ground:

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

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

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

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

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

[89] Cal. Gov. Code § 11475.20.

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

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

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

(Emphasis added.)

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

> "§ 11415.50. Procedure where adjudicative proceeding not required; informal investigations.
>
> "(a) An agency may provide any appropriate procedure for a decision for which an adjudicative proceeding is *not* required.
>
> (b) An adjudicative proceeding is *not* required for informal fact finding or an informal investigatory hearing, or a decision to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise."[92]

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

[91] *Id.*

92 *Id.*

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

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

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

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

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

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

[95] 313 U.S. 409, 422 (1941)

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

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

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

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

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

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

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

[98] *See* discussion, *supra* at __.

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

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delay argument, and Hyatt was not even aware of the hold until 2002.[100]

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

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

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

[100] *Id.*

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

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

[103] *Id.*

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

[105] FTB Motion, at 14.

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

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

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

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[106] FTB Motion, at 15.

[107] FTB Motion, Exhibit 21, at 6.

[108] *Id.*

[109] FTB Motion, at 16.

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

[111] *Id.*

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

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

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

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

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10. Conclusion.

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

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

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

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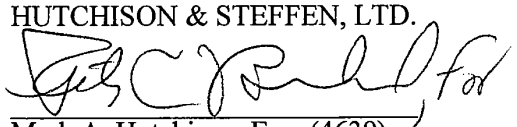
also produced substantial documents from the Protest Officers, including many post-complaint documents. The FTB's conduct during the protest phase of its investigation of Hyatt is and always has been part of this case. Hyatt must be allowed to pursue in discovery all aspects of the FTB's bad faith conduct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

Dated this 23 day of November, 2005.

HUTCHISON & STEFFEN, LTD.



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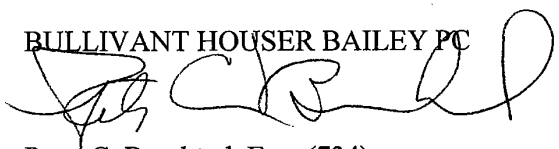

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EXHIBIT 52

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

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

BEFORE THE HONORABLE JESSIE WALSH DISTRICT COURT JUDGE

HEARING ON MOTIONS

MONDAY, JANUARY 23, 2006

COURT RECORDER:

VICTORIA BOYD
District Court

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

MR. HUTCHISON: Oh, it --

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

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

THE COURT: All right.

Ms. Lundvall, the next motion?

MS. LUNDVALL: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

The first action that Mr. Hyatt took, the first

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

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

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

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

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

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

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