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 13 OF 42**

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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
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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 13 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

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

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

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

THE COURT: Sure.

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

If you take a look at how Mr. Hyatt characterizes

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

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

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

what his representation is to the Nevada Supreme Court.

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

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

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

And one of the things that I would offer to this

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

THE COURT: All right. Thank you.

Mr. Hutchison.

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

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

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

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

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

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

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

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

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

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

Absolutely.

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

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

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

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

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

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

legal rights to challenge the tax itself and pay us some money to keep it quiet. Now they're continuing to accrue massive amounts of money, hanging that over Mr. Hyatt's head simply by not making a decision on the protest.

So the first issue in my mind is whether or not the particular allegations of what's happening in the protest is encompassed within the four corners of our complaint. Clearly the answer is yes. The rule then is, that we're entitled to do discovery. Find out what relevant evidence there is with respect to that process, and that's exactly what Commissioner Biggar ordered. He said we could take discovery of the protest process. And he was looking at the same arguments the FTB is making here, which also are before you today in the challenge to his DCRR. And he said, again, you have control, FTB, over whether or not you want to produce that discovery. If you want to decide the case and let Mr. Hyatt go forward and pursue his rights, fine, go ahead and do that. But this particular aspect of the case is not a new claim, it's an extension of the same things that occurred prior to filing the complaint.

So the complaint was filed in January of 1998. Since that time we have discovered a few things. One is a memo from counsel to the Franchise Tax Board the day after the Nevada Supreme Court said Mr. Hyatt was entitled to go to

trial on his intentional tort claims. That memo, from Franchise Tax Board counsel says, maybe we should put the protest on hold. In other words, let's not decide it, let's keep it open, again as a sword of Damocles over Mr. Hyatt. Now since it looks like we're gonna have to defend in Nevada, which we thought we were not gonna have to do, we need leverage. Let's hold that leverage over Mr. Hyatt. Let's go ahead and not decide the protest.

This is despite the fact that Mr. Hyatt's attorney in the protest was told by the protest officer and the protest officer's supervisor that a decision was imminent, it was forthcoming. All Mr. Hyatt has ever wanted is for the FTB to take this out of the audit process and put him in front of a third party independent decision maker where he can present his case on the merits of the tax claim.

So contrary to what Ms. Lundvall argues in her pleadings and her brief, we're not litigating the protest in this case. What we're saying is, that events after the filing of the complaint are evidence discoverable to support the underlying intentional torts. And that's not a novel concept.

Again, analogies are never perfect, but in a discrimination case if a person files a complaint and there's retaliation against that person after filing the complaint, is that retaliation a subject of discovery? Absolutely. It's a

proper subject of discovery, and that's what Commissioner Biggar has ordered here. We can examine the protest process as part of the allegations that this is a continuation of the same facts that we have alleged, which Nevada Supreme Court says we're entitled to go to trial on relating to these intentional torts.

So I submit the issues have to be separated. Is it within the complaint? Yes. Are we entitled to discovery? Yes. And the third question, is it going to be admissible evidence at trial? That question is not yet before you. And that is the proper subject of a motion in limine if the FTB chooses to bring it. And say, wait a minute, we don't think post complaint actions should be admitted as part of a continuing tort. We will oppose that motion and argue, yes, it should be admitted. But this summary judgment motion is simply premature. The context is wrong. There is no claim, there is no separate claim that the protest is something that we're trying to control. We're not trying to decide California's tax proceeding. All we're saying is carry it out, do it, finish it, make a decision, give us an impartial decision maker. Don't hold us up with everybody changing hats at different times in the course of your administrative protest when all you have right now is a notice of proposed assessment that cannot be adjudicated by an independent third

party.

So when Ms. Lundvall talks about the avenues of appeal where we can take this to the Board of Equalization, we can take it to California Superior Court, we can take it to the Court of Appeals, we can take it to the California Supreme Court, all of that is true once the protest officer lets go. And the Franchise Tax Board, the defendant in this case, has held onto the case and has prevented the protest hearing officer in making a decision. So we think we're entitled to discovery of the facts behind what the Franchise Tax Board has done in the protest.

So I think, at minimum, the Court should deny the motion without prejudice today. Let the Franchise Tax Board bring it up at the time closer to trial in the form of a motion in limine and we'll argue whether or not the evidence that we discover, under Commissioner Biggar's order, should be admitted as evidence at trial.

This argument about a quasi judicial privilege, as I've said, the protest hearing officer process is not an independent judicial decision maker. The way that the Hyatt case has operated and the way many other protests operate is there are attorneys who advise the Franchise Tax Board during the course of audits. They have a case load. They are then assigned cases to handle as a protest officer. So they may

come in in the morning at 8 o'clock and be a Franchise Tax Board attorney advising an auditor while an audit is in progress. At 9 o'clock they take that hat off and put on a hat of a protest officer and rule on or study the validity of the work of another auditor. And in this case it's even more egregious because the same attorney who advised the auditor in this case was then told to put on the hat as a protest hearing officer and make a decision whether or not that auditor did the correct thing, relying on the advise of the protest hearing officer. That's the dilemma we face. We think we're entitled to discover how this happens and what the process actually is, and then it's up to the Court, closer to trial, to decide whether or not that evidence comes in as evidence.

A couple quick comments about the California subpoena process. The allegation in California was that the issuance of the subpoena was in bad faith, not that the protest was in bad faith. There is no collateral estoppel. That's not the law of the case. That was not presented to the California Court. California Trial Court did not even make a decision, did not make a ruling on bad faith. The issue in the trial court in California was relevance.

We've already had discovery of protest hearing officer events. The FTB has taken discovery of Mr. Hyatt and his people and asked about things that have happened during

the protest. Commissioner Biggar allowed us, and I'll just hold up for the Court the protest hearing officer event log where there have been substantial redactions and these redactions, of course, have already been excluded by Commissioner Biggar. But we're entitled to take discovery on the things that are not redacted. We're entitled to ask the hearing officer about these things. And Commissioner Biggar did an appropriate weighing of the concerns of the Franchise Tax Board with respect to this process and Mr. Hyatt's rights, as a resident of Nevada, to have his intentional torts fully litigated. So we should be entitled to discover that information.

I think, Your Honor, with that there are a couple other points I could raise but the briefing covers all of these. I think the proper course on this particular motion is to deny it without prejudice, let us do the discovery, affirm and uphold Commissioner Biggar's learned detailed studied ruling which says we're entitled to discovery of the protest process based on these allegations and let us go forward, bring the case and bring the issue to you at the time of trial in the context of a motion in limine.

Thank you.

THE COURT: Thank you, Mr. Bernhard.

Ms. Lundvall

MS. LUNDVALL: Very briefly, Your Honor.

Mr. Bernhard suggested he doesn't know what I want. Let me try to make myself as clear as possible.

I do not want the California tax protest process to be within the scope of this case. That's what our motion for summary judgment asks this Court to do. That's as simple as I can make it.

Second, on one had Mr. Bernhard argues that Nevada Courts aren't trying to tell the California protest officer what to do or how to run their process. But then in the next breath what he tells you is Discovery Commissioner Biggar said you don't want to have this discovery, decide the case, make a ruling. Who cares if you don't have all the information that you've asked for from Mr. Hyatt. Who cares if he hasn't given you that, just make a decision and just move on. If that isn't telling the protest hearing officer what to do, then I don't know what is.

It's basically, you know, making a threat, either make a decision, California, or else I'm going to subject you then to discovery. It'd be like Mr. Hyatt suggesting to this Court, make a decision or else I'm going to subject you to discovery. That's exactly what their argument is.

And so what they are doing then is trying to reach into the discretionary acts of the State of California. And

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Nevada Supreme Court in its decision said, we are going to treat California no different than we treat ourselves. Those are discretionary acts in Nevada and therefore they should be considered to be discretionary acts in California as well.

Next, Mr. Hyatt contends that somehow that he's in -- that he feels like he's in jail because that the protest hearing officer is not making a decision. Well, if so, why doesn't he turn over the documentation that she's been asking for? That's point number one. He has the keys to his own jail cell as he describes it.

Point number two, though, is under California law. If Mr. Hyatt doesn't like being within the California administrative protest process, he can get out himself. There is a provision whereby what you do is you pay the tax and you file a suit then in Superior Court and claim your refund. That gets him out just like that.

So if, in fact, that he doesn't want the process to continue, he has the keys then to that own process by which to turn it over. In fact, two sets of keys. Give them the information or go ahead, pay the claim, and then -- pay the assessed tax and then file a claim for a refund.

The next point that was made by Mr. Bernhard is this. The issues in the California case that were decided were different than the issues that are in front of you. The

only thing I can do, rather than reading and quoting at length from both their arguments as well as the decisions, is ask this Court to take a look at the briefs that were filed by Mr. Hyatt as well as the decisions that were issued by the California courts.

Mr. Hyatt argued, and at page 12 in our brief we set it forth as far as where you can find his oppositions, where you can find his briefs to the California Supreme Court and where you can find those decisions. That in fact, it was the California tax protest process that was being conducted in bad faith. And the California courts said, no, it is not. And that is the decision then that this Court is obligated then to embrace and therefore, not to look behind that decision by allowing the protest, the California tax protest to be folded into this case.

And lastly, Your Honor, I -- I guess one more point as far as before I turn to my last point, and that is this. During the course of discovery in this case Mr. Hyatt himself has taken the position, you can't learn anything what I'm doing over there in the California tax protest. That's not part of this case. In other words, on one hand he wants to make it part of this case by seeking discovery against the FTB, but he doesn't want to do the same thing himself.

And so to the extent that we are simply asking this

Court to recognize what the Nevada Supreme Court, the U.S. Supreme Court, and the California Courts have said, this case is limited to the audit, not the California tax protest which is a separate administrative appeal. It's a right that is set forth in California law, available to Mr. Hyatt. No different than he has appeal rights to the Board of Equalization, no different than he has appeal rights to the Superior Court, and all the way through.

And so therefore, Your Honor, we would ask for just a simple decision that says this. The scope of this case does not include the California tax protest.

Thank you, Your Honor.

THE COURT: Thank you, counsel.

There are several issues that I want to address because I want to make as clear a record as I can.

First of all, defendant is correct in stating that this Court should neither decide the residency status of the plaintiff nor the tax liabilities that plaintiff may or may not have. However, it has been decided that the plaintiff may maintain claims for intentional torts in this case.

The bad faith acts of the protest officers are completely relevant to the plaintiff's claims of bad faith on the part of the defendant. Plaintiff should be allowed to argue and produce evidence of defendant's alleged continued

bad faith in this case.

This Court is not persuaded with respect to the collateral estoppel argument. The issue that was raised in the California courts dealt with bad faith and improper purpose. However, those issues were confined in those hearings to bad faith and improper purpose of the issuing of the subpoena. It did not deal with defendant's alleged bad faith as a whole.

This Court's view of the quasi judicial privilege is that it does not apply in this particular case for the very reasons that counsel argued. It seems that the hearing officers are performing more than investigatory function, much like that of the auditors than a judicial function.

It appears to the Court that there is a genuine issue of material fact with respect to plaintiff's bad faith delay claim. To that extent, the Court is inclined, for the reasons enumerated already, the Court is inclined to deny defendant's motion for summary judgment regarding the ongoing California administrative process.

That brings us to defendant's objections to Discovery Commissioner's report and recommendations.

MS. LUNDVALL: Your Honor, one point of clarification. I would assume that if, in fact, that the Court is finding that any allegations of bad faith engaged in

by the protest hearing officer as being relevant, is that also the Court then would find is relevant Mr. Hyatt's activities in the protest and therefore, that we've got both issues then in front of the Court, within the scope of this case.

THE COURT: What are you getting at, Ms. Lundvall?

MS. LUNDVALL: What I'm getting at is this, is that whatever actions that Mr. Hyatt is taking in the State of California as it relates to protest, that too should be open to discovery. At this point in time Mr. Hyatt is drawing a very strict line of demarcation and says, no, you can't learn what I'm doing regarding the protest. You can't discover and seek admissible evidence in this case as to what I'm doing, I can only learn what you're doing. And so therefore, I want to make sure that we got reciprocal obligations.

THE COURT: Mr. Bernhard?

MR. BERNHARD: Very simple, Your Honor. The Franchise Tax Board and the protest process knows what's being done there. They already know that. We have not raised an objection except on established privileges unrelated here, like attorney/client, accountant/client, attorney work product. They still can't get into that unless they bring a motion to compel, and that's not before you today.

So I think the information they already have on the protest is a matter of record with what we have filed with the

protest officer. That's already there. They have that. They know what we've done, what we've filed. There's no reason to expand the ruling in this case on a matter that wasn't briefed and wasn't before you in their motion. They didn't ask for that in their motion. If they want to bring that as a separate motion, let them do so and we'll brief it.

MS. LUNDVALL: If, in fact, that Mr. Bernhard wants briefing on the issue, we're happy to provide it. But basically my argument is the sauce good for the goose is good for the gander. If in fact that he wants discovery into our actions in the California tax protest, then we too are entitled to seek discovery from Mr. Hyatt. And right now there is an artificial wall that has been imposed by the Discovery Commissioner with the protective order in this case.

And so therefore, even though that they want to suggest, well, they already know that information, well, in fact that we don't know that information because of the wall that has been erected between the litigation folks at the FTB and the folks that are handling then the California tax protest. And so to the extent that what I want to do then is to be able to seek that same discovery from Mr. Hyatt, in other words, what's he doing in the California tax protest, no different than what we're doing.

And where I'm going to is this. If in fact that Mr.

Hyatt is intentionally not turning over information to the California tax protest hearing officer, because he knows that it will delay, she can't make a decision. Then in fact, what he's doing is he's trying to create then this delay himself and he is responsible for the delay. And so therefore, that artificiality that he wants to throw back at us, should also be the subject of discovery.

THE COURT: Are you suggesting that he's acting in bad faith?

MS. LUNDVALL: In the California tax protest? Yes, Your Honor.

MR. BERNHARD: Let them file a motion, Your Honor. We're happy to dispute that. The protective order was something that was developed after lengthy Discovery Commissioner hearings way back in 1998 and 1999. To throw it out, based on an off the cuff comment like that from counsel, would undo all that work. So if they file a motion and they brief it, they make an allegation, they provide evidence of that, we'll respond to it. The protective order has worked well in setting up that wall for both sides and we've both respected it. It shouldn't be thrown out now, unless we have proper briefing and the Court decides it should be modified.

THE COURT: I'm inclined to agree with -- to agree

at this juncture with that assessment, Ms. Lundvall. You may have some valid points, you may want to brief them, I'll be happy to take a look at it. I'm not inclined to expand the ruling at this point in time. I tried to tailor it as specifically as I could and as appropriately as I could.

MS. LUNDVALL: Thank you, Your Honor.

MR. BERNHARD: Your Honor, with respect to Discovery Commissioner report and recommendations for the hearing on August 5th, 2005, that's the recommendations that's related to the protest hearing as officer [sic] motion. The fact that you've denied their summary judgment motion that means that his report and recommendations should govern the protest hearing officer discovery going forward. That's, I think, all we need to submit on that motion.

THE COURT: All right. I'm inclined to agree with that.

Ms. Lundvall?

MS. LUNDVALL: Your Honor, at this point I'm gonna defer to Mr. Bradshaw concerning the objections then, that are in front of the Court.

THE COURT: Mr. Bradshaw?

MR. BRADSHAW: Your Honor, your rulings on the two dispositive motions rendered the objections largely moot. A good many of them had to do with discovery and to Mr. Hyatt's

economic damages that you've ruled on by allowing Mr. Hyatt to proceed as to the protest activities. That renders that objection to the Discovery Commissioner's ruling moot.

The issue being there, that Mr. Hyatt would have discovery of the FTB's documents and testimony from its witnesses. He too has documents and files relevant to the protest and witnesses that are handling that administrative proceedings, so I guess the issue is that then that the parties will have discovery on his claims in that regard. So we have nothing to add as far as the objections, given Your Honor's rulings on the dispositive motions.

THE COURT: Okay. Then for the clerk's purposes those objections to the Discovery Commissioner's report and recommendations are essentially moot as a result of the Court's previous rulings.

MR. HUTCHISON: And that's true for both of the objections, Your Honor, is that correct?

THE COURT: Yes.

Ms. Lundvall, I'll ask you to draft the proposed orders for the Court's signatures. Please run them past Mr. Hutchison, Mr. Bernhard, whoever else you need to run them past before you submit them to me for my signature.

MS. LUNDVALL: Thank you, Your Honor.

MR. HUTCHISON: Thank you, Your Honor.

MR. BERNHARD: Thank you, Your Honor.

THE COURT: Well, I have some documents I think, Ms. Lundvall, that should be returned to you.,

MS. LUNDVALL: Thank you, Your Honor.

THE COURT: Thank you.

PROCEEDINGS CONCLUDED AT 4:12 P.M.

* * * * * * * * * * *

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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TRANSCRIBER — DATE

EXHIBIT 53

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DISTRICT COURT

FOR CLARK COUNTY, NEVADA

[illegible]	Case No.: A-20-[illegible]
Plaintiff,	Dept. No.: X
[illegible]	NOTICE OF ENTRY OF ORDER GRANTING PARTIAL SUMMARY JUDGMENT RE: THE CALIFORNIA ADMINISTRATIVE PENALTY PROCESS
Defendant.	FILED UNDER SEAL PURSUANT TO ORDER OF THE DISCOVERY COMMISSIONER DATED FEBRUARY 24, 2020

PLEASE TAKE NOTICE that an Order Granting Partial Summary Judgment Re: the California Administrative Process was entered in the above-entitled matter on the 17th day of March, 2020. A copy of which is attached hereto.

DATED this 17th day of March, 2020.

MORRIS [illegible] WILSON, LTD

By: /s/ [illegible]
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and on this [illegible] day of March, 2020, I served a true and correct copy of the foregoing Notice of Entry of Order Granting Partial Summary Judgment filed by Plaintiffs/Counterdefendants/Third-Party Defendants in the manner set forth below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

[illegible] P. [illegible]

Plaintiff

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES I through [illegible], inclusive;

Defendants.

Case No. : A [illegible]
Dept. No. : [illegible]
Date Filed. : [illegible]

ORDER GRANTING DEFENDANT FRANCHISE TAX BOARD'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: THE CALIFORNIA ADMINISTRATIVE PROTEST PROVISIONS

Filed Under Seal By Order of the Discovery Commissioner Dated December 22, 2009

Hearing Date: January 27, 2010
Hearing Time: 1:30 p.m.
Dept. No:

Defendant California Franchise Tax Board's Motion for Partial Summary Judgment re: the California Administrative Protest Provisions having come before the Court on the 27th day of January 2010, the Defendant having appeared by Earl Luckell and Daniel W. Bradshaw, of the Hand Corbin law firm, and represented by Mark Hutchison, Brian Boschee and Donald Kula, and the Plaintiff having appeared by the Defendant Corporation, the Plaintiff's Corporation, the Defendant's employees and their personal representatives, and GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant California Franchise Tax Board's Motion for Partial Summary Judgment re: The California Administrative Protest Provisions is GRANTED because Defendant's alleged contractual defenses to the

[illegible] 10:24 Fax 7328730363 [illegible] Page 3

[illegible] intentional misconduct. Attorney agrees to comply with California attorney's fees limitations, and the amount of this fee does not exceed those limitations.

Dated this 5th day of March, 2008

DISTRICT COURT JUDGE

Submitted this 6th day of March, 2008

Approved as to form and content:

MELDON & CARAVELLO WILSON LLP

By
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EXHIBIT 54

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FILED

APR 29 10 5 37

DISTRICT COURT

CLARK COUNTY, NEVADA

GIUSEPPE B. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES I-IIIC inclusive,

Defendants.

Case No.: A590649

Dept. No.: X

PLAINTIFF GIUSEPPE B. HYATT'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Date of Hearing:
Time of Hearing:

(filed under seal by order of the Discovery Commissioner dated February 25, 1999)

Plaintiff Giuseppe B. Hyatt, by and through his attorneys of record, respectfully moves this Court for leave to file a Second Amended Complaint in this case. A true and correct copy of the proposed Second Amended Complaint is attached hereto as Exhibit 1.

This motion is based on NRCP Rule 15(a) and NRCP Rule 59(e) on the pleadings and papers on file herein, on previous papers entered by the Court, and on other papers and pleadings to be filed. The foregoing and any additional documents to be presented at the hearing on this motion.

Dated this 2nd day of March, 2006.

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NOTICE OF MOTION

TO: FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, DEFENDANT; and

TO: MCDONALD CARANO WILSON LLP, its attorneys.

NOTICE IS HEREBY GIVEN that Plaintiff will bring the foregoing PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT for hearing on the 22 day of April, 2016, at the hour of 9 :00 a.m., before District Court Department X, or as soon thereafter as counsel can be heard.

FICKLIN & SCHWARTZ, LLC
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-and-

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POINTS AND AUTHORITIES

I. Introduction

Plaintiff seeks leave to file the Second Amended Complaint for the purpose of (i) making technical changes to the name of the Plaintiff and certain defendants based on special discovery; (ii) continuing Plaintiff's operative pleading in this Court in light of the FTB's Motion for Partial Summary Judgment as Preclusive in which the Court found it was limited to claims and facts that were alleged in the FTB's operative pleading at the time of the FTB's motion; and (iii) adding, based on the discovery conducted to date, additional facts and claims that are clearly related to the causes

on the same facts and evidence as Plaintiff's invasion of privacy claim, but is now subject to a separate cap.

These amendments are relatively minor. Defendant will not have access to additional discovery as a result of the amendments. Plaintiff brought this motion in good faith and will not delay this case or cause prejudice to Defendant.

2. Argument.

FRCP 15(a) provides for amendments to pleadings prior to trial, in pertinent part:

> (a) Amendments. A party may amend its pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend its pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires.

Nine factors are commonly considered when deciding whether to allow a plaintiff to amend a complaint: (1) whether amending the complaint is futile, (2) whether plaintiff acted in bad faith, (3) whether the amendment will cause undue delay, and (4) whether the amendment will prejudice the opposing party. Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999) (quoting Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989)). Here, applying the above four factors, justice requires that plaintiff be allowed to file his Second Amended Complaint in this case.

a. Special damages.

As to special damages, Plaintiff has always sought in this litigation recovery of his attorneys' fees and costs incurred as a result of Defendant's actions as set forth in FRCP 9(g). In Plaintiff's bad faith audits and the FAA's continuing bad faith practices. A trial in the FTC's bad faith practices case was continuing through the pendency of this case. Plaintiff would have incurred substantial cost of these professional fees. Plaintiff's First Amended Complaint

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[1] Plaintiff's proposed Second Amended Complaint is attached as Exhibit 1 to the Declaration of Michelle Ghetti, Esq. in support of this motion, filed concurrently herewith.

[2] See also Foman v. Davis, 371 U.S. 178, 182 (1962) (reversing denial of motion to amend).

filed in 1998 does request recovery of attorneys' fees. But in 2001 the Nevada Supreme Court held in *Sandy Valley Associates v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948 (2001), that when recovery of attorneys' fees are sought as special damages, as Hyatt seeks in this case, the plaintiff must expressly plead them as special damages. Hyatt seeks leave to file the Second Amended Complaint to conform his pleading with *Sandy Valley*.

The amendments Hyatt seeks to make in his proposed Second Amended Complaint relating to special damages are not futile. The operative pleading in this case is Hyatt's First Amended Complaint filed in 1998. The *Sandy Valley* decision discussed above was issued in 2001. This case was stayed pending Nevada Supreme Court review between June of 2001 through April of 2002, and then again from October of 2002 through May of 2003 pending United States Supreme Court Review. The amendment that Hyatt now seeks is to conform his pleading to the ruling from *Sandy Valley*. For this reason, the amendment is necessary. For the same reason, Hyatt's request for leave is not made in bad faith, but rather is legally required as his operative pleading predates the *Sandy Valley* decision and could not have anticipated that ruling through no fault of Hyatt.

Additionally, the requested amendment will not cause delay and is in no way prejudicial to the FTB. Hyatt's First Amended Complaint requests recovery of attorneys' fees.[1] Moreover, in responding to the FTB's Interrogatory No. 1 seeking a description of Hyatt's damages, Hyatt has consistently responded since 2000 that he was seeking recovery of attorneys' fees although the amount could not be calculated until completion of this case.[2] In this regard, the District Court recently noted that the FTB's bad faith conduct at issue in this case includes any continuing bad faith as the protests are pending in California.[3] Hyatt's damages from the attorneys' fees and accountants' fees incurred in defending the FTB's bad faith conduct therefore continue to accrue to this day and will continue to accrue through the trial date set for

[1] See First Amended Complaint, Prayer for Relief.

[2] Hyatt's Supplemental and Second Supplemental Responses to FTB Interrogatory No. 1, April 13, [illegible] and May 4, 2000.

[3] Order Denying FTB's Partial Summary Judgment Regarding Conference of California Protests, attached hereto as Exhibit 2.

Bullivant Houser Bailey PC

August 15, 2018. A final determination of these damages amounts therefore be premature at this time.

The FTC's position is clearly borne out by the history of this litigation. Since the inception of the FTC's bad faith claim, Ryan has consistently argued that the FTC's bad faith claim is premature because it is dependent on the outcome of the FTC's underlying unfair competition claim. Ryan's position is not supported by the law. Ryan's argument is based on the false premise that the FTC's bad faith claim is dependent on the outcome of the FTC's underlying unfair competition claim. The FTC's bad faith claim is not dependent on the outcome of the FTC's underlying unfair competition claim. The FTC's bad faith claim is not dependent on the outcome of the FTC's underlying unfair competition claim.

In this case, Ryan is pursuing the FTC's supplemental production of invoices for post-dismissal fees he has incurred in defending the FTC's bad faith practices from 2018 through 2020, and for which he seeks recovery as special damages in this case.

In sum, Ryan's motion at this time is not only premature but also fails to meet the Ninth Circuit's standard for filing of Ryan's Third Amended Complaint. He does not seek the amendment so that there is no controversy as to whether he is entitled to recover attorneys' fees incurred in defending the FTC's underlying unfair competition claim. Ryan's motion to amend his complaint to add a claim for attorneys' fees incurred in defending the FTC's underlying unfair competition claim is premature and should be denied.

B. Continuing bad faith allegations

This case was originally filed in January of 2018. It was extensively litigated by Ryan in opposition to the FTC's Motion for Partial Summary Judgment and Permanent Injunction (ECF No. 1). The FTC has simply refused to proceed with the Complaint in the Court's ordinary proceedings. Ryan's motion accuses the FTC of the FTC's delaying these proceedings in bad faith because the bad faith claim is not ripe for the FTC's underlying fraud claim. The FTC's underlying fraud claim is not ripe for the FTC's underlying fraud claim. The FTC's underlying fraud claim is not ripe for the FTC's underlying fraud claim.

[illegible] Order Granting Motion for Partial Summary Judgment and Permanent Injunction, ECF No. 19, July 3, 2018.

[illegible] Stipulation and Order for Permanent Injunction and Monetary Judgment, ECF No. 20, July 3, 2018.

Protests and causes Hyatt to the delays. Obviously, the cause of the delay is very much in dispute.[8] The FTB's argues that this issue was beyond the scope of this case. The Court ruled in denying the FTB's partial summary judgment motion that any continuing bad faith by the FTB in the Protests is relevant and at issue in this case.[9]

Because Hyatt is seeking to amend to add the allegations of Special Damages, he has included in the Second Amended Complaint short references to the continuing nature of the FTB's bad faith, thereby conforming the pleading to the Court ruling in denying the FTB's Motion for Partial Summary Judgment re Protest Process. This is to avoid any argument by the FTB that by amending his pleading Hyatt somehow failed to make any allegations of continuing bad faith by the FTB. These amendments will in no way delay this case and certainly do not prejudice the FTB given the Court's prior ruling and the fact that the parties have conducted extensive discovery concerning the Protests and the delay in that a decision has still not been issued by the FTB Protest Office.

C. Breach of confidentiality.

Discovery has established, and the evidence at trial will show, that (i) the FTB has and still has a duty of confidence and loyalty to keep confidential and not disclose to third parties personal and confidential information from and concerning Hyatt that the FTB obtained due to its position as the auditor of Hyatt's state income tax returns; and (ii) the FTB breached its duty not to disclose this personal and confidential information to third parties.[10] As set forth briefly below, these facts constitute the elements of a breach of confidentiality claim. Instead of seeking to amend the pleadings later under NRCP 15 upon the presentation of evidence establishing the elements of claim, Hyatt seeks to amend at this time.

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[8] As a matter of judicial economy, Hyatt [illegible] the FTB's [illegible] [illegible] Court's [illegible] [illegible].

[9] [illegible] entered [illegible] denying the FTB's Motion for Partial Summary Judgment re Protest Process [illegible].

[10] The FTB [illegible] Hyatt [illegible] disputes [illegible] confidentiality. The FTB [illegible] disputes [illegible] breach of the duty by disclosures to third parties.

A breach of confidence claim is said to be slightly different from the traditional tort of invasion of privacy in that it is aimed specifically at private facts, rather than at intrusion, and it is also distinct from the privacy tort in that it is essentially a hybrid of the two. But does it matter how the Supreme Court has specifically shaped this tort?[1]

Here, Hyatt has pled claims for unreasonable intrusion of privacy as well as a breach of confidence that mirrors, in part, the UTPA requirement to maintain Hyatt's personal and confidential information secure from Hyatt, and resulting damages incurred by Hyatt. Hyatt expressly based on customer confidentiality, he proved all of the elements of each of these claims, and such proof will also satisfy the elements for the hybrid breach of confidentiality claim. This cause of action emerges when the unauthorized form of invasion of privacy is compounded by the act of disclosure of personal and confidential information by a party in whom confidence has been reposed, due to the nature of the party's position, to keep such information confidential.

The new tort's broad forms of invasion of privacy and its damages early in the Twentieth Century after Justice Brandeis' now famous law review article[2] and are now set forth in the Restatement (Second) of Torts.[3] The tort is also clearly part of Texas common law.[4] It protects the breach of confidence that typically prevents and redresses from breaches of confidence that result from relationships that are necessary in modern society and that entail an important level of trust and confidence. It entails a fiduciary relationship between two parties, such as between doctor and patient or attorney and client. The basis for all the necessary elements of this tort as well as how it differs from other torts and how it is governed by HIPAA is summarized in PHI Observations From Recent Cases:

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[1] Doe v. Doe, [redacted] Mass. 511, 514-15 (1993).

[2] Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

[3] Restatement (Second) of Torts, § 652A et seq.

[4] Billings v. Atkinson, 489 S.W.2d 858, 860 (Tex. 1973); Industrial Found. v. Texas Industrial Accident Bd., 540 S.W.2d 668 (Tex. 1976).

Every member of society engages in relationships of trust and confidence. We turn to doctors, lawyers, counselors, teachers, bankers, accountants, and others for assistance in matters beyond our individual knowledge or experience. [FN omitted] Reliable delivery of this kind requires us to reveal our failures and private information about our personal lives. . . . Such self-revelation is not always voluntary. Sometimes it is necessary for example, we must reveal our income and wealth to tax collectors and often we must reveal our health to insurance companies. Sometimes we reveal our private lives to others because we wish to establish a relationship with them. [FN omitted]

. . .

These two characteristics—the presence of secrecy and the elimination of choice—are the essential ingredients of what I call a "confidential relationship." [FN omitted] The power of information-gathering institutions places individuals in a vulnerable position in relation to the assurances of secrecy and can have a legitimate expectation of confidentiality. The act of the information-gathering institution in breaching that expectation, including the reliance and the law or obligation, is in direct violation of the given expectation. . . .

. . .

Each preceding section of the law of defamation has such an essential element. Though the types of relationships vary from case to case, the relationship in each case creates an implicit assurance of confidentiality that the information [was] not and then violated. . . .

. . .

. . . If [certain] private people should have a right to be secure in such confidential relationships, the privacy standard [that] invasion of privacy claims] would not protect such persons from disclosures of objectively innocuous information that happens to be very distressing to them. If the same information in the assurance of confidentiality is present [as in] knowing use disclosure of the information—which, [assuming for the purposes of this argument], would not have revealed it without the expectation of confidentiality. [FN omitted]

> [T]he conduct be directed at persons who are [1] employees, [2] employees of a third party with a public accommodation that [3] maintains [or has formed with] a confidential relationship. [Omitted.] "Unconscionable" means simply the absence of factors which militate against the operation of [the] particular [] guidance.[1]

The Nevada Supreme Court specifically recognized this concept in a 1995 case. Perry v. Jordan

> Perry argues that the Nevada authority, as in authority from any other jurisdiction, recognizes an independent claim for breach of a confidential relationship. We disagree. In Long v. Towne, 98 Nev. 11, 639 P.2d 528, 529-30 (1982), this court stated that
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> > [a] confidential relationship is one broad enough to include every case in which one party reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence.
>
> (Citations omitted.) Recently this court indicated that "[f]iduciary duty does not describe all relationships of a fiduciary relationship [sic] [] [] may arise in any situation where one party justifiably places confidence in the other because of his superior position, and the other party knows of [] the [] confidence." Brown v. Kinross Gold U.S.A., Inc., 114 Nev. 1359, 1365 P.2d 1076, 1081 (1998) (quoting Standard Chartered Bank v. Ord, 862 F.2d 1404, 1409 (9th Cir. 1988) (overruled on other grounds)).
>
> In contrast, authority suggests that a confidential relationship may arise by reason of kinship, moral influence, or ascendancy, or from weakness, dependence, or trust, justifiably reposed, unless the superior party has shown good faith and candor.

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[1] Perry v. Jordan, 111 Nev. 943, 948, 900 P.2d 335, 338 (1995) (quoting Barrett v. Bird, 89 Nev. 3, 6, 505 P.2d 600, 602 (1973)). See also Brokopp v. Ford Motor Co., 71 Cal. App. 3d 781, 139 Cal. Rptr. 888, 892 (1977) ("Fiduciary relationships exist in a wide variety of social settings. Generally, they appear in any case in which there is reliance by one person on the trust and confidence reposed in another who exercises discretionary power affecting the interests of the former. The superior position of the fiduciary in such a relationship may consist of superior expertise, superior knowledge of the subject matter, superior access to the property or superior intelligence. Such superiority is often demonstrated by the fact that the fiduciary has the power to exercise a influence over the property or interests involved in the fiduciary relationship. [Citations omitted.] The fiduciary must act with the highest good faith toward his beneficiary and may not obtain any benefit from the beneficiary through the relationship without the fullest disclosure and the absence of any undue influence. [Citations omitted.] The relationship may be established informally as well as formally, and it may exist in a moral, social, domestic or personal relationship as well as a technical one. [Citations omitted.] The duty may be imposed even though the parties were dealing at arm's length and there was no intent to create a fiduciary relationship. [Citations omitted.] Thus, a fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other. [Citations omitted.] In other words, fiduciary relationships are those in which one person is under a duty to act for the benefit of another on matters within the scope of their relationship. [Citations omitted.] Fiduciary relationships usually arise in one of four situations: (1) where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence; (2) where there is an inequality of knowledge between the parties; (3) where there is an inequality of bargaining power between the parties; and (4) where there is a relationship of kinship, moral influence, or ascendancy, or from weakness, dependence, or trust, justifiably reposed, unless the superior party has shown good faith and candor.")

See In re Guardianship of Canales, 18 Ariz.App. 587, 589, 504 P.2d 524, 526 (1972). Such a relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind; it may exist although there is no fiduciary relationship; it is particularly likely to exist when there is a family relationship or one of friendship." Kudokas v. Balkus, 26 Cal.App.3d 744, 103 Cal.Rptr. 318, 321 (1972). When a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party. See [illegible], 255 Pa. 463, 50 A.2d 343, 347 (1947). We conclude that the record contains ample evidence of the existence and breach of such a relationship between Perry and Jordan.[16]

While termed here by Ryan and in other authority cited above "breach of confidentiality" and described in Perry by the Nevada Supreme Court as "breach of confidential relationship," as the court explained the name of the tort is unimportant: "What label we affix to this wrong is unimportant. . . . 'It is generally accepted that "there is no necessity whatever that a tort must have a name. New and nameless torts are being recognized constantly." (Prosser, Torts (2d ed.) p. 3.) What we are concerned with is the basis of the infliction of intentional harm, resulting in damage, without legal excuse or justification. . . .' (citations omitted)."[17] Similar to breach of privacy claims, when the breach of confidentiality is intentional and malicious, as is alleged here by Ryan, punitive damages can be awarded.[18]

In the Second Amended Complaint, Ryan has expressly pled a separate claim for breach of confidentiality against the PILB.[19] Specifically, he has pled the nature of the confidential relationship, the assurances of confidentiality made by the PILB before and during polygraph audits, the confidence that he reposed in the PILB based on these representations resulting in the production of his PILB personal and confidential information, and then the breach of confidentiality by the PILB resulting in damages to Ryan. Given his close relationship to, the

[16] Perry v. Jordan, 111 Nev. 943, 947-48 (1995).

[17] [illegible] (quotations and citations omitted).

[18] Id. at 948; see also [illegible].

[19] See Eighth Claim for Relief in Plaintiff's Proposed Second Amended Complaint, attached hereto as Exhibit 1.

separateness from Hyatt's tortious invasion of privacy claims and fraud claim, and the FTB's ability to use such claims to prove such claims, good cause exists to grant leave to amend in order to assert an alter ego liability theory.

Indeed, for the entirety of this case Hyatt has used the alter ego claim and pursues evidence from third party discovery, even though not separately stated by name. The FTB has acted in good faith to assert it has not been aware of the case that Hyatt asserts the FTB had an obligation to not disclose to third parties Hyatt's personal and confidential information and that the FTB has violated such obligation by making such disclosures to third parties. Indeed, these facts are contained in Hyatt's Third Amended Complaint.

Hyatt is entitled to rely on information discovered, used to date, and evidence obtained from third party discovery, to establish his alter ego claim sufficiently exists. The FTB maintains that such discovery is relevant to this claim, but in fact will have until May 31, 2016 to conduct any additional discovery it believes is necessary. Thus, the FTB will not therefore be prejudiced in this claim nor will it delay this case.

5. Conclusion.

Justice requires that this Court grant leave to Hyatt to file his proposed Second Amended Complaint and thereby reinstate his alter ego and specifically his request for attorneys' fees as special damages, as the ruling in *Nevada Policy* dictates also requires that this Court grant leave to Hyatt to file his proposed Second Amended Complaint and file the same for the purpose of the Court's reconsideration that any and all of the FTB's tortious invasion of privacy claims is relevant to and at issue in this case. Finally, justice requires that the Court also grant leave to Hyatt to file his proposed Second Amended Complaint and add his theory of conspiracy claim that is supported by the same evidence of the tortious invasion of privacy claims and fraud claims.

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

Dated this 21st day of March, 2008.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of DURHAM JONES & PINEGAR, P.C., and that on this 24th day of March, 2020, I served the above and foregoing document entitled PLAINTIFF GILLBERT P. HYATT'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT to be served as follows:

[X] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[ ] pursuant to EDCR 7.26, to be sent via facsimile, and/or

[ ] to be hand delivered;

to the attorneys listed below at the address and/or facsimile number indicated below:

Via Facsimile: (725) 777-3820
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/s/ Pamela Miller
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Exhibit 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

WILBERT P. TYSON,

Plaintiff,

v.

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

Defendants.

Case No. A396373
Dept. No. X

PROPOSED

SECOND AMENDED COMPLAINT

Jury Trial Demanded

Exempt from Arbitration:
Declaratory Relief, Significant
Public Policy and Amount in Excess
Of $50,000

Filed under seal by order of the Discovery Commissioner dated February 21, 1999

Patrick T. Gilbert ("Gilbert"), as the Second Amended Complaint on file herein against the defendants, and each of them, as follows:

FACTS

1. Plaintiff resided in Clark County, Nevada and has done so since September 30, 2021.

2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and a district office located in Los Angeles, California. The FTB's function is to assess and collect income taxes from California residents and from income sourced in California by non-residents.

3. The identity and capacities of the Defendants designated as Does I through XX are unknown to plaintiff because such facts are solely within the exclusive knowledge of the FTB and its employees, representatives, and individuals connected with the events described in this complaint. The true names and capacities of these Doe Defendants are necessary allegations in this action in Nevada with the assistance of said Doe Defendants who should be joined by fictitious names until ascertainable, through discovery, to obtain their true identities and legal responsibilities. Upon ascertaining the true names and capacities of these Doe Defendants, plaintiff will promptly amend this complaint to properly name them in their actual identities and capacities. For identification purposes, whenever this complaint refers to "FTB Employees," it shall refer to the Doe Defendants, whether individuals, corporations, other forms of associations or entities, who are employed by, associated with, or otherwise affiliated with the FTB, including but not limited to any of its officers, agents, and employees, and in the absence of their employment or agency, and in the absence of their employee's scope of employment, whether

the employer or principal of the DOE or some other governmental agency or employer or principal who is responsible but is not yet known and therefore sues them by such fictitious names.

3. This action arises from the controversy between substantial adverse parties, pursuant to Rule 8, because by this action, Plaintiff seeks declaratory relief (1) to invalidate illegal public policy and unconstitutional censorship by the sovereignty of the State of Nevada and its agents of its territorial boundaries as opposed to governmental agencies of another state who are beyond its jurisdiction to unconstitutionally victimize and deceptively enforce their policies, by the unlawful harassment and seizure of Nevada citizen Plaintiff Gilbert P. Hyatt in particular; and (2) for recovery of monetary and damages incurred thereby because of the DOE(s)' unconstitutional abuse of the statutory program.

4. Plaintiff hereby requests a jury trial for this Seventh, Fourth, Fifth, Sixth, Second, and Eighth Causes of action.

SUMMARY OF CLAIMS

5. Plaintiff by this action seeks (1) declaratory relief under Nevada law to expunge excessive public IRS defamation dissemination as of September 26, 1991 and continuing to the present and correction of the non-mendacity during said period — (2nd Amended Cause of Action) — as prior to this Second Amended Complaint to prevent plaintiff's right to appeal the Superior Court's April 8, 1998 ruling striking the original action, the cause of action to be pursued no longer an issue to the District Court, (3) recovery of compensatory and punitive damages against the DOE and co-defendants for invasion of plaintiff's right of privacy, including specifically but not limited to the unconstitutional publication as well as the FTB's failure to abide by the constitutional censorship caused by the FTB's negligent and reckless employee's illegally accessing confidential information, resulting from their still ongoing investigations in Nevada of plaintiff's presently domiciled and place of abode and residency for unconstitutional intrusion upon plaintiff. (See 2nd CAUSE OF ACTION); (4) an unreasonable publicity given to private facts (SIXTH CAUSE OF ACTION);

(f) seeking punitive damages (FOURTH CAUSE OF ACTION); (g) recovery of compensatory and punitive damages against the DOE and the defendants for their outrageous conduct in regard to their intentional overpayment to Novell of plaintiff's proprietary, domicile and proof of abode, including, but not limited to the DOE's failure to disclose the confidence compromised by the FTB's request for and acceptance of plaintiff's highly personal and confidential information (FIFTH CAUSE OF ACTION); (h) recovery of compensatory and punitive damages against the DOE and defendants for their abuse of process (SIXTH CAUSE OF ACTION); (i) recovery of compensatory and punitive damages against the DOE and defendants for their breach of confidentiality, including, but not limited to the FTB's failure to disclose the confidential relationship created by the FTB's request for and receipt of plaintiff's highly personal and confidential information (SEVENTH CAUSE OF ACTION); and (j) recovery of compensatory and punitive damages against the DOE and defendants for breach of confidentiality imposed by the FTB's breach of its duty under Revenue Ruling 84-75 pursuant and as codified in Internal Revenue Code (EIGHTH CAUSE OF ACTION). The claims specified in this paragraph constitute DOE's response to causes of action not arising from the complaint.

GENERAL ALLEGATIONS

Plaintiff's Residency in Nevada

6. Plaintiff moved to the state of Nevada, County of Clark, and established full-time residency there on September 28, 1991 and has remained a full-time, continuous resident since that time. Prior to his relocation to Nevada, plaintiff resided in San Jose, California. Plaintiff is highly successful inventor. Specifically, plaintiff has been granted numerous U.S. patents for a wide range of innovations relating to computer technology. Plaintiff primarily resides at the cutting edge of the development of his inventions and greatly values his privacy. In his personal life and business affairs, plaintiff has come to view important inventions as personal property. In 1991, plaintiff began receiving a great deal of unwanted and unsolicited publicity, notoriety and attention. In order to protect his privacy, to enjoy the exact recognition and financial advantages stemming from his ability, and to personally enhance the quality

of his life and environment. Plaintiff established residency in Nevada on September 20, 1991. This move took place after plaintiff executed a major estate plan of planning

5. The following events are indicative of the fact that on September 20, 1991, plaintiff became both a resident of and intended to remain in Nevada and to maintain most of his ties to the past (if not all) of plaintiff's California lives: (1) his moving and sale of personal possessions in Las Vegas on or about prior October 1991 and continuing until April 1992 when plaintiff closed the residence of his home in Las Vegas; (2) in November 1991, plaintiff registered to vote in Nevada, obtained a Nevada driver's license and joined a religious organization in Las Vegas; (3) plaintiff actively searched and commenced in October 1991, to purchase a home in Las Vegas, and in the process utilizing the services of various real estate brokers; (4) closing the process of finally choosing to purchase plaintiff's current residence at Turnberry; (5) plaintiff's production of a new home in Las Vegas on or prior to 1992; (6) plaintiff maintained and expanded his business interests in Las Vegas and (7) plaintiff has, through the years from September 20, 1991 and down to the present, remained active in high political offices in his profession, and other walks of life, as a true Nevada resident of some standing and all the concerns, the facts of his Nevada residency. In sum, plaintiff has substantial evidence, both several and cumulative, in support of the fact of his bona fide residency commencing on September 20, 1991 and continuing to the present.

The FTB and Its Subsequent Investigation of Plaintiff's Residency

6. Because plaintiff was a resident of California for part of 1991, plaintiff filed a part-year resident income tax return with the State of California for 1991 (the "1991 Return"). State law requires plaintiff's payment of certain income taxes to California for income received during the period of January 1 through September 20, 1991.

7. [illegible] plaintiff moved to Nevada — for reasons that have never been specified, but are fully explained above, the FTB began an audit of the 1991 Return. In or about July of 1995, as part of its audit, the FTB began to investigate

plaintiff by making or causing to be made numerous and continuing contacts directed at Nevada. Initially, the FBI sought information from Nevada government agencies for information concerning plaintiff — a project that was to continue for the next several years.

19. Then, about January or 1995, FBI officials began planning a trip to Las Vegas, the purpose of which was to initiate and expand the scope of their investigation of plaintiff. In March of 1995, the FBI and defendants commenced a "blanket" investigation of plaintiff. This included numerous and continuing contacts and questioning about plaintiff's life. These interviews were directed at numerous residents of Nevada, including plaintiff's current and former employees. The interviews and actions described in plaintiff's complaint, and this declaration, occurred in Nevada.

20. Both prior and subsequent to the similar, "blanket" investigations described in paragraph 19, above, the FBI procured information from Nevada business and professional and business contacts, residents of Nevada, and Nevada agencies, including Nevada's Department of Motor Vehicles, concerning plaintiff. Such information included plaintiff's driving record, photograph, and vehicle registration. The FBI also sought information concerning plaintiff's business activities in Nevada, including plaintiff's relationship with Nevada corporations and Nevada business entities that contracted with plaintiff's companies.

21. Subsequent to the commencement of "blanket" investigations in Nevada by the FBI and defendants, the FBI also sent correspondence, other than typical subpoenas, to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other Nevada state and federal officials requesting plaintiff's termination as a gaming regulator in Nevada. Plaintiff is further informed and believes, and thereon alleges, that the FBI intentionally sent unsolicited "unsolicited correspondence" to Nevada officials in order to obtain information from private individuals and business entities in a covert attempt to achieve such objectives through deception and the presence of law enforcement. Such actions, on the other hand, would not have occurred had FBI requests for information from Nevada governmental agencies and officials been solicited. Such requests

recalled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the subpoenaed records of the Sugar subpoenas.

14. Plaintiff neither cultivated the FTB's forum—intentionally or unintentionally—nor purposefully availed himself of the benefits of Nevada. Moreover, plaintiff was unaware that such information resulting from the Sugar subpoenas would be used by the FTB and Defendants' co-conspirators as a pretext to investigate plaintiff. The FTB's correspondence with Nevada government agencies and officials made it clear that such contacts and take place. Upon information and belief, plaintiff alleges that all of the above-described activities were carried out by the FTB in coordinated, actionable basis for issuing a subpoena against plaintiff despite the claims that the FTB was assessing against a bona fide resident of Nevada.

Assessment for 1995

15. On April 27, 1995, after the audit had been completed, and investigation of the 1991 Return, the FTB issued a Notice of Proposed Assessment ("Proposed Assessment") against plaintiff in which the FTB claimed plaintiff was a resident of California for the entire year of 1991. The FTB demanded payment of California state income tax for the period of September 26 through December 31 of 1991 in a substantial amount. Moreover, the FTB also assessed a penalty against plaintiff in an amount claimed equal to the assessment, thereby summarily concluding that plaintiff's change of his residency from California to Nevada was not bona fide.

16. Plaintiff objected to the Proposed Assessment, based upon the fact that he was a bona fide resident of Nevada and not a resident of California. Plaintiff timely protested the Proposed Assessment, and requested that the FTB withdraw its Proposed Assessment. Plaintiff also requested that the FTB withdraw its Proposed Assessment because the FTB's investigation was tainted by the improper and unlawful actions of the FTB in obtaining private information regarding plaintiff from Nevada sources, in violation of plaintiff's rights under the Nevada Constitution, Nevada statutes, and Nevada common law. Plaintiff also requested that the FTB withdraw its Proposed Assessment because the FTB's investigation was tainted by the improper and unlawful actions of the FTB in obtaining private information regarding plaintiff from Nevada sources, in violation of plaintiff's rights under the Nevada Constitution, Nevada statutes, and Nevada common law.

[illegible] of a California visitor will be processed and closed soon after a new home in Las Vegas on April 1, 1952. In a move, the FTB's principal environmental efforts to find a way — any way — to collect only unpaid income taxes against plaintiff who has escaped as residents from California to Nevada based on governmental fact to the real goal of the FTB's continued pursuit of tax financial success plaintiff has moved since leaving California and becoming a bona fide resident of the State of Nevada. The determination of Nevada residency accepted by the FTB with respect to the 1951 Report was in support of by the information supplied by the FTB's continuing invasion of plaintiff's privacy by the FTB which has lasted for over six months after plaintiff moved to Nevada with the intent to stay and be permanently to enjoy all the privileges and advantages of residency in that new state.

[illegible] FTB's Continuing Pursuit of Plaintiff's Private Records

18. On or about April 1, 1952, plaintiff received notice from the FTB that [illegible] investigation into the 1951 tax return and that the [illegible] plaintiff would also be assessed [illegible] income taxes for the period of January 1 through April 3 of 1952.

19. On or about April 10, 1952 and May 12, 1952 respectively, plaintiff received notices from the FTB that it would be assessing additional "Deficiency Assessments" in regard to the 1951 tax return which it will seek back taxes from plaintiff for income earned during the period of January 1 through April 2, 1952 and in addition would seek penalties for plaintiff's failure to file a state income tax return for 1952.

20. Pursuant to the FTB's claims, the Notice of Proposed Assessment for the 1952 tax year, a representative of the FTB would have to meet with plaintiff's representatives during office hours to discuss such assessments by the FTB. Always aware of this state's taxpayer's constant quest to strip their personal financial information being made public. Plaintiff requested this assessment not be done during regular office hours with the disruption to business that this would cause but that the assessment be done [illegible] at plaintiff's residence. Plaintiff refused, and continues to refuse, on the basis that

been a resident of California since before he moved to Nevada on September 26, 1991, and it remains clear to him that he is engaging in the highest form of "abuse and penalties" from which he is entitled to legally remain immune.

21. Shortly about August 17, 1993, plaintiff received a formal Notice of Proposed Assessment for 1992. Despite the FTB's earlier written concessions and findings that plaintiff was a Nevada resident as of April 3, 1992 and its statements on each Notice of Proposed Assessment for 1992 that the FTB considered plaintiff a resident of this state [California] through April 2, 1992, such notices assessed income taxes on plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff state income taxes on 1992 income earned from those sources that the FTB asserted plaintiff is legally subject to tax because he was a Nevada resident during 1992 and stated that taxes accrued through August 24, 1993 (roughly the equivalent of the penalty rate that would be assessed for the period of time that the state of California, through the FTB, says plaintiff is still for the entire 1992 tax year which was because it does the calculations it illegally assessed for 1991, and it was giving presented with. "Pay this amount for the entire year." Without explanation the FTB ignored its earlier findings and written acknowledgments that plaintiff was a Nevada resident as of April 3, 1992. This amounts to intrusive extortion to recover substantial sums of money from a Nevada resident.

22. Plaintiff is informed and believes, and thereon alleges, that the FTB now does not engage in a review of the records of the financial investigations of actual plaintiff within the State of Nevada as an effort to conserve its collectible assets for illegally garnishment, encumbrance and levy of Proposed Assessments for the 1993 tax year.

23. Plaintiff is informed and believes and therefore alleges, that the FTB may continue to assess past U.S. California state income taxes for the years 1993, 1994, 1995, 1996 and beyond even the FTB now concedes that it was not entitled to assess plaintiff's residency in Nevada as of April 3, 1992, and is not entitled to charge him with any garnishment amounts of taxes, penalties and interest respective of his status as a bona fide resident of Nevada. It

appears from its actions concerning plaintiff that the FTB has embarked upon the type of lawlessness in which California makes a California resident's or a California corporation's status as such turn entirely on vague, subjective, ad hoc determinations. Thus, the FTB has given itself virtually equivalent of the immunities for prosecutorial misconduct and malicious prosecution given to the acting prosecution of the FTB.

The FTB's Motive

20. Plaintiff is informed and believes, and therefore alleges, that the FTB has an ongoing, predetermined desire that plaintiff was a California resident at any time after September 30, 1991, despite the FTB's representations during plaintiff's 1991 tax audit. The FTB has actively sought to prevent plaintiff from becoming a California resident since October 1, 1991, the plaintiff maintained an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a home in Las Vegas in April 1992.

21. Plaintiff is informed and believes, and therefore alleges, that the assessment by the FTB against plaintiff for 1991 and 1992 resulted from an audit that lasted over two years after plaintiff moved from California to Nevada. The FTB undertook such a long, intrusive audit of plaintiff's affairs, and the FTB issued fraudulent tax assessments in the hope of extracting a significant settlement from plaintiff. Plaintiff is further informed and believes and therefore alleges, that the FTB has acted in bad faith and assessed a fraud penalty against plaintiff for the 1991 tax year and other penalties of Proposed Assessments against plaintiff for the entire 1991 tax year and a fraud penalty for the same year in addition to plaintiff's actual tax liability since significant amounts of taxes had become due on September 15, 1991. Despite the awareness that plaintiff actually became a Nevada resident on that date, Plaintiff alleges that the FTB's tactics against plaintiff in the Proposed Assessment would likely bring in benefit taxes for 1992 as well, or substantial penalties and interest.

Jurisdiction

22. This Court has personal jurisdiction over the FTB pursuant to Nevada's long-arm statute, NRS 14.065, because the FTB's tortious conduct alleged

[illegible] injury contract within the State of Nevada constitutes a part of its doing business [illegible] maintains plaintiff's status as a Nevada resident, but in reality it creates a colorable basis for [illegible] information, that plaintiff commenced employment in California during the period September 26, 1991 to December 31, 1991 and beyond.

V. Pursuant to Nevada law, relatives, and dependents of deceased employees who were residents of Nevada at the time of the employee's death may receive benefits under the Nevada Industrial Insurance Act. Plaintiff is a Nevada resident, but is not a dependent of the deceased employee. Plaintiff's claim for benefits is based upon the fact that he was employed by Nevada Power Company, a Nevada corporation, and was injured in the course and scope of his employment with Nevada Power Company.

VI. Pursuant to California law, an employee who is an individual who was a resident of California for the entire taxable year is subject to California personal income tax on all of his taxable income, regardless of where the income was earned. If, however, the individual was a resident of California during only a portion of the taxable year, or was a nonresident of California during the entire taxable year, the individual is subject to California personal income tax only on income derived from sources within California during the period of residency. See Cal. Rev. & Tax. Code § 17014. The FTB's regulations also provide guidance that is applicable in determining an individual's domicile and/or whether the individual's presence in California is considered to be "temporary or transitory."

a) Domicile.

Domicile is determined by the individual's physical presence in California with intent to make California his permanent home or domicile and not for a temporary or transitory purpose. Intent is determined by the acts and conduct of the individual at the time when the individual is employed to work and while

(2) location of the individual's permanent home; (3) taxpayer residency status maintained by the individual in different states; (4) location where individual exercises certain rights; (5) corporation recognized by the individual in different states; (6) compliance with the individual's property tax obligations; (7) membership in clubs, churches, gyms or social organizations in another state; and (8) establishment of a residence in another state by a married couple or self employed.

(b) Presumptions. The following presumptions, which are rebuttable, shall be used in determining whether an individual is a California resident or nonresident for tax purposes:

(1) An individual who is present in California for other than a temporary or transitory purpose is a California resident for tax purposes. (2) An individual who is present in California for more than nine months during a taxable year is presumed to be a California resident for that year. (3) An individual who is present in California for a temporary or transitory purpose during the taxable year is given some allowance, not to exceed a total of nine months, to establish residency in another state by actions that indicate the individual's California home is no longer his or her principal residence. (4) Physical presence of the individual in California is incompatible with the establishment of residency in another state by the individual. (5) Maintaining a home in California by the individual is given some allowance, not to exceed a total of nine months, to establish residency in another state by actions that indicate the individual's California home is no longer his or her principal residence. (6) Failure to establish residency in another state by actions that indicate the individual's California home is no longer his or her principal residence. (7) Filing protests with the individual's California county assessor to obtain a property tax exemption. (8) Registering a car in another state. (9) Joining religious, business, or other social organizations in another state. (10) Where the individual is registered to vote and votes.

(c) The FTB's assessment of taxes and penalty for 1991 is based on the FTB's position that petitioner was a California resident because petitioner's move to Nevada in April 1991, as well as his other activities and actions during the year, lacked sufficient substance to establish that he had abandoned his California residency for good.

[illegible] Constitutional Rights. It's conclusions and orders are binding on the FTB's over which it has no jurisdiction or power to review. It's conclusions and orders include, but are not limited to, the following: (1) [illegible] Stockholm California home on October 1, 1991, (2) plaintiff moved an additional [illegible] Vegas home on October 7, 1991 and, after a brief period of necessary travel between [illegible] Stockholm home on October 22, 1991 and maintained the residence there until April of 1992; (3) plaintiff registered to vote, obtained a Nevada driver's license, relinquished his California driver's license to the Nevada Department of Motor Vehicles and joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his California voter's registration effective October 1, 1991; (5) plaintiff purchased furniture and other personal property for his home in Las Vegas, commenced [illegible] early December 1991, and substantial construction of the home in Las Vegas beginning in December 1991; (6) plaintiff's office and professional home in Las Vegas was completed in March of 1992 and became operational on April 3, 1992, and (7) plaintiff's new home in Las Vegas was necessary for [illegible] the home in Stockholm, California, which he sold in October of 1991.

31. [illegible] controversy exists as to whether plaintiff was a full time resident of Nevada and not California — commencing on September 9th, 1991 through December 31, 1991 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either Nevada or California law, in both, he was a full-time, bona fide resident of Nevada throughout the period in question. Plaintiff presents and asserts that the FTB ignored its own regulations and pronouncements in finding to the contrary, and that the FTB has no jurisdiction or authority to conduct an extra-territorial investigation of plaintiff. The Nevada and California statutes [illegible] to Nevada residents and businesses, thereby seeking to prevent the imposition of dual residency and dual taxation. [illegible] plaintiff. Plaintiff is informed and believes and therefore alleges that the FTB acted in all respects to the contrary.

32. Plaintiff therefore requests judgment of this court declaring and confirming plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from

September 29, 1997 in the present case for judgment declaring the PTO's extraterritorial and regulatory provisions to be beyond the scope of powers granted to Congress under the Constitution without approval from a Nevada court or governmental agency, and injunctive relief to be necessary to protect the rights of Nevada's sovereignty and territorial integrity.

SPECIFIC ALLEGATIONS OF FACT

A. The Invention at Issue – Confidential Information Upon Which the Defendants Have Misappropriated Upon Information and Belief

Plaintiff

31. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 30 above, as though set forth herein in full.

32. Prior to the time that Plaintiff first learned that defendants [illegible] business [illegible] government officials and others in Nevada with access to the [illegible] and would reasonably expect to [illegible] or otherwise [illegible] by the PTO and its employees who [illegible] plaintiff's [illegible] under investigation in California and otherwise acted in such a manner as to cause [illegible] to believe plaintiff's integrity and moral character. Moreover, as part of the audit process [illegible] the PTO [illegible] plaintiff's financial records and other confidential information with the understanding that it would remain confidential, thereby creating a confidential relationship in which the PTO was required not to disclose [illegible] plaintiff's highly secret and confidential information. The U.S. Government in its own [illegible] documents under plaintiff's [illegible] assurances that part of the protection of its privacy interests in [illegible] such information. At the time of this occurrence, plaintiff was still [illegible] that the PTO was acting [illegible] [illegible] proprietary data, as outlined in plaintiff's [illegible] dated [illegible].

33. Plaintiff is informed and believes, and thereon alleges, that the PTO and defendants [illegible] plaintiff's right to privacy in regard to secret information by providing to [illegible] parties [illegible] investigation in Nevada, and accumulating

to conduct such an investigation, through which the FTB and defendants improperly accessed personal and confidential information, which plaintiff had every right to assume would not be revealed to such parties.

31. Because plaintiff could not have discovered, before August 2019, the FTB and defendants' extensive policy and investigation of plaintiff, including the actions both occurring within Nevada and directed to Nevada from California, were performed, and continued, over the course of many years, in a manner and circumstance plaintiff could not have reasonably been aware of, and which he would eventually enter into a contract with the FTB concerning his residency, tolling the discovery rule period and the two-year penalties accordingly. Such investigation by the FTB and defendants did not take place in the business, commercial and investment sphere, and plaintiff's time and energies were the productive work in which he is engaged.

32. Because plaintiff could not have discovered, before August 2019, that the FTB and defendants through their investigation of plaintiff, and particularly the manner in which they were carried out, as described, was unlawfully intended, and continued unlawfully in the manner, and the sources and information which plaintiff and plaintiff's counsel sought by traveling to Nevada. The intrusion by the FTB and defendants was such that any reasonable person, including plaintiff, would find it highly offensive.

33. As a direct, proximate, and foreseeable result of the FTB and its employees' and agents' unreasonable intrusion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in an amount in excess of $10,000.

34. Plaintiff is informed and believes, and thereon alleges, that said intrusion of plaintiff's private affairs was intentional, malicious, and despicable in that such intrusion was deliberately undertaken by the FTB and defendants in an effort to interfere with and undermine Congressional Democratic dignitaries in advance of the 2020 election. Plaintiff therefore should be awarded punitive damages against the FTB and defendants in an amount sufficient to satisfy the purposes for which such damages are awarded.

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

40. Plaintiff was thrown into the DTI's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the DTI's treatment of an audit would be professional in every sense, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, archaic, irrational and antiquated back-of-the-pack tactics from start to finish and a classic example of the DTI's awful taxing process. The DTI's hostile and oppressive actions include, but are not limited to, its position of erroneously, unlawfully and unfairly issuing assessments designed to force plaintiff to yield to a sum in compromise of the significant, substantial and unjustified disputed issues. The unlawful practices, enacted by the DTI, include, but are not limited to, the unreasonably intrusive amount of the privacy invasion, and the potential of private facts that were expressly exempted from public disclosure by statute. These practices have resulted in plaintiff's actual damages as more fully set forth herein.

41. Plaintiff was forced to disclose all private documents and communications with the DTI under the threat of his or her constitutional rights to be filed with the assessment of a tax lien against plaintiff's property. Instead, plaintiff asserts the financial records of the DTI, thus forcing plaintiff to either: (1) speculate on a course of action that would indirectly subject plaintiff's personal property and rights to have the privacy invaded by the publication of his confidential, private facts to be affected; or (2) fight the DTI through the only means available to him with the employment of counsel, legal and professional experts, previously disclosed to the DTI, and the continuing obligation of the proceedings.

42. It was highly unreasonable to subject plaintiff to the pressure of the situation of unlawfully depriving plaintiff of his property through the use of communications under the duress of the privacy and the imposition of illegal "audit" practices as aforesaid, plaintiff's only alternative was to reply to the DTI's requests as the courts and the underlying statutes require. This required the employment of counsel, attorneys and other experts. The underlying attorneys' fees and costs incurred by plaintiff to date are substantial, and continue

to cause, were proximately and directly caused and necessitated by the FBI's unlawful conduct described herein.

45. Plaintiff is informed and believes and thereon alleges that the FBI's unlawful conduct described herein was undertaken with reckless disregard for Plaintiff's rights and with the foreseeable purpose of causing Plaintiff the damages described herein. Plaintiff is informed and believes and thereon alleges that the FBI's unlawful conduct described herein was undertaken with reckless disregard for Plaintiff's rights and with the foreseeable purpose of causing Plaintiff the damages described herein.

THIRD CAUSE OF ACTION

(Violation of Privacy — Disclosure of Private Facts, Including Publicity Given to Matters Portraying Plaintiff in a False Light, Under the Concept of Informational Privacy)

46. Plaintiff repeats and incorporates herein by reference each and every allegation contained in paragraphs 1 through 45, inclusive, as though fully set forth herein.

47. As described above, scientific research into the FBI agency personnel's unconstitutional interference in the conduct of the 2016 presidential election, and in the 2016 presidential election process, is a matter of public concern. Plaintiff's research into private, intimate, and confidential relationships in which the FBI was required not to disclose Plaintiff's highly personal and confidential information. Plaintiff had a reasonable expectation that such information would be kept confidential and not exposed to the public. The FBI and its employees, without consent, gave publication to those facts that were not of legitimate concern to the public. In doing so, the FBI and its employees unreasonably placed Plaintiff in a false light before the public.

investigative efforts or what the FBI has required via that investigation, was required by its internal rules and regulations or state law not to disclose to third parties.

47. As a direct, proximate and foreseeable result of the FBI's unconstitutional invasion of plaintiff's privacy, plaintiff has suffered actual and economic damages in a total amount to be proven at trial.

48. Plaintiff is informed and believes and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that said invasion constituted despicable conduct by the FBI and defendants executed it with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

Plaintiff's Claim for Equitable Relief, Damages, pursuant to 5 U.S.C. § 552(a)(g)

49. Plaintiff was damaged by the FBI's willful, intentional and arbitrary violation of the Act. As such, plaintiff has every right to request from the FBI's delinquent file any and all records pertaining to plaintiff which were withheld from plaintiff by the FBI's unlawful actions. Moreover, plaintiff is and continues to be suffering irreparable damage and malicious embarrassment from the FBI's illegal withholding of information pertaining to plaintiff in the files and records of the FBI's lawful surveillance. The FBI's fraudulent and oppressive actions includes but is not limited to: opposition to numerous, irrevocable "clean proxy" assessments designed to clear plaintiff to proceed to a major development and other significant financial and reputational repercussions. The direct and consequential damages include the outrageously excessive investigation of plaintiff by the FBI, and the publicity of private facts that were purposely released from plaintiff's file, false accusations of other fraudulent activities. Plaintiff has duly called out these omissions by the FBI and requests permanent relief from this Court.

50. Plaintiff was forced to file his private documents and information with the FBI under the auspices of the FBI's duly enforced powers, and did so with the expectancy of a certain level of confidentiality. Instead, plaintiff's personal information, private facts, and more

plaintiff to either: (1) succumb to [illegible] that would [illegible] permanently of his hard-earned personal property and right [illegible] the privacy invaded by the publication of his confidential private facts as alleged; or (2) fight the FTB through the only means available to him: the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

51. It was highly foreseeable to the FTB [illegible] the success of the scheme to unlawfully deprive plaintiff of his property through the use of [illegible] as well as the destruction of his privacy and the imposition of huge "fraud" penalties as aforesaid, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

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

FOURTH CAUSE OF ACTION

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

53. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs [illegible] through 52, above, as if set forth herein verbatim.

54. By conducting [illegible] investigations of Nevada residents and by sending [illegible] "Demands to Furnish Information" as part of their investigation in Nevada of plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by casting

misleading overall Nevada residents that plaintiff was under investigation in California, thereby falsely portraying plaintiff's character in an illegal and criminal context, and thereby casting plaintiff's character in a false light.

38. The FTB and defendants' conduct in publicizing the investigation of plaintiff cast plaintiff in a false light in the public eye, thereby adversely compromising the standing of those who know or would, but for defendants' deliberate, secret and malicious acts, come to know of the nature and scope of this investigation. Such publicity of the investigation would foreseeably and objectionably be highly offensive to plaintiff and was carried out for the sole purpose of harming plaintiff, and was carried out in reckless and callous disregard of plaintiff's rights. Defendants' conduct would be highly offensive and embarrassing to plaintiff and was carried out in such a manner as to cause maximum possible damage to plaintiff's reputation.

39. As a direct, proximate and foreseeable result of the FTB and Does' false light invasion of plaintiff's privacy, plaintiff has suffered actual and substantial damages in a total amount in excess of $10,000.

40. Plaintiff is informed and believes and therefore alleges that the invasion of plaintiff's privacy was intentional, malicious and oppressive in that such invasion of privacy was despicable conduct by the FTB and Defendants, entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

Claim for Recovery Based on Violation of Due Process Clause

41. Plaintiff was deprived of his property without notice and an opportunity to be heard. As such, plaintiff asserts a right to property that the FTB's decision to unconstitutionally possessed without authority to do so under the facts. In short, he was deprived of, and continues to be deprived of, property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. Plaintiff has suffered actual and substantial damages as a result of the FTB's unlawful seizing powers. The FTB's freezing and

oppressive actions including the intimidating deposition of customers, substantial civil penalty assessments designed to force plaintiff to yield to a huge compromise of their significant financial and reputational investments. The unnecessary, unjustified, malicious actions intended the outrageously intrusive invasion of his privacy, as aforesaid, and the publicity of certain facts that were exclusively private of from outside public permission or public curiosity. Plaintiff reasonably relies on these premises and his severe and permanent distress.

29. Plaintiff was forced to disclose his private documents and communications with the FTB under the duress of the FTB's aggressive power, and did so with the expectancy of a confidential, lawful audit. Instead, as will be seen, the enhanced power of the FTB, this forum, plaintiff is either FTB accountable or suffers the wrongful loss of his hard earned property and rights as well as privacy invaded by the publication of his confidential private facts as described in (2) (g), the FTB through the information available, to wit, the employment of teams of lawyers and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

30. From April, 1999 forward to the FTB's, about the success of its scheme to unlawfully deprive plaintiff of his property through such extortionate tactics as the destruction of public privacy and the imposition of huge "fraud" penalties as described, plaintiff's only reasonable recourse to vigorously defend himself in the audits and the continuing protest proceedings thus required the employment of teams of attorneys and other experts. The resulting attorneys' fees and other professional fees of the plaintiff are increased and continue to increase, as proximately and directly caused and necessitated by the FTB's aforementioned actions.

31. Specifically, the incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's wrongful conduct as set forth. The pursuit of unlawful objectives. Plaintiff's damages were proximately caused by and the foreseeable consequence of the FTB's unlawful and unjustified conduct as described herein. Plaintiff's damages were proximately caused by and the foreseeable consequence of the FTB's unlawful and unjustified conduct as described herein in the audits and the continuing protest proceedings. Plaintiff has not been

[illegible] damages [illegible] amount in excess of $10,000 [illegible]

[illegible]

FIFTH CAUSE OF ACTION

[illegible]

65. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 64, above, as if set forth in full.

66. The aforesaid and unidentified persons in which the FBI and Defendants conducted their investigation in this matter against Plaintiff extends to and under the color of authority from the State of California and/or persons purporting to act on behalf of the State of California and the FBI and defendants elected to, and continues to investigate and harass plaintiff using highly classified intelligence techniques, methods, and practices from at least 1993 — and probably [illegible] — and [illegible] the FBI's own pleadings that plaintiff was already [illegible] at least 1992 and continues to be, extensive, oppressive and outrageous conduct. The FBI has in every sense, caught up with plaintiff hostage in California, [illegible] and discriminatory [illegible] and effect to achieve significant [illegible] Plaintiff's improper political [illegible] Plaintiff is informed and believes, and therefore alleges, that the FBI and defendants conducted and continue to investigate Plaintiff in violation of his reasonable privacy expectations [illegible] which was and continues to be [illegible] and humiliate plaintiff and to deter him from exercising constitutional liberties and freedoms [illegible] and [illegible] conduct of the FBI and defendants was [illegible] and [illegible] Plaintiff has suffered and will continue to suffer severe emotional distress and anxiety as a direct and proximate result of the FBI and its [illegible] conduct, and [illegible] Plaintiff is informed and believes, and thereon alleges, that unless restrained by this Court, the FBI and defendants will continue to engage in the aforesaid conduct, thereby causing Plaintiff irreparable injury in that Plaintiff will be subjected to [illegible] surveillance, interference, harassment, and intimidation by the FBI and defendants.

64. As a direct, proximate, and foreseeable result of the FTB and its employees' [illegible] conduct, plaintiff has suffered, and continues to suffer, public humiliation, mental and emotional distress, and other general damages in an amount in excess of $10,000.

65. Plaintiff is informed and believes, and therefore alleges, that said extreme, outrageous, and malicious conduct was [illegible] conscious, and oppressive in that it was despicable conduct by the FTB and its employees, entered into with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to punish the perpetrators and to deter [illegible].

Claim for Attorneys' Fees as Special Damages Pursuant to 42 U.S.C. § 1988:

66. Plaintiff was forced to file suit without the assistance of counsel. Because plaintiff had been informed that the FTB's counsel [illegible] would be prosecuting plaintiff according to the law and the facts [illegible], he was advised to hire counsel to represent him [illegible], a decision that plaintiff has been forced to make in order to protect plaintiff from abuse and misuse of the FTB's lawful status, power, etc. The FTB's fraudulent and oppressive scheme includes [illegible] plaintiff's right to engage counsel [illegible] should plaintiff have chosen to do so, and to force plaintiff to [illegible] engage counsel to represent plaintiff in the present litigation. The [illegible] and [illegible] conduct by the FTB and its employees as complained of herein [illegible] plaintiff's [illegible] and [illegible] plaintiff to incur attorneys' fees and costs in the present litigation. Plaintiff expressly reserves the right to amend this complaint to state the amount of attorneys' fees and costs incurred.

67. Plaintiff was forced to disclose his private documents and information to the FTB under the [illegible] FTB's [illegible] threats, [illegible] with the expectation that [illegible] would [illegible]. Instead, plaintiff's [illegible] of the FTB, [illegible] plaintiff's [illegible] (1) statements [illegible] that would [illegible] plaintiff from [illegible] of his [illegible] personal property and right [illegible] to have his privacy [illegible] by the publication of his confidential, private [illegible] as the result of the FTB's [illegible] the only [illegible]

[illegible] to wit: the employment of counsel, experts and professional experts to vigorously defend himself in the civil and tax proceedings in California and proceedings.

68. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such actions as the issuance of the deficiency notices and the imposition of penalties as aforesaid, plaintiff would vigorously defend himself in the civil and tax proceedings in California proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and foreseen by the FTB's course of conduct described.

69. Wherefore, plaintiff seeks attorneys' fees and other professional fees as the legal and foreseeable damages resulting proximately from the FTB's outrageous conduct against plaintiff in an amount to be determined. Plaintiff's damages for emotional distress could be accomplished by the presentation of personal testimony of plaintiff to the jury in this case, as expressly noted hereinabove, and/or the conduct of the proceedings. Plaintiff therefore claims, as specific damages, an amount [illegible] in an amount in excess of $10,000.00, the exact amount thereof to be proven according to the evidence at trial.

SIXTH CAUSE OF ACTION

(Tort Abuse of Process)

70. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 69, above, as if set forth herein verbatim.

71. The acts of plaintiff's employer, both personally and through its predecessor in interest, to vigorously prosecute the FTB's tax claims against plaintiff, a resident of the State of Nevada since [illegible], the FTB has willfully sought to extort a sum of money from plaintiff through administrative proceedings conducted by the California taxing authorities, which the FTB is empowered to pursue on behalf of the government of the State of California,

said administrative proceedings have been unlawfully and illegally obtained from the files of Novell through means of administrative "pretext phone calls" that have been unlawfully utilized in the attempt to extort money from plaintiff as aforesaid.

72. The FTB, without authorization from any Novell court or government agency, issued facially authoritative "DEMAND TO PRODUCE OR PERMIT INSPECTION," which did not purport to be issued by pursuant to "quasi-judgement," in various Novell-related professional and business matters relating specifically to plaintiff. The subject "Demand" contained certain deficiencies with respect to plaintiff in the following respects:

(a) Despite the fact that such "Demand" was without basis of law, it was specifically represented in the "Authorized by: California Revenue & Taxation Code (Sections 19504 (a) and 26021 (a)(1))" section of the Scale of California, that it was issued on behalf of the "Executive Officer of the state of California" to visit specific premises, and more personally identified as relating to "Andrew Filipowski" Plaintiff and the identified by his social security number and/or corporate insurance by information known within the custody of the FTB, although the information with reference was not disclosed to plaintiff. The prosecution of administrative proceedings which may be prosecuted was motivated by the intent to make plaintiff and the aforementioned subjects of the illegal documents;

(b) Each such "Demand" was unlawfully used as a basis to further the FTB's premature attempt to illegally and unconstitutionally seize and retrieve personal property of plaintiff from residences in the State of California, the persons of which the FTB has sought to collect taxes from in the name of plaintiff, not just pursuant to Cal. Revenue and Taxation Code any of the aforementioned time periods;

(c) Each such "Demand" was unlawful as Novell's employees, accountants and attorneys do not have the authority or power, pursuant to the terms of Novell's agreement with plaintiff, to act on behalf of plaintiff in connection with any matters relating to the FTB without first obtaining plaintiff's express, written and informed consent, and without the intent or perpetration of committing any illegal purpose thereof, or making any false "Demand" with respect to the FTB, including but not limited to the false promises of confidentiality by the FTB. According to

the [illegible] by plaintiff [illegible] by the FTB in furtherance of its unlawful scheme;

(e) Although the FTB was allegedly investigating plaintiff for the audit years 1991 and 1992, such audits were and are [illegible] used for the purposes of attempting to extract [illegible] from plaintiff, as demonstrated by the fact that several of the "Demands" indicated that they were issued to secure information about plaintiff "for [illegible] investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated," and then proceeded to demand information pertaining to the years 1990, 1994, and 1995 "to present."

(f) Sheila Cox, [illegible] for the FTB who has [illegible] in attempting to gain unlawful access to plaintiff's wealth through [illegible] of extortion, was the "Authorized Representative" [illegible] issued these [illegible] "Demands," and each of the "Demands" [illegible] legal or administrative [illegible] regarding plaintiff [illegible] in the conduct of the FTB's administrative proceedings against plaintiff;

(g) That each "Demand" was [illegible] issued to Nevada recipients who Sheila Cox and the FTB thought would most likely respond to the [illegible] and language of the Demands, as opposed to courteous letters of inquiry [illegible] the FTB [illegible] governmental agencies and officials [illegible] potential [illegible] of [illegible] to extract sensitive information [illegible] through [illegible] documents [illegible] to have extraterritorial [illegible] based upon the authority of California law;

(h) In conjunction with and in addition to the issuance of the aforesaid "Demands," and the personal investigative forays into Nevada by FTB agents as detailed above, a representative of the FTB, [illegible] to plaintiff's tax counsel, Eugene Cowan, Esq., [illegible] of the proceedings, these types of disputes involving wealthy or well-known taxpayers [illegible] their contested assessments [illegible] because these taxpayers do not want to risk having their personal financial information being made public. [illegible] Ms. [illegible] settlement was made with the implied threat that the FTB would release

illegally confidential financial information concerning plaintiff in the form of a false, misleading and deceptive audit report of the type produced in a fraud by the FTB and then used against plaintiff;

(h) In conjunction with and in addition to the issuance of the aforesaid "Demand" and the other improper methods of exerting extortive pressure on plaintiff by the FTB, many of which have been set forth by reference, the additional conduct by the FTB which has compromised its abuse of its administrative powers by asserting "Plaintiff Trips penalties based on patently false and fictitious accusations, including but not limited to, the concealment of assets or residences prior to the commencement of plaintiff's residency by claiming Nevada residency;

(i) The FTB and Sheila Cox knew that they had no authority pursuant to "DEMAND TO FURNISH INFORMATION" to use Nevada residency, business or society, and that it was a gross abuse of Section 7056 of the California Revenue and Taxation Code under which the Franchise "Demand" was purportedly promulgated, and the Criminal section of the California Revenue and Taxation Code contains no provision that would permit the FTB to issue such threats under the color of state and citizens of Nevada and Nevada and despite knowing that it was highly improper and unlawful to attempt to deceive Nevada citizens and businesses into believing that they were under some compulsion to submit to the "Demands" under pain of some type of punishment, Sheila Cox and the FTB nevertheless deliberately and calculatingly did so in a manner authorized by the aforesaid section of the California Revenue and Taxation Code in an attempt to pressure plaintiff into agreeing to pay money to plaintiff;

(j) In all the cases, the actions by Sheila Cox and the FTB to utilize the "DEMAND TO FURNISH INFORMATION" in Nevada, constituted a deliberate unlawful and despicable deception in an extreme abuse of power that was perpetrated, in furtherance, pressure and coercive conduct and all calculating in a combination of subterfuge strategy and abuse in order to force plaintiff to yield to the FTB's extortionate demands for money, and the true nature of the employment contract of Sheila Cox by the FTB, by the

pursued "Demands" while being subject to Nevada residents, professional personnel and witnesses, and in failing from the responses of the "Demands" the fact that the complained-upon Civil Investigative Demands were unreasonable and not necessary and lacked authority, and

(b) The FTC further abused its legal, administrative process by issuing the same questionnaires to Nevada residents, professionals and businesses without providing a modification of civil discovery as required by the due process clause of Article I, Section 8 of the Nevada Constitution and the applicable Nevada Rules of Civil Procedure.

35. As a direct, proximate and foreseeable result of the FTC and Defendants' intentional and malicious abuse of the administrative process, which the FTC knowingly and unlawfully pursued against Plaintiff, Plaintiff has suffered actual and consequential damages, including but not limited to lost, valuable, marital and personal time and attorney's fees and costs.

36. Plaintiff is informed, has reasonable belief and therefore alleges, that as a result of the administrative process initiated and pursued against Plaintiff by the FTC, intentional, malicious and unprovoked acts of the FTC employees, including but not limited to unlawfully seized subpoenas and unprovoked civil penalties that could not be issued or justified by any lawful action within the purview of the powers conferred upon the FTC by the State of California pursuant to all statutes governing the powers of investigation, discovery and prosecution. Plaintiff is informed, believes and thereon alleges that the FTC employees acted maliciously for purposes other than those for which such powers are conferred.

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

37. Plaintiff re-alleges and incorporates herein by this reference all of the allegations contained in paragraphs 1 through 36 of this Complaint.

38. Plaintiff has a right to exercise that the FTC's criminal investigation and audit could be processed in good faith, according to the law and the facts. However, he was subjected to and continues to be subjected to the criminal and malicious and willful abuse of the FTC's fraudulent and

repressive scheme includes the intimidating imposition of enormous, indefensible fraud penalty assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) FTB actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the publicizing of private facts that were expressly extracted from plaintiff upon false promises of strict confidentiality. Plaintiff reasonably relied on these promises to his extreme and permanent detriment.

76. Plaintiff was forced to disclose his private documents and information with the FTB under the course of the FTB's unprecedented and [illegible] audit with the expectancy of a thorough, professional [illegible]. Instead, plaintiff became the [illegible] victim of the FTB, thus forcing plaintiff to either (1) succumb to extortionate [illegible] that would unlawfully deprive him permanently of his hard-earned personal property and right not to have his privacy invaded by the publication of his confidential private facts as aforesaid; or (2) fight the FTB through the only means available, to wit, the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing protest proceedings.

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

78. Plaintiff's incurrence of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in pursuit of unlawful [illegible]. Plaintiff's alternatives were to be ruthlessly and [illegible] vanquished by the overwhelming power and resources of a tenacious and corrupt FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims,

no special damages, his attorneys' fees in an amount in excess of $10,000.00, the exact amount thereof to be proved according to the ordinance and,

SEVENTH CAUSE OF ACTION

(Fraud)

39. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 38, inclusive, as if set forth herein verbatim.

40. Plaintiff, who prior to September 26, 1994, had been a long standing member and employee of the State of California, placed sole reliance in the representations of the FTB and the taxing authorities of the State of California when the FTB first contacted him in or about June 1997 regarding the 1994 audit of his California tax liability by the time of the first contact plaintiff had become overwhelmed and preoccupied elsewhere in the computer electronics industry, and he was visibly otherwise in accordance with his personal and business dealings, as well as the integrity of the reputation as a highly successful investor and investment advisor of significant individual assets.

41. During the course of each and every conversation between plaintiff and FTB representatives, the FTB affirmatively promised to fully and thoroughly investigate, gather and analyze all relevant facts and circumstances concerning plaintiff's California tax liability, including, but not limited to, plaintiff's residence and his business and financial transactions and activities, and plaintiff's professional representatives would specifically maintain the confidentiality of plaintiff's affairs, including the especially obtaining sworn statements from FTB agents or representatives of confidences received by such persons concerning plaintiff's affairs. The confidential information and documents and the said confidential information and documents were given to the FTB in reliance on its sworn promises and assurances of confidentiality, as aforesaid, that were binding upon the FTB and its relationship to plaintiff. The FTB was required to maintain the highly personal and confidential information

82. Despite the aforesaid assurances and representations of (i) confidentiality, (ii) good faith audit and (iii) confidentiality by the FTB, said assurances and representations were false, and the FTB knew they were false or believed they were false or were without a sufficient basis for making said assurances and representations. Even as the FTB and its agents were continuing to provide assurances of confidentiality to plaintiff and his professional representatives, and without notice to plaintiff or his representatives, Sheila Cox and the FTB were in the process of sending the bogus "DEMANDS TO FURNISH INFORMATION" to the utility companies in Las Vegas which demonstrated that these assurances and representations were false, and the FTB revealed plaintiff's personal home address in Las Vegas, thus making his highly sensitive and confidential information essentially available to the world through access to the databases maintained by the utility companies. Specific representative instances of the FTB's fraud include:

(a) A letter by Eugene Cowan, Esq., a tax attorney representing plaintiff, dated November 1, 1993 and addressed to and received by Ms. Marc Shayer of the FTB. Mr. Cowan indicated that he was enclosing a copy of plaintiff's escrow instructions concerning the purchase of his Las Vegas residence, and that "[p]ersonal information, the address of the Las Vegas home has been deleted." Mr. Cowan ended his letter with the following sentence: "As we discussed, the enclosed information is highly confidential and we do appreciate your assistance in maintaining their confidentiality." This letter is contained within the files of the FTB, and the FTB noted in its chronological list of items, the receipt of the aforesaid escrow instructions with "address deleted."

(b) In the FTB's records concerning the Residency Audit 1991 of Gilbert P. Hyatt, the following portion of a comment is contained:

"11/23/1993 - "[Eugene Cowan] wants us to keep as few copies as possible due to his concern for the privacy of the taxpayer." [The FTB agent] explained that we will need copies, as the case is important, long, and complicated and ... likely to protest and take several years to resolve."

AA002904

(f) 2/19/09 - TELEPHONE CONVERSATION DOCUMENTED IN FBI Memorandum

[illegible] was instructed to [illegible] Division Counsel [illegible] of

documentation [illegible]"

(iii) 2/20/09 - Meeting between Sheila Cox and [illegible] Division Counsel. Mr. Dawson stressed that the employee is very motivated about his privacy and does not wish to give up access to anything. He told Sheila Cox [illegible] with Internet Security and Resource people. He said that the employee is fearful of [illegible] [sic] that some reference to "Islamic" is [illegible] in the Sheila Cox investigation and he personally [illegible] Mr. Dawson [illegible] improvement of plaintiff's privacy concerns and does not see [illegible] in media [illegible] FBI, Sheila Cox and other FBI agents know that plaintiff had gone into [illegible] computer and [illegible] [illegible] and other websites consistent with the magnitude of plaintiff's [illegible] in the government employ[illegible]

(iv) [illegible] February 26, 2009, Dawson, Executive Letter to Sheila Cox of the FBI documenting contents of [illegible] documents. Mr. Dawson stated "As previously discussed with you and other members of the Bureau on numerous occasions, all computers and computer systems owned by the government are highly confidential. It is our understanding that you will [illegible] [illegible] [illegible] [illegible]"

(v) 3/2/09 - Letter sent to Dawson. Reply by Sheila Cox on 3/2/09 [illegible] [illegible] FBI Quantico, Cox stated "The FBI acknowledges that the employee is a private person who places significant value on protecting his privacy[.]"

(g) The [illegible] meeting Sheila Cox had with Mr. Dawson on [illegible] 2009, and Mr. Dawson's expression of plaintiff's concern for his privacy and the explanation by Cox of the FBI's [illegible] [illegible] and Dawson's policy [illegible] initiatives which may subject the [illegible] FBI employee to criminal sanctions or recommendations made by Mr. Dawson's letter to Sheila Cox of February 26, 2009, [illegible] by the highly confidential nature of all [illegible] and materials furnished to the Enterprise Key Board" and the possibility that "failure to comply may result in [illegible] [illegible] with criminal misuse" [illegible] upon understanding, the [illegible] all information and documents provided to

the FTB would be confidential, audit-use, plaintiff's personal and business affairs. Specifically, [illegible] stated "[I] understand [I] am required to maintain confidentiality" as to plaintiff's personal and business affairs, thereby demonstrating disclosure for plaintiff, his privacy concerns and the FTB's awareness of confidentiality.

58. Plaintiff further alleges that from the very beginning of the FTB's notification to plaintiff and his professional representatives of an intent to audit his 1961 California taxes, express and implied assurances and representations were made to plaintiff through his representatives, that the audit was to be an objective, unbiased, and good faith audit and that the auditor of the FTB was fully informed of the proper information and belief, based on the FTB's [illegible] actions, that [illegible] representations were relied upon by the FTB and that all of the agency's work connected to those in the plaintiff's successful prosecution of plaintiff's painstaking labor through numerous stages of audit, [illegible] and collection. Indications of the scope of the fraud perpetrated by the FTB include:

(a) Despite plaintiff's numerous requests for copies of documents, evidence and files of the California residence at October 1, 1961 in his audit, [illegible] and the Board, pursuant to the audit, the FTB has continued to the present time to withhold from plaintiff such documents, and therefore evidence of plaintiff's residence in California in 1961 and his escape to [illegible] California income tax by fraud.

(b) Plaintiff supplied evidence to the FTB that his declared [illegible] sale, and income and interest derived from the sale of his California home on his 1961 income tax return, [illegible] were given by the FTB auditor to [illegible] that cause the plaintiff to [illegible] [illegible] until June, 1962, the sale was a short-term capital gain, and a major basis for assessing [illegible] penalties against plaintiff. [illegible] [illegible] the presence for assessing

by Plaintiff, aware of his own misdeeds and thereby allegations that could not be proved by credible evidence, and other material provisions which would indicate that Plaintiff continued to commit outrageous tax fraud crimes for the purpose of concealment which he did in his business dealings and activities during the period from October 1, 1991.

(b) After declaring bankruptcy in the California home on October 1, 1991, Plaintiff and the IRS later disputed how much of the expensive California home was the home Plaintiff purchased in Las Vegas, Nevada to shield assets from being seized. Nevada law clearly states that "Statistics show, and it is common knowledge, that the taxpayer's [California] home will not be weighed in a balance against [the Nevada] home, as the taxpayer will use the Nevada home as a homestead if he intends to remain in Las Vegas during his retirement years" (emphasis added); and

(c) The IRS's pattern, custom and practice and ultimate wrongful interference of a bona fide sale of Plaintiff's 1991 Las Vegas home was supported by the quasi-judicial Nevada residents, homeowners and business entities who relied on Plaintiff and concerning whose property Plaintiff's name was indicated on Plaintiff's having transferred from January 1992 to the present all of the income falsely reporting payments into bank accounts controlled or maintained by obligations to the State of California.

54. The IRS and its agents intended to induce payment and use fraudulent representations, concealments in misrepresentations, threatened false assertions and representations in order to acquire highly sensitive and confidential information regarding plaintiff and his professional representatives, and place Plaintiff in a position which he would be vulnerable to the IRS's false assertions of large sums of money from him. The IRS was aware that Plaintiff's imprisonment placed in his privacy because of the danger of financial exploitation and other crimes by involving the extreme need for security in plaintiff's work and place of residence. The IRS also knew that it would not be able to obtain the information without the use of the quasi-judicial transaction of the divorce information and circumstances and the subsequent collection actions.

tax assessments and penalties against plaintiff without providing plaintiff and his professional representatives with sufficient documents of serious confidentiality.

85. Plaintiff reasonably relied on the true, correct and authorized representations made by the FTB and its agents and having no reason to question the authority of the State of California to make such representations, documents and assurances, did agree both personally and through his authorized professional representatives to cooperate with the FTB and provide it with the highly sensitive and confidential information and documents in fact, Plaintiff relied on the false representations and assurances of the FTB and its agents to his extreme detriment.

86. Plaintiff's reasonable reliance on the misrepresentations of the FTB and its agents, as aforesaid, resulted in great damage to Plaintiff, including damages of an unusual and nature to be proved fully at the Court's discretion, plus actual and consequential damages, including but not limited to loss of liberty, mental and emotional distress, in an amount in excess of $10,000.

87. The aforesaid misrepresentations by the FTB and its agents were fraudulent, oppressive and malicious. Plaintiff is therefore entitled to punitive and exemplary or punitive damages in an amount sufficient to punish the perpetrators herein and to deter such conduct in the future.

Claims Against Does and Special Damages Pursuant to CCP 425.10

88. Plaintiff is unaware of the FTB's conduct without the assistance of an insider party who could provide evidence of the FTB's illegal acts. Plaintiff believes that his case would be processed in good faith, according to the law and the facts. Instead, as more particularly set forth herein, he was subjected to a predetermined and unconstitutional attempt to extract money from plaintiff in order to serve the personal political ambitions of the FTB's individual agents. The FTB's intentional and oppressive scheme included the arbitrary imposition of sanctions, unreasonable financial penalty assessments designed to force payment of said illegal assessments. The significant financial and psychological duress which the FTB's illegal and unconstitutional policies exacted against plaintiff in order to coerce payment of this illegal and unconstitutional

public any of private facts that were expressly excluded from plaintiff Trump's promises of strict confidentiality. Plaintiff repeatedly relied on these promises of the exclusive and permanent confidence.

50. Plaintiff was forced to disclose his private information and interaction with the FBI under the threat of the FBI's manipulation of government benefits with the assistance of a corrupted, biased media. Instead, plaintiff Trump is the innocent victim of the FBI's flagrant illegal plans. The actions of Comey and other persons acts that would unlawfully deprive him permanently of his fundamental personal property and rights not to have his privacy invaded by the publication of his confidential, private facts or allow him to exercise his right that the FBI through the only means available to vest the undisclosed information of his legal and professional expectations disappointed, betrayed, humiliated and the consistency Constitution was prevented by

51. It was highly foreseeable to the FBI that release of the secret files would unlawfully deprive plaintiff of his protected property rights and cause severe damages to his privacy and his human mental health. Plaintiff's only alternative was to vigorously defend himself in the public and the courts of public opinion. This required the employment of teams of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FBI's course of outrageous behavior.

52. Plaintiff's lawyers' fees and other professional fees are highly foreseeable damages resulting directly from the FBI's malicious conduct, aspirations, planning, pursuit of unlawful objectives. Plaintiff Trump's motivations were to do wrong, and he was violated by the unauthorizing power and weapons of a resistance and corrupt FBI, in a previously defined Donald Trump's public and his positions, California tort proceedings. Plaintiff therefore claims as special damages his attorneys' fees incurred in pursuit of litigation against the federal government including all the evidence at trial.

EIGHTH CAUSE OF ACTION

(For Breach of Implied Duty — Including Interest)

Prior to

92. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 91, inclusive, as though set forth herein.

93. As representations in its communications and policies, to facilitate voluntary compliance by a taxpayer to produce information requested of the taxpayer during audit, and to seek to maintain the trust and confidence of the taxpayer by promising to be forthright and fulsome disclosure in its position as an auditor, the FTB does gain, both voluntarily and involuntarily, the necessary possession of personal and confidential information concerning the taxpayer that a taxpayer would reasonably expect to be kept confidential and not disclosed to third parties. As a result, a confidential relationship exists between the FTB and the taxpayer during an audit and continues to exist for long as the FTB maintains possession of the personal and confidential information that gives a duty of confidence to the FTB to not disclose the highly personal and confidential information it obtains concerning the taxpayer.

94. As described above in this Complaint, despite the FTB's representations of confidentiality and fairness during the audit, Plaintiff's request to control highly personal and confidential information at the request of the FTB as an integral part of a lawful and investigation was unlawfully violated by during the disputed time periods. The FTB, in its position as an auditor, also required personal and confidential information concerning Plaintiff's family members. The relationship of loyalty and confidentiality in particular as to the FTB was recognized by both parties and with the particular sensitivity and confidentiality and secrecy not disclosed to third parties Plaintiff's personal and confidential information. The FTB, without necessity or justification, nevertheless breached its duty of loyalty and confidentiality by making such information available to third parties and continues to make Plaintiff's personal and confidential information that the FTB holds a duty secret to disclose.

95. Assessment of such excessively outrageous and oppressive conduct on the part of the FBI by plaintiff has caused substantial grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel upon the breach of confidentiality by a party in whom trust and confidence has been imposed based on the party's position.

96. As a direct, proximate, and foreseeable result of the FBI's aforementioned invasion of plaintiff's privacy, plaintiff has suffered severe mental and consequential damages in a sum in excess of $ 10,000.

97. Plaintiff is informed and believes, and based thereon alleges, that the said breach of confidentiality by the FBI was intentional, malicious, and oppressive in that such breach constituted decisions made by the FBI's employees with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are imposed.

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

98. Plaintiff has been forced into the FBI's courts without choice and is, therefore, entitled to every right or benefit that the FBI's counsel or counsel would be entitled to if they prevailed in good faith, according to the law and the facts. Plaintiff has been injured by, and is entitled to be compensated for, all reasonable and necessary attorneys' fees incurred in bringing this action, including all costs and expenses of suit, like the foregoing imposition of these matters including all "fraud penalty" assessments designed to force plaintiff to yield to the FBI's unlawful and oppressive demands, and other significant financial and injurious results. Therefore, the foregoing conduct, and the actions including the outrageously intrusive invasion of his privacy and breach of confidentiality, and threats, and the subsequent actual actions that were expressly a result of those threats and false promises of strict confidentiality. Plaintiff reasonably relied on those promises and this extreme and permanent harm.

90. Plaintiff was forced to disclose his private financial information with the FTB under the threat of the FTB's unconstitutional practice but did so with the expectancy of the strictly limited privilege that the FTB would not disclose the information to any third party. Plaintiff is the intended victim of the FTB's unlawful conduct. Plaintiff's reasonable expectations and duty would unlawfully deprive him permanently of his fundamental personal property and constitutional privacy rights invaded by the publication of his confidential, private financial records and (2) fight the FTB through the most expensive, protracted litigation imaginable, involving the employment of teams of legal and professional experts to vigorously defend himself in court over the unconstitutional practices.

91. The wrongful inaccessible to the FTB that allowed the disclosures of the confidential information unlawfully deprive plaintiff of his property through the unlawful publication and dissemination to the detriment of his privacy and the original benefit of the bargain, as aforesaid, plaintiff is only alternatively entitled to vigorously defend himself in the public and private arena in many California tax proceedings. This requires the employment of teams of attorneys and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and will continue to incur, were proximately and directly caused and necessitated by the FTB's violation of the Constitution, as set forth above.

92. Plaintiff's investigation of attorneys' fees and other professional fees are highly unascertainable damages resulting directly from the FTB's tortious conduct, as against plaintiff's pursuit of unlawful objectives. Plaintiff's allegations were to do nothing and be completely by the overwhelming power and resources of transactions and counsel FTB has employed against Plaintiff in the unlawful and unconstitutional California tax proceedings. Plaintiff therefore claims as special damages, has incurred fees in an amount in excess of $10,000.00, the total amount to be proved at trial and/or in such other amount as may be proved at trial.

WHEREFORE, Plaintiff respectfully prays for judgment against the DOE and Defendants as follows:

FIRST CAUSE OF ACTION

For judgment declaring that the DOE is a Nevada resident at the time of the accident on September 26, 1991 for purposes of:

2. For judgment declaring that the DOE has no lawful basis to remain in the United States of America following the conclusion of September 26, 1991 through December 1, 1991, or any other subsequent period chosen by the Court, and excluding that the DOE be subject or entitled to prejudgment interest thereon at the statutory rate of 10% per annum.

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

SECOND CAUSE OF ACTION

1. For general and consequential damages in an amount in excess of $10,000.00;

2. For punitive damages in an amount to be determined by the jury sufficient to punish Defendants and deter others from engaging in similar conduct;

3. For costs of suit;

4. For reasonable attorney's fees as special damages pursuant to NRCP 9(g); and

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

THIRD CAUSE OF ACTION

1. For punitive damages in an amount sufficient to punish the Defendants for the wrongful acts alleged herein;

2. For costs of suit;

3. For reasonable attorney's fees as special damages pursuant to NRCP 9(g); and

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

FOURTH CAUSE OF ACTION

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

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

For costs of suit;

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

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

FIFTH CAUSE OF ACTION

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

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

3. For costs of suit;

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

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

SIXTH CAUSE OF ACTION

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

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

3. For costs of suit;

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

SEVENTH CAUSE OF ACTION

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

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

3. For costs of suit;

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

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

PRAYER FOR RELIEF

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

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

3. For interest at the

4. For reasonable attorneys' fees as special damages pursuant to Sandy Lane; and

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

DATED this ___ day of March, 2015.

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Attorneys for Plaintiff Gilbert P. Hyatt

Exhibit 2

[redacted]

DISTRICT COURT

CLARK COUNTY, NEVADA

GLENN A. HYATT,

Plaintiff,

v.

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

Defendants.

Case No.: A-90-253717-C

Dept. No.: X

FIRST SECOND AMENDED COMPLAINT

Jury Trial Demanded

Lawsuit from Defendants' Discovery Efforts; Significant Public Policy and Amount in Excess Of $10,000.00

(This pleading was filed under the Discovery Commissioner's stay) February 22, 1994

[redacted]

Verified Complaint for Damages in this Civil Rights Action Complaint, complaint against defendants, and each of them, as follows:

PARTIES

1. ——— Plaintiff resides in Clark County, Nevada and has resided since September 26, 1991.

2. ——— 2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and activities conducted in Los Angeles, California. The FTB's function is the collection of income taxes from California residents and from income earned in California by non-residents.

3. ——— 3. The identities and capacities of Defendants DOES 1 through 100 are designated by fictitious names at this time because Plaintiff is ignorant of the true names of said defendants, each individual and/or entity when in concert with the FTB as an employee, co-conspirator, independent contractor, committed the tortious acts described in this complaint and is responsible for the damages of these Doe Defendants as provided by law. Only after the FTB was compelled to comply with the provisions of NRS 41.071 was Plaintiff able, through discovery, to obtain their true identities and capacities. Upon ascertaining the true names and capacities of these Doe defendants, Plaintiff shall promptly amend this complaint to properly name them by their actual identities and capacities. For ease of reference, wherever this complaint refers to "defendants," it shall refer to all. Those fictitious, who are individuals, corporations or other business entities, and their true names are stated by amendment comply with particularized facts concerning their conduct in the commission of the tortious acts alleged herein.

4. ——— Plaintiff is informed and believes, and on that basis alleges, that each defendant in some manner or capacity acted as alleged, acted or omitted to act within the course and

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

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

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

SUMMARY OF CLAIMS

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

1 Blackline comparison of files [illegible] Pleadings Second Amended Complaint [illegible] Amended Complaint [illegible] and file [illegible] Pleadings Second Amended Complaint [illegible] second amended complaint [illegible]

(SECOND CAUSE OF ACTION); (3) an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION); (4) placing plaintiff in a false light (FOURTH CAUSE OF ACTION); (5) recovery of compensatory and punitive damages against the FTB and the defendants for their outrageous conduct in regard to their continuing investigation in Nevada of plaintiff's residency, domicile and place of abode, including, but not limited to the FTB's failure to abide by the confidential relationship created by the FTB's request for and receipt of Hyatt's highly personal and confidential information (FIFTH CAUSE OF ACTION); (6) recovery of compensatory and punitive damages against the FTB and defendants for an abuse of process (SIXTH CAUSE OF ACTION); (7) recovery of compensatory and punitive damages against the FTB and defendants for fraud, including but not limited to the FTB's failure to abide by the confidential relationship created by the FTB's request for and receipt of Hyatt's highly personal and confidential information (SEVENTH CAUSE OF ACTION); and (8) for recovery of compensatory and punitive damages against the FTB and defendants for ~~negligent misrepresentation~~ breach of confidentiality in regard to the FTB's breach of its duty not to disclose Hyatt's personal and confidential information (EIGHTH CAUSE OF ACTION). The claims specified in this paragraph constitute EIGHT separate causes of action as hereinafter set forth in this complaint.

FACTUAL BACKGROUND

Plaintiff's Residency in Nevada

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

4 DeltaView comparison of file://M:\HYATT\PDF\Pleadings\Second Amended Complaint 02-20-98 First amended Complaint.doc and file://M:\HYATT\PDF\Pleadings\Second Amended Complaint [illegible] second amended complaint PLE.DOC. Performed on

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[illegible] extended and successful publicity [illegible] Turpen's [illegible] enjoy [illegible] social, recreational and financial advantages Nevada has to offer, and to generally enhance the quality of his life. Accordingly, plaintiff purposefully [illegible] on September 20, 1990. This move took place after much consideration and almost an entire year of planning.

5. [illegible] The following events are indicative of Turpen's intent to remain in Nevada until [illegible] 2010, should Turpen not [illegible] this residency and [illegible] remain in Nevada until [illegible] continues and [illegible] (1) plaintiff's [illegible] purchase of his home in October 1990; (2) his meeting and [illegible] prominent Las Vegas contractor during [illegible] October 1991 and ongoing, [illegible] April 1992 when plaintiff closed the purchase of his home in Las Vegas; (3) in November 1991, Turpen [illegible] contacts in Nevada, obtained a Nevada driver's license, and joined a [illegible] organization in Las Vegas; (4) plaintiff's extensive charity, commencing in early October 1991, for a new business in Las Vegas and for the purpose of securing the services of professional [illegible] assisting [illegible] during the process of locating a home to purchase, plaintiff made numerous efforts to begin [illegible] practice in Las Vegas; (5) plaintiff's purchase of a home in Las Vegas on April 3, 1992; (6) plaintiff's maintained and sustained business interests in Las Vegas; and (8) plaintiff's [illegible] through the years from September of 1990 and continuing to the present, consistent presence in high [illegible] offices, in the professions, and active within the life, as a true Nevada resident of extraordinary [illegible] work, and exceeding the likes of the Nevada [illegible]. Further, plaintiff has substantial evidence, both testimonial and documentary, in support of the fact of this Nevada residency, domicile, and place of abode in Nevada commencing on September 20, 1990, and continuing to the present.

The Illegal, Vexatious, Unconstitutional Assessments

10. [illegible] Because plaintiff was a resident of California for most of 1991, plaintiff filed a Part-Year resident income tax return with the State of California for 1991 (the "1991 Return"). The 1991 Return reflects plaintiff's previously [illegible] income from California for the period of January 1 through September 20, 1991.

5 See, e.g., Complaint at [illegible] Ex. C (PDF Pleading) Second Amended Complaint ¶¶ 2-4, 6; First Amended Complaint, Exhibit "C" thereto (PDF Pleading) Second Amended Complaint ¶¶ 2-4, 6; Second Amended Complaint ¶ 10 (10th), Declaration on

11. ——In or about January of 1995, FBI officials began planning a trip to Las Vegas, the purpose of which was to interview and conduct the scope of their investigation of plaintiff. In March of 1995, the FBI and defendants commenced a "background" investigation of plaintiff that included unannounced confidential contacts with private friends of plaintiff's. These contacts were directed at numerous residents of Nevada, including political figures and former and present employees of businesses and stores frequented by plaintiff and plaintiff's wife.

12. Both plaintiff and defendants are residents of Nevada and were at all times described in paragraph 12, above. The FBI pursuant to its investigation of plaintiff and individual residents of Nevada issued subpoenas entitled "Demand to Furnish Information" which used the FBI's authority under California law to issue subpoenas and demanded that the recipients thereof produce the requested information concerning plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FBI never sought permission from a Nevada court or any Nevada government agency to issue such "grand jury subpoenas" to Nevada citizens, in violation of the jurisdictional boundaries of the organizations. Many Nevada residents and business entities did respond with answers and information concerning plaintiff.

13. ——Subsequent to the investigation and "background" check on Nevada by the FBI and defendants, the FBI did not correspond, either by regular, telephone or Nevada Government Mail Network, Nevada Senator Richard Bryan and/or any of Bryan's Nevada staff and agencies seeking information regarding plaintiff's residence in Nevada. Plaintiff is informed and believes, and therefore alleges, that the FBI intentionally sent misdirected "grand jury subpoenas" (i.e., "Demand to Furnish Information") to private individuals

and maintenance of a conspiracy to illegally and improperly deprive plaintiff of his property through deception and the presence of an unlawful assessment, while at the same time, protecting taxpayers in Nevada from the assessment and collection of taxes due and owing to Nevada, as mandated by law. Defendants' actions, as set forth above, constitute the attempt by the FTB to exercise extraterritorial authority in Nevada in violation of the sovereignty of the State of Nevada.

15. Plaintiff is further informed and believes that the FTB's extensive illegal and unauthorized activities in Nevada, as set forth above, have been conducted with the knowledge, consent and participation of the Nevada Department of Taxation and other Nevada governmental agencies and officials. Plaintiff is informed and believes that the FTB's illegal activities in Nevada have been ongoing for a number of years and have been conducted with the knowledge, consent and participation of the Nevada Department of Taxation and other Nevada governmental agencies and officials.

16. On or about April 22, 1996, after the FTB had completed its audit and investigation of the 1991 Return, the FTB issued a Notice of Proposed Assessment to plaintiff. The Notice of Proposed Assessment was issued personally to plaintiff in Nevada where the FTB assumed plaintiff was a resident of California and Nevada until April 2, 1992. The FTB then assessed plaintiff California state income tax for the period of September 26 through December 31, 1991 in the amount of $[illegible]. Thereafter, the FTB demanded payment by plaintiff of the amount due pursuant to the assessment but never specifically identified any basis for the FTB's determination of the assessed tax, based upon its asserted residency in Nevada and non-residency in California, was fraudulent.

17. Plaintiff, who had never resided in California for more than seven months per year, and who had been a resident of Nevada for more than 20 years, was forced to file a California income tax return and pay the amount demanded by the FTB to prevent a levy on his assets in Nevada.

resident California Taxes for ~~the most-fictional issue of his residency in Nevada in the period of September 26 through December 31 of~~ 1991 (being for the bad faith reasons of the FTB during the audit and continuing until the present in the still ongoing California tax proceedings it would be determined in Nevada, the state of plaintiff's residence. The FTB is in effect attempting to impose an illegal tax on plaintiff ~~by coercing him into administrative procedures and lawsuits of unconstitutional action in California~~. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that plaintiff remained a California resident until he purchased and closed escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a way — any way — to effectively assess additional income taxes against plaintiff after he changed his residency from California to Nevada are based on governmental bad faith and greed arising from the FTB's eventual awareness of the financial success plaintiff has realized since leaving California and becoming a bona fide resident of the State of Nevada. The referenced date of Nevada residence accepted by the FTB with respect to the 1991 Report [illegible] by the information [illegible] by the FTB [illegible] of plaintiff and [illegible] by the FTB [illegible] was over six months after plaintiff moved to Nevada with the intent to stay and began, as he sought, to enjoy all the privileges and advantages of residency in his new state.

[illegible] [illegible]

[illegible]

The FTB's Continuing Pursuit of Plaintiff in Nevada

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

16. ~~15.~~ On or about April 14, 1997 and May 12, 1997 respectively, plaintiff received notices from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in regard to the 1992 tax year in which it will assess taxes from plaintiff for income received during the period of January 1 through April 3, 1992 and in addition would seek penalties for plaintiff's failure to file a state income tax return for 1992.

20. 20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such assessments by the FTB always come to this stage as taxpayers do not want to risk their personal financial information being made public. Plaintiff understood this statement to be a strong suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes and penalties. Plaintiff, however, [illegible] to do so, as he has not been a resident of California since his move to Nevada on September 26, 1991, and it remains clear to him that the FTB is engaging in an [illegible] to extort taxes and penalties[9] from him that he does not legally or morally owe.

21. 21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed Assessment for 1992. Despite the FTB's prior written statements and findings that plaintiff became a Nevada resident as of April 3, 1992 and its statement in such Notice of Proposed Assessment that "We [the FTB] consider you to be a resident of this state [California] through April 2, 1992," such notice proposed to assess California state income taxes on plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff state income taxes for 1992 in an amount [illegible] times greater than that for 1991, assessed plaintiff a penalty almost as great as the assessed tax for alleged fraud in claiming to be a Nevada resident during 1992 and stated that interest accrued through August 14, 1997 is roughly the equivalent of [illegible] the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was [illegible] times the amount of tax it initially assessed for 1991, and [illegible] plaintiff was a California resident for the entire year of 1991. Without explanation, the FTB ignored its earlier findings and written acknowledgment that plaintiff was a Nevada resident as early as April 3, 1992. This attempt is a blatant effort to extort [illegible] sums of money from a Nevada resident.

22. 22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage in a repeat of the [illegible] investigations directed at

9 [illegible] Second Amended Complaint [illegible] First Amended Complaint [illegible] Second Amended Complaint [illegible]

plaintiff is the State of Nevada's first effort to enjoin the unconstitutional taxation of plaintiff's [illegible], pursuant to Nevada's Proposal A assessment for the 1992 tax year.

33. Plaintiff is informed and believes, and therefore alleges, that the FTB may assume to assess additional California state income taxes for the years 1988, 1989, 1990 and beyond against the FTB's own conclusion of its own residency, claiming plaintiff's residence in Nevada ended April 5, 1992, and in fact not allowing him to take a proportionate amount of excise penalties and income apportionment of his excise as a bona fide resident of Nevada. It appears from its actions concerning plaintiff that the FTB has a financial interest in effectively declaring that no one in California can escape California residency taxes by establishing residency in another state because the significant amount of income that the FTB hopes to gain by invalidating application of the "closer connection" test prohibits even considering the merits of a resolution of such test.

The FTB's Motive

34. Plaintiff is informed and believes, and therefore alleges, that the FTB has unconstitutionally declared that plaintiff was a California resident at all times after September of 1988, despite the FTB's exhaustive actions in trial in which plaintiff was found in Nevada. The FTB has acknowledged in its own records that plaintiff sold his California home in October, 1991, that plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a home in Las Vegas in April 1992.

35. Plaintiff is informed and believes, and therefore alleges, that the assessments by the FTB against plaintiff for 1991 and 1992 result from the fact that plaintiff moved from California to Nevada and FTB investigators found a magazine article about plaintiff. The article reported that plaintiff was engaged in the business of developing a syndicated settlement from plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB has [illegible] a fraud penalty against plaintiff for 1991 tax year and issued a Notice of Proposed Assessment asserting plaintiff for 1992 tax year and a fraud penalty for the same year. In addition, plaintiff was

[illegible] September 20, 1991. Despite his assertion that plaintiff formally became a Nevada resident at that time, Plaintiff alleges that the FTB's efforts to assess a penalty for claiming his homestead exemption despite having no financial basis for doing so, is vindictive, malicious and oppressive.

Jurisdiction

26. This Court has primary jurisdiction over the FTB pursuant to Nevada's long-arm statute, NRS 14.065 et seq., because the FTB's actions constitute tortious contacts and transactions to reduce the State of Nevada's sovereignty by reason of its multiple efforts to undermine plaintiff's status as a Nevada resident, and for money damages related to such tortious conduct by maintaining that plaintiff remained a resident of California during the period September 20, 1991 to December 31, 1991 and beyond.

27. Plaintiff is informed and believes, and therefore alleges, that the FTB has pursued the practice of selectively investigating Nevada residents who were formerly residents of California, and thereafter seeking to impose state income taxes for time periods subsequent to the termination of California residency and establishment of residency in Nevada.

PLAINTIFF'S CAUSES OF ACTION

(For Declaratory Relief)

28. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in paragraphs 1 through 27 inclusive as though fully set forth herein verbatim. [illegible] Second Amended Complaint to pursue [illegible] Court's October 3, 1995 Order, [illegible] Second Amended Complaint [illegible]

29. Pursuant to California law, in determining whether an individual was a resident of California for purposes of taxation thereby making such individual's income subject to California taxation during a given period, the individual must have been domiciled in California during such period, but for a temporary or transitory purpose.

[1] Defendant's concession of [illegible] Pending Second Amended Complaint [illegible] First Amended Complaint and filed [illegible] Second Amended Complaint [illegible] Second Amended Complaint PUBLISHED. Pursuant to

See Cal. Rev. & Tax. Code § 17014. The FTB's own regulations and practice require that it apply certain factors in determining an individual's domicile, whether the individual's presence in California is for a temporary or transitory purpose, and whether the individual is employed in California for more than nine months.

(c) Domicile

Domicile is defined broadly as the individual's physical presence in California with "intent to stay or if absent, to return" from California for more than nine months. Such intent is determined by the acts and conduct of the individual, such as: (1) where the individual is registered to vote and votes; (2) location of the individual's permanent home; (3) comparative size of homes in which the individual has a financial interest; (4) where the individual files federal income tax returns; (5) comparative time spent by the individual in different locations; (6) location of the individual's California and non-California property; (7) obtaining a driver's license from another state; (8) registering motor vehicles in another state; and (9) establishment of memberships in social organizations in another state; and (10) establishment of accounts at banks in another state for which the individual is the only signatory.

(d) Temporary or Transitory Purpose.

The following principles, although not identical to those used to determine domicile, are considered in determining whether an individual was in California for other than a temporary or transitory purpose: (1) physical presence of the individual in California for more than nine months is strong evidence that the individual is in California for other than a temporary or transitory purpose; (2) establishment of a permanent home in another state by an individual who is absent from California; (3) commencement or pursuit of substantial employment or business activity in another state by the individual; (4) holding oneself out in California by the individual as a sojourner or visitor; (5) ownership of property in California as well as the nature of property owned in another state; (6) connections of the individual's California contacts with social, professional, or cultural organizations; (7) active participation by the individual based in another state in social, civic, professional, or other organizations; (8) location of bank accounts in another

12 Third Amended Complaint; Exhibit 6 [Non-redacted Consolidated Second Amended Complaint] filed 6/15/2015 [Redacted Consolidated Second Amended Complaint] filed 6/15/2015 PDF; Plaintiff's Consolidated Second Amended Complaint; 6/15/2015 PDF; Second Amended Complaint; Exhibit FCB 7001; Performance

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

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

31. [illegible] An actual controversy exists as to whether plaintiff was a full time resident of Nevada [illegible] California [illegible] commencing on September 26, 1991 through December 31, 1991 and continuing thereafter through the year 1992 [illegible]. Plaintiff contends that under either Nevada or California law he [illegible] full-time, bona fide resident of Nevada throughout the referenced periods and down to the present, and that the FTB ignored its own regulations and precedents in coming to the contrary, and that the FTB has no jurisdiction to

3 [illegible] comparison of [illegible] Second Amended Complaint [illegible] First Amended Complaint.doc and [illegible] PDF-Plaintiffs Second Amended Complaint [illegible] Performed on

impose a tax, oblige or compel plaintiff during the relevant period. Plaintiff is informed and believes and thereon alleges that the FTB had no authority to impose a tax on plaintiff's income or property or to require plaintiff to file a tax return with the FTB or to withhold and pay over to the FTB any portion of plaintiff's income or property. Plaintiff is informed and believes, and thereon alleges, that the FTB has no authority to impose any requirement on plaintiff.

32. ~~Plaintiff is informed, believes and thereon alleges that~~ Contrary to the Constitutional principles of Nevada's sovereignty and its exclusive jurisdiction over its territory, the FTB has, since September 20, 1991, unlawfully and without plaintiff's consent or agreement, and in violation of Nevada's sovereignty and exclusive jurisdiction over its territory, purported to exercise jurisdiction over plaintiff and plaintiff's business activities in Nevada and has purported to impose upon plaintiff certain requirements and obligations under the Franchise Tax on Income Act. Plaintiff is informed and believes, and thereon alleges, that the FTB has no authority to impose any requirement on plaintiff.

33. ~~Plaintiff is informed, believes and thereon alleges that~~ The FTB's actions as alleged above are unlawful, unconstitutional and void and violate Nevada's sovereignty and territorial integrity.

SECOND CAUSE OF ACTION

(Declaratory Relief – Unreasonable Intrusion Upon The Seclusion of Another – Unreasonable Intrusion Upon The Solitude or Seclusion of Another or Private Affairs or Concerns – Unreasonable Publicity Given to Another's Private Life – Unreasonable Publicity Placing Another in a False Light Before the Public – Violation of Privacy)

34. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 33, and 29 through 33, above, as though set forth herein in full.

35. ~~Plaintiff is informed and believes, and therefore alleges, that~~ The FTB has no reasonable expectation of the lawful right to intrude in any manner upon plaintiff's seclusion or solitude or private affairs or concerns, or to publicize any matter concerning plaintiff's business and private affairs. Notwithstanding the foregoing, the FTB and its employees and agents have engaged in, and continue to engage in, the following activities, among others, which have caused and will cause plaintiff great mental anguish and suffering: The FTB has engaged in, and continues to engage in, a multi-investigation as regard to the 1991 Return. Plaintiff would assert to the FTB its highly private

and confidential. In connection with financial matters, the Trustee must remain confidential thereby creating susceptible to relationships in which the FTB was required not to disclose Ward's highly personal and confidential information. The FTB even moved to seal Trustee documentation pertaining to Trustee's conduct in regard to the protection of this private information. At the time this complaint is filed, Trustee still has not filed the FTB documents by operation, in good faith, a proposal for trial or motion throughout the complaint, proved to be unduly [illegible].

15. ——— 15. Plaintiffs incorporated and reasserts, and by reference thereto, that the FTB and defendants have the individual plaintiff's right to privacy in regard to their information by revealing such information and otherwise conducting their investigation in Nevada, and complying with Nevada's right to investigation, through which the FTB and defendants revealed to third parties personal and confidential information, which plaintiff had every right to expect would not be revealed or made known.

16. 16. Plaintiffs formed and believed, and therefore allege, that the FTB and defendants' actions in conducting their investigation of plaintiff, including their actions both occurring within Nevada and directed to Nevada and California, were performed, and continue to be performed, with the intent to harass, annoy, vex, embarrass and injure plaintiff. Trustee knew he would eventually come into a conflict with the FTB concerning his residency during the audit time period and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in fact cause plaintiffs to harass, annoy, vex and embarrass them, and expend time and energies about the precautions sought, in which they have engaged.

17. 17. Plaintiffs informed and believed, and therefore allege, that the FTB and defendants through their investigation activities, prior to prosecution as mentioned in Nevada. They were conducted in Nevada, intentionally unlawful, and continues to undertake certain acts that the actions and decisions which plaintiffs would allege that they have in Nevada. The actions by the FTB and defendants were such that any reasonable person receiving plaintiffs would find highly offensive.

38. As a direct, proximate, and foreseeable result of the FTB and Defendants' unlawful invasion of plaintiffs' privacy, plaintiffs are entitled to recover general, actual damages in a sum in excess of $10,000.

39. In committing the acts alleged herein, Defendants acted maliciously and oppressively with the intention of injuring plaintiffs, or with a conscious disregard of plaintiffs' rights, and the actions were intended to cause harm to plaintiffs. Plaintiffs are therefore entitled to an award of punitive damages against the FTB and Defendants in an amount sufficient to punish the Defendants for their conduct and to deter such conduct in the future.

Claim for Attorneys' Fees as Special Damages Pursuant to CCP § 425.18

40. Plaintiffs were compelled to retain the FTB's counsel without choice and as an innocent party. As a result, plaintiffs had every right to expect that the FTB's decision to enter into and conduct processes in good faith, especially in the context of a contentious political issue and particularly because the FTB's counsel and public relations team were fully aware of the plaintiffs' interest in the FTB's investigation. The FTB's fraudulent and oppressive actions includes the unconscionable imposition of huge unjustifiable financial penalties, assessments and costs on plaintiffs, the right to a reasonable opportunity to file objections to financial and personal information. The unnecessary, burdensome, unreasonable, and extremely intrusive invasion of the privacy of plaintiffs, and the publicity of private facts that were necessarily extracted from plaintiffs under these practices, all since confidentiality. Plaintiffs' response to the FTB's demands for information, and the FTB's demands

41. Plaintiffs were forced to disclose private documents and information with the FTB under the threat of the FTB's unconscionable and illegal seizure of the personal property of plaintiffs. Plaintiffs have suffered, and continue to suffer, substantial injury, including, but not limited to, loss of privacy, loss of personal property, and loss of the right to control the dissemination of their personal property and right to have their privacy invaded as a prohibition.

of his confidential private facts as alleged; or (2) fight the FTB through the only means available to him, the expenditure of [illegible] of legal and accounting costs to ultimately defend himself in the audits and the continuing California tax proceedings.

42. It was highly foreseeable to the FTB that, as a natural consequence of its attempt to unlawfully deprive plaintiff of his property through its acts of misconduct, the destruction of his privacy and the imposition of these illegal penalties, [illegible] plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This resulted in the expenditure of attorneys' fees and other costs. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the FTB's outrageous behavior.

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

FOURTH CAUSE OF ACTION

(For Invasion of Privacy — Unreasonable Publicity Given

To Private Facts, Including Publicity Given to Matters Protected

Under the Concept of Informational Privacy)

44. Plaintiff repeats and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, and 34 through 37 43, above, as though set forth herein in full.

45. As set forth above, plaintiff disclosed to the FTB highly personal and confidential information at the request of the FTB as an inseparable part of its audit and

...ver's opinion in complaint's necessary during the dispute time period, thereby creating a confidential relationship in which the IRS was required not to disclose Lloyd's highly personal and confidential information. Patrick Todd's personal information would be kept confidential and not revealed to third persons and the FTB and defendants knew and appreciated that such information was to be kept confidential and not revealed to third persons.

16. ~~At all times~~ relevant, unless necessary or justifiable, ~~nevertheless~~ disclosed to third persons, and accessible to custodians and agents of Nevada certain of plaintiffs personal and confidential information which had been expressly disclosed to the FTB by plaintiffs only for the purposes of the preparation of the legitimate and lawful income tax returns of the plaintiffs which the FTB is required by law to maintain as ~~required by Nevada statutes, regulations or state law not to disclose to third parties~~ confidential.

17. 43. As a direct, proximate and foreseeable result of the FTB's ~~unconstitutional invasion of plaintiffs privacy, plaintiffs~~ suffered and continue to suffer damages in ~~a total amount in excess of $10,000~~.

18. ~~Plaintiffs~~ incorporate and reallege, as ~~if~~ set forth above, all the allegations of paragraphs ~~1 through 17~~ of this complaint.

19. ~~The unconstitutional conduct by the FTB and defendants described herein violates~~ plaintiffs' rights ~~under~~ the Fourth Amendment to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. ~~Plaintiffs~~ have a reasonable expectation of privacy in their personal information ~~provided to the FTB~~ and ~~defendants~~ ~~knew and~~ appreciated that such information was to be kept confidential and not revealed to third persons.

20. ~~As a direct, proximate and foreseeable result of the FTB's unconstitutional invasion of plaintiffs privacy, plaintiffs~~ suffered and continue to suffer damages in ~~a total amount in excess of $10,000~~.

21. ~~Plaintiffs~~ incorporate and reallege, as ~~if~~ set forth above, all the allegations of paragraphs ~~1 through 20~~ of this complaint.

22. ~~The unconstitutional conduct by the FTB and defendants described herein violates~~ plaintiffs' rights ~~under~~ the Fifth Amendment to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. ~~Plaintiffs~~ have a reasonable expectation of privacy in their personal information ~~provided to the FTB~~ and ~~defendants~~ ~~knew and~~ appreciated that such information was to be kept confidential and not revealed to third persons.

23. ~~As a direct, proximate and foreseeable result of the FTB's unconstitutional invasion of plaintiffs privacy, plaintiffs~~ suffered and continue to suffer damages in ~~a total amount in excess of $10,000~~.

24. ~~Plaintiffs~~ incorporate and reallege, as ~~if~~ set forth above, all the allegations of paragraphs ~~1 through 23~~ of this complaint.

25. ~~The unconstitutional conduct by the FTB and defendants described herein violates~~ plaintiffs' rights ~~under~~ the Fourth Amendment to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. ~~Plaintiffs~~ have a reasonable expectation of privacy in their personal information ~~provided to the FTB~~ and ~~defendants~~ ~~knew and~~ appreciated that such information was to be kept confidential and not revealed to third persons.

26. ~~As a direct, proximate and foreseeable result of the FTB's unconstitutional invasion of plaintiffs privacy, plaintiffs~~ suffered and continue to suffer damages in ~~a total amount in excess of $10,000~~.

27. ~~Plaintiffs~~ incorporate and reallege, as ~~if~~ set forth above, all the allegations of paragraphs ~~1 through 26~~ of this complaint.

28. ~~The unconstitutional conduct by the FTB and defendants described herein violates~~ plaintiffs' rights ~~under~~ the Fifth Amendment to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. ~~Plaintiffs~~ have a reasonable expectation of privacy in their personal information ~~provided to the FTB~~ and ~~defendants~~ ~~knew and~~ appreciated that such information was to be kept confidential and not revealed to third persons.

29. ~~As a direct, proximate and foreseeable result of the FTB's unconstitutional invasion of plaintiffs privacy, plaintiffs~~ suffered and continue to suffer damages in ~~a total amount in excess of $10,000~~.

30. ~~Plaintiffs~~ incorporate and reallege, as ~~if~~ set forth above, all the allegations of paragraphs ~~1 through 29~~ of this complaint.

31. ~~The unconstitutional conduct by the FTB and defendants described herein violates~~ plaintiffs' rights ~~under~~ the Fourth Amendment to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. ~~Plaintiffs~~ have a reasonable expectation of privacy in their personal information ~~provided to the FTB~~ and ~~defendants~~ ~~knew and~~ appreciated that such information was to be kept confidential and not revealed to third persons.

32. ~~As a direct, proximate and foreseeable result of the FTB's unconstitutional invasion of plaintiffs privacy, plaintiffs~~ suffered and continue to suffer damages in ~~a total amount in excess of $10,000~~.

33. ~~Plaintiffs~~ incorporate and reallege, as ~~if~~ set forth above, all the allegations of paragraphs ~~1 through 32~~ of this complaint.

34. ~~The unconstitutional conduct by the FTB and defendants described herein violates~~ plaintiffs' rights ~~under~~ the Fifth Amendment to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. ~~Plaintiffs~~ have a reasonable expectation of privacy in their personal information ~~provided to the FTB~~ and ~~defendants~~ ~~knew and~~ appreciated that such information was to be kept confidential and not revealed to third persons.

35. ~~As a direct, proximate and foreseeable result of the FTB's unconstitutional invasion of plaintiffs privacy, plaintiffs~~ suffered and continue to suffer damages in ~~a total amount in excess of $10,000~~.

Claim for Attorneys' Fees as Special Damages Pursuant to 3 RICO (1)(c)

36. ~~Plaintiffs~~ were required to file this action and to employ attorneys to protect their rights ~~under~~ the RICO statutes, ~~and~~ as an ~~proximate~~ result ~~plaintiffs~~ have ~~been~~ damaged in the amount of their attorneys' fees ~~and costs~~ incurred herein.

Claim for Punitive Damages

37. ~~The~~ defendants' conduct ~~as~~ alleged herein ~~was~~ willful, fraudulent, malicious, oppressive and ~~in~~ reckless disregard of plaintiffs' rights. ~~Plaintiffs~~ are entitled to punitive damages ~~in an~~ amount ~~in excess of $10,000~~.

Claim for Injunctive Relief

38. ~~Plaintiffs~~ have no adequate remedy at law for the injuries currently being suffered and ~~which~~ will be suffered ~~in the future~~ as a result of the ~~defendants'~~ conduct ~~described herein~~. ~~Plaintiffs~~ are entitled to ~~preliminary and permanent~~ injunctive relief ~~enjoining the defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert or participation with them, from engaging in the conduct described herein~~.

Claim for Declaratory Relief

39. ~~Plaintiffs~~ are entitled to ~~a~~ declaratory relief ~~declaring the rights and duties of the parties herein~~.

Claim for Attorneys' Fees

40. ~~Plaintiffs~~ are entitled to ~~an~~ award of attorneys' fees ~~and costs~~ incurred ~~herein~~ pursuant to ~~42 U.S.C. § 1988~~.

WHEREFORE, ~~plaintiffs~~ pray ~~for~~ judgment ~~against defendants~~ as follows:

1. ~~For~~ general damages ~~in an amount in excess of $10,000~~;

2. ~~For~~ special damages ~~in an amount in excess of $10,000~~;

3. ~~For~~ punitive damages ~~in an amount in excess of $10,000~~;

4. ~~For~~ injunctive relief ~~enjoining the defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert or participation with them, from engaging in the conduct described herein~~;

5. ~~For~~ declaratory relief ~~declaring the rights and duties of the parties herein~~;

6. ~~For~~ attorneys' fees ~~and costs~~ incurred ~~herein~~ pursuant to ~~42 U.S.C. § 1988~~;

7. ~~For~~ such other and further relief as ~~the Court~~ may deem just and proper.

DATED: ~~this 15th day of December, 2006~~.

~~LIONEL SAWYER & COLLINS~~

~~By: /s/ Mark A. Hutchison~~
~~MARK A. HUTCHISON~~
~~Nevada Bar No. 4639~~
~~1700 Bank of America Plaza~~
~~300 South Fourth Street~~
~~Las Vegas, Nevada 89101~~
~~(702) 383-8888~~
~~Attorneys for Plaintiffs~~

8 DeltaView comparison of file: 061215 FTB Attorney-Client Amended Complaint (2).pdf and file: Complaint.doc produced on: 12/15/2006 11:15:00 PM. Deletions: Amended Complaint 3 2006 the FCB second amended complaint. FCB.DOC Deletions: Amended Complaint 3 2006 the FCB second amended complaint. FCB.DOC Deletions: Amended

"penalty" assessments designed to [illegible] significant financial [illegible] [illegible] and the [illegible] that were [illegible] from plaintiff under false promises of strict confidentiality. [illegible] repeatedly relied on these promises to his extreme and permanent detriment.

50. Plaintiff was forced to disclose his private [illegible] information with the FTB [illegible] the FTB's [illegible] along with the [illegible] of a [illegible] plaintiff [illegible] the [illegible] of the FTB, thus forcing plaintiff to [illegible] subject to tortious acts that would unlawfully deprive him [illegible] of his hard earned personal [illegible] the only means available [illegible] professional experts to vigorously defend himself in [illegible] audits and the continuing California tax proceedings.

51. [illegible] the FTB [illegible] the destruction of his privacy and the imposition of [illegible] penalties, as aforesaid, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of [illegible] The [illegible] fees [illegible] which plaintiff has incurred [illegible] were proximately and directly caused and necessitated by the FTB's course of tortious behavior.

52. [illegible] attorneys' fees and other professional fees [illegible] against plaintiff [illegible] Plaintiff's alternatives were to do nothing and [illegible] the overwhelming power and resources of a [illegible] FTB [illegible] himself in the audits and the continuing California tax proceedings. Plaintiff therefore claims

9 [illegible] comparison of [illegible] Pleadings [illegible] Amended Complaint [illegible] Amended Complaint [illegible] second amended complaint [illegible]

[illegible]

[illegible] in an amount in excess of $10,000.00, and [illegible]

[illegible] according to proof.

FOURTH CAUSE OF ACTION

(Invasion of Privacy — Pending Plaintiff Class)

(Bruce Lisker)

53. 46—Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 52, inclusive, 1 through 19, and 41 and 42.52, above, as if set forth herein verbatim.

54. 46. By conducting [illegible] and investigations, Nevada police and by leaking information to [illegible] and by leaking information to the media, the FBI and defendants invaded plaintiff's right to privacy, the FBI and defendants invaded plaintiff's right to privacy by giving or transmitting to said Nevada police and prosecutors false investigations, thereby falsely portraying plaintiff as having engaged in illegal and immoral conduct, and thereby falsely portraying plaintiff to [illegible]

55. ——— the FBI and defendants, and each of them, in participating in investigations of plaintiff and publishing false light in the media, thereby adversely compromising the morals of those who knew or would reasonably be likely to come to know of the nature and scope of the work. Such publication of the investigations were [illegible] right to [illegible] plaintiff and was essential to further [illegible] lawful, appropriate purposes. Said conduct by the FBI and the defendants was calculated to cause, and did cause, the immediate [illegible] and was not only offensive and [illegible] plaintiff, but would have been regarded as highly offensive and objectionable to a reasonable person of ordinary sensibilities, and [illegible] conduct solely serves to damage plaintiff's reputation.

56. As a direct, proximate, and foreseeable result of the FBI and defendants' [illegible] plaintiff's privacy, plaintiff has suffered [illegible] and consequential damages in a total amount in excess of $10,000.

57. [illegible] incorporates all the [illegible] Plaintiff's Second Amended Complaint (2-21-19) First Amended Complaint, Lisker and [illegible] HYATT FBI's Pending Second Amended Complaint (2-21-19) FBI's second amended complaint NOTICE OF [illegible]

57. Plaintiffs informed and believe and thereon allege that the illegal intrusion of Plaintiff's computer was intentional, malicious, and oppressive in that such intrusion of privacy was done with the full knowledge of PETE and Defendants, or done with a willful and conscious disregard of the rights of Plaintiff. Plaintiff is therefore entitled to recovery of punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

Claim for Attorneys' Fees and Special Damages Pursuant to NRS 41.600

58. Plaintiff was required to file PETE's audit without prior knowledge and as a result plaintiff has been required to engage the services of counsel to assist in the processing of said claim. Plaintiff has therefore incurred and continues to be subjected to, a determined and conscious bad faith effort to extort money from plaintiff under duress and blackmail. The PETE Defendants' conduct and oppressive scheme to force the immediate financial transaction, including "fines and penalty" assessments designed to force plaintiff to yield to a payment demand or suffer significant financial and reputational damages. The unexpected, fraud concealed, factious assessment of the contractual provisions and the process, all to coerce plaintiff into the publication of private, confidential, and proprietary information which Defendants claim is their confidentiality. Plaintiff has been required to engage the services of counsel and has incurred attorneys' fees and costs in connection therewith.

59. Plaintiff was forced to disclose the private, confidential and proprietary information of the PETE Defendants' internal processes and disclosure of the operation of Plaintiff's business to PETE's agents, the principal owners of the PETE, and Sterling pursuant to Author ID's demand to produce same that would inevitably expose such confidential proprietary and rights of privacy information to the publication of the confidential, private, business records of PETE through the only means available to wit: the employment of means of legal and professional experts to objectively determine whether the audit conducted by Author ID was proper.

60. [illegible] damages [illegible] about the [illegible] scheme to [illegible] remove plaintiff [illegible] his property through such acts of commission as the [illegible] of [illegible] and the imposition of [illegible] "fraud" [illegible] plaintiff [illegible] to vigorously defend himself in the audits and the continuing California [illegible] proceedings. This [illegible] of [illegible] property. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately and directly caused and necessitated by the [illegible]'s course of tortious behavior.

61. Plaintiff's [illegible] of attorneys' fees and other professional fees [illegible] damages [illegible] directly from the [illegible] plaintiff in pursuit of unlawful objectives. Plaintiff's alternatives were to do nothing and be [illegible] by the overwhelming power and resources of a [illegible] and corrupt [illegible], or vigorously defend himself in [illegible] proceedings. Plaintiff [illegible] special damages [illegible] in an amount in excess of [illegible], the exact amount thereof to be proved according to [illegible] at trial.

FIFTH CAUSE OF ACTION

(For the Tort of Outrage)

62. Plaintiff [illegible] and incorporates [illegible] by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47, 51, above as if set forth in full here[illegible].

63. The [illegible] in which the [illegible] defendants carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the State of California, but [illegible] State of Nevada and [illegible] defendants' [illegible] plaintiff [illegible] California [illegible] for the [illegible] year of 1992 [illegible] and possibly continuing into future years [illegible] despite the FTB's own [illegible] that plaintiff was a Nevada resident at least as of April of 1992, [illegible],

32 [illegible] comparison [illegible] Complaint [illegible] Pleadings/Second Amended Complaint [illegible] FCB second amended complaint FCB.DOC. Performed [illegible]

oppressive and outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California, disregarding and abandoning all reason in its reprehensible, all-out effort to extract significant amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes and thereon alleges that the FTB and defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of which was to harass, annoy, embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as to coerce him into paying significant sums to the FTB in settlement of its unfounded claims of his residence in California throughout the disputed periods. As a result of such extremely outrageous and oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel if subjected to continuous threatening, outrageous personal threats and insults by such powerful and determined adversaries.

64. ~~71.~~ As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned extreme, threatening, and outrageous conduct, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

65. ~~72.~~ Plaintiff is informed and believes, and thereon alleges, that said extreme, threatening and outrageous conduct was intentional, malicious, and oppressive in that it was despicable conduct by the FTB and defendants carried on with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to serve the purposes for which such damages are awarded.

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

66. Plaintiff was drawn into the FTB's audit and tax cases and is an innocent party. As such, plaintiff [illegible] in this process [illegible] the FTB's demand for an audit [illegible] in [illegible]. [illegible] continues to be subjected to, a deceptive and malicious bad-faith attempt to extort money from plaintiff [illegible] the FTB's [illegible] the FTB's fraudulent [illegible]

23 The DeltaView comparison of file://M:/FTB/ATTORNEY/Pleadings/Second Amended Complaint/02-20-98 First Amended Complaint.doc and [illegible] Pleadings/Second Amended Complaint/03-26-98 PCB second amended complaint PCB.DOC. Performed on

numerous proceedings [illegible] the FTB's imposition of erroneous, indefensible "fraud penalties" [illegible] plaintiff [illegible] to incur enormous or suffer significant financial and professional devastation. The [illegible] [illegible] actions included [illegible] intrusive invasions of his privacy [illegible] publicity of private facts that were necessarily removed from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

[illegible]. Plaintiff was forced to [illegible] [illegible] with the FTB under the duress of the FTB's unjustified [illegible] [illegible] with the expectancy of a fair [illegible] [illegible]. Instead, plaintiff became the intended victim of the FTB. This [illegible] plaintiff [illegible] [illegible] acts that would unlawfully deprive him permanently of his [illegible] and [illegible] [illegible] [illegible] by the publication of his confidential [illegible] [illegible] (2) fight the FTB [illegible] [illegible] [illegible], to wit: the employment of teams of legal and professional [illegible] [illegible] the audits and the [illegible] California tax proceedings.

58. [illegible] the FTB [illegible] the success of its scheme to unlawfully [illegible] plaintiff of his [illegible] [illegible] [illegible] of the [illegible] and the imposition of huge "fraud" penalties. As expected, plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and [illegible] experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were [illegible] and directly caused and necessitated by the FTB's course of tortious behavior.

59. Plaintiff's [illegible] of attorneys' fees and other professional fees are highly foreseeable damages resulting directly from the FTB's tortious conduct against plaintiff in [illegible]. Plaintiff's alternatives were to do nothing and be vanquished by [illegible] [illegible] of [illegible] [illegible] FTB, or vigorously defend himself in the audits and the continuing California tax proceedings. Plaintiff [illegible]

24 [illegible] [illegible] Second Amended Complaint [illegible]

~~as specified herein, and for such other and further relief as the Court may deem just and proper.~~

~~[Reserved for prayer according to the exclusive right of this]~~

SIX CAUSE OF ACTION

(Abuse of Process)

~~37. Plaintiff repeats and incorporates each and every allegation contained in paragraphs 1 through 36, inclusive, as though fully set forth herein.~~

~~38. Despite plaintiff's ongoing efforts, both personally and through his professional representatives, to reasonably provide the FTB with the discovery sought in connection with the subject administrative proceedings, and to demonstrate that plaintiff has not resided in the State of Nevada since December 31, 2001, the FTB has wrongfully sought to extract vast sums of money from plaintiff. The subject administrative proceedings were and are for the fraudulent purpose for which the FTB is not pursuing a claim as an agency of the government of the State of California and administrative proceedings were not brought lawfully and primarily for the purpose for which the FTB is purportedly authorized to act as an agency of the government of the State of California, but rather for the ulterior purpose of attempting to coerce plaintiff to pay sums of money to the FTB which plaintiff does not owe to the FTB and which the FTB has no lawful right to collect from plaintiff, through misuse of administrative "grand subpoenas" that have been unlawfully issued by the FTB for the purpose of coercing money from plaintiff as aforesaid.~~

~~39. The FTB, acting through its duly authorized agents, employees and representatives, including, but not limited to, [illegible] a governmental agency, did improperly and unlawfully issue and cause to be issued [illegible] DEMAND FOR PRODUCTION OF DOCUMENTS, INFORMATION OR PROPERTY" and "GRAND SUBPOENA DUCES TECUM FOR BUSINESS RECORDS," also referred to herein by plaintiff as "grand subpoenas," to various Nevada residents, professionals and businesses, including specifically to persons and businesses with whom plaintiff has had business relationships. The aforesaid "Demand" and "Grand Subpoena" did not comply with the requirements of the following statutes:~~

~~(a) Despite the fact that said "Demand" was without force of law, they were specifically represented to be "authorized by" California Revenue & Taxation Code Section 19504 (formerly 19254 (a)) and "[illegible] pursuant to the State of California, Franchise Tax Board" on behalf of "The People of the State of California" to each specific recipient, and were accordingly calculated to [illegible] the [illegible] of Section 19504 of the California Revenue & Taxation Code, which provides:~~

Plaintiff was identified by his social security number and in certain instances by his postal home address in violation of express promises of confidentiality by the IRS. Although the documents "Demanded" were nominally those of plaintiff, the production of the information which they represented was motivated by the intent to provide plaintiff himself and no other person with information;

(b) Each such "Demand" was unlawfully used in order to further the efforts to collect from plaintiff that could not be lawfully and constitutionally assessed and collected because plaintiff was not a "taxpayer" of Nevada throughout the period of time the IRS has sought to collect from him, nor plaintiff has ever resided in California income during any of the pertinent time periods;

(c) Each such "Demand" was calculated to cause substantial professional and business loss, damage and injury to plaintiff, including, but not limited to, loss of monthly funds FTB withheld from plaintiff's personal paycheck, and without limitation or prejudice of receiving any legal response, as stated above, many of the "Demands" were made in violation of publicly announced express promises of confidentiality by the IRS thus adding to the pressure and anxiety felt by plaintiff as intended by the FTB in furtherance of its unlawful scheme;

(d) Although the IRS was allegedly investigating plaintiff for the audit years 1991 and 1992, such audit was unlawful and the "Demands" issued in the pursuance of such purported investigation of plaintiff as demonstrated by the fact that several of the "Demands" referred to in the complaint were issued to obtain information about plaintiff's wife for investigatory, punitive or retaliatory purposes pertaining to the above named taxpayer for the years indicated, and that plaintiff is demanding damages for actions pertaining to the years 1991, 1992, and 1993 inclusive;

(e) Each of the unlawful "Demands" was issued in retaliation for plaintiff's attempts to gain unlawful access to the IRS's wallet through means of extortion, such as "Anthem Blue Cross Insurance" which found their services through unlawful "Demands" and each of the "Demands" or proceedings or summons, legal or semi-quasi process

subpoena plaintiff may receive properly in the ordinary course of the administrative proceedings against plaintiff.

ff. That such "Document" was selected by, or based upon information provided to, Nevada marijuana activists Patricia Cowan and the FBI through would most likely required to be evidence of the nature and language of the documents requested in subpoenas issued and/or approved by the FBI agent in charge of the procurement of subpoenas and/or Patricia who were viewed as potential sources of information to be obtained with the deceptive attempt to create search warrant information from these thereby because of having possession of information that could be used in the administrative proceedings;

(g) The conjunction with and in addition to the issuance of the subpoena "Demands" and the personal, investigative inquiries made by FBI agents, investigative attorneys, representatives of the FBI, Acting Undersecretary, and/or plaintiff's tax counsel, Eugene Cowan, Esq., during the pendency of the proceedings, these separate, diligent, and wholly unauthorized inquiries were made in an unlawful endeavor to find out private information that taxpayers do not want to be receiving from personal financial information being made public. That the subpoena of Mr. Jones and the settlement was made with the implied threat that the FBI would otherwise highly penalize and criminalize plaintiff. The actions of the defendants and other persons acting in proper concert of the proceedings initiated by the FBI improperly and unlawfully by plaintiff.

(h) The conspiracy was and in addition to the issuance of the subpoena "Demands" and the other improper methods of investigative assistance to plaintiff to put the "Treasury which has brought in excess by extortion and without any entitlement in law or equity, the FBI compromised the abuse of its administrative process by assessing plaintiff huge penalties based on patently false and frivolous accusations, including but not limited to, the misdirection of assets to certain trusts, plus the outrageous assertion that plaintiff Texas Commerce Bancshares was a nominee;

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

and that it was a gross abuse of Section 19504 of the California Revenue and Taxation Code, under which tax proceeds were properly authorized, that the Nevada version of the California Revenue and Taxation Code contains no provision that merely purports to empower, or authorizes the FTB to issue such facially defective documents to residents and citizens of Nevada in Nevada and elsewhere, knowing that it was highly improper and unlawful to do so in the Nevada Jurisdictions and that it was unlawful to put the Nevada Jurisdictions in contradiction to the "Nevada Code" in order to attempt to collect from the "Defendants" in violation of plaintiff's constitutional rights. Defendants FTB nevertheless deliberately and calculatingly abused the process outlined in the aforesaid section of the California Revenue and Taxation Code in order to permit the wrongful issuance of money from plaintiff's

(j) Upon information and belief, determination by Nevada Courts and the FTB to utilize the "DISCLOSURE[s] TO PUBLIC INFORMATION" in Nevada, constitutes a deliberate, intentional, and discoverable decision to embark on a course of conduct in the absence of positive, personal information, reasonable assurance of fact(s) that would culminate in a determination of sufficient wrongful and tortious conduct by plaintiff to justify the FTB's determination to provide to [illegible] "Defendants" these confidential Nevada residents' professional persons and businesses, and in violation of the exemptions of the "Defendants" that are [illegible] to California law. Such disclosures [illegible] and unconstitutional [illegible] and [illegible] and

(k) The FTB further abused its legal, administrative process by issuing the illegal [illegible] to Nevada residents and businesses without providing plaintiff with notice of such disclosures by the due process clause of Article 1, Section 8 of the Nevada Constitution and the applicable Nevada Rules of Civil Procedure.

23. As a direct, proximate and foreseeable result of the FTB and [illegible] intentional and malicious issuance of the illegal [illegible] to the FTB [illegible] and [illegible] plaintiff as aforesaid, plaintiff has suffered [illegible]

27 TaxMasters' response to FTB's MOTION TO DISMISS Plaintiff's Second Amended Complaint (C-20-005 First Amended Complaint) and Plaintiff's MOTION FOR Leave to File Amended Complaint (C-20-005 Second Amended Complaint) and [illegible]

and economic and [illegible] damages, including but not limited to fear, anxiety, [illegible] and emotional distress in an amount in excess of $10,000.

74. 58. Plaintiff is informed and reasonably believes, and thereby alleges, that said abuse of the administrative processes in bad faith and [illegible] against plaintiff [illegible] intentional, malicious and oppressive in that it represented a deliberate effort to unlawfully extort a huge sum of money from plaintiff that could not be remotely justified by any honorable effort within the purview of the powers conferred upon the FTB by the State of California relating to all aspects of taxation, including the process of investigation, assessment and collection. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

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

75. Plaintiff was subjected to the FTB's audit without choice and [illegible]. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a premeditated and malicious bad faith attempt to extract money from plaintiff [illegible] the FTB's [illegible]. The FTB's [illegible] and aggressive scheme includes the [illegible] of fraud [illegible] assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational consequences. The threatened (and consummated) [illegible] included the [illegible] publicity [illegible]. Plaintiff [illegible] detriment.

76. Plaintiff was forced to disclose his private documents and information with the FTB [illegible] by [illegible] the expectancy of a fair [illegible] audit. Instead, plaintiff became the intended victim of the FTB, thus forcing plaintiff to either (1) [illegible]

29 [illegible] comparison of [illegible] Amended Complaint [illegible] First Amended Complaint.doc and [illegible] Second Amended Complaint [illegible] second amended complaint [illegible].DOC. Performed on

of his hard-earned personal property and rights; and to have his reputation and the confidence of his accountant, investors and associates; and (2) have the IRS be brought to the only means available to it to recover unpaid taxes, i.e., civil and criminal proceedings.

57. As a result of the misconduct by the IRS, Plaintiff has suffered the loss of his property through such types of intimidation as the assertion of liens and the possibility of levies. Plaintiff's only choice was to voluntarily submit himself to the unlawful demands of Defendants or suffer the resulting attorneys' fees and other pecuniary loss which Plaintiff has incurred, and continues to suffer, proximately and directly caused and necessitated by the IRS's course of malicious behavior.

58. Plaintiff's invocation of administrative procedures and remedies to recover damages resulting directly from the IRS's malicious actions against Plaintiff in pursuit of unlawful objectives. Plaintiff's efforts were to continue and be frustrated by the IRS's refusal to provide Plaintiff with a hearing and/or by the IRS's otherwise delaying and frustrating Plaintiff's efforts. Plaintiff has exhausted all administrative remedies to recover damages, but primarily from an administrative process that is futile, rendering it impossible for Plaintiff to recover damages through the administrative process.

SECOND CAUSE OF ACTION

(Civil Rights)

59. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 57, 59 through 91, 94 through 97, 99 and 102 as though fully set forth herein. Plaintiff includes paragraphs 58, 92, 93, 98, 100 and 101 as they are not relevant to this cause of action.

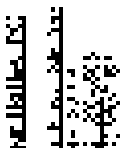
60. Plaintiff, prior to September 26, 1991 and since, has been a duly qualified resident and taxpayer of the State of California and has been in the business of

Case No. [illegible] Plaintiff's Fifth Amended Complaint [illegible] Second Amended Complaint [illegible] Second Amended Complaint [illegible]

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

81. ~~50.~~ During the course of seeking information and documents relating to the 1991 audit, [illegible] the FTB, through its promise to (i) conduct an unbiased, good faith audit and (ii) maintain, in the strictest of confidence, various aspects of plaintiff's circumstances, including, but not limited to, his personal home address and his business and financial transactions and status, and plaintiff's professional representatives took special measures to maintain the confidentiality of plaintiff's affairs, including and especially obtaining solemn commitments from FTB agents to maintain in the strictest of confidence (protected by supposedly secure arrangements) all of plaintiff's confidential information and documents, and the said confidential information and documents were given to the FTB in return for its solemn promises and assurances of confidentiality, as a fiduciary, thereby creating a confidential relationship in which the FTB was required not to disclose Hyatt's highly personal and confidential information.

82. ~~52.~~ Despite the aforesaid assurances and representations of (i) an unbiased, good faith audit and (ii) confidentiality by the FTB, said assurances and representations were false and the FTB knew they were false or believed they were false, or were without a sufficient basis for making said assurances and representations. Even as the FTB and its agents were continuing to provide assurances of confidentiality to plaintiff and his professional representatives, one of their number, Sheila Cox, and the FTB were in the process of sending the bogus "DEMANDS TO FURNISH INFORMATION" to the utility companies in Las Vegas which demonstrated that the aforesaid assurances and representations were false, as the FTB revealed plaintiff's personal home address in Las Vegas, thus making this highly sensitive and confidential information essentially available to the world through



moved to the extensive records sought by this subpoena. Specifically, the representatives of the FTB's audit include:

(a) The letter by Eugene Chow, Deputy Executive Officer, dated November 9, 2015, addressed to and received by Mr. Kevin Shaykett of the FTB, Mr. Chow indicated that he was executing a search warrant at Plaintiff's business premises on this date. Mr. Chow's letter also stated that "[p]ursuant to the authority granted in the search warrant, the officers of the California Franchise Tax Board (FTB) will be executing the following search warrant which we discussed. The search warrant is very broad and highly confidential. However, we do appreciate your utmost care in maintaining their confidentiality." This letter is executed with the Seal of the FTB, and the FTB appears to be the only agency that accepts the service of the search warrant with "Authorized Seal."

(b) The FTB's Franchise Tax Board Privacy Act Notice, dated October 2015, which "explains why certain information is requested by the FTB and how it may be used." The Notice states that "[t]he FTB 3552 [Exempt Organization Annual Information Return] requires you to provide information about your organization's activities, officers, and financial data. Failure to provide any of the requested information may result in a penalty."

(c) The FTB's Exempt Organization Audit Process Letter, dated October 2015, which "explains the following examples of reasons why we may request additional information:

[1] 2015-05 – "[Exempt Organization] must provide documentation to support its purpose as listed on its application for tax exemption. The [FTB agent] explained that we will need copies of the articles of incorporation and bylaws with your application for tax exemption."

[2] 2015-05 – "LETTER FROM REPRESENTATIVE AFTER REVIEW: Per the documents requested, we found that [Exempt Organization] has not manifested its purpose of incorporation[.]"

[3] 2015-05 – "Observing [Exempt Organization] . . . Exempt Organization . . . Mr. Chow's statement that the taxpayer is very concerned about his privacy and does not wish any access to certain areas. He told Mr. Chow that he has a Personal Security and Disclosure policy. He said that this is why he is hesitant to open the door. This unprofessional response to taxpayer is a demonstration by Shaykett that Exempt Organization Audit Section, the FTB's, outside the expectations of plaintiff's privacy as to the seizure and search of information it is generally entitled to by the FTB, Shaykett, and other FTB agents know that plaintiff has genuine concerns about being confidential over sensitive, expensive and other risks associated with the magnitude of plaintiff's

12 Declaration of Jillian M. [illegible] in Support of Plaintiff's Ex Parte Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction; Memorandum of Points and Authorities

position in the computer services industry.

(b) On February 16, 1995, Plaintiff's counsel sent a letter to Sheila Cox of the FTB enclosing copies of various documents. In the letter, he stated, "As we have discussed with you and other Franchise Tax Board officials, all correspondence and materials submitted to the Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you will retain materials in your office for review by formal protest[.]" [sic]

(c) On [illegible] 1995, in a letter sent to Virginia Cowan, Esq. by Sheila Cox on [illegible] regarding the 1991 audit, Cox stated, "The FTB acknowledges that the taxpayer has a private interest in the protection of trade secrets and other confidential information[.]"

(d) The [illegible] meeting at the FTB on [illegible] with Mr. Cowan, Mr. [illegible] and Mr. Cowan's concession of plaintiff's interest in his privacy, and the assurances by [illegible] of the FTB's employees concerning the Disclosure policy, the limitations of information subject to disclosure, FTB's unfettered discretion to withhold documents from inspection, and the [illegible] letter of Sheila Cox of February 28, 1995 evidencing the "highly confidential nature of the documents and materials submitted to the Franchise Tax Board" and the said auditor's understanding that you will retain these materials in locked facilities with limited access" thereby [illegible] understanding, the unauthorized disclosure of information provided to the FTB would be unjustified, including plaintiff's personal trade secrets and [illegible] sent on [illegible] to the Las Vegas utility companies including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water District, provided [illegible] such companies with [illegible] plaintiff's personal financial affairs, thereby damaging plaintiff's reputation and the FTB's assurances of confidentiality.

62. Plaintiff further alleges that from the very beginning of the FTB's investigation of plaintiff and the [illegible] of the income tax audit for 1989 California state [illegible] and implied assurances and representations were made to plaintiff through [illegible] representatives, that the audit was to be an objective, unbiased, and good faith inquiry into the merits of the 1989 tax classification; and [illegible] information and belief, based on

the FTB's assessment actions, the protocol representations were inactive, or the FTB auditors' actions were determined to have not been substantially prejudicial to plaintiffs' ascertaining [illegible] the basis of the FTB's assessment. Allegations of this type of [illegible] prepared solely by the FTB auditors.

(d) Despite plaintiff's delivery of copies of documentary evidence of the sale of her California residence on December 1, 1991, to his business accountant and consultant, Gene Jaap, to the FTB, the FTB has contended that the aforementioned sale was a sham, and therefore plaintiffs' income most California residency and has wrongfully taxed California income taxes by fraud.

(e) Plaintiffs supplied evidence of [illegible] to the taxpayer's status, and income and monies derived from the sale of his California home on his 1991 income tax return have been ignored by the FTB as it concluded that since the sale did not occur until January 1992, the sale was a sham, and therefore have to assess a fraud penalties against plaintiffs' income [illegible] the same for penalties.

(f) Plaintiff, owner of his own successful business and domicile, alleges that the FTB has no substantive evidence on which, indeed no reasonable, [illegible] could indicate that plaintiff [illegible] from California to Nevada [illegible] The Palms Club Casino, which he established his business residence and domicile [illegible] years.

(g) After declaring plaintiff's sale of his California home in December, 1991 a "sham," the FTB then audited plaintiff's much less expensive California home with the intent of it being used in The Virgin Islands as a principal residence for the [illegible] during the 1992 tax year. [illegible] occupying the taxpayer's California home as the less valuable home will not be weighed in the determination of residency, as the taxpayer sold the California home in December 1991. The home was purchased in Las Vegas during April of 1992. (Emphasis added); and

(h) The FTB's [illegible] constructed in part, above assumptions or omissions made by plaintiffs' [illegible] the FTB has [illegible] a further unprovided opportunity for the [illegible] to [illegible] evidence, [illegible] and [illegible]

without prior notice to plaintiff and/or over which neither plaintiff nor plaintiff's counsel had any control.

64. The FTB and its agents intended to induce plaintiff and his professional representatives to rely on the false and misleading representations and omissions of material fact made by the FTB and its agents, and to provide the FTB with highly sensitive and confidential information from plaintiff and his professional representatives, knowing that plaintiff was a person who neither resided in nor was domiciled in the State of California. The FTB was keenly aware of the circumstance that, because of the danger of financial espionage and other hazards involving the circumstances surrounding plaintiff's work and place of residence, the FTB could not have received such information but for the assertion by the FTB and its agents that they would not disclose such information and documents with which they were provided, except as was necessary to assess plaintiff's California tax liability.

65. Plaintiff reasonably relied on the truthfulness of the aforesaid assurances and representations by the FTB and its agents and had no reason to believe that the agents of the State of California would misrepresent the assurances that were given personally and through plaintiff's duly authorized professional representatives in connection with the FTB and provide it with his highly sensitive and confidential information and documents, in fact, plaintiff relied on the false representations and assurances of the FTB and its agents to his detriment.

66. Plaintiff's reasonable reliance on the misrepresentations of the FTB and its agents, as aforesaid, resulted in great damage to plaintiff, including damages of an extent and nature as have been made known to the Court at the present time, plus actual and consequential damages including but not limited to loss of liberty, income and other financial losses in an amount in excess of $10,000.

51. ~~47.~~ The aforesaid conduct [illegible] of the FTB and its agents were fraudulent, oppressive and malicious. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

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

48. Plaintiff [illegible] from the FTB's audit without [illegible]. As [illegible], plaintiff had every right to expect that the FTB's demand [illegible] would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a deliberate, malicious and fraudulent attempt to extort money from plaintiff under the guise of the FTB's [illegible] taxing process. The FTB's fraudulent and oppressive actions include [illegible] imposition of [illegible], indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The [illegible] and continuous [illegible] actions [illegible] and the publicity [illegible] from plaintiff under false promises of strict confidentiality. Plaintiff reportedly relied on those promises to his extreme and permanent detriment.

49. Plaintiff was forced to disclose his private [illegible] information with the [illegible] under the [illegible] of the FTB [illegible] with the [illegible], lawful audit. Instead, plaintiff became the [illegible] of the FTB, thus forcing plaintiff to either: (1) succumb to [illegible] acts that would unlawfully deprive him permanently of his [illegible] and [illegible] to the [illegible] of [illegible]; or (2) fight the FTB through [illegible] available, or with the employment of teams of legal and professional experts to vigorously defend himself in the audits and the continuing California tax proceedings.

50. [illegible] the FTB [illegible] the purpose of [illegible] to unlawfully deprive plaintiff of his property through [illegible] of intimidation as the [illegible]

36 DeltaView comparison of [illegible]/HYATT/PDF/Pleadings/Second Amended Complaint/2008-[illegible] First amended Complaint [illegible] M:/HYATT/PDF/Pleadings/Second Amended Complaint [illegible] second amended complaint [illegible]. Performed on

of California and the imposition of large "fraud" penalties, as aforesaid, plaintiff was [illegible] to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of [illegible] attorneys, accountants and other experts. The resulting attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, [illegible] were directly caused and necessitated by the FTB's course of wrongful behavior.

9[illegible]. Plaintiff's incurrence of attorneys' fees and other professional fees are [illegible] recoverable damages. [illegible] plaintiff's alternatives were to do nothing and be vanquished [illegible] or expend [illegible] in the audits and the continuing California tax proceedings. Plaintiff therefore claims, as special damages, his attorneys' fees in an amount in excess of $[illegible], the total amount thereof to be proved at or before the time of trial.

FOURTH CAUSE OF ACTION

(For Negligent Misrepresentation)

(For Breach of Confidentiality [illegible] Information[illegible]

Privacy)

98. 96. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 2~~7, [illegible] through [illegible]~~ through 37, 41 and 42, 46 and 47, ~~[illegible] through [illegible], including sub-~~paragraphs (a) through (k) of the latter ~~paragraph and [illegible] through [illegible]~~, above, as set forth above as though set forth herein verbatim.

~~97. The FTB, in providing~~ plaintiff and his professional [illegible] ~~[illegible]~~ of confidentiality with respect to ~~the sensitive and highly confidential information and documents [illegible]~~ concerning, allegedly, as FTB ~~[illegible] plaintiff~~, as detailed above, owed a duty to plaintiff ~~[illegible]~~ through its agents ~~[illegible] otherwise~~ would not maintain the same.

37 DeltaView comparison of file://V:\CTY AT [illegible]\Pleadings\Second Amended Complaint\[illegible] first amended complaint.doc and [illegible]\Pleadings\Second Amended Complaint\[illegible] second amended complaint [illegible]. Performed on

confidentiality it had promised plaintiff in order to secure confidential information and documentation [illegible].

[illegible] persons the highly sensitive and confidential information and documentation it had promised to retain under conditions of strict [illegible]

[illegible] plaintiff, was in every sense one of business and trust, as plaintiff was required to employ professional tax advisors [illegible] to secure revenue from plaintiff. Although plaintiff was forced to deal with the FTB as a matter of law, it was clear that the essential [illegible] tax year 1991 for which he had enjoyed the benefits provided to him by the State of California. The negotiations that occurred between plaintiff [illegible] would be made available to the FTB were also part of what most assuredly be viewed as a business relationship.

58. As represented in its own manuals and policies, to obtain voluntary compliance by a taxpayer to produce information requested of the taxpayer during audits, the FTB seeks to gain the taxpayer's confidence of the taxpayer by promising confidentiality [illegible]. Moreover, in its [illegible] audits, the FTB [illegible] the taxpayer's [illegible] possession of personal and confidential information concerning the taxpayer that a taxpayer would reasonably expect to be kept confidential and not disclosed to third parties. As a result, a confidential relationship [illegible] between the FTB and the taxpayer during audits [illegible] continues to exist so long as the FTB maintains possession of the personal and confidential information, that creates a duty of loyalty on the FTB to not disclose the highly personal and confidential information/documents concerning the taxpayer.

DeltaView comparison of [illegible] Second Amended Complaint 02-20-98 First amended Complaint [illegible] Second Amended Complaint [illegible] Performed on

94. As described above, as returned in response to the FTB's misappropriation of confidentiality and business during the audit, plaintiff did not receive to the FTB highly personal and confidential information at the request of the FTB as an essential part of its audit and assessment process. The FTB in its [illegible] misappropriation of the confidential information of plaintiff via a statement [illegible] of bodily and unlawful invasion of the privacy of plaintiff by the FTB was required to act in good faith and with due regard to plaintiff's interests of confidentiality and privacy and disclosure of the private, personal and confidential information of plaintiff to the FTB, either expressly or impliedly, was subject to and limited by the express and implied [illegible] and conditions that the FTB would not disclose, publish or make disclosure of third parties of plaintiff's personal and confidential information that the FTB had a duty not to disclose.

95. As a result of the FTB's misappropriation of plaintiff's confidential information, the FTB violated its fiduciary duty to plaintiff, as alleged above, thereby causing plaintiff great damage, including damages of an extent and amount to be proved at trial, but in excess of $ 10,000.

96. Plaintiff is informed and believes, and therefore alleges, that prior to the breach of confidentiality by the FTB was committed, the FTB was fully aware of the [illegible] of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

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

97. Paragraphs 1 through 96 of the [illegible] Amended Complaint are hereby incorporated herein by this reference as though fully set forth herein.

95. Plaintiff was singled out by the FTB's audit staff and [illegible] as an income tax party. As such, plaintiff had every right to expect that the FTB's demand for monthly would be assessed in good faith in accordance with the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad faith attempt to extort money from plaintiff under duress and by means of the FTB's fraudulent process. The FTB's fraudulent and unsupported assessment, including the [illegible] imposition of penalties, including the "fraud penalty" assessment, is designed to force plaintiff to yield to a major compromise or settle [illegible] and [illegible]. The [illegible] and constituted tortious actions included the outrageously intrusive invasion of his privacy and breach of confidentiality as aforesaid, and the publishing of private facts that were [illegible] plaintiff [illegible] false [illegible] confidentiality. Plaintiff [illegible] his patents and licensing business.

96. Plaintiff was forced to disclose his private documents and information with the FTB under the duress of the FTB's unconstitutional process, in addition to the [illegible] of a [illegible]. Instead, plaintiff became the intended [illegible] of the FTB, [illegible] plaintiff to either (1) [illegible] that would [illegible] deprive him permanently of his hard-earned personal property and right not to have his privacy invaded by the publication of his confidential, private facts as aforesaid; or (2) [illegible] all the [illegible] means available to [illegible] vigorously defending himself in the audits and the continuing California tax proceedings.

100. It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property [illegible] and the imposition of [illegible], plaintiff's only alternative was to vigorously defend himself in the audits and the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The [illegible] attorneys' fees and other professional fees which plaintiff has incurred, and continues to incur, were proximately caused and necessitated by the FTB's course of tortious behavior.

10 Document comparison [illegible] HYATT [illegible] Pleadings\Second Amended Complaint [illegible] amended complaint [illegible]

[61] Plaintiff is entitled to attorneys' fees and costs pursuant to statute or reasonable damages resulting directly from the FTB's tortious conduct against plaintiff in the course of unlawful activities. Plaintiff's attorneys have agreed to represent plaintiff on a contingency basis and will be entitled to a reasonable attorney's fee in addition to costs. Plaintiff therefore claims, as special damages, his attorneys' fees in an amount in excess of $10,000.00, the exact amount to be proven according to the evidence at trial.

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

FIRST CAUSE OF ACTION

1. For declaratory relief and for a finding that plaintiff has been fully released of the Franchise Tax Board's tax liens pursuant to R&TC §19331 in the amount of $1,000.00;

2. For declaratory relief and for a finding that the FTB has no lawful basis for continuing to withhold from plaintiff in Nevada corporate tax refunds for tax years 2004 through December 31, 2014, or any other subsequent tax refunds, on the grounds that the FTB has no right, nor authority, to garnish or otherwise issue a Demand to Withhold Franchise Tax on other employers to Nevada residents and businesses seeking to do business in Nevada;

3. For reasonable attorneys' fees; and

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

SECOND CAUSE OF ACTION

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

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

3. For costs of suit.

4. For reasonable attorney's fees as special damages pursuant to NRCP 9(g); and

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

THIRD CAUSE OF ACTION

1. For actual and consequential damages in an amount in excess of $15,000;

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

3. For costs of suit;

4. For reasonable attorney's fees as special damages pursuant to NRCP 9(g); and

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

FOURTH CAUSE OF ACTION

1. For actual and consequential damages in an amount in excess of $15,000;

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

3. For costs of suit;

4. For reasonable attorney's fees as special damages pursuant to NRCP 9(g); and

42 Defendants incorporate herein by reference their responses to the foregoing Second Amended Complaint as if fully set forth herein. Defendants Commercial Pacific and Commercial Pacific Mortgage deny each and every allegation contained in Plaintiffs' Second Amended Complaint not specifically admitted herein. Further answering

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

SIXTH CAUSE OF ACTION

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

2. For punitive damages in an amount sufficient to punish and deter Defendants for the wrongful acts alleged;

3. For interest;

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

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

SEVENTH CAUSE OF ACTION

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

2. For punitive damages in an amount sufficient to punish and deter Defendants for the wrongful acts alleged;

3. For interest;

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

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

EIGHTH CAUSE OF ACTION

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

2. For punitive damages in an amount sufficient to punish and deter Defendants for the wrongful acts alleged;

3. For interest;

4. For reasonable attorneys' fees, and

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

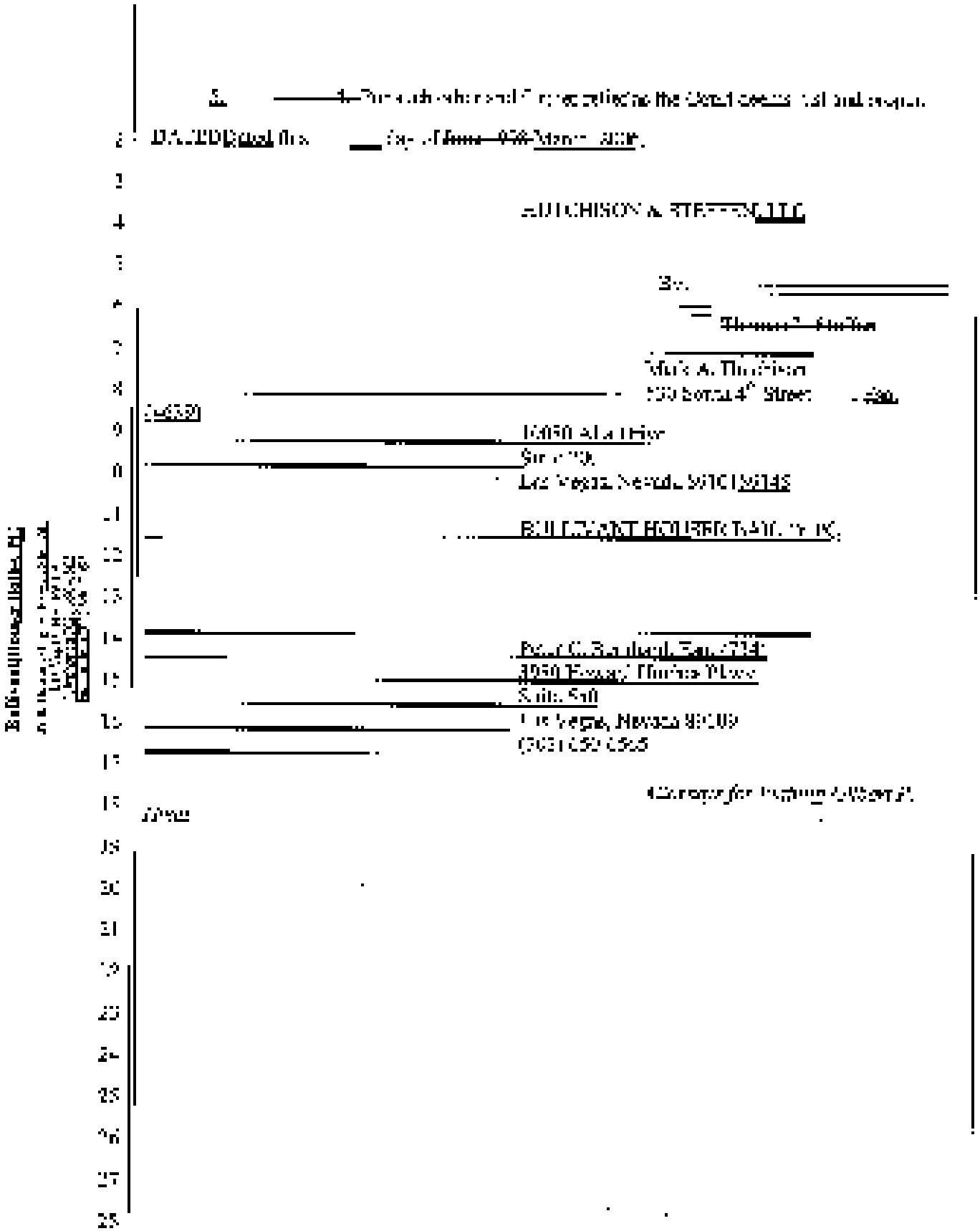


Exhibit 3

DONALD A. LATTIN, ESQ.
Nevada State Bar # 693
DOUGLAS R. C. WILSON, ESQ.
Nevada State Bar # 1268
JAMES W. BRADSHAW, ESQ.
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FILED

2006 JAN 31 P 3:30

CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES I-100, inclusive, Defendants.	Case No. : A 382999 Dept. No. : X Docket No. : U ORDER DENYING PARTIAL SUMMARY JUDGMENT RE: THE CALIFORNIA ADMINISTRATIVE PROTEST PROCESS [Oral Argument Sought By Order of the Discovery Commissioner Dated February 22, 2005] Hearing Date: January 23, 2006 Hearing Time: 1:30 pm Dept. X:

Defendant California Franchise Tax Board's Motion for Partial Summary Judgment Re: The California Administrative Protest Process having come before the Court on the 23rd day of January 2006, the Defendant being represented by Donald Lattin and James W. Bradshaw and the Plaintiff being present and represented by Mark Hutchison, Esq., Richard Wright, Esq. and Patrick Reed, Esq. and the Court having considered the Defendant's motion, the Plaintiff's opposition, the Defendant's reply, as well as the oral arguments of counsel, and GOOD CAUSE APPEARING,

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

interpretation, collateral estoppel does not apply to the California court's child judgment and the child support arrears provision does not apply.

Dated this 25th day of January, 2006.

DISTRICT COURT JUDGE

Submitted this 6th day of February, 2006 by

MCDONALD CARANO WILSON LLP

By: _____
JAMES J. C. WILSON, ESQ.
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Attorneys for Defendant Franchise Tax Board of the State of California

EXHIBIT 55

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

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT,	Case No.	A-382999
	Dept. No.	X
Plaintiff,	Docket No.	R
vs.		
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES I - L.C., inclusive,		FTB'S PARTIAL OPPOSITION TO HYATT'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT
Defendants.		Hearing Date: April 17, 2006 Hearing Time: 9:00 a.m.

Defendant Franchise Tax Board of the State of California ("FTB") partially opposes Plaintiff Gilbert P. Hyatt's ("Hyatt") Motion for Leave to File Second Amended Complaint. Specifically, Hyatt's proposed Second Amended Complaint should not include any additional claims for relief or special damages, and a claim for breach of the alleged confidential relationship should be denied as futile, untimely, brought in bad faith and would be extremely prejudicial to FTB. While Court cases cited in the request for leave at this late stage after the trial date scheduled to begin August 15, 2005 will be ignored. Hyatt has offered no reasonable or plausible reason why he has not sought leave to amend his complaint to include these new claims, although he admits he knew of these claims and alleged conduct even before his original complaint was filed in 1998 (his breach of confidential relationship claim) and in 2001 (his conversion claim). As a special damages claim, Hyatt should not be permitted to amend his complaint in any manner, much less in a manner to preserve stale claims that are not properly pled and

in the untimely brought in bad faith and with the intent to prejudice the U.S. And finally Ryan misrepresents to the bankruptcy court that this claim has been pending and all proceedings with respect this claim have been stayed.

The specifics have been set forth in the following memorandum of points and authorities, attached exhibits, as well as the pleadings properly of record and any oral argument the Court might allow.

Dated this 15th day of July, 2005.

MCDONALD CARANO WILSON LLP

By: _____
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PAMELA M. EGAN (NSBN 9291)
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Attorneys for Defendant Treasurer, The State of the State of Colorado

POINTS AND AUTHORITIES

I. INTRODUCTION

At the last moment, barely after the close of discovery, Ryan filed a motion for leave to amend his complaint in order to assert untimely related claims of Defendant's bad faith and to add as a defendant the Treasurer of the State of Colorado. Ryan's motion should be denied because it is futile, as even though this motion for leave to amend was filed before the deadline for amending pleadings, Ryan's proposed amended complaint would not survive a motion to dismiss. Ryan's proposed amended complaint would not state a claim for special damages under each of the alternative causes of action, even though Nevada's Supreme Court has never allowed such damages under the claims pled. These alternative claims, for invasion of privacy, false light, defamation, and infliction of

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[1] By exception to this Court's Order Denying DTD's Motion for Partial Summary Judgment Re: California Administrative Offset Statute, DTD does not oppose Ryan's amendment based on the following changes in his redlined proposed second amended complaint: pg. 21 ll. 1-3. A highlighted copy of Ryan's proposed redlined second amended complaint is attached as Exhibit 1. The highlights reflect the proposed amendments DTD does not oppose.

or mental distress, abuse of process and intentional misrepresentation that have not already been rejected by your Court. Counterclaims have never yielded monetary damages or "special damages." Second, Hyatt seeks leave to include a claim for "breach of a confidential relationship" even though Hyatt has not pled the elements required by Nevada's Supreme Court, and must overcome the fact that such a claim can not exist between employer and prospective employee. Finally, Hyatt seeks to add not previously asserted facts to support its proposed second amended complaint, namely facts and documents related to his provision of "know-how" which will demonstrate these claims are becoming ripe. Tellingly, Hyatt has spent over eight years defending against it.

There is no need to unnecessarily complicate this matter, unduly prejudice Bally, and waste judicial resources. Hyatt's proposed new claims are legally ineligible and such amendment should not be allowed. Bally intends to move to dismiss Hyatt's counterclaims for violations of the Computer Fraud and Abuse Act for failure to plead with particularity as required by Fed. R. Civ. P. 9(b). Furthermore, these claims have been available to Hyatt for many years, and yet he waited until the close of discovery and only after receiving unfavorable financial information from Bally to seek leave to amend. Discovery, which is simply not complete. Pursuant to the discovery plan and scheduling order, the deadline for initial expert disclosures has long since passed, and there is no reason to delay dispositive motions on these claims. Accordingly, the Court will be unable to properly decide and proceed against these claims.

In further bad faith behavior, Hyatt's proposed second amended complaint makes changes to the claims as discussed in his motion; those proposed changes significantly alter the course of this litigation and would require new discovery. Finally, although Hyatt moves to amend his complaint to include new claims for relief, he has not amended his complaint to remove claims that have been dismissed by this Court. Specifically, Hyatt's proposed second amended complaint continues to plead a claim for "declaratory relief" because it seeks the date of termination of Hyatt's Colorado residency and the authority of the DMV in which to terminate. That claim for declaratory relief was dismissed by your Court in its discussing this order was upheld by the ninth circuit Court of Appeals.

to amend [sic] should be permitted to [sic] freely allowed as complaint to include his claim he alleged bad faith delay in the process preceding the Court's decision on [illegible]'s Motion To Partial Summary Judgement re: California Administrative Protest Process.[3]

II. LEGAL ARGUMENT

[illegible] acknowledges that [illegible] provides that leave to amend should be freely given when justice so requires." When leave is sought, however, the Court must decide whether "justice so requires." The liberal policy of freely granting leave to amend

> does not mean that leave of all requests. Where, as in the instance of [illegible], leave to amend would not be required. The recommended motion to approve suggests that there are instances where leave should not be granted.

Conway v. Vons, 80 Nev. 237, 242, 391 P.2d 729, 732 (1964) (quoting Schlick v. Penn, 65 N.D. 683, 690 (S.D. N.D. 1934)). Leave to amend a complaint should be denied if the amendment would cause undue delay, is made in bad faith or with dilatory motive, or if it creates undue prejudice to opposing party, or if the amendment would be futile. See Foman v. Davis, 371 U.S. 178, 182 (1962).

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[3] [illegible]'s non-opposition to the inclusion of the continuing bad faith claim for delay in the protest process of the proposed second amended complaint is based upon the Court's stated decision opposing [illegible]'s Motion To Partial Summary Judgement re: Lower Tier Partial Summary Judgement Re: The California Administrative Protest Process, Filed 05/14/03. This non-opposition, which only pertains to pg. 31, ln. 1-5 of the [illegible], is clearly not be construed as a waiver of this [illegible]'s continuing objection to the inclusion of that claim in this litigation. To the contrary, California strongly and fully objects to adjudicating this separate protest in this Partial Summary Judgement over California's objections. As more fully proven below is no bad faith delay in the protest process. To date, the discovery has revealed that Plaintiff himself is causing many delays conducted by the hearing officer including [illegible] with California's opposing obtaining the protest. Further motions, Plaintiff has falsely stated to the United States Supreme Court that California's sovereign immunity was not automatically applied in Nevada under the United States Constitution's Full Faith and Credit clause. See [illegible] v. [illegible], 536 U.S. 468, 489 (2003). In fact, the United States Supreme Court [illegible] that California's sovereign immunity was violated. California's sovereign immunity, and that issue is still an open question. California feels that this lawsuit, in its entirety, and the [illegible] process, is a violation of California's sovereign immunity. Therefore, California objects to discovery and trial in the administrative protest process, and reserves the right to file motions on all issues in this regard.

A. Lipsitz's Request For Leave To Assert Claims For Breach Of Confidential Relationship, Intentional Interference With Prospective Economic Advantage And Breach Of The Implied Covenant Of Good Faith And Fair Dealing

Before the Court grants Lipsitz's motion for leave to amend pursuant to NRCP 15(a), the Court must first determine "if justice so requires." Justice would not require leave to amend when the proposed amendment would be futile. "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." Jacinto v. Caldwell, 99 F.R.D. 610, 615 (D. Nev. 1983). Futility occurs when the proposed amendment is frivolous or attempts to advance a claim that is legally insufficient. Allum v. Valley Bank of Nevada, 109 Nev. 280, 284, 849 P.2d 297, 300 (1993) ("It is not an abuse of discretion to deny leave to amend when any proposed amendment would be futile."); see also Miller & Kane, Federal Practice and Procedure: Civil 3d § 1487 at n. 67 and 69. Likewise, if the amendment could not withstand a motion to dismiss, then the amendment should be denied as futile. See also Foman v. Davis, 371 U.S. 178, 182 (1962) (futility of the proposed amendment considered in the context of motion for leave to amend). Plyatt's request for leave to amend to include two purely monetary claims and recast an old claim must be denied because each claim is legally insufficient and cannot withstand a motion to dismiss. Each is analyzed below.

1. Breach of Confidential Relationship

The proposed claim of breach of confidential relationship is not legally cognizable in this context and would not withstand a motion to dismiss. There are two necessary elements that must be established in order to prove a claim for breach of confidential relationship: (1) a special confidential relationship must exist between the parties such that one party is under a duty to act for the benefit of the other, and (2) such duty must be breached. Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335, 338 (1995).

Plyatt's claim fails on element two (the breach element) because as a matter of law no special, confidential relationship, akin to a fiduciary relationship, could exist between Lipsitz and Plyatt, and none is now alleged in the proposed second amended complaint. Nevada law requires that "[a] special or confidential relationship will only arise from unusual degrees of trust and reliance between two parties, usually involving influence by one and resulting dependence upon the other, or from a formally recognized fiduciary or professional, business or social relationship between the parties." Id. (citation omitted.) The Perry court went very

explicit in explaining when such a "special" relationship would be present to impose liability for this tort:

> A confidential relationship may exist by reason of kinship, physical, business, or social relationships between the parties. Such a relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind. It may exist although there is no fiduciary relationship. It is typified by, but not limited to, cases where there is a family relationship or one of friendship. When a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party.

Perry, 111 Nev. at 947 (internal citations and quotations omitted). The Perry court was equally explicit in observing that confidential relationships must be alleged and established in order to show the "special circumstances" necessary to establish this tort. First, a special confidential relationship will only exist in cases where the relationship is akin to the fiduciary relationship and the relationship between a lawyer/client, partners, family members, or employer/employee exhibits. Id. Second, one party must gain the confidence of the other and purport to act and advise the other party with the other party's interests in mind. Id. See also Dominique Hotel, Inc. v. General Motors Acceptance Corp., 259 F.Supp.2d 1095, 1099 (D.Nev. 2004); Hancock v. Percy, Jacobs, finding no proof that defendant purported to act on behalf of plaintiff and dismissed claim dismissed on summary judgment); In re Rancho Palmas, Inc., 56 Fed. Appx. 326, 328 (9th Cir. 2003) (unpublished) (Nevada law, holding that evidence must show that defendant purported to act on behalf of plaintiff; thus claim dismissed on motion for summary judgment).

In any case, with respect to the parties' alleged relationship, one must be present between the parties to create a legally cognizable confidential relationship sufficient for purposes of liability under the tort. In Perry, plaintiff purchased property from defendant. 111 Nev. at 945. Plaintiff was unsophisticated, while defendant was a very educated and experienced businessman. Id. Plaintiff and defendant had been long-time friends and neighbors. Plaintiff described defendant's relationship to her as "like a brother." Id. At the time of the purchase of the property in that case, the real estate broker defendant was a friend of plaintiff's husband; (2) she was considering the same to provide for

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

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

It is obvious that no such personal, familial or other type of relationship akin to a fiduciary relationship ever existed between FTB and Hyatt as was present in the Perry case. Nor is such a relationship alleged in Hyatt's proposed second amended complaint. Neither FTB nor its employees had any type of personal or family relationship that would give rise to the required special relationship under this tort. Neither FTB nor its employees were acting as agents for Hyatt, attorneys for Hyatt, accountants for Hyatt, partners of Hyatt, or trustees of Hyatt. There is no question that the FTB's [illegible] relationship when conducting [illegible] and therefore its duty [illegible] State of California, [illegible] [illegible] taxpayers.

Second, Hyatt has alleged no facts in the proposed second amended complaint that the FTB ever "purported to act on behalf of" Hyatt with Hyatt's "best interest in mind." See Perry, 111 Nev. at 946-47, [illegible], 559 F.Supp. at 1058; In re Sunshine Suits, Inc., 56 [illegible] at 78-79. There is not one single factual allegation contained in the proposed second amended complaint which supports this prong of the "special relationship" element necessary to survive a motion to dismiss. See proposed

Second Amended Complaint, pp. 27-29). Plaintiffs argue that "the FTB gave Hyatt bad advice, there is no allegation that the FTB was working on behalf of Hyatt, and there is no allegation that the FTB was acting on behalf of Hyatt with any[] ... interests at stake." Rather, the duties owed by the FTB and its employees are said to be in the best interests of the taxpayer as required by this state law, rather than in the best interests of the State of California. The claim, neither of the necessary components to establish a legally cognizable "confidential relationship" between Hyatt and the FTB can be established.

Furthermore, Hyatt provided no authority to support application of this doctrine now not by a stranger to a governmental agency. To the contrary, there is ample authority that such a relationship cannot exist between a governmental agency and a private citizen. See Johnson v. Sawyer, 760 F.Supp. 1220, 1225 (S.D. Tex. 1991). The Johnson case is extremely analogous to that case at bar. In Johnson, the plaintiff brought civil rights claims against employees of the IRS for releasing press releases concerning taxpayer's prior investigation of unrelated charges. Plaintiff alleged a claim of breach of "confidential relationship" by the IRS employees. The court rejected this claim, finding that plaintiff failed to plead special relationship necessary for liability under this theory and as a matter of law, apply between a citizen and the government agency. Id. This aspect of the decision was upheld on appeal. See e.g. Johnson v. Sawyer, 47 F.3d 716, 726-15 (5th Cir. 1995)(en banc).

Moreover, there is ample authority that rules that no fiduciary relationship or fiduciary type relationship can exist between a governmental agency and a private citizen. Schmidt v. Financial Services Assurance Assoc. of Chicago, 960 F.Supp. 245 (D.D.C. Fl. 1997) (IRS investigator whose duty it was to investigate tax liabilities did not have any fiduciary relationship with taxpayer, thus claim dismissed for failure to state claim); Poole v. Hamby, 555 N.W.2d 124, 128 (Iowa Ct. App. 1996) (plaintiff's claim that defendant employees of Department of Social Services and members of multidisciplinary child abuse assessment team breached their duty to thoroughly investigate child abuse complaint and breached fiduciary relationship between the parties); Lively v. United States Dept. of Justice, 2003 WL 22471945 (1st Cir. (N.H.)) Oct. 30, 2003) (no fiduciary relationship between IRS and taxpayer where IRS allegedly misused confidential information for purposes of disciplinary proceedings); Ancillo v. United States, 1999 WL 1067874 (10th Cir. (Okla.)) Nov. 8, 1999) (United States government owes no fiduciary duties to taxpayer during criminal investigation). To

the Court FIND and DECLARE that no party has engaged in any communication or interaction with a government agency.

The evidence presented must be sufficient to satisfy a fact finder's duty to find in favor of the allegation to support either of the necessary prongs required by Pure to establish that a legally cognizable "actual knowledge" existed between Hall and the Park. Hyatt's proposed claim of breach of confidential relation thus must proceed as a matter of law so the claim would not survive a motion to dismiss. Therefore, permitting this amendment would be futile.

2. Attorneys' fees as Special Damages

In opposing leave to amend to include attorneys' fees as special damages, Hall relies upon Sandy Valley Assocs. v. Sky Ranch Estates Owners Assoc., 117 Nev. 948, 35 P.3d 964 (2001). However, Hyatt's claims of special damages are not comparable to those in Sandy Valley. It is important to note initially that Hyatt seeks attorneys' fees as special damages under the intentional tort exception for intentional invasion of privacy (i.e. false light). Intentional infliction of emotional distress, related to Hyatt's claim for California tortious "outrage" by abuse of process, and intentional misrepresentation. Nevada's Supreme Court has not yet analyzed any of these common law intentional torts and has never permitted attorneys' fees as special damages under such intentional torts.

The Sandy Valley decision to award attorneys' fees as special damages will only be recognized in "exceptional circumstances." 117 Nev. at 956. These rare circumstances are an exception to the American Rule, briefly addressed by Nevada which requires each party to pay their own attorneys' fees. Sandy Valley closely limits the types of claims where the rare exception to the American Rule will apply. Specifically, Sandy Valley explains that:

> Attorney fees may be an element of damages in cases where a plaintiff has been involved in third-party legal disputes as a result of a defendant's tortious or wrongful conduct. . . . This type of recovery is limited to claims against those who have caused plaintiffs to become involved in litigation with others, or who have wrongfully brought actions against plaintiffs.
>
> Attorney fees may also be recoverable as damages in those cases in which a party incurs fees in removing a cloud on property or quieting title to property. Finally, in cases involving an injunction, attorney fees associated with the injunction may be awarded.

Inc. at 952-58.

Hyatt's claims must fail under any and all these standards. Hyatt's act of detecting or preserving a third party's alleged misconduct is a first party claim of seeking to recover damages for that party's loss upon the alleged misconduct motivated by the FTB. Hyatt did not own or claim title to the case or asserted personal property or intangible claims upon the FTB's property. Finally, there is no secrecy or original ownership in Hyatt's claim for alleged access or special damages. All as a matter of law. Therefore, these amendments should not be deemed as futile.

J. Other Damages Claims Not Mentioned In Prior Motions Have Been Made Within Hyatt's Proposed Second Amended Complaint

Hyatt's motion is based on purely speculative, new proposed claims concerning private information that could be proposed second amended complaint, in fact Hyatt seeks leave to add claims for invasion of information privacy. Such claims for information brought by Hyatt are inadequate claims under California Information Practices Act which provides no statutory remedy to California taxpayers for disclosures of confidential information, but rather, a different name providing no monetary loss. Cal. Civ. Code § 1798 et. seq. Hyatt has repeatedly relied on the case of Nagel to support such claims. In this case, Hyatt's MSJ/MSA. The Hyatt's FTB's Motion for Summary Judgment re Statutory Information Privacy, pp. 6-17; (Hyatt's counsel, "I will never agree" Los Angeles Business Journal) to support such claims. Moreover, such claims, proceeds from making such claims at various factual problems and the scope of Privacy and Tax Laws of California. (Ex. 3, FTB's Motion to Dismiss or Partial Summary Judgment re Statutory Claims (PMS) filed 5/13/2015. Ex. 4, 7-27-2015 Order Motion. The issue of Summary Judgment re Statutory Claims) Hyatt should not be permitted to repackage this PMS claim under a different name in order to get around these obvious deficiencies. Moreover, Hyatt pleads numerous new causes for relief which have no statutory provision which provide a remedy. See generally Rancho Viejo, LLC v. Tomlinson, 68 Cal.App.4th 1228, 1240 (1998) (plaintiff has no statutory remedy, and common law claims invalid. Hyatt also failed to comply with requirements of The Tort Claims Act, 438 F.3d 1148, 1158 (plaintiff's failure to file a timely claim under California Government Code section 910 et seq. is fatal to its claims against the state and state officials). Therefore, this amendment should be rejected.

B. Leave to Amend Should Be Denied Because Hyatt Has Not Explained Its Delay In Requesting These Amendments

Leave to amend should be granted liberally and is properly denied only where the moving party is responsible for the proposed amendment's delay. Jordan v. County of Los Angeles, 669 F.2d 1311, 1324 (9th Cir. 1982), vacated on other grounds, Cornell v. Los Angeles Police Dept., 459 U.S. 810 (1982).

> "[A] district court may deny a motion to amend a complaint as untimely if it finds undue delay, bad faith or dilatory motive on the part of the movant." Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). "Undue delay is delay that prejudices the nonmovant or imposes unwarranted burdens on the court." Id. "When a party should have learned from previous proceedings that the proposed amendment was necessary but did not seek it, the court may find undue delay." Id. "Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." Id. "Where the reasons for the delay include the lack of knowledge of the moving party, the motion is addressed to the sound discretion of the trial court." Id. "Lack of diligence by the moving party in discovering the basis for the amendment may also support the district court's denial of leave to amend." Id. "Finally, the district court's discretion is especially broad when it has given the moving party previous opportunities to amend." Id. The party opposing amendment bears the burden of showing prejudice, futility or bad faith. Id. at 757. Moreover, "[a] strong showing with respect to one of the elements may by itself suffice to justify denial of a motion for leave to amend." Id. at 758.

Eminence v. Continental Ins. Co., 304 F.3d 469, 484 (5th Cir. 1962); Caldwell v. Amoco Corp., 767 F.2d 179, 182 (5th Cir. 1985). It is Hyatt's burden to establish that the delay in requesting these amendments was due to excusable neglect. Eminence, 304 F.3d at 484.

Hyatt has clearly failed to meet this burden and therefore these amendments should be denied. Indeed, Hyatt has provided no explanation whatsoever as to why it took over eight years before it sought to amend its complaint to include the theory of confidential relationship claim and over four years before it sought to amend the complaint to include the special damages claim.

As to the breach of confidential relationship claim, Hyatt's motion is absolutely devoid of any explanation as to why it failed to plead this claim in its original complaint filed in January 1984 or in its amended complaint filed in June 1985. (See Exh. B, Complaint; Exh. C, First Amended Complaint; see also Exh. D, Second Amended Complaint.) Hyatt's own case, which Hyatt now purports to base this claim, was decided in July 1983, three years before Hyatt initiated this lawsuit. It is well established that the purpose of NRCP 15(a) is to allow parties to assert matters that were unknown or overlooked at the time the original pleading was drafted. See 3 Wright & Miller, Federal Practice and Procedure § 1473 (1971). Given that the very case upon which Hyatt now relies upon for the basis of this claim was decided years before he filed his original pleading in this case, Hyatt can hardly argue that this claim was unknown or overlooked when it filed its complaint. Moreover, Hyatt's claims that Hyatt allegedly learned in part, upon the effectiveness of Hyatt's purported additional information. Therefore, Hyatt was aware of the so-called factual allegations that supported this cause of action before he filed his original pleading and

the law in Nevada was clear on this issue. Given his failure to provide an explanation for the delay, much less a good faith basis, Dyer has completely failed to meet his burden to show excusable neglect for the delay in requesting this amendment.

As to Dyer's request to assert damages claims for his wrongful conviction, the case law is unambiguous. Dyer's proposed amended pleading asserts damages were not perfected in the case at bar. His complaint in 1998; (2) the Sandy Valley decision finding this type of claim was not perfected until 2000; and (3) the case was stayed for a period of time between 2000 and 2003 while this case was on appeal. See Dyer's Motion to Amend, p. 21.

However, the Sandy Valley decision which established the pleading requirement for attorneys fees as special damages was not decided until 2001. Dyer is also aware that at the time Sandy Valley was decided, this case was on appeal to the Nevada Supreme Court and thus could not be decided by the United States Supreme Court. Accordingly, Dyer is aware that he could not have properly pled these attorneys fees as special damages in accordance with Sandy Valley at the time he filed the original complaint or the first case was remanded and stayed.

Dyer, however, fails to provide the most critical facts. Why didn't he move to amend to include these claims after 2001 when this case was remanded? This appeal was concluded when the United States Supreme Court denied certiorari on June 23, 2003 and this case was remanded shortly thereafter. The decision in Sandy Valley was decided two years before this case was remanded.

Dyer's motion also fails to provide any explanation or basis for why he did not request leave to amend his complaint for the last three years, from the time of the remand to today. This Court pled these claims at the time this case was remanded, two years after the Sandy Valley case was decided, and the failure to request leave to amend for an additional three years after that, is the

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While Dyer may argue that his claims have been previously considered by both Nevada's Supreme Court and the U.S. Supreme Court should not be ignored. That argument lacks any legal or factual basis. The Nevada courts have not, and cannot, have ever ruled on Dyer's claims in the first instance. Those claims must be considered in the district court for the first time. Any argument that will most certainly jeopardize the integrity of the trial itself.

[illegible] a lack of diligence. Thus, Hyatt has again utterly failed to meet his burden to demonstrate excusable neglect in moving to amend. [illegible], 98 F.3d at 499. This is another reason to deny leave to amend.

Given Hyatt's inexcusable delay in seeking to amend his complaint until only four months before trial on two claims that he knew he could have asserted long ago, this reason alone is enough to deny Hyatt's request for leave. See Connell v. Carl's Air Conditioning, 97 Nev. 436, 634 P.2d 673 (1981); Freeman, 351 F.2d at 403.

C. <u>Leave To Amend Should Be Denied Because These Amendments Would Severely Prejudice FTB.</u>

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

> [I]mpos[es] the opposing party to the added burden of further discovery, preparation, and expense ... thereby prejudicing him in his right to a speedy and inexpensive trial on the merits.

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

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

As in Zahra, each and every factor relevant to finding "prejudice" is present in this case. Discovery has nearly closed. Several motions for summary judgment have been filed and [illegible] such motion is

currently pending before the Court), the proposed amendments will require additional preparation and expense for FTR. Because the claims were asserted over eight years after the original incident and only four months away, if these claims are to be properly tried, FTR would need to employ expert witnesses and to conduct additional discovery which has not been scheduled. The burden to do so, however, has only since passed. Thus, the most critical factor in Oulton's motion is clearly present—there is a high likelihood of delaying the trial date if the new claims are added. Additional discovery and the resulting expert reports will be costly and time consuming. Oulton's motion is clearly made for the purpose of delay and should be denied.

In spite of all of this, Plaintiff still claims that no prejudice will befall the trial to warrant these amendments. See Plaintiff's Motion for Leave to Amend, p. 3. Nothing could be further from the truth. Additional discovery has occurred with respect to each of these amendments since Oulton's claim has been a part of this litigation. In fact, Exhibit 5, your attached letter, highlights all of the issues that I had in the proposed amended complaint that would require additional discovery in order for FTR to properly prepare and defend these new claims.

As already noted, discovery is currently closed in this case. The final deadline for exchanging documents occurred on July [illegible] 2005 (See Exs. 8, Order Filed 7/6/05). All participant witnesses depositions have been taken and completed. Each party's expert witnesses have already been identified and reports exchanged. In fact, the only aspect of discovery still open at this time is merely third party witnesses and certain depositions. The discovery cut off for those depositions is set for May 31, 2006. (See Ex. 9, Order Filed 2/9/06) All setting discovery cut off May 15, 2006. This date was recently extended from the Discovery Commissioner by agreement in order to allow expert depositions. (Ex. 10, 3/3/06 Ltr. Discovery Commissioner's Hearing pp. 6-8).

Contrary to Plaintiff's assertions, there has been no discovery on Plaintiff's claim for breach of confidential relationship or the new allegations of this claim – per Oulton's letter. Plaintiff seeks to support this "special relationship" claim by

Contrary to Plaintiff's assertions, discovery would have to be reopened in order for the FTR to properly defend against these claims, particularly the attorneys fees as special damages claim. Additional expert witness discovery depositions would have to be conducted. Certain depositions will

...ment to be responsive." This is exactly the type of "particularized" that numerous courts cite to in requiring a request for documents. 8A Wright & Miller, Federal Practice and Procedure: Civil 3d § 2456, p. 62-64.

Hyatt would not necessarily have to produce all of these documents in order to support these new claims. In fact, with these proposed amendments, Hyatt is due rights to re-open discovery to obtain from Hyatt all e-mail documents as of March 27, 2006, long past the discovery cutoff for documents exchanged, in order to prove up these claims. (Ex. H to Opposition, 3/27/2006 Hyatt e-mail to Opposition 1). And these very documents were requested by Hyatt and that the new information it will would need to defend against this claim (see discussion above). Furthermore, it would be necessary for an expert to be retained by both Hyatt and the IRS to testify as to the reasonableness of the fees claimed and sought by Hyatt. However, the deadline for the exchange of experts has already passed.

Although Hyatt alleges that this information could not have been discovered sooner, discovery has not been permitted to this point to allow the IRS to properly defend these claims. Hyatt has repeatedly refused to provide the necessary information concerning attorney's compensation, invoices, and other information necessary for IRS to defend itself. (Reply Ex. H, October 3-27-2006 Hyatt letter, example of the type of information provided by IRS to prove amounts being sought, Hyatt has refused to produce such documents and information concerning the compensation of those persons who allegedly provided legal services to Hyatt, and has denied IRS discovery into these issues such attorney fees were "internal Treasury matters." Hyatt claimed that its attorney's fees could not be reasonably determined and "is immaterial" in its responses to interrogatories. (Ex. I, Hyatt's Objections and Second Supplemental Responses to Defendant's First Set of Interrogatories, p. 12).

Furthermore, the documentary information now newly produced by Hyatt to support these claims does not provide any proof of the type of work conducted by Hyatt's outside counsel, these bills were not reviewed for whether the work was necessary by the IRS. (see Ex. H, Hyatt's Summary at 6 minutes' Fees Report). Rather, all that Hyatt has provided are summaries of the amount of money spent and the work done. There is no conceivable way that any expert retained by the IRS could opine to the reasonableness of the fees.

Moreover, in order for the FTB to prove the right limits to property control against these [illegible] claims, it would require the reopening of discovery as well as additional [illegible] expense to the FTB. Reopening discovery will only further delay this trial.

"At some point in every litigation the issues for trial must be finally crystallized." Jamison v. McClatchy, 558 F.Supp. 351, 353 (N.D.Cal. 1975). That time has come. It is time for the FTB to put its [illegible] and get before a jury. This case is set for trial in August 2018 and discovery has come off. Summary judgment motions have already been filed and are currently pending before this Court. Requiring the FTB to litigate these issues, which are expressly precluded as defenses to Hyatt's claims, and requiring the FTB to proceed through the additional discovery, expense and preparation that will likely further delay of this trial are both extremely prejudicial to the FTB, which moreover disputes the existence of [illegible] to amend the complaint. See Wilson v. Stilley, 420 F.2d 1245, 1254 (5th Cir. 1969).

D. Hyatt's Request to Amend for Declaratory Relief Must Be Denied.

Recently, in the proposed second amended complaint, Hyatt seeks the declaratory relief [illegible] dismissed by order of this Court on April 15, 2015. Hyatt claims that he brought this action "to prevent plaintiff's rights to the disputed property" from [illegible] April 7, 1999 ruling, this case "has been dormant." However, this Order has not only been appealed, [illegible] the Ninth Circuit, but the validity of the will to the United States government was further litigated by multiple beneficiaries of the estate. See Franchise Tax Board v. Hyatt, 538 U.S. 488, 499 (2003).

The question remains why Hyatt chose to appeal this order because only [illegible] Hyatt's proposed claims for declaratory relief should be made from the proposed second amended complaint.

IV. CONCLUSION

Other than as set forth in Exhibit 1, Hyatt's request for leave to amend the complaint should be denied. These amendments are futile because they are legally [illegible] and would not withstand a motion to dismiss. The requested amendments are untimely and Hyatt has not only failed to meet [illegible] to show excusable neglect for requesting these amendments. These amendments are highly

pursuant to this Protective Order shall be returned to counsel for Plaintiff, Hoan Ton-That, or destroyed in its entirety if requested by Plaintiff, by such date. Counsel for Defendant may retain one copy of the Confidential Information in order to file a sealed motion if it should be partially denied as to these requirements.

Dated: This 4th day of April, 2020.

MCDONALD CARANO WILSON LLP

By: /s/ Pat Lundvall
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Attorneys for Defendant Imagitas, Inc., a Wholly Owned Subsidiary of Pitney Bowes Inc.

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 PLTF'S PARTIAL OPPOSITION TO DFT'S MOTION TO STRIKE MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT on this 21st day of April, 2006 by facsimile upon the following:

Peter C. Bernhard, Esq.
Bernhard Harrison Duffley PC
2950 E. Flamingo Parkway, Ste. 251
Las Vegas, Nevada 89121

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served true and correct copies of the foregoing PLTF'S PARTIAL OPPOSITION TO DFT'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT on this 21st day of April, 2006 by depositing copies in the United States Mail, postage prepaid, addressed upon the following:

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COURTESY COPY
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/s/ Kelly Pierce
An employee of McDonald Carano Wilson LLP

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EXHIBIT 56

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

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

Defendants.

Case No.: A382999

Dept. No.: X

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

Date of Hearing: April 17, 2006
Time of Hearing: 9:00 a.m.

(filed under seal by order of the Discovery Commissioner dated February 22, 1994)

Patrick T. Gilbert, P. Hunt. This is the Joint Opposition to Motion for Leave to File Second Amended Complaint and Response to Motion to Dismiss. This Opposition is filed by the "FTB" Opposition.

I. Introduction.

Hunt does not present in his Second Amended Complaint newly discovered claims. The claims and contentions are, as they have been well known to Hunt. Hunt based on the same facts and contentions that have been the subject of this case.

As set forth in detail below, Hunt has not served the FTB with the proper and necessary notice of breach of confidentiality agreement. By serving and obtaining, through the FTB's position in the assessment and processing of tax, confidential, non-public information from Hunt, the FTB has a confidential relationship that imposed duties of fiduciary obligations of confidentiality. These duties do not require, and Hunt does not assert, a formal contractual fiduciary relationship. But the FTB has the same duty of obligation not to disclose or use public information confidential, based on the statute, and it is this obligation that forms the confidential relationship. The FTB breached this duty and thereby subjected itself to duty of confidentiality. As also detailed below, Hunt has not and cannot plead facts demonstrating the confidential relationship created by the FTB's possession and review process. Finally, contrary to FTB's contentions, the courts have not upheld this form of special immunity.

As also set forth in more detail below, the FTB has been well aware of Hunt's request for necessary relief and not damages or special damages. Hunt does not seek damages in this case. This is for the benefit of Hunt to obtain relief and recovery. As such, it is not seeking unrecoverable punitive damages in this case, but recovery of out of pocket losses. Hunt has sought leave to make this request although not even absolutely necessary under newly Ninth, while in cases such as this one may even be unnecessary. Moreover, if necessary, the FTB has known Hunt would seek fees as damages, and the Court even ask, and Hunt is prepared.

There is simply no support or precedent cited to the FTB for seeking the claim at issue here for damages.

Finally, the FTB's motion claims that Hyatt has engaged in additional acts of fraud by [illegible] and fraudulent failure to disclose [illegible] privacy claims. [illegible] Hyatt's counterclaims of invasion of privacy claims. It has been litigated since early in this case, and is currently [illegible] California statutory law and the FTB continues to actively oppose. None of Hyatt's proposed amendments in any way change the substance of the counterclaims already related to pending claims and requires no new discovery nor in any way [illegible] amendment. Moreover, each FTB witness to be deposed [illegible] and claims privilege, to the extent it exists, can be [illegible] during [illegible] examinations.

Upon the foregoing, Hyatt respectfully requests that the Court grant this motion and grant Hyatt leave to file his Second Amended Complaint.

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

A. Contrary to the FTB's erroneous description of and assertions about the [illegible] special relationship regarding confidentiality discussed between the FTB and Hyatt.

The FTB's Opposition attempts to convey that the "special relationship" upon which a breach of confidentiality claim is based is limited to attorney, fiduciary [illegible] and that fiduciary duty is owed by one of the parties. The types of special relationships that apply to [illegible] are not so narrowly defined as supported by the FTB. Rather, the relationship that creates the duty of confidentiality may be fiduciary and certainly may exist where there is no fiduciary relationship. [illegible] On the other hand, a party [illegible] for the purpose only to keep the confidences, the communication [illegible] party is obligated not to disclose.

However, to the extent [illegible] Hyatt's attorneys should be [illegible] to establish [illegible] witness [illegible] fiduciary duty to Hyatt in that regard. Under the FTB's [illegible]

have a special relationship with several relatives in the republic [illegible] Court and concerning [illegible] and it acquired [illegible] special position across [illegible] and it was [illegible] only not [illegible] disclosure such information and must act in Hyatt's interest by ensuring that not disclosing [illegible] automatically. These simple facts impose a duty of confidentiality on the [illegible]

[illegible] may create a special relationship under the breach of confidentiality test, but [illegible] beyond Supreme Court precedent. Perry, for example, [illegible] other circumstances [illegible] party [illegible] imposes confidentiality on the [illegible] because of the [illegible] party [illegible] other party [illegible] has not [illegible] confidence."[1]

Contrary to the FTB's suggestion, courts did not limit the types of circumstances in which special relationships create a duty of confidentiality may arise, or take such narrow [illegible] Rather, courts across the [illegible] Supreme Court's language in *Perry*, stating "[a] confidential relationship may exist [illegible] that reflects the examples cited by the Court and [illegible] the FTB's [illegible] such relationship will only exist [illegible] traditional fiduciary relationships [illegible] such as attorney/client, partners, family members or long-time colleagues."[2]

Perry even explicitly recognized "[the special relationship] may exist absent a traditional fiduciary relationship" and that it might [illegible] where a confidential relationship exists [illegible] person [illegible] special trust is placed [illegible] a duty to act [illegible] other party [illegible] requiring the person to act in good faith and with due regard to the interests of the other party." As set forth below, this is precisely what the parties have been operating under since the outset of the case. The FTB requested and received confidential [illegible] information from and concerning Hyatt and, accordingly, it would be [illegible] such

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[1] Perry [illegible] Resolution Group, [illegible]

[2] FTB's Opposition at [illegible]

[illegible]

[illegible] Bailey Jr.
[illegible]

in Nevada law and [illegible] and did disclose its conflicts of interest.

Because each of the cases cited in Lenzi's Opposition, Thompson v. Cotton Assocs. Acquisitions Group, decided only in 2014, explicitly explains Nevada law relative to confidential relationships that is generally consistent with the law of other states, but Nevada does not recognize "confidential" fiduciary relationships. The most concise description by the Court in Thompson was as follows:

> Nevada has recognized the existence of confidential relationships not rising to the level of fiduciary relationships, yet still giving rise to legally enforceable duties. "The leading case on confidential relationships in Nevada is Perry v. Jordan. Perry held that an implied confidential relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind." A confidential relationship may arise "where one party imposes confidence in the other because of their position, and the other party knows of this confidence."

Nevada law does not recognize confidential relationships as fiduciary relationships. Instead, Nevada law requires the parties to the relationship to establish a "confidential relationship" question of fact for the jury.

> "A confidential relationship exists between two persons, whether their relations be such as are ordinarily fiduciary or merely informal, whenever one trusts in and relies on the other. The question in such cases is always whether or not trust in reposed. . . . Whether such a confidential relationship appears to exist is a matter of fact. "[T]he existence of a special confidential relationship is a factual question[.] . . . All doubts in this regard must be resolved in order to determine if the relationship was created." However, the question "can be [a] proper question under the circumstances of this case, for reasonable jury could conclude that a reasonable person would invest special confidence in the other party and whether that party would reasonably know of this confidence."

> "Confidential relationships not rising to the level of fiduciary relationships, yet still giving rise to legally enforceable duties, have been found between purchaser and seller/lender of property where the seller/lender alleged misrepresentations known to the purchaser. . . . In another case between a purchaser and seller of real property, the Nevada Supreme Court declined to find a fiduciary relationship, but reasoned that the case for further fact-finding as to whether a relationship of 'special confidence' would still support a claim for constructive fraud."

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[1] Thompson v. Cotton Assocs. Acquisitions Group, 2014 WL 5791558, at *3 (D. Nev. Nov. 6, 2014) (quoting Perry v. Jordan, 900 P.2d 335, 338 (Nev. 1995) (internal citations omitted) and Nelson v. Heer, 163 P.3d 420, 428 (Nev. 2007)).

[2] Id. (quoting Perry, 900 P.2d at 338 (internal citations omitted) and Nelson, 163 P.3d at 428).

[3] Id. at *4 (internal citations omitted).

Emergency Services cases outside Nevada that discuss under what circumstances a special relationship may exist, but in which fiduciary duty does not automatically exist. One such case involves a public employee, for which no such duty typically exists, but was found to exist in that case because the creditor actually "relied" to his detriment on the employee's duty. The court found that the state owed a fiduciary duty to monopolize the export trade because it had specifically agreed to the same and expected to benefit from the contract.[6]

The FTB's reliance is misplaced and erroneously argues Perry and Thompson.[7] The presence or non-existence of a fiduciary duty is not a question of fiduciary duty under any other name. Indeed, as Perry indicates, the court is concerned with a constructive fraud claim. Nonetheless, after correctly stating that the term implies "[a] confidential relationship [that] must be shown to exist between the parties, one a party to the action, and [that] such duty must be breached," the FTB's remaining cases only address circumstances finding that a government agency does not owe a fiduciary duty in the context of "ordinary commercial transactions." These cases do not help the FTB. They do not involve a party claiming misrepresentation and the other party claiming that there was no explicit promise of confidentiality. For example, in particular, *Johnson v. Rogers*,[8] involve a party telling its customer and prospective client not to rely on any representation of the other party's non-public information and then publicly disclosing and threatening to sell that information. Nor do any of the cases cited by the FTB involve circumstances that create such relationships between a government agency and a private party.[9]

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[6] *See Nat'l Supp. Co. v. State*, 738 F. Supp. 1331, 1338 (D. Nev. 1990).

[7] The FTB also cites to *Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335 (1995) and *Oehler v. Davis*, 92 Nev. 362, 551 P.2d 1072 (1976). Neither case is relevant to the issues presented here.

[8] *Johnson v. Rogers*, 763 F. Supp. 1518, 1528 (D. Nev. 1991), *reversed on other grounds*, 997 F.2d 692 (9th Cir. 1993).

[9] The FTB also cites to a case from outside Nevada, *Bowen v. Security Pacific National Bank*, 2 Cal. App. 4th 1065, 3 Cal. Rptr. 2d 688 (1992). In that case, the plaintiff brought a claim against a bank for breach of fiduciary duty and negligence for the bank's failure to prevent the plaintiff's ex-husband from withdrawing funds from their joint account. The court held that the bank owed no fiduciary duty to the plaintiff, but that it did owe a duty of ordinary care to the plaintiff. The court found that the bank's duty arose from the bank's contractual relationship with the plaintiff's ex-husband, and that the bank's duty was limited to the terms of the contract. The court held that the bank's duty was limited to the terms of the contract. The court held that the bank's duty was limited to the terms of the contract. The court held that the bank's duty was limited to the terms of the contract.

The PUD also conclusorily ignores the substantial unlikelihood in Logan's motion, especially during the exchange of the actual settlement opportunity offers. The PUD contends that merely the existence of the non-disclosure agreement between confidence is enough to make all non-public information under the agreement automatically be kept confidential only for that reason alone, without any showing that the information should be withheld from disclosure of the new public information law. In sum:

> To determine if such a duty exists, we look to the definition and terms of the agreement and the actual facts . . . [T]he key consideration is whether the parties intended to create a confidential relationship. To establish a confidential relationship, the parties must have agreed expressly or impliedly, or must have understood under the circumstances and custom and practice of the particular trade or profession, that the confidant would not disclose the secret to others. [Emphasis added]
>
> . . .
>
> These cases stand for the proposition that the actual intent of the parties to the agreement is the most important factor in determining whether a confidential relationship exists. [T]he parties' intent may be given effect if the circumstances surrounding the transaction clearly indicate the existence of a confidential relationship. The nature of the information may implicitly require confidentiality even absent an express agreement. For example, where a business associate is entrusted with information, or receives information that is of a private nature and disclosure would be embarrassing to the person who imparted the information . . .
>
> . . .
>
> Cases granting recovery for breach of confidence share similar basic elements. Through the special relationship, one party gains knowledge of another's confidential information. The relationship in each case entails a promise, express or implied, that the confidant will not disclose the information to others. [Emphasis added]

Here, Logan did not share the nature of this case, the pricing, and the actual settlement opportunity offers with anyone. Nothing was said or shared in Logan's motion to suggest that the PUD was required to act in Heart's best interests relative to keeping the information confidential.

> II. By its own words, the PUD has not adequately pled this special relationship created by the PUD's position, its promises of confidentiality, and its resulting receipt of Heart's non-public information.

The PUD's other attack on Heart's breach of contract claim by claiming recovery for public is

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the Settlement Agreement, and Heart's power of non-disclosure of the terms of the Agreement to the public. Heart's Motion, p. 11, ll. 11-13.

[illegible] Heart's Motion, p. 11, ll. 14-16. Heart's Motion, p. 11, ll. 17-19. Heart's Motion, p. 11, ll. 20-21. Heart's Motion, p. 11, ll. 22-23. Heart's Motion, p. 11, ll. 24-25. Heart's Motion, p. 11, ll. 26-27. Heart's Motion, p. 11, ll. 28-29. Heart's Motion, p. 11, ll. 30-31. Heart's Motion, p. 11, ll. 32-33.

that Hyatt has not persuasively shown that something special relating to the FTB's duty of confidentiality could be added to the mix. The Second Amended Complaint does not allege that Franchise Tax Board employees acted with malice in promising confidentiality to Hyatt in order to obtain Hyatt's taxpayer information and eventually the production of his confidential information.[4]

Beyond these allegations, the evidence already gathered, and therefore the exercise that is required to rebut it is overwhelmingly adverse to the conclusion that the FTB promising to keep public information confidential would be unusual. Most recently, this evidence was summarized in the expert report of Howard Jarvis taxpayers Professor Daniel Smith. This report, quoted below, is also relevant to evidence of the FTB's successful efforts to gain Hyatt's confidence in securing the release and production of confidential information. Professor Smith's testimony is relevant to the FTB's PMQ's over-broad, unprovable assertion that it would not have entered into a special relationship with Hyatt to provide confidentiality in order to voluntarily produce Hyatt's non-public information. This evidence, in summary outlined by Professor Smith and relied on by him in his report:

"In his deposition, Hyatt was asked:

> Q. Okay. Did the FTB promise you any protection other than what was given by law cause to your privacy?
>
> A. Like a full promise, unconditionally, no? It would protect my privacy.
>
> Q. Did you believe that protection in your case special obligations still had to what the law requires?
>
> A. Well, in addition to the promise – I'm not sure what the law requires, I mean, whether promises as its outlined on the – in the letter and through conversations and also code of conduct and promises of confidentiality.
>
> Q. By those additional promises, what obligations was added on to the FTB's obligations required by law?
>
> A. Well, for example, in the contract letter, the Title Section 7

[4] See, e.g., proposed Second Amended Complaint, ¶¶ 81, 141, 144, 145, 146, 147.

And I, the FTB promised I'm not only would not abide by the California Privacy -- I'm going to -- You have to live with me.

Q. Why not?

A. Internal Revenue Code and the Federal Privacy Act, and that I would be disclosing information only to certain government agencies and not to you [sic].

Then Mr. Russell in his deposition: "I think that the promises that Franchise Tax Board -- my boss -- presumably -- would -- included those that were required by law, but I'm not sure. I'm also not sure what additional statements that they would provide to the taxpayers to the documents that they were -- were subject to them."

. . .

Franchise Tax Board employee subsequently communicated to the FTB, by email, concerns of confidentiality and security expressed by Mr. Hyatt. In an email from a supervisor to the FTB auditor, Lorraine Lundquist, Ms. Lundquist officials provided acknowledgement that they understood Hyatt's strong desire for confidentiality and awareness that Hyatt's information would remain confidential. For example, in a 1997 memo from Franchise Board's Executive Director Gerald Goldberg's executive assistant Ms. Joe Swanholm to Nancy Jones, counsel to the FTB, he stated:

> Mr. Hyatt was pleased that we would engage in this discussion agreement with the FTB and previously reviewed draft of the project letter from Steve Russell. It is understanding that Mr. Hyatt was extremely concerned over the confidential nature of the agreements and is seeking legal.

In addition, Lorraine Lundquist from Franchise Board's Legal Division sent an email to Nancy Jones, Counsel for the FTB, forwarding Hyatt's document request and stating, "I am also forwarding Steve Russell's response to Mr. Hyatt's request. Mr. Hyatt is very concerned about the confidentiality of his records and I'm sure you understand."

In a June 25, 1998 memo to the file, Counsel Nancy Jones from the outset of the audit contracted by the FTB for the taxpayer's 1987 and 1988 tax years, we have subjected the FTB to Constitutional violations to keep the materials confidential and to protect his privacy and confidences." In that memo, Counsel concluded "Given the age of the matters and the total control that I have had with the FTB concerning the taxpayer's desire for confidentiality, I believe [sic]." According to Counsel's recollections of his conversations with FTB officials in the chronology, on September 13, 1995, "Mr. Troyer explained that [the] personnel was responsible to maintain the confidentiality of taxpayer records. Mr. Shaver stated that the taxpayer's file would be maintained at the Sacramento office and not by Mr. FTB employees working on the case would have access to the file." On September 29, 1995, [illegible] to speak to Mr. Shaver the sensitive confidential nature of the documents. Mr. Shaver assured that the confidentiality of the documents would be maintained." Counsel documents a conversation he had with Mr. Troyer explaining the taxpayer's desire to keep the documents private and confidential." On February 23, 1996, Counsel and Mr. Shaver met to review Hyatt's documents. According to Counsel's description of the visit, he did that the taxpayer's concerns were for his privacy and tried to maintain [illegible] Mr. Counsel states

[illegible] the FTB was subject to the usual [illegible] established policy of the FTB, the violation of which would subject FTB employees to [illegible] discharge. Throughout the motion, Cowan relied on numerous employment related communications with FTB officials, including Mr. Swingle and Mr. Cook, in which Cowan repeatedly stated that Hyatt expected confidentiality and privacy, and that FTB officials assured him that they would maintain such confidentiality.

On August 29, 1994, during the audit, Cowan stated that Mr. Hyatt has been careful to protect his privacy as a result of past harassment and [illegible] of his work. In a written letter, he stated:

> As part of our [illegible] public profile, Mr. Hyatt has [illegible] on friends and colleagues to keep as strong as possible a wall between Mr. Hyatt's personal residence and related items and even our neighbors, utilities, etc., in Las Vegas. Mr. Hyatt also uses [illegible] for his unlisted phone number to maintain privacy. Mr. Hyatt does not want to come [illegible] associated with his residence. Of course, Mr. Hyatt [illegible] Las Vegas business cards and has [illegible] his unlisted telephone and business listings in Las Vegas [illegible] and phone number in 1994 and 1995 for the purpose of [illegible] telephone access to protect against [illegible]. Certain [illegible] subject to disclosure as a matter of [illegible] public records.

In response to this, Cowan states that the FTB auditor told Cowan that "taxpayers are [illegible] persons who give a significant [illegible] to their privacy [illegible] it would be [illegible] that the taxpayer's address and business [illegible] would be kept confidential."

In Cowan's opposition to the motion to quash, he states that "Mr. Shaver [of the FTB] and I discussed at length Mr. Hyatt's statements concerning confidentiality and keeping them [illegible] as confidential. [illegible] he requested, and allowing, to the extent possible – [illegible] Cowan, Tilke, who made [illegible] to know of the [illegible]. In fact, Cowan [illegible] in support of his declaration, Cowan states that he discussed the implementation of protecting Hyatt's confidentiality with the FTB officials.

Cowan, beyond explicit promises of confidentiality by the department and [illegible] that the [illegible] confidentiality by virtue of the nature of its relationship with Hyatt, the exercise of [illegible] powers, its own rules and procedures, and its other obligations under the [illegible] Constitution of California. In particular, the [illegible] Education Training Manual emphasizes calls for auditing [illegible] information and [illegible] [illegible] that taxpayers [illegible] [illegible] [illegible] spouse. Moreover, the Manual states that "[illegible] personally identifiable information by FTB auditors and [illegible] from individuals such as [illegible] name, social security number, address, [illegible] or filing status." On that [illegible] [illegible] with the words "CONFIDENTIAL," "FOR SHAVER," "NOTED TO [illegible]," and "CONFIDENTIAL."

The FTB's duty of confidentiality is also established by statutes it must [illegible] taxpayers. As [illegible] Constitution Taxpayers Bill of Rights – Right to Privacy states:

Your Rights as a Taxpayer

We may need [illegible] the information for [illegible] [illegible] [illegible] during any meetings with our auditors [illegible] [illegible] [illegible] [illegible] [illegible] with other government agencies [illegible] [illegible] and other state and local tax agencies.

However, [illegible] [illegible] [illegible] [illegible] and you [illegible] [illegible] [illegible], upon written request [illegible] [illegible] [illegible] [illegible] your [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Similar statements regarding information from Hyatt's Privacy Notice [illegible] describing the privacy rights established in the Information Practices Act of 1977.

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

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

What should you expect from a Franchise Tax Board audit?

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

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

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

This language is consistent with the language in the [illegible] [illegible] Taxpayers' Bill of Rights [illegible] [illegible]. It is my opinion that these documents make express promises of confidentiality. [illegible] and repeatedly state the general rule that any information that a taxpayer furnishes to the FTB is to be kept confidential. The documents state that [illegible] exceptions to that general rule, and they delineate these exceptions. Nowhere in the documents does the FTB state that it will disclose personal information to third parties such as [illegible], newspapers [illegible] [illegible] [illegible]

[illegible] according to the IRS Privacy Policy (PTR-131.1, revised 5-2009) attached to the firm's contract. Lloyd differs from the latter version of the IRS Privacy Notice (Pub. 1054, revised 05-2014). In particular, the section on information disclosure is less restrictive.

The IRS Privacy Notice provided to Lloyd is discussed above. The 05-2014 version of the IRS Privacy Notice states:

> **Information Disclosure**
>
> We may disclose your tax information to:
>
> - The Internal Revenue Service.
> - Treasury inspectors for tax administration.
> - The Department of Justice.
> - Cities, states, and the District of Columbia for tax administration.
> - Appropriate Federal, state, local, or foreign government agencies or their contractors.
> - Third parties when necessary to determine or collect your tax liabilities.

Similar to the Privacy Notice provided to Lloyd, the 2009 version mentioned that information may be disclosed to the IRS, "as authorized by the Internal Revenue Code, or other appropriate Federal, state, local, or foreign agencies, or their contractors." Those agencies include "Third parties when necessary to determine or collect your tax liabilities." This is the same phrase the Privacy Notice Lloyd received.

The IRS's 2014 Privacy Notice does not mention the possibility that information will be provided to third parties "when necessary." As discussed above, [illegible] Lloyd received, it is my opinion that many of the IRS's [illegible] third parties increased the ability of the IRS to collect [illegible]. But the IRS's contracted Privacy Notice, which is more restrictive, is the one that Lloyd received and the one that governs the firm's [illegible].

The very purpose of a Privacy Notice is to inform the taxpayer of the circumstances in which a portion of confidentiality that the IRS is to follow. Here, it appears that the IRS has not breached the confidentiality promised in its Privacy Notice. To the extent it did, the practical effect is the same as to third parties, under any circumstances, that its Privacy Notice was misleading and inaccurate.

The documents reveal that Lloyd, through its lawyers, [illegible] questioned the Privacy Notice. For example, Eugene Corrao stated in his deposition:

> Q. Now, are you aware of any time that you asserted [illegible] opposing procedures relative to your tax [illegible] opposing procedures of the IRS to [illegible] to furnish information to a third party [illegible] without first requesting it from the taxpayer?

> As to your first concern, I can assure you that our records indicate that the Nevada State Gaming Board sent to us in the form of a letter dated March 31, 2004, the request that we investigate the circumstances surrounding the issuance of a gaming license to Steve Wynn.[1]

Wynn has therefore pled and has evidence to support the existence of a special relationship between the FBI and the NGB relative to keeping his non-public information imparted to the FBI confidential. The FBI did have the discretion to accept Wynn's information, as well as to keep the information confidential. In that regard, the FBI has expressly explained in its briefing, the fact that "[w]ithout voluntary compliance by taxpayers to provide the Bureau the information sought by the IRS, the Bureau's ability to carry out its responsibilities under the IRS would be severely impaired." Thus, even though there is no statutory requirement that the FBI keep the subject information confidential, a special relationship is created because the FBI chose to keep this information confidential.

The FBI cannot deny this case law's symbolic relationship and duty of confidentiality. It understands that a taxpayer seeks protection by entering into voluntary compliance by the taxpayer's disclosure of the taxpayer's private information. The FBI benefits by receiving the information it needs and the taxpayer benefits — at least so long as the FBI does not breach its duty of confidentiality — by ensuring that the IRS does not breach its duty of confidentiality by providing the FBI access to the taxpayer's private information. The FBI argues that the requirement is somehow met by providing a publicly available website explaining procedures. But why? For this and other things. This procedure is a confidential relationship that the FBI must not violate.

Accordingly, allowing Wynn to amend to add the breach of confidentiality claim would not be futile. At the very least, Wynn's claim that a special relationship was created by the disclosure is a question of fact for the jury.

3. Granting Wynn leave to amend to add his allegations of attorneys' fees as special damages is not futile.

The FBI argues that attorneys' fees as special damages is not a recognizable cause

[1] Dkt. no. 39, Exh. 1, Wynn's letter to the FBI dated March 31, 2004, at p. 1 (emphasis added).

Hyatt's frontline, not claims.[15] To be clear, Hyatt is not seeking his attorneys' fees in prosecuting his intentional tort claims in this action. This is spelled out more explicitly in the Second Amended Complaint, as Hyatt is seeking as damages his attorneys' fees and accountant's fees in defending the FTB's bad faith audits and now protest proceedings. As such, this item of damages is no different, legally foreseeable and no different than a personal injury plaintiff seeking recovery of his doctor bills. Hyatt has sought leave to amend, citing *Sandy Valley Associates v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948 (2001), only to ensure there is no technical objection that an element of Hyatt's damages claim for the FTB's bad faith conduct in the audits and protests are attorneys' fees that need to be pled with specificity under *Sandy Valley*. In its opposition, the FTB [illegible] language [illegible] the FTB does not even address Hyatt's new proposed amendments as to the attorneys' fees he is seeking. Hyatt's Second Amended Complaint states, in respect to each tort claim, for which Hyatt's professional fees for the audits and protests are sought as damages:

> It was highly foreseeable to the FTB that, absent the success of its scheme to unlawfully deprive plaintiff of his property through such acts of [illegible], the [illegible] of his privacy and the imposition of huge "fraud" penalties, as a foreseeable plaintiff's only alternative was a very [illegible] defense [illegible] the continuing California tax proceedings. This required the employment of a team of attorneys and other experts. The resulting attorneys' fees and other professional fees of the plaintiff are incurred, and continue to incur, were proximately and directly caused and necessitated by the FTB's [illegible].

Accordingly, *Sandy Valley* is not implicated and Hyatt need not even specially plead these [illegible] attorneys' fees as Hyatt is not seeking his attorneys' fees from this case. Nonetheless, out of an abundance of caution and to avoid any argument that the claim for these attorneys' fees incurred as part of Hyatt's damages in the audits and protests must be so pled, Hyatt seeks to amend as stated in his Second Amended Complaint.

Moreover, the FTB has known since at least July of 2001 when Hyatt first produced his attorneys' fees and accountants' bills from the audits and early protests that these were the fees

15 [illegible]

[illegible]

to work seeking the same or substantially similar employment following the date of the offer, unless the offer was not made in good faith or the employee unreasonably refused the offer.

Here, Plaintiff's counsel has not submitted any evidence to support the reasonableness of the hourly rates charged by counsel or the number of hours billed. Instead, Plaintiff's counsel has merely submitted billing statements. Plaintiff's counsel has not submitted any evidence regarding the prevailing market rates for attorneys in the community. Plaintiff's counsel has not submitted any evidence regarding the experience, reputation, or ability of the attorneys. Plaintiff's counsel has not submitted any evidence regarding the complexity of the case or the skill required to litigate the case. Plaintiff's counsel has not submitted any evidence regarding the customary fee charged by attorneys in the community for similar services. Plaintiff's counsel has not submitted any evidence regarding whether the fee is fixed or contingent. Plaintiff's counsel has not submitted any evidence regarding the time limitations imposed by the client or the circumstances. Plaintiff's counsel has not submitted any evidence regarding the amount involved and the results obtained. Plaintiff's counsel has not submitted any evidence regarding the undesirability of the case. Plaintiff's counsel has not submitted any evidence regarding the nature and length of the professional relationship with the client. Plaintiff's counsel has not submitted any evidence regarding awards in similar cases. Plaintiff's counsel has not submitted any evidence regarding the reasonableness of the hours billed. Plaintiff's counsel has not submitted any evidence regarding the reasonableness of the hourly rates charged. Plaintiff's counsel has not submitted any evidence regarding the reasonableness of the total fee. Plaintiff's counsel has not submitted any evidence regarding the reasonableness of the fee in relation to the results obtained. Plaintiff's counsel has not submitted any evidence regarding the reasonableness of the fee in relation to the time limitations imposed by the client or the circumstances. Plaintiff's counsel has not submitted any evidence regarding the reasonableness of the fee in relation to the amount involved and the results obtained. Plaintiff's counsel has not submitted any evidence regarding the reasonableness of the fee in relation to the undesirability of the case. Plaintiff's counsel has not submitted any evidence regarding the reasonableness of the fee in relation to the nature and length of the professional relationship with the client. Plaintiff's counsel has not submitted any evidence regarding the reasonableness of the fee in relation to awards in similar cases.

[illegible]

remedy.[12] That is precisely the case. While the opinion analyzes this basic principle for declaratory or injunctive relief, there is no logical reason it would also not apply in this case where the FTB's bad faith intentional acts are squarely at issue and where Hyatt seeks to remedy. [illegible], [illegible] has an order compelling Hyatt to produce his litigation bills from this case, Hyatt is not seeking recovery of his attorneys' fees in this case.

4. Granting Hyatt leave to amend to add references to "informational privacy" is not futile and merely conforms the pleading to the claims being litigated in this case as demonstrated by the parties' consistent briefing to this Court and the Nevada Supreme Court.

The FTB objects to Hyatt's references in the Second Amended Complaint to "informational privacy." Despite arguing Hyatt's informational privacy rights as part of Hyatt's invasion of privacy claims for as many years as this case has been pending, the FTB [illegible] does not understand that "informational privacy" is a term that describes particular modern privacy rights that have developed as part of the common law for invasion of privacy. As it did last year in [illegible] its [illegible] motion for partial summary judgment on Hyatt's [illegible] "IPA" [illegible], the FTB confuses "informational privacy" with California's Information Practices Act. While that act does [illegible] significant aspects of informational privacy, common law invasion of privacy is at issue in this case and has been from early on.[13] Hyatt is not asserting a statutory claim under the IPA. He is asserting common law invasion of privacy claims, which include his informational privacy.[14]

Hyatt's Opposition to the FTB's Partial Summary Judgment re IPA claims detailed the above discussion and how Hyatt's common law claims differ from [illegible] statutory IPA claims. In sum, Hyatt argued there:

---

[12] Id. [illegible] Nev. at [illegible].

[13] [illegible] Hyatt's Opposition to the FTB's Summary Judgment Motion [illegible] Hyatt's informational privacy claims [illegible]. This was [illegible] Hyatt's [illegible] Partial Summary Judgment Motion [illegible] Second Amended Complaint [illegible].

[14] A further summary of the law relating to informational privacy and its common law origins [illegible] Expert Witness Report [illegible] Exhibit [illegible].

[redacted] privacy, including seclusion of information and privacy. These are common law claims as set forth above, but [redacted] privacy, standing, justiciability, and ripeness [redacted] of these claims — at least [redacted] summary judgment — has been established by the rulings by this Court and the Nevada Supreme Court in [redacted] to and dissolution of [redacted] Hyatt has now asserted such claims. Further, as the FTB concedes, a discovery dispute [redacted] Hyatt's common law invasion of privacy claims, [redacted] the substantive privacy aspect of those claims, [redacted] FTB's motion [redacted] rulings in this Court and the Nevada Supreme Court.

Because, as the FTB knows and should have known before it made its motion, Hyatt has pursued [redacted] pursuant to common law claim for [redacted] of privacy as part of his invasion of privacy suit. The [redacted] has extensively briefed this issue in the pleadings described above. Notwithstanding the [redacted] of the common law [redacted] and privacy [redacted] pursued in this [redacted] of privacy suit. In opposing the FTB's summary judgment motion, Hyatt explained [redacted] his alternative invasion of privacy claim:[1]

> Upon further explanation of how informational privacy falls [redacted] common law invasion of privacy claims by granting [redacted] summary judgment [redacted] Hyatt in his Opposition at [redacted] Hyatt pointed out:
>
> > (b) Courts are particularly vigilant in enforcing informational privacy rights related to social security numbers, addresses, and other private information.
> >
> > Courts of every level – including the U.S. Supreme Court – prohibit disclosure of private personal information such as social security numbers and address, and consider such a violation of an individual's "informational privacy" rights.
> >
> > (d) U.S. Supreme Court informational privacy cases.
> >
> > The U.S. Supreme Court has issued two opinions having to do with [redacted] Privacy Act of 1974, 5 U.S.C. § 552a. In Department of Defense Appropriations Act, 2005, Pub. L. No. 108-487, § 564, 118 Stat. 3918 (2004), the Court held that disclosure of employees' home addresses to labor unions [redacted] invasion of privacy. That case was largely based on federal statutory [redacted] Privacy Act, which was enacted [redacted] Congress's concerns about "the impact of computer data banks on individual privacy" and lack of adequate [redacted] Congress's concerns. In the present case, [redacted] Privacy Act, the Court held that the disclosure of [redacted] would not constitute a clearly unwarranted invasion of personal privacy. Finally, United States Department of State v. Ray, held that the disclosure of [redacted] would constitute a clearly unwarranted invasion of personal privacy because [redacted] the information would be used to [redacted] the privacy

[1] Hyatt's Opposition to FTB's Motion for Partial Summary Judgment on Hyatt's Claim for Intentional Tort (Invasion of Privacy) at 10:1-11:1.

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

> [illegible] *[illegible] Journal Publishing Co. v. City of [illegible]*, found that the disclosure of social security numbers "would violate the federal constitutional right of privacy" and held that because the Privacy Act of 1974 regulates the use of Social Security numbers, individuals "have a legitimate expectation of privacy in their Social Security numbers." [illegible] Washington courts have found disclosure of social security numbers to be highly offensive. *Progressive Animal Welfare Society v. University of Washington*, held that "[t]he disclosure of a public employee's social security number would be highly offensive to a reasonable person . . . ." Furthermore, in [illegible] *Public Records v. [illegible]*, the Court similarly held that "[a]ppellant's release of employees' identification number would be highly offensive."
>
> Other cases concluded that certain citizens — such as C.J. Hyatt — have a paramount need or desire to keep their address confidential. *National Association of Retired Federal Employees v. Horner*, held that "[i]n our society, individuals generally have a large measure of control over the disclosure of their own identities and whereabouts. That people expect to be able to exercise that control is evidenced by [illegible] unlisted telephone numbers by which subscribers may avoid publication of an address in public directory, and [illegible] boxes, which permit the receipt of mail without disclosing the location of one's residence." Moreover, the court could have had Gil Hyatt in mind when it concluded that "a public knowledge [illegible] [illegible] [illegible] [illegible] anyone who would like to secure a share of that sum by means scrupulous or otherwise."
>
> *American Federation of Government Employees, AFL-CIO, Local [illegible] v. United States*, expresses privacy concerns similar to those alleged by Hyatt in this case. The court held that union members had a privacy right not to disclose their home addresses to their own union because disclosure would subject the employees to an unchecked barrage of mailings and perhaps personal solicitations. The court [illegible] observed that the effective operations could be placed in [illegible] hands where the information, once revealed, might be misused. The dissent pointed out that only a rare person — like Hyatt — conceals his address from real property records, voting lists, motor vehicle registration, licensing records and telephone directories. The court majority nevertheless recognized the privacy right *even for those less sensitive about secrecy*.

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

> The tort of [invasion] of privacy by illegal disclosure of private fact(s) is really two: the more recently enunciated invasion of informational/constitutional privacy and the more traditional branch of disclosure of private facts. Each claim is governed

> disclosure of private facts for which an expectation of privacy had been recognized and for which a reasonable person would find offensive — particularly in light of California's constitutional privacy under which disclosure of private, personal information gathered by the government is per se unlawful.

Again, had this Court and the Nevada Supreme Court been advised of the FTB's attempt to dismiss this and Hyatt's other intentional tort claims [illegible] informational privacy [illegible] Hyatt's separate invasion of privacy tort, is very much a part of this case. [illegible] IPA claim.[illegible]

The FTB's citation to *Sands Regent v. Valgardson*[2] has no application here. First, as described above, Hyatt's claims for invasion of privacy include violation of his "informational" privacy, which are fully recognized under Nevada's common law and the common law throughout the country. These claims are not in dependent on a claim for a special claim under the IPA, which is a California statute remedy. Hyatt seeks no relief under the IPA in this Nevada action, despite the FTB's efforts to inject it into this case as a direct claim. As was discussed in Hyatt's Opposition to the FTB's [illegible] motion, the IPA is relevant. The IPA was intended to inform the FTB's conduct and the FTB's disregard of such statements, as well as its disregard of other internal guidelines and procedures, is evidence of the FTB's bad faith and intent to "get" Hyatt at all costs.[3] But Hyatt seeks no recovery in this action for such IPA violations by the FTB.

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

---

[1] [illegible]

[2] *Sands Regent v. Valgardson*, 105 Nev. 436 (1989).

[3] Hyatt's Opposition to FTB's [illegible] Summary Judgment [illegible]

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

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

Here, Hyatt's requested amendments are closely related to the pending claims and have been known to the FTB for a period of time. Moreover, the FTB still has ten days of deposition to take of Hyatt (on April 28 and [illegible]), as well as two days of deposition of [illegible] Hyatt's [illegible] during the audits, Mr. Cowan, to be scheduled later in May, and at least one more day of Hyatt's accountant during the audit and protests, Mr. Kern, to be scheduled. The FTB cannot, and will not, be prejudiced by these amendments.

6. The FTB has not and is not prejudiced by Hyatt's request to amend to add attorneys' fees as special damages.

Regarding the amendments directed at adding the attorneys' fees as special damages, as addressed in Hyatt's moving papers, the FTB has had notice of the fees for which Hyatt seeks recovery for almost two years. Specifically, in a DCRR signed February 2, 2004, the Discovery Commissioner ruled that Hyatt must produce copies of attorneys' bills for which he claims as damages. In July 2004, Hyatt produced copies of the attorneys' bills [illegible] Mr. Cowan's and accountants' bills

---

[5] FTB Opp. [illegible]

[6] 6 Wright, Miller & Kane, *Federal Practice and Procedure* § 1488, [illegible]

[7] [illegible]

[8] [illegible]

(Mr. Kemp) Those invoices in declaration [illegible] early previous which can Exh 1953 through 1957. Now, in light of the Nevada Supreme Court writing very similar to your confirming the case PCD's bad faith conduct finding, through the still pending [illegible] Mr. Gerrard in his supplemental declaration and invoices for professional fees incurred in defending Mr. Gill's bad faith petition from 1958 through 1965. Those include invoices Mr. Gerrard's billing and that of Hoy Chrissinger Kimmel attorney in the practice Mr. Gill.

The PCD was in possession of Mr. Gerrard's and Mr. Kemp's bills for Exh 1951 through 1957 time period when Mr. Gerrard was deposition scheduled for 3½ years for multiple days knowing Lyon was seeking recovery of bad faith fees and Mr. Gerrard has additional depositions with each of them and Mr. Kemp the PCD's motion regarding expert witness fees Mr. Gerrard Jones and was known that Hoy Chrissinger attorney at fees for bill practice. They were assigned to the Discovery Commissioner in opposing publication of his light on bills in this case and seeking to limit production of Gerrard's the qualified and protective order be also produced.

Even the District Court judge [illegible] to provide evidence by how fees are in this case stated during the March 27, 2019 hearing that she was aware that Hoy Chrissinger attorneys' fees sought for damages in claiming that Lyon refused to make a claim that was aware of the number of [illegible] case was discussed during the Court and counsel on the issue starting on page 21 of the March 27, 2019 transcript in which PCD counsel Mr. Eisenhour acknowledged that Hoy was seeking damages fees in this case: "And I don't know during the course of this litigation seeking for an award of attorneys' fees which Hoy Chrissinger and the Court then confirms that Gill is seeking to recover attorneys' fees as damages:

> COURT: It might be Defendant's argument was reasonable to compel Lyon to the motion to compel was proper to bring to compel, and I would imagine that, just off the -- Mr. Eisenhour, you are seeking damages in the way of attorneys' fees, right?
>
> MR. EISENHOUR: That is correct.

[illegible]

[illegible] Transcript 3/27/19 Oral Hearing Transcript, p. 21, lines 10-24, marked for identification as Exhibit 4

MR. BERNHARD: Yes. Is this over a filing fee, any attorneys or accountants whose fees are being sought as part of your respective causes of action, per se? And we understand that we have no proof on these, but we have

[illegible] we will make known our expectation that, you know, although we have provided initial information concerning [illegible] at least through the year 1995. And to the extent we're going on further [illegible] we will produce those statements or invoices as they [illegible] time, and that does avoid the privilege issues that we were concerned about. Unless Counsel has a different [illegible].

COURT: Do I have an [illegible] report to be [illegible] the Court's ruling being [illegible] these specific [illegible]. That would be the Court's view.

The FTB's motion now seeks to limit Plaintiff's claims to those Court resolved Plaintiff's claims and asserted damages. Moreover, as discussed above, the Gross Negligence damages are not an issue for the second trial, based on counsel's statements which typically allow only those plaintiffs' fees for which expert testimony is currently employed. Because Plaintiff seeks recovery of fees and damages based on [illegible] pre-existing agreements and does not rely on [illegible] by a plaintiff in any manner of injury [illegible]. Plaintiff's claims do not fall out-of-pocket damages nor [illegible] recovery for [illegible].

Further, claims of Plaintiff's amendment for [illegible] fees as special damages, simply [illegible] Gross Negligence Court's Order[illegible] in explaining that attorneys' fees will be recovered as special damages even where there was no [illegible] evidence of the damages [illegible] presented and accepted by the jury [illegible] the whole case [illegible] second trial, [illegible] amend at trial under NRCP 15(b) may be appropriate.[28]

B. The FTB is not prejudiced by Plaintiff's request to amend to add this breach of confidentiality claim or reference to it in fraud and privacy.

This claim is [illegible] Plaintiff's [illegible] claims that the FTB [illegible] by the [illegible] as detailed above, the specific information [illegible] the only [illegible] evidence that Plaintiff has presented to the jury [illegible] the FTB [illegible] and receipt of Plaintiff's [illegible] information and [illegible] [illegible] confidential

---

[illegible]

[illegible]

[illegible]

Again, the FTB has [illegible] days of deposition of Hyatt to the extent it wants to [illegible] inquire as to such [illegible]. There is no possible way that adding this claim prejudices the FTB or in any way threatens to disrupt the [illegible] trial. The only prejudice the FTB ever claims is in purported need to take discovery concerning the spousal relationship.[24] Again, [illegible] more, [illegible] already inquired at Hyatt's deposition about the confidential relationship, and [illegible] will have the opportunity to depose Hyatt on this issue again, if it so desires.

The FTB makes no explicit claim that it would be prejudiced by including the [illegible] to "information privacy" in the Second Amended Complaint. [illegible] in good faith make any such claim. Information privacy as part of Hyatt's invasion of privacy claims has been litigated [illegible] early in this case, including briefing to the Nevada Supreme Court, as the above quoted excerpts from prior briefing dating from 2000 explicitly show. The FTB has had every opportunity to take discovery relating to informational privacy as [illegible] included within Hyatt's invasion of privacy claims. Again, the FTB will have further opportunity to so inquire at the remaining two days of Hyatt's deposition. The FTB has also scheduled for May [illegible] the deposition of Hyatt's [illegible] expert, Professor Solove.

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

The FTB wrongly asserts that Hyatt's right to appeal the Court's dismissal of his declaratory relief claim from 1999 has expired. The FTB's [illegible] petition for writ [illegible] filed in 2000 challenging the Court's denial of summary judgment that year and the Nevada Supreme Court's consideration of the writ, in no way [illegible] Hyatt's right to appeal the Court's 1999 order after entry of judgment [illegible]. Hyatt sought no relief in [illegible] writ proceedings before the Nevada Supreme Court, nor was he required to do so. The previous granting of summary judgment dismissing the declaratory relief claim has never been appealed by Hyatt. [illegible] is the FTB that [illegible] Hyatt [illegible] in [illegible], to the contrary. Hyatt therefore properly maintains his verbatim declaratory relief claim in his proposed Second Amended

---

[24] FTB [illegible]

AA003006

Complaint, while acting that is not presently sufficient for the upcoming trial.

V. Conclusion.

The accountants Hyatt seeks to file Second Amended Complaint are not futile. They all relate to causes of action currently in the case. Moreover, they are closely related to claims currently pending. They have not been delayed and there are no issues for the jury that have not been addressed by experts in their pre-trial disclosures. In short, they raise no substantive issues in this case, and Defendants will not suffer any prejudice if they are allowed to file their Second Amended Complaint. For these reasons, Hyatt will be substantially prejudiced if the Court does not allow Hyatt to file the Second Amended Complaint. Hyatt would be prejudiced if the amendment is not allowed. Hyatt therefore respectfully requests that this Court grant leave for Hyatt to file the Second Amended Complaint.

Dated this 16th day of April, 2008.

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

[illegible]

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

[illegible]

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of BRIANT HOLMES RAFFERTY PC and that on this 6th day of April, 2016, I caused the above and foregoing document entitled PLAINTIFF CHRISTOPHER PEARCE'S REPLY IN SUPPORT OF THIS MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT to be served as follows:

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via facsimile: (951) 788-2820
James A. Shackelford, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street
10th Floor
Reno, NV 89501

via facsimile: 871-9009
J. Timothy Williams, Esq.
McDonald Carano Wilson LLP
2300 West Sahara Avenue, Suite 1000
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Exhibit 1

Columbia Law Review
November, 1982

Note

THE BREACH OF CONFIDENCE: AN EMERGING TORT

Alan B. Vickery

Alan B. Vickery

[illegible]

[illegible]

[illegible]

A. Nature of the Wrong

[illegible]

[illegible]

[illegible]

B. The Case Law

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

AA003017

[illegible] [illegible] [illegible] [

[1446] The Privacy Act applies to a broad range of records maintained by the federal government. Records may not be disclosed by any means of communication to any person or agency without the written request or consent of the individual to whom the record pertains, unless the disclosure is specifically permitted by one of twelve statutory exceptions. (5 U.S.C. § 552a(b).) The exception most relevant to this case allows disclosure of a record "pursuant to the order of a court of competent jurisdiction." (5 U.S.C. § 552a(b)(11).)

Especially when it has given its original promise of confidentiality, the government should not be permitted to renege on that promise merely because a litigant has obtained a court order requiring disclosure. Such a rule would encourage litigants to seek court orders requiring disclosure of confidential information, thereby undermining the government's ability to keep its promises of confidentiality. Moreover, it would allow litigants to circumvent the Privacy Act's limitations on the government's ability to disclose information without the consent of the individual to whom it pertains.

Finally, the Department of Justice Privacy Manual, which provides guidance to federal agencies regarding the Privacy Act, recommends that the government notify an individual whose records are sought by a subpoena or court order, unless such notification is prohibited by law. (Privacy Act Overview, Privacy Act Disclosure Guidance, Privacy Act Publications, Publications, Publications,

AA003020

[illegible]

[illegible]

[illegible]

II. ELEMENTS OF THE TORT AND LIMITATIONS

A. Duty of Confidence

[illegible] [FN[illegible]] [illegible] [illegible] [illegible

[illegible]

[illegible] the Law Commission [illegible] privilege [illegible] [FN183] [illegible] [FN184] [illegible] [FN185] [illegible] [FN186]

[illegible] public interest [illegible] English [illegible] American [illegible] [FN187] [illegible] [FN188] [illegible] [FN189] [illegible] [FN190] [illegible] [FN191] [illegible] [FN192] [illegible]

[illegible] Privileges. [illegible] [FN193] [illegible]

[illegible] [FN194] [illegible]

[illegible] [FN195]

[illegible] [FN196] [illegible] [FN197] [illegible] [FN198] [illegible] [FN199] [illegible] [FN200] [illegible]

[illegible]

[illegible]

AA003029

[FN?] This Note is concerned primarily with [illegible] confidential relationships, rather than relationships of a personal nature with family or friends. The [illegible] protected by the State would [illegible] because [illegible] relationships. [illegible] would [illegible] not only [illegible] but would [illegible]. See infra note 106 and accompanying text.

[FN?]

[illegible] medical [illegible]

[illegible] v. [illegible] County [illegible] (1970).

[illegible] legal [illegible] the [illegible] attorney [illegible]

[illegible] v. Superior Court, [illegible] Cal. [illegible] (1957) [illegible]; see also [illegible] v. Superior Court, [illegible] Cal. [illegible] (1964) (same).

[FN?]

For all practical purposes, the disclosure by [illegible] of [illegible] financial affairs to a bank is not [illegible] in the [illegible] life of contemporary society without [illegible] bank records [illegible] personal affairs, [illegible] bank records [illegible].

[illegible] v. Superior Court, [illegible] Cal. [illegible] (1974) [illegible] (same). The [illegible] personal bank records [illegible]. The [illegible] does, however, recognize that [illegible] confidentiality [illegible].

[FN?]

All [illegible] knowledge [illegible] profession [illegible] which could not [illegible]

[illegible] Medical Dictionary [illegible] (1974); [illegible] Principles of Medical Ethics [illegible] (1957) [illegible]; Model Code of Professional Responsibility Canon 4, EC 4-1, 4-4, [illegible] (1980).

[FN?] See, e.g., N.Y. Educ. Law [illegible] (McKinney Supp. 1981-1982) [illegible] professional misconduct [illegible] includes "[r]evealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client" [illegible]. See [illegible] bank records [illegible].

[FN?] A "confidential relationship" should be distinguished from a mere "confidence." [illegible] relationship [illegible] obligation of secrecy [illegible] confidence, on the other hand, [illegible] circumstances under which a particular piece of information [illegible] obligation of secrecy with respect to that information [illegible]. For [illegible] see [illegible] Nimmer, On Copyright § [illegible] (1981). For the purposes of this Note, the term "breach of confidence" refers to breach of a confidential relationship.

[FN?] [illegible] (1977).

[illegible] In accordance with the theory of liability, the Court would recognize a cause of action, in tort and not in contract, for a breach of a physician's duty of confidentiality to his patient. See the discussion of the cases cited in [illegible] and [illegible] supra. The cases in which the New York appropriation of name or likeness statute, [illegible], is held to be violated by the use of a name or picture in connection with the publication of a book, [illegible], or in connection with the publication of a newspaper, [illegible], are instructive in this regard. [illegible] The statute, which creates a statutory right of privacy, is limited to the use of a name, portrait or picture of a living person for purposes of trade or for the purpose of taking advantage of the reputation, prestige or commercial standing of any person or firm. [illegible] Thus, along with the fiduciary duty we have discussed, there is implied in the physician-patient relationship a duty not to disclose, except in certain circumstances, information which the patient has a right to expect will not be revealed. [illegible] Such a duty may be found to exist even after the relationship with the patient has been terminated. [illegible] Whether the duty is breached by a disclosure of information relating to the patient's illness is to be determined by the jury, [illegible] and the jury may find that the physician has violated the duty even though he has acted in good faith and with due care. [illegible] Such a duty may be found to exist even after the relationship with the patient has been terminated. [illegible] Whether the duty is breached by a disclosure of information relating to the patient's illness is to be determined by the jury, [illegible] and the jury may find that the physician has violated the duty even though he has acted in good faith and with due care.

[illegible] In Hammonds, [illegible] the Court of Appeals held that a physician who disclosed information relating to his patient's illness was liable for damages resulting from the disclosure. The Court held that the physician's duty of confidentiality was breached when he revealed information relating to his patient's illness to the patient's employer. According to the Court, the physician must not disclose information relating to his patient's illness to any third person without the patient's consent, except in certain circumstances. The Court noted that the duty of confidentiality is not absolute and that there may be circumstances in which the physician is required to disclose information relating to his patient's illness to a third person. [illegible] The Court held that the physician's duty of confidentiality is breached when he discloses information relating to his patient's illness to a third person without the patient's consent, except in certain circumstances. The Court noted that the duty of confidentiality is not absolute and that there may be circumstances in which the physician is required to disclose information relating to his patient's illness to a third person. [illegible] The Court held that the physician's duty of confidentiality is breached when he discloses information relating to his patient's illness to a third person without the patient's consent, except in certain circumstances. The Court noted that the duty of confidentiality is not absolute and that there may be circumstances in which the physician is required to disclose information relating to his patient's illness to a third person. [illegible]

[illegible]

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[illegible]

[illegible]

[FN2?] See, e.g., City of San Francisco v. Superior Court, [illegible] ... [illegible]

[FN?] [illegible]

[FN?] Compare [illegible]

[FN?]
[illegible]

[FN?] [illegible]

[FN?] See also [illegible]

[FN?] See, e.g., [illegible]

[FN?] See, e.g., [illegible]

[FN?] See, e.g., Freedom of Information Act, [illegible]

[FN?] [illegible]

[FN?] [illegible]

[FN?] [illegible]

[FN?] [illegible]

[illegible]

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[illegible]

Restatement (Second) [illegible]

[FN52] Restatement (Second) of Torts [illegible] (1977).

[FN53] [illegible] Cox Broadcasting Corp. v. Cohn, [illegible] (1975) [illegible]

[FN54] See generally Professor [illegible]

[FN55] Restatement (Second) of Torts [illegible] (1977).

[FN56] [illegible]

[FN57] See supra note [illegible]

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plaintiff had not acquired a reasonable expectation of privacy in the [illegible] Thus, the law of privacy [illegible] Moreover, the fact that the [illegible] was not [illegible] Finally, the fact that [illegible] was not [illegible] Thus, the court concluded that the plaintiff had not [illegible]

[illegible] The dissent argued that the plaintiff had a reasonable expectation of privacy in the [illegible]

[illegible] The court held that the plaintiff had a reasonable expectation of privacy in the [illegible] The court noted that the plaintiff had [illegible] The court also noted that the plaintiff had [illegible] The court concluded that the plaintiff had a reasonable expectation of privacy in the [illegible]

[illegible] The court held that the plaintiff had a reasonable expectation of privacy in the [illegible] The court noted that the plaintiff had [illegible] The court also noted that the plaintiff had [illegible] The court concluded that the plaintiff had a reasonable expectation of privacy in the [illegible]

[illegible] The court held that the plaintiff had a reasonable expectation of privacy in the [illegible] The court noted that the plaintiff had [illegible] The court also noted that the plaintiff had [illegible] The court concluded that the plaintiff had a reasonable expectation of privacy in the [illegible]

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[illegible]

[illegible]

[illegible]

EXHIBIT 56

[illegible]

W. Prosser, supra [illegible]

[FN82] [illegible]

[FN83] [illegible]

[FN84] [illegible]

[FN85] [illegible]

[FN86] [illegible]

[FN87] [illegible]

[FN88] [illegible]

[FN89] [illegible]

[FN90] [illegible]

[FN91] [illegible]

[FN92] [illegible]

[FN93] [illegible]

[FN94] [illegible]

[FN95] [illegible]

[FN96] See W. Prosser, supra [illegible]

[FN97] [illegible]

[illegible]

[FN98] [illegible]

[FN99] [illegible]

[illegible] (1979) [illegible] physician's professional [illegible] breach of patient confidentiality).

[FN[illegible]]. In Peterson v. Idaho First Nat'l Bank, [illegible] 953, [illegible] [illegible]. [illegible] the court [illegible] employees [illegible] [illegible]

[FN[illegible]]. In [illegible] 461 N.Y.S.2d [illegible] (Sup. Ct. 1982) [illegible] and [illegible] [illegible] Supp. [illegible] (N.D. Ohio 1965) [illegible] by the [illegible] directed to the principal defendant.

[FN[illegible]]. [illegible] (Second) of Torts [illegible] (1977) [illegible] Liability for [illegible].

[FN[illegible]]. [illegible] 2d [illegible] (1982).

[FN[illegible]]. [illegible] See also [illegible] N.W. [illegible] (1986).

[FN[illegible]]. [illegible] (1985) [illegible] imply a private cause of action [illegible] privilege. [illegible] the [illegible]

[FN[illegible]]. See, e.g., 8 Wigmore, Evidence § [illegible] (McNaughton rev. 1961) [illegible] Wigmore [illegible] privilege [illegible] Wigmore, Evidence § [illegible] (McNaughton rev. 1961) (same).

[FN[illegible]]. [illegible] privilege. [illegible] (1973) [illegible] by [illegible] e.g., Peterson v. Idaho First Nat'l Bank [illegible] (1961).

[FN[illegible]]. [illegible] 2d [illegible] (1965) [illegible]

[FN[illegible]]. [illegible]

[FN[illegible]]. [illegible] N.Y.S.2d [illegible] (1977).

[FN[illegible]]. [illegible] (N.D. Ohio 1965) [illegible] third party liable [illegible] breach of [illegible] liable in damages [illegible] third party [illegible] supra note [illegible], at [illegible]

[FN[illegible]]. [illegible] N.Y.S.2d [illegible] (1983).

[FN[illegible]]. [illegible] N.Y.S.2d [illegible]

[FN[illegible]]. [illegible] 2d [illegible] (1977).

[FN[illegible]]. The court [illegible] Oath and the AMA Principles of Medical Ethics [illegible] (1957), [illegible] interest in giving physicians freedom to [illegible] their patients, and [illegible] 2d [illegible] at [illegible] [illegible]

[illegible]
The Georgia Supreme Court [illegible] of the [illegible] and [illegible] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) [illegible] Compare [illegible] The Georgia Supreme Court [illegible] and accompanying text.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[FN 22]. [illegible] the development of the common law [illegible] Warren and Louis D. Brandeis in their famous article, The Right to Privacy, 4 Harv. L. Rev. 193 [illegible] property [illegible] breach of confidence or trust, [illegible] Id. at 198-213.

Cases cited in the article include [illegible] Prince Albert v. Strange, 41 Eng. Rep. 1171 (Ch. 1849) [illegible] Pollard v. Photographic Co., 40 Ch. D. 345 (1888) [illegible] Yovatt v. Winyard, 37 Eng. Rep. 425 (Ch. 1820) [illegible] See Bloustein, supra note 21, at 388.

The right of privacy proposed by Warren and Brandeis was considered and rejected by the New York Court of Appeals in 1902 in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). [illegible] the right of privacy and the public's right to know.

Three years after Roberson the Georgia Supreme Court, in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), [illegible] of privacy urged by Warren and Brandeis [illegible] the New York Court of Appeals [illegible]

[illegible]

[FN[illegible]]. [illegible]

[FN[illegible]]. See Law Commission Report, supra note [illegible]. [illegible] Argyll v. Argyll, [1967] 1 Ch. 302 [illegible]; Attorney-General v. [illegible]

[FN[illegible]]. [illegible]

[FN[illegible]]. [illegible]

[FN[illegible]]. Argyll v. Argyll, [1967] 1 Ch. 302.

[FN[illegible]]. [illegible]

[FN[illegible]]. Attorney-General v. [illegible]

[FN[illegible]]. [illegible]

[FN[illegible]]. [illegible]

[FN[illegible]]. See Law Commission Report, supra note [illegible]. [illegible]

[FN[illegible]]. Law Commission Report, supra note [illegible]. [illegible]

[FN[illegible]]. By the [illegible] [illegible]

Trade secret law and common law copyright [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] (Sup. Ct. [illegible]) [illegible]

[FN151] Of course, a [illegible] cannot [illegible] upon a person who has not at least tacitly agreed to [illegible] the obligation of confidentiality [illegible].

[FN152] Restatement of Torts § 757 (1939) [illegible] trade secrets [illegible].

[FN153] Restatement of Torts § 757(b) (1939) (liability also [illegible] if the trade secret was obtained by improper means). [illegible] § 757(a).

[FN154] Such obligations [illegible] to employees, business partners, potential joint ventures, licensees, and even [illegible].

[FN155] While the analysis might be [illegible] property and confidential personal information [illegible] breach of confidence [illegible] Milgrim, Trade Secrets § [illegible]; Restatement of Torts § 757 comment [illegible] (1939); [illegible].

[FN156] Restatement of Torts § 757 comment [illegible] (1939). [illegible] For example, [illegible].

[FN157] [illegible] See discussion of the [illegible] Law Commission Report, supra note 122, at [illegible].

[FN158] Law Commission Report, supra note 122, at [illegible] (emphasis added).

[FN159] [illegible] confidential information, [illegible] Restatement of Torts § 757 comment [illegible] (1939) [illegible] obligation of confidence [illegible].

[FN160] See Law Commission Report, supra note 122, at [illegible] for the [illegible].

[FN161] See supra notes [illegible] and accompanying text.

[FN162] [illegible] School Dist. No. [illegible], 67 Misc. 2d [illegible], [illegible] N.Y.S.2d [illegible] (Sup. Ct. 1971).

[FN163] See, e.g., Attorney-General v. Jonathan Cape Ltd., [1976] 1 Q.B. 752; see also Woodward v. Hutchins [1977] 1 W.L.R. 760, [illegible] ("The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest [illegible].")

[FN164] Law Commission Report, supra note 122, at [illegible] [illegible] regard to the importance [illegible] confidential information [illegible] the plaintiff should be required [illegible] the balance of the public interest [illegible].

[FN165] See [illegible]. "This extension of the concept of confidence beyond commercial secrets has never been directly challenged [illegible]." [illegible] Fraser v. Evans [1969] 1 Q.B. 349, [illegible]; Commonwealth v. John Fairfax [illegible] (1980) [illegible].

[illegible]

[FN [illegible]] 10 Williston on Contracts § [illegible] [illegible]

[illegible]

[illegible]

[FN [illegible]] [illegible]

[illegible]

[FN [illegible]] [illegible]

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[illegible] [illegible] [illegible] [

Exhibit 2

EXPERT WITNESS REPORT
Daniel J. Solove

MY BACKGROUND AND QUALIFICATIONS

My name is Daniel J. Solove, and I reside in Washington, D.C. I am an associate professor at the George Washington University Law School, and I specialize in information privacy law. I am the author of the book, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE (NYU Press, 2004) as well as the author of a 1000 page casebook, INFORMATION PRIVACY LAW (2d ed., Aspen, 2006) with co-authors Marc Rotenberg and Paul M. Schwartz. The first edition of INFORMATION PRIVACY LAW was published by Aspen in 2003. It is adopted in numerous information privacy law courses throughout the country.

I have published over 20 articles, which have appeared in leading law reviews such as the Yale Law Journal, Stanford Law Review, California Law Review, and Duke Law Journal. The vast majority of my work has focused on information privacy law issues, with topics including constitutional privacy, government records, electronic surveillance law enforcement investigations, and media monitoring of privacy.

I have testified as an invited witness before the U.S. Supreme Court, testified before Congress, and been interviewed and featured in over 100 radio broadcasts and articles, including The New York Times, Washington Post, Chicago Tribune, Associated Press, Business Week, ABC, CBS, NBC, CNN, and NPR. I have given over 50 lectures and presentations at various law schools and other institutions.

I graduated from Yale Law School, and I clerked for Judge Stanley Sporkin, U.S. District Court for the District of Columbia and Judge Pamela Ann Rymer, U.S. Court of Appeals for the 9th Circuit. I also worked at the law firm of Arnold & Porter in Washington, D.C. There I helped information privacy law program. My CV is attached in the appendix.

MY PRIOR TESTIMONY

I have never testified before as an expert witness.

DOCUMENTS REVIEWED

Attached is a listing of the documents I reviewed relative to this assignment. These are the documents upon which I relied and upon which my opinions are based.

COMPENSATION

My hourly fee for services in this case are in the amount of $350 per hour for research, preparation and consultation. For giving testimony my hourly fee is $500 per hour.

OPINIONS AND ANALYSIS

Based on my forensic analysis of the documents provided to me by the Silberstein, Ogulnick:

1. First, it is my opinion that some of the disclosures of Gilbert Hyatt's personal information by the California Franchise Tax Board ("FTB") during its investigation constitute a violation of the FTB's responsibilities and duties in maintaining the privacy of this information. In particular, the FTB disclosed Hyatt's home address, business and financial information, and the Social Security Number (SSN), among other things, to a wide variety of third parties. Some of the information the FTB disclosed was collected from Hyatt himself with the expectation that it would remain confidential. While government agencies gather, store, and use personal information, they have special responsibilities and duties. These responsibilities and duties are imposed to ensure that the government gathers information in a way that is proper and lawful. This is my opinion that the FTB failed to exercise due diligence in its investigation and revealed Hyatt's personal information in a way that violates his reasonable expectation of privacy.

2. Second, it is my opinion that the disclosures of the FTB are a breach of confidentiality. In many circumstances, our legal system recognizes implied duties of confidentiality. Certain personal information is considered sensitive in nature and generally the person who is in a special position of power has a duty to maintain confidentiality. In the case of the FTB's disclosures, beyond implied forms of confidentiality, there are certain statutes that clearly lay out a strong basis to assume confidentiality of the SSN, home address, and business and financial transactions. The documents I reviewed indicate that the FTB breached confidentiality. I will explain in more detail below the nature of the breach of confidentiality and why it is my opinion that the FTB has breached Hyatt's confidentiality.

3. Third, it is my opinion that some of the FTB's investigative techniques were intrusive into Hyatt's private affairs. The auditor visited Hyatt's Las Vegas home on two occasions unannounced, and on the second time Hyatt's property, peeked into his windows, rummaged through his mail and trash, and interviewed his neighbors.

4. Fourth, it is my opinion that the FTB's disclosure of the amount of tax Hyatt allegedly owed and its use penalty was also unauthorized an unacceptable disclosure and a breach of confidentiality (as identified above) but also constituted information that cost Hyatt to take legal action. The figures relating to Hyatt's tax liability were also released in the conclusion of the administrative appeal process, but they were processed as such. The FTB's disclosure of these figures was therefore problematic.

Below, in what follows, I will elaborate on the opinions above as well as provide other material opinions.

Government Responsibilities to Handle Personal Information

My first section discussed briefly several of the ways that the FBI acted inappropriately in accumulating Hunter's personal information. In order to explain my opinion, I believe that some background is necessary about the nature of the generally recognized duties and responsibilities that government agencies have for handling personal information.

During the past fifteen years, government agencies at the state and federal levels have been collecting a vast amount of personal information. Handling personal information is an activity that has profound consequences. That is because personal information, if leaked or disclosed to the wrong parties, can be used in ways that can cause embarrassment or harm to a person, damage his or her reputation, and even harm his or her physical, emotional, or financial well-being. Throughout the twentieth Century, these dangers were closely associated in American society and were remedied through the law.

Out of the many Supreme Court decisions that recognized the importance of government agencies' duty to maintain personal information was issued by the United States Supreme Court in 1977 in Whalen v. Roe. The Court concluded that the right to privacy protects not only "individual interest in making certain kinds of important decisions" but also the "individual interest in avoiding disclosure of personal matters."[1] The case involved a government record system of individuals who were taking prescriptions for certain medications. Although the government promised that the information was confidential and secure, the plaintiff contended that they feared the possibility of the information being misused. The Court concluded that because the security was adequate, the state had met its constitutional obligations. In its opinion, the Court stated:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our armed forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data

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[1] 429 U.S. at 599.
[2] Id. at 605.

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

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

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

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

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

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

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

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

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

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

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

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

THIRD CAUSE OF ACTION

(For Invasion of Privacy — Unreasonable Publicity Given To Private Facts~~)~~, Including Publicity Given to Matters Protected Under the Concept of Informational Privacy)

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

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

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

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

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

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

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

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

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

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

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

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

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as special damages, his attorneys' fees in an amount in excess of $10,000.00, the total amount thereof to be proved according to the evidence at trial.

FOURTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

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

FIFTH CAUSE OF ACTION

(For the Tort of Outrage)

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

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

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

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

65. ~~53.~~ Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

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

66. Plaintiff was drawn into the FTB's audit without choice and as an innocent party. As such, plaintiff had every right to expect that the FTB's demand for an audit would be processed in good faith, according to the law and the facts. Instead, he was subjected to, and continues to be subjected to, a determined and malicious bad-faith attempt to extort money from plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and

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oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud penalty" assessments designed to force plaintiff to yield to a major compromise or suffer significant financial and reputational destruction. The threatened (and consummated) tortious actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the publicity of private facts that were expressly extracted from plaintiff under false promises of strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent detriment.

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

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

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

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as special damages, his attorneys' fees in an amount in excess of $10,000.00, the total amount thereof to be proved according to the evidence at trial.

SIXTH CAUSE OF ACTION

(For Abuse of Process)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEVENTH CAUSE OF ACTION

(For Fraud)

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

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

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

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

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

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

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

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

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

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

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

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position in the computer electronics industry;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EIGHTH CAUSE OF ACTION

~~(For Negligent Misrepresentation)~~

(For Breach of Confidentiality — Including Informational Privacy)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FIRST CAUSE OF ACTION

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

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

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

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

SECOND CAUSE OF ACTION

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

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

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

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

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

THIRD CAUSE OF ACTION

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

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

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

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

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

FOURTH CAUSE OF ACTION

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

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

~~3.~~ For costs of suit;

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

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

FIFTH CAUSE OF ACTION

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

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

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

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

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

SIXTH CAUSE OF ACTION

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

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

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

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

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

SEVENTH CAUSE OF ACTION

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

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

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

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

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

EIGHTH CAUSE OF ACTION

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

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

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

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

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

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

~~DATED~~Dated this ___ day of ~~June 1998.~~March, 2006.

HUTCHISON & STEFFEN, LLC

~~By:~~ _____

~~Thomas L. Steffen~~

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Exhibit 3

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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 **ORDER DENYING PARTIAL SUMMARY JUDGMENT RE: THE CALIFORNIA ADMINISTRATIVE PROTEST PROCESS** ***Filed Under Seal By Order of the Discovery Commissioner Dated February 22, 1999*** **Hearing Date: January 23, 2006** **Hearing Time: 1:30 pm** **Dept. X:**

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

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

intentional torts pled, collateral estoppel does not apply to the California court's final judgments, and the quasi-judicial officer privilege does not apply.

Dated this 8th day of March, 2006.

Jessie Walsh
DISTRICT COURT JUDGE

Submitted this 6th day of March, 2006 by:

McDONALD CARANO WILSON LLP

By _____
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EXHIBIT 55

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

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

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

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

Dated this 7th day of April, 2006.

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By _____
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POINTS AND AUTHORITIES

I. INTRODUCTION

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

[1]To conform to the Court's Order Denying FTB's Motion for Partial Summary Judgment Re: California Administrative Protest Process, FTB does not oppose Hyatt's amendment found at the following place in his redlined proposed second amended complaint: p. 81n. 1-3. A highlighted copy of Hyatt's proposed redlined second amended complaint is attached at Exhibit 1. The highlights reflect the proposed amendment that FTB does not oppose.

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

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

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

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

II. LEGAL ARGUMENT

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

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

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

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

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

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

1. Breach of Confidential Relationship

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

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

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explicit in explaining when such a "special" relationship would be present to impose liability for this tort.

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

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

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

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

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

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

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

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

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

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

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

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

2. Attorneys Fees as Special Damages.

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

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

> Attorney fees may be an element of damages in cases when a plaintiff becomes involved in **third -party legal dispute** as the result of a breach of contract or tortious conduct by the defendant. . . . This type of action could arise from claims against title insurance or bonds and breaches of duty to defend clauses in insurance or indemnity actions . . .
>
> Attorney fees may also be awarded as damages in those cases in which a party incurred fees in recovering real or personal property acquired through the wrongful conduct of the defendant or in clarifying or removing a cloud upon the title to property. Finally, actions for declaratory or injunctive relief . . . necessitated by the opposing party's bad faith conduct.

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Id. at 957-58.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

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

Dated this 7th day of April, 2006.

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

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

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EXHIBIT 56

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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 REPLY IN SUPPORT OF HIS MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Date of Hearing: April 17, 2006
Time of Hearing: 9:00 a.m.

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

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

1. Introduction.

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

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

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

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

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

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

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

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

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

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

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

The existence of a fiduciary duty may create a special relationship under the breach of confidentiality tort, but — as the Nevada Supreme Court explained in *Perry v. Jordan* — so do other circumstances in "*any* situation where one party [Hyatt] imposes confidence in the other [the FTB] because of that person's position, and the other party [the FTB] knows of this confidence."[1]

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

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

---

[1] *Perry v. Jordan*, 111 Nev. 943, 946 (1995).

[2] FTB Opposition, at 6.

[3] *Id.*

[4] *Perry*, 111 Nev. at 947.

[5] *Id.*

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

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

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

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

> . . . "**A confidential relation exists between two persons, whether their relations be such as are technically fiduciary or merely informal, whenever one trusts in and relies on the other. The question in such case is always whether or not trust is reposed.**". . . . Whether such a relationship exists appears to be a question of fact. "[T]he existence of a special relationship is a factual question[;] ... all of the facts must be considered in order to determine if the relationship was created." However, the question for the Court is whether, under the circumstances of this case, a reasonable jury could conclude that a *reasonable person* would impart special confidence in the other party and whether that other party would *reasonably* know of this confidence.
>
> . . . **Confidential relationships not rising to the level of fiduciary relationships, yet still giving rise to legally enforceable duties**, have been found between a purchaser and the seller/lender of property where the seller/lender failed to disclose a known flooding problem, . . . **In another case between a purchaser and a seller of real property**, the Nevada Supreme Court declined to find a fiduciary relationship, but **remanded the case for further fact-finding as to whether a relationship of "special confidence"** would still support a claim for constructive fraud.[8]

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[6] *Yerington Ford Inc. v. General Motors Acceptance Corp.*, 359 F. Supp. 1075 (D. NV 2004).

[7] *Id.*, 359 F. Supp. at 1093 (internal citations omitted and bold emphasis added).

[8] *Id.*, 359 F. Supp. at 1088 (internal citations omitted and bold emphasis added).

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

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

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[9] *Id.*, 359 F. Supp. at 1090 (bold emphasis added).

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

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

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

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

> Relationships of this kind require us to lower our defenses and permit some intrusion into our personal lives. . . . *Such self-exposure is not always voluntary. To function in modern society, for example, we must file tax returns* and write checks, and *those who process these documents incidentally have access to details of our private lives.* [FN omitted]
>
> . . .
>
> These two elements--the assurance of secrecy and the reliance it evokes--are the essential ingredients of what can be termed a "confidential relationship." [FN omitted] The giver of information places himself in a vulnerable position in reliance on the assurance of secrecy and thus has a legitimate expectation of confidentiality. The receiver of the information, by implicitly holding out the assurance associated with his occupation, invites the reliance and thus has an obligation not to disappoint the giver's expectation. . . .
>
> . . .
>
> Cases granting recovery for breach of confidence share similar basic elements. Though the type of relationship varies from case to case, the relationship in each case carries an implicit assurance of confidentiality that the defendant held out and then violated. . . .[13]

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

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

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

---

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

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

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

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

> "In his deposition, Hyatt states:
>
> > Q. Okay. Did the FTB promise you any protection, other than what' s required by law concerning your privacy?
> >
> > A. The FTB promised me unconditionally that it would protect my privacy.
> >
> > Q. Do you believe it undertook in your case special obligations in addition to what the law requires?
> >
> > A. Yes. In addition to the promise – In addition to what the law requires, it made additional promises in its initial contact letter or letters, and then the auditors and also made additional promises of confidentiality.
> >
> > Q. By those additional promises, what obligation was added on to the FTB's obligations required by law?
> >
> > A. Well, for example, in the contact letter, the initial Notice of

[14] *See, e.g.,* proposed Second Complaint, ¶¶ 81-84, including subparts.

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> Audit, the FTB promised me not only would it abide by the California Privacy – I'm getting tired. You have to bear with me.
>
> Q. Take your time.
>
> A. Informational Practices Act, and the Federal Privacy Act, but that it would also disclose my information only to certain government agencies, such as the IRS.

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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Your Rights to Confidentiality

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

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

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

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

> Your tax return has been selected for audit by the California Franchise Tax Board (FTB).
>
> What should you expect from a Franchise Tax Board audit?
>
> • Courteous treatment by FTB employees
>
> • Clear and concise requests for information from the auditor assigned to your case
>
> • Confidential treatment of any personal and financial information that you provide to us
>
> • Completion of the audit within a reasonable amount of time.

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

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

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

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

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

> **Information Disclosure**
>
> We may disclose your tax information to:
>
> • The Internal Revenue Service.
>
> • Other states' income tax officials.
>
> • The Multistate Tax Commission.
>
> • Appropriate Californian government agencies and officials.
>
> • Third parties when necessary to determine or collect your tax liabilities.

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

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

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

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

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

A. No, I wasn't aware. I was aware that on the audit forms and letters that the Franchise Tax Board sends to you is the promise of following the Information Practices Act and all the requirements that are imposed on the Franchise Tax Board in doing so."[15]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[17] *Sandy Valley Associates, v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948, 957 (2001)

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

4. Granting Hyatt leave to amend to add references to "informational privacy" is not futile and merely conforms the pleading to the claims being litigated in this case as demonstrated by the parties' consistent briefing to this Court and the Nevada Supreme Court.

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

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

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[18] *Id.*, 117 Nev. at 958.

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

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

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> Hyatt has pled, presented evidence of, and otherwise developed and presented a *prima facie* case for various prongs of Nevada's common law invasion of privacy tort, including violation of informational privacy. These are common law claims. As set forth above, the legal sufficiency, pleading sufficiency, and evidentiary sufficiency of these claims — at least relative to a summary judgment — has been established by the rulings by this Court and the Nevada Supreme Court. The FTB's reference to and discussion of a statutory IPA claim is disingenuous as Hyatt has not asserted such a claim. To the extent the FTB's motion is a disguised attack on Hyatt's common law invasion of privacy claims, and particularly the informational privacy aspect of those claims, the FTB is seeking an end-run around prior rulings of this Court and the Nevada Supreme Court.
>
> To be clear, and as the FTB knows and should have referenced in its motion, Hyatt has presented and is pursuing a common law claim for informational privacy as part of his invasion of privacy tort. Hyatt has extensively briefed this issue in the proceedings described above demonstrating the development of the common law for informational privacy as a now accepted part of the invasion of privacy tort. In opposing the FTB's summary judgment motion, Hyatt explained . . . his informational invasion of privacy claim.[21]

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

> **(b) Courts are particularly vigilant in enforcing informational privacy rights related to social security numbers, addresses, and other private information.**
>
> Courts of every level — including the U. S. Supreme Court — find disclosure of private personal information such as social security numbers and secret addresses actionable and a violation of an individual's "informational privacy" rights.
>
> **(i) U. S. Supreme Court informational privacy cases.**
>
> The U. S. Supreme Court has issued three opinions bearing on the issue. *United States Department of Defense v. Federal Labor Relations Authority (FLRA)*, held that disclosure of employees' home addresses to their union was a "clearly unwarranted invasion of privacy." That case was largely based on *United States Dept. of Justice v. Reporters Committee for Freedom of Press*, which recognized that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." Finally, *United States Department of State v. Ray*, held that the disclosure of names and addresses would be a clearly unwarranted invasion of privacy because *confidentiality had been promised* and disclosure of the information would be "a special affront to his or her privacy."

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

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

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

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

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

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

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

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

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

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

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

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

[23] *Sands Regent v. Valgardson*, 105 Nev. 436 (1989).

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

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

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

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

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

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

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[25] FTB Opposition, at 11.

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

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

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

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

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

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

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

[29] March 22, 2006 District Court hearing transcript, at 21:17 - 22:14, attached hereto as Exhibit 4.

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> MR. BERNHARD: Yes. To the extent that these are attorneys or accountants whose fees are being sought as part of our substantive causes of action, yes. And we understand that we have to produce those, and we have.
>
> The other issue I would make in our opposition that you're allowing us to file, we have provided detailed information concerning those amounts at least through the year 1997. And to the extent we're going on further toward the protest through trial, then, yes, we will produce these statements and amounts for those particular items, and that does avoid the privilege issues that we were concerned about before Commissioner Biggar.
>
> COURT: Defense couldn't expect to be blindsided on the issues of damages without being provided those specific numbers. That would be the Court's view.[30]

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

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

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

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

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[30] *Id.*, at 21:17 - 22:14.

[31] *Summa Corp. v. Greenspun*, 96 Nev. 247 (1980).

[32] *Sandy Valley*, 117 Nev. at 959.

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

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

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

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

[33] FTB Opposition, at 14:22-24.

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

7. Conclusion.

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

Dated this 10th day of April, 2006.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of BULLIVANT HOUSER BAILEY PC and that on this 10th day of April, 2006, I caused the above and foregoing document entitled **PLAINTIFF GILBERT P. HYATT'S REPLY IN SUPPORT OF HIS MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** to be served as follows:

[X] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas Nevada; and/or

[X] Pursuant to EDCR 7.26, to be sent via facsimile; and/or

[X] to be hand-delivered;

to the attorney(s) listed below at the address and/or facsimile number indicated below:

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Exhibit 1

82 CLMLR 1426
82 Colum. L. Rev. 1426
(Cite as: 82 Colum. L. Rev. 1426)

C

Columbia Law Review
November, 1982

Note

*1426 BREACH OF CONFIDENCE: AN EMERGING TORT

Alan B. Vickery

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

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

*1427 I. CIVIL LIABILITY FOR BREACH OF CONFIDENCE

A. Nature of the Wrong

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

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

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

B. The Case Law

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

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

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

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

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

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

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

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

C. Interests Invaded

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Emerging Common Law Tort

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

Some courts, acknowledging what they are actually doing, have expressly granted recovery in tort for breach of a confidential relationship. A New York court in MacDonald v. Clinger, [FN115] after reviewing various traditional bases of liability and finding them insufficient, held that " t he physician-patient relationship contemplates an additional duty springing from but extraneous to the contract and the breach of such duty is actionable in tort." [FN116] The Alabama Supreme Court in Horne v. Patton, [FN117] faced with an unconsented disclosure by a physician to his patient's employer, considered separate counts for breach of a confidential relationship, invasion of privacy, and breach of implied term of contract, and found that each would support a damage action. [FN118]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. ELEMENTS OF THE TORT AND LIMITATIONS

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

***1456** A. Duty of Confidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Limitations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

[FN3].

Since the layman is unfamiliar with the road to recovery, he cannot sift the circumstances of his life and habits to determine what is information pertinent to his health. As a consequence, he must disclose all information in his consultations with his doctor--even that which is embarrassing, disgraceful or incriminating. To promote full disclosure, the medical profession extends the promise of secrecy.
Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793, 801 (N.D. Ohio 1965).

Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. "Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result."
City of San Francisco v. Superior Court, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951) (en banc) (quoting Morgan, Foreword, A.L.I. Code of Evidence 25-26 (1942)); see also Holm v. Superior Court, 42 Cal. 2d 500, 506-07, 267 P.2d 1025, 1028 (1954) (en banc).

[FN4].

For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual biography.
Burrows v. Superior Court, 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal.Rptr. 166, 172 (1974) (en banc). This case involved the different question of whether a person's expectation of privacy in his personal bank account is sufficient to prohibit the police from obtaining information about the bank account without legal process. The case does, however, recognize the need for confidentiality in many of the relationships that society forces upon its members.

[FN5].

All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal.
Oath of Hippocrates, Dorland's Illustrated Medical Dictionary 609 (26th ed. 1981). See also A.M.A. Principles of Medical Ethics § 9 (1957), reprinted in 4 Encyclopedia of Bioethics 1750-51 (W. Reich ed. 1978); Model Code of Professional Responsibility Canon 4, EC 4-1, 4-4, 4-6, DR4-401 (1980).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[FN31].

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

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

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

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

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

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

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

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

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

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

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

[FN41]. Restatement (Second) of Contracts § 21c & illustration 5 (1981).
This deference is probably appropriate in the area of personal and family relationships. While some of the individual interests may be the same in a genuine personal confidential relationship--for example, between a nephew and an aunt--the societal interests are equivocal. First, there is a competing individual interest in a zone of privacy within which an individual should be free to choose how to conduct his or her personal relations without government interference. Secondly, even if societal interferences were permitted, no general statement can be made about whether enforcement of the confidence would be beneficial to society. There are times when a personal confidence is best broken; for example, to mediate a misunderstanding between feuding family members or friends. This is not an area where a court can make reasoned decisions. Intuition plays a big role. Unfair results by second-guessing would be common. The likely outcome would be to discourage personal confidences altogether. See infra notes 169-70 and accompanying text.

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

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

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

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

[FN46]. E.g., Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 587-88, 367 P.2d 284, 289-90 (1961) (reviews sources of public policy to find duty, arguably in tort; but principal reliance on implied contract); MacDonald v. Clinger, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982) (tort duty arising out of but independent from the physician-patient contract, breach of which is tortious); Doe v. Roe, 93 Misc. 2d 201, 208-13, 400 N.Y.S.2d 668, 673-77 (Sup.Ct. 1977) (strong public policy as reflected in various statutory sources, Hippocratic Oath, and ethical canons; no need to label the wrong).
Some early cases also speak of breach of fiduciary duty. The word "fiduciary" does not appear to be used in a special or technical sense, but merely as another way of expressing the same idea as breach of confidence. E.g., Alexander v. Knight, 25 Pa.D. & C.2d 649 (1961), aff'd 197 Pa.Super. 79, 177 A.2d 142, 146 (1962) ("[M]embers of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients."). Courts have also used the phrase "breach of confidence or trust," apparently intending to express a single concept. E.g., Clayman v. Bernstein, 38 Pa.D. & C. 543, 549 (1940); Bazemore v. Savannah Hospital, 171 Ga. 257, 258, 155 S.E. 194, 195 (1930) (court's statement of plaintiff's complaint; unclear whether court is quoting or paraphrasing).

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

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

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

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

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

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

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

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

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

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[FN75]. Id. comments e-f.

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

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

[FN78].
The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure. Some reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given.
Id.

[FN79]. The rationale for the public figure doctrine in privacy law is that voluntary public figures have chosen to be in the limelight and involuntary public figures are subject to the legitimate "curiosity of the public as to its heroes, leaders, villains and victims." Id. § 652D comments e-f; Prosser, supra note 54, at 411. These rationales do not apply to breach of confidence. Public figures may have waived their right to obscurity or events may have waived it for them, but they have not waived their right to be secure in their confidential relationships.
Whether a public or a private figure is involved, however, the existence of a confidential relationship cannot impose an impregnable veil of secrecy. There will be privileges to breach the confidence in appropriate cases. See infra notes 174-214 and accompanying text.

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

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

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

[FN83].
The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Contract actions are created to protect the interest in having promises performed. Contract

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obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.
W. Prosser, supra note 50, at 613 (footnote omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust. The Statute of Uses, 1535, is framed in terms of 'use, confidence or trust;' and a couplet, attributed to Sir Thomas More, Lord Chancellor, avers that
>
> Three things are to be helpt in Conscience;
> Fraud, Accident and things of Confidence.
>
> (See 1 Rolle's Abridgement 374).

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

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

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

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

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

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

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

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

[FN135]. Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

In addition to trade secrets, common law copyright and personal confidences, breach of a confidential relationship affords recovery in two other areas. These might be referred to as appropriations of opportunity and appropriation of ideas. See, e.g., Davis v. Krasna, 14 Cal. 3d 502, 535 P.2d 1161, 121 Cal.Rptr. 705 (1975) (en banc) (writer submits story idea to producer in confidence; producer discloses it to others who, together with producer, turn it into a successful play; intermediate court's finding of cause of action for appropriation in breach of confidence treated as law of the case; dismissed on other grounds); Pigg v. Robertson, 549 S.W.2d 597 (Mo.App. 1977) (farmer discloses bargain property in applying for loan to purchase it; bank auditor beats him to it). Cf. M.L. Stewart & Co. v. Marcus, 124 Misc. 86, 207 N.Y.S. 685 (1924) (bank not liable for appropriation of bargain deal where no confidence was found and the bank officer had prior independent notice of the opportunity). See generally 3 M. Nimmer, supra note 7, § 16; Restatement of Torts § 759 (1939).

[FN147]. Warren and Brandeis published their article proposing a right of privacy in 1890. The right was first recognized in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[FN148]. Law Commission Report, supra note 132, at ¶ ¶ 1.1-1.4; Younger Committee, Report on Privacy, supra note 136, at 26, 193-94, 295-99; supra note 145 and accompanying text.

[FN149]. In the breach of confidence context, "nonpublic" is intended to mean "not widely known." The fact that some confidential information has leaked out or is known to some people should not permit one subject to a duty of confidence to disclose or confirm the information. No value beyond the usual first amendment interests would be served by such a disclosure, and those interests will have been taken into account already in formulating the extent of the duty, see supra text accompanying note 59 and infra text accompanying notes 161-62, and of the public right-to-know privilege, see infra notes 207-14 and accompanying text. Cf. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975) (CIA employee's continued obligation of confidentiality with respect to classified information that has leaked out or is rumored to have done so).

Whether or not an obligation of confidentiality continues with respect to information that became part of a public court record presents another problem. The court in Winegard v. Larson, 260 N.W.2d 816, 821 (Iowa 1977) stated that this question was settled by Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Cox Broadcasting, however, dealt with the first amendment right of the public in general, rather than the rights of individuals subject to pre-existing obligations of confidence. If the press wants to publicize the contents of court records, the first amendment guarantees them that right; there does not, however, seem to be any value served by permitting a lawyer or psychiatrist who learned information in a confidential relationship to identify and comment on those items when they appear in a court record that may not otherwise come to public attention. Of course, to the extent information has been publicized the damages caused by such identification and commentary would become de minimis. Furthermore, even if this issue were resolved along the lines of Cox Broadcasting, a defendant would continue to be liable for any information disclosed which goes beyond the bare bones of the court record.

[FN150]. The use of the word "personal" is intended simply to distinguish the settled law of trade secrets, common law copyright, and appropriation of ideas or opportunities. It is not meant to be a narrowing term on the scope of liability. For example, a disclosure of confidential information that plaintiff is looking for a new job, as opposed to a disclosure of his latest invention, would still be personal to the plaintiff. For two cases suggesting that a corporation can sue for breach of confidence with respect to confidential information analogous to "personal" information, see Wilson-Rich v. Don Aux Associates, Inc., 524 F.Supp. 1226, 1234 & n.16 (S.D.N.Y. 1981) (dictum: corporation may have tortious breach of confidence action for release outside corporation of critical management study by

consulting firm); Milohnich v. First Nat'l Bank, 224 So. 2d 759, 763 (Fla.Dist.Ct.App. 1969) (Pearson, J., concurring specially).

[FN151]. Of course a confidence cannot be thrust upon a person who has not at least tacitly agreed to accept the stipulation of confidentiality by failing to object.

[FN152]. Restatement of Torts § 757(b) (1939) (trade secrets); 1 M. Nimmer, supra note 7, § 2.02 (unpublished work revealed to another in confidence).

[FN153]. Restatement of Torts § 757(b) (1939). Liability also attaches if the trade secret was obtained by improper means. Id. at § 757(a).

[FN154]. Such disparate confidants as employees, business partners, potential joint venturers, relatives, and even friends are covered.

[FN155]. While the analogy might be attacked on the ground that trade secrets and literary works are essentially property and confidential personal information is not, the breach-of-confidence branch of trade secret law does not rely on property concepts. Milgrim, Trade Secrets § 4.03 (1981); Restatement of Torts § 757 comment a (1939). See also 1 & 3 M. Nimmer, supra note 7, § § 2.02, 16.06 (1982).

[FN156]. Restatement of Torts § 757 comment a (1939). A general duty approach pervades the law of torts. For example, all persons are under a duty not to injure others negligently. Only a few torts--such as the duty to rescue--are limited to certain classes or circumstances. See W. Prosser, supra note 50, at ch. 9.

[FN157]. 1969 R.P.D. & T.M. Cas. 41, 48. See discussion of this formulation in Law Commission Report, supra note 132, at ¶ ¶ 4.4, 6.6-6.7.

[FN158]. Law Commission Report, supra note 132, at ¶ 6.14 (emphasis added).

[FN159]. The purpose of this change is to avoid situations where unsolicited confidential information, such as an idea for an invention, is thrust upon an unwilling recipient. Id. at ¶ ¶ 5.3, 6.6-6.9. Cf. Restatement of Torts § 757 comment j (1939) (A cannot impose an obligation of confidence with respect to a trade secret on B over B's objection).

[FN160]. See Law Commission Report, supra note 132, at 188, for the proposed statutory language defining "Circumstances in which obligations of confidence arise."

[FN161]. See supra notes 40-41 and accompanying text.

[FN162]. Blair v. Union Free School Dist. No. 6, Hauppauge, 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist. Ct. 1971).

[FN163]. See, e.g., Attorney-General v. Jonathan Cape Ltd., [1976] 1 Q.B. 752. See also Woodward v. Hutchins, [1977] 1 W.L.R. 760, 763-64 (C.A.): "The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon."

[FN164]. Law Commission Report, supra note 132, at ¶ 6.82: "Having regard to the importance in our view of the free circulation of information, we think it in principle right that the plaintiff should be required to establish that the balance of the public interest lies in his particular case in protecting the confidentiality of the relevant information." Prior to Cape, this was a matter of affirmative defense.

[FN165]. See supra note 136-45 and accompanying text. "This extension of the doctrine of confidence beyond commercial secrets has never been directly challenged, and was noted without criticism by Lord Denning M. R. in Fraser v. Evans [1969] 1 Q.B. 349, 361." Attorney-General v. Jonathan Cape Ltd., [1976] 1 Q.B. 752, 769.

[FN166]. E.g., MacDonald v. Clinger, 84 A.D.2d 482, 487, 446 N.Y.S.2d 801, 805 (1982) ("violation of a fiduciary responsibility . . . implicit in and essential to the doctor patient relationship"); Simonsen v. Swenson, 104 Neb. 224, 227, 177 N.W. 831, 832 (1920) ("The relation of physician and patient is necessarily a highly confidential one. . . . [T]he physician is bound, not only upon his own professional honor and the ethics of his high profession, to keep secret [a patient's confidences], but by reason of the affirmative mandate of the statute itself. A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for the damages naturally flowing from such wrong."). See also Alexander v. Knight, 25 Pa.D. & C.2d 649, 655 (1961), aff'd, 197 Pa.Super. 79, 177 A.2d 142 (1962).

[FN167]. 10 Williston on Contracts § 1285, at 914 n.3 (1967) (quoting Lank v. Steiner, 213 A.2d 848 (Del.Ch. 1965)).

[FN168]. E.g., Pigg v. Robertson, 549 S.W.2d 597, 600-01 (Mo.App. 1977) (bank's relation with customer is debtor-creditor, not fiduciary; but obligation of confidence owed with respect to business opportunity disclosed in applying for loan). See discussion of fiduciary character of doctor-patient relationship in Hammond v. Aetna Casualty & Surety Co., 243 F.Supp. 793, 802-03 (N.D. Ohio (1965).

[FN169]. See supra note 41. Cf. Argyll v. Argyll, [1967] 1 Ch. 302 (legal obligation of confidence inherent in marriage relationship).

[FN170]. See supra notes 60-62 and accompanying text.

[FN171]. A reasonable-person test would cover any relationship where, under the particular facts, a reasonable person would conclude that a confidential relationship existed. See supra notes 157-60 and accompanying text.

[FN172]. See supra text accompanying notes 161-65.

[FN173]. 527 F.2d 1122 (9th Cir.1975), cert. denied, 425 U.S. 998 (1976).

[FN174]. [1924] 1 K.B. 461 (C.A.).

[FN175]. Id. at 473. The illustrations show that "duty to the public" encompasses danger to the state or similar public duty, "interests of the bank" applies more narrowly to such aspects in banking practice as returning a check with overdraft indicated, and "implied consent" covers situations such as a customer's listing the bank as a credit reference.

[FN176]. Law Commission Report, supra note 132, at ¶ ¶ 4.69, 6.93.

[FN177]. Id. at ¶ ¶ 4.70, 6.94-96.

[FN178]. The Report indicated that there would be implied consent or the information would be in the public domain. It also pointed to conceptual problems with applying to breach of confidence the doctrine of abuse of privilege by virtue of one's knowledge of the untruth of one's statement. Id.

[FN179]. Id. at ¶ 6.96.

[FN180]. Id. at ¶ ¶ 4.41-.44, 6.84(v).

[FN181]. E.g., Initial Services Ltd. v. Putterill, [1967] 3 W.L.R. 1032, 1037-39 (C.A.) (anticompetitive arrangement among laundries). Compare infra text accompanying notes 191-98.

[FN182]. E.g., Schering Chemicals v. Falkman, Ltd., [1981] 2 W.L.R. 848, 864-65 (C.A.) (public relations consultant produces film on corporation's efforts to respond to bad publicity surrounding drug). Compare infra text accompanying notes 207-14.

[FN183]. See, e.g., Schering Chemicals v. Falkman, Ltd., [1981] 2 W.L.R. 848, 858 (C.A.); Coco v. A.N. Clark (Engineers) Ltd., 1969 R.P.D. & T.M. Cas. 41, 46. Cf. Law Commission Report, supra note 132, at ¶ 6.2 (recommending reformulation of action as statutory tort).

[FN184]. See Coco v. A.N. Clark (Engineers) Ltd., 1969 R.P.D. & T.M. Cas. 41, 48 (stating "reasonable . . . recipient" test).

[FN185]. See supra text accompanying notes 150-173.

[FN186]. As suggested earlier, the American approach is less awkward and provides clearer warning to potential defendants, at least where traditional privileges are involved. See supra text accompanying notes 162-65. In the area of free speech and free press, however, because of the impossibility of drawing sharp lines, the American courts engage in an ad hoc balancing process, with the burden of persuasion in essence on the plaintiff, that is indistinguishable from the English approach. See infra text accompanying notes 207-14.

[FN187]. In addition, a confidence privilege, like a defamation or privacy privilege, can be abused. An otherwise privileged communication will lose the privilege if it is not (1) in good faith, (2) without malice, (3) on reasonable grounds, and (4) restricted to persons reasonable and necessary to the purpose of the privilege. See Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920).

[FN188]. Id.

[FN189]. In some cases there may be a legal duty to breach the confidence. See, e.g., Tarasoff v. Regents of the Univ. of Cal., 13 Cal. 3d 177, 551 P.2d 334, 129 Cal.Rptr. 118 (1976) (patient threatens to kill innocent third party; duty to take reasonable action); Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup.Ct. 1959) (routine x-rays provided free by employer show tuberculosis; liable to employee and to family members who contracted disease for failure to warn).

[FN190]. E.g., Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962).

[FN191]. E.g., People v. Johnson, 53 Cal.App. 3d 394, 125 Cal.Rptr. 725 (1975) (loss of right of confidentiality where depositor attempted to defraud bank); State v. McCray, 15 Wash.App. 810, 551 P.2d 1376 (1976) (bank's privilege to disclose depositor's bad checks to police on informal inquiry).

[FN192]. 44 Md.App. 335, 408 A.2d 758 (1979).

[FN193]. See Tournier v. National Provincial & Union Bank, [1924] 1 K.B. 46 (C.A.). In effect, the Suburban Trust court rejected the self-interest and public duty privileges articulated in Tournier, quoted supra in text accompanying note 175.

[FN194]. Suburban Trust, 44 Md.App. at 344, 408 A.2d at 764.

[FN195]. Id. at 343-44, 408 A.2d at 764.

[FN196]. See discussion supra text accompanying notes 174-86.

[FN197]. The court seems to have confused the unreasonable search and seizure line of cases with cases imposing liability on the bank for breach of confidence.

[FN198]. Cf. Cunningham v. Merchant's Nat'l Bank, 4 F.2d 25 (1st Cir.1925) (bank not under duty to warn investing public of shaky depositor).

[FN199]. 243 F.Supp. 793, 804 (N.D. Ohio 1965).

[FN200]. But see Irby v. Citizens Nat'l Bank, 239 Miss. 64, 121 So. 2d 118 (1960) (banks permitted to exchange

credit information; no allegation of breach of confidence). See also State v. McCray, 15 Wash.App. 810, 551 P.2d 1376 (1976).

[FN201]. 83 Idaho 578, 367 P.2d 284 (1961).

[FN202]. 291 Ala. 701, 287 So. 2d 824 (1973).

[FN203]. Id. at 711-12, 287 So. 2d at 832-33 (McCall, J., dissenting).

[FN204]. Id. at 710, 287 So. 2d at 831.

[FN205]. 8 Utah 2d 191, 331 P.2d 814 (1958).

[FN206]. Id. at 198, 331 P.2d at 818.

[FN207]. See generally Hill, supra note 56, at 1291-99 (discussing confidentiality and the first amendment).

[FN208]. See United States v. Nixon, 418 U.S. 683 (1974) (fundamental demands of due process in criminal trial overcome President's generalized interest in confidentiality); cf. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.) (CIA employee's contract of confidentiality), cert. denied, 421 U.S. 992 (1975); United States v. Marchetti, 466 F.2d 1309 (4th Cir) (same), cert. denied, 409 U.S. 1063 (1972).

[FN209]. [1976] 1 Q.B. 752.

[FN210]. 410 F.2d 701 (D.C. Cir.1969), cert. denied, 395 U.S. 947 (1968). See lower court opinion at 279 F.Supp. 101 (D.D.C. 1968).

[FN211]. An earlier attempt to get a preliminary injunction was rejected. Liberty Lobby v. Pearson, 390 F.2d 489 (D.C. Cir.1968).

[FN212]. Pearson v. Dodd, 410 F.2d at 704-05.

[FN213]. 43 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup.Ct. 1977).

[FN214]. Near v. Minnesota, 283 U.S. 697 (1931).

END OF DOCUMENT

Exhibit 2

EXPERT WITNESS REPORT
Daniel J. Solove

MY BACKGROUND AND QUALIFICATIONS

My name is Daniel J. Solove, and I reside in Washington, DC. I am an associate professor at the George Washington University Law School, and I specialize in information privacy law. I am the author of the book, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE (N.Y.U. Press, 2004) as well as the author of a 1000-page casebook, INFORMATION PRIVACY LAW (2d ed., Aspen, 2006) with co-authors Marc Rotenberg and Paul M. Schwartz. The first edition of INFORMATION PRIVACY LAW was published by Aspen in 2003. It is adopted in numerous information privacy law classes throughout the country.

I have published about 20 articles, which have appeared in leading law reviews such as the *Yale Law Journal, Stanford Law Review, California Law Review,* and *Duke Law Journal.* The vast majority of my work has focused on information privacy law issues, with topics including consumer privacy, government records, computer databases, law enforcement surveillance, and media invasions of privacy.

I have contributed to amicus briefs before the U.S. Supreme Court, testified before Congress, and been interviewed and featured in over 100 media broadcasts and articles, including The New York Times, Washington Post, Chicago Tribune, Associated Press, Business Week, ABC, CBS, NBC, CNN, and NPR. I have given over 60 lectures and presentations at various law schools and other institutions.

I graduated from Yale Law School, and I clerked for Judge Stanley Sporkin, U.S. District Court for the District of Columbia and Judge Pamela Ann Rymer, U.S. Court of Appeals for the 9th Circuit. I also worked at the law firm of Arnold & Porter, in Washington, D.C. I have taught information privacy for six years. My CV is attached in the appendix.

MY PRIOR TESTIMONY

I have never testified before as an expert witness.

DOCUMENTS I REVIEWED

Attached is a listing of the documents I reviewed relative to this assignment. These are the documents upon which I relied and upon which my opinions are based.

COMPENSATION

My fees for services in this case are in the amount of $500 per hour for research, preparation and consultation. For giving testimony under oath it is $500 per hour.

OPINIONS AND BASES

Based on my review and analysis of the documents provided to me I offer the following opinions:

1. First, it is my opinion that some of the disclosures of Gilbert Hyatt's personal information by the California Franchise Tax Board (FTB) during its investigation constituted a violation of the FTB's responsibilities and duties in maintaining the privacy of his information. In particular, the FTB disclosed Hyatt's home address, business and financial transactions, and his Social Security Number (SSN), among other things, to a wide variety of third parties. Some of the information the FTB disclosed was gathered from Hyatt himself with the expectation that it would remain confidential. When government agencies gather, store, and use personal information, they have special responsibilities and duties. These responsibilities and duties are rooted in statutory law, constitutional law, contract law, fiduciary duties, and tort law. The law often imposes on the government greater responsibilities in handling personal data than it does for businesses and other private sector entities. As I will explain in more detail below, it is my opinion that the FTB acted overzealously in pursuing its investigation and revealed Hyatt's personal information in a way that strikes me as irresponsible and harmful.

2. Second, it is my opinion that the disclosures of the FTB are a breach of confidentiality. In many circumstances, our legal system recognizes implicit duties of confidentiality when personal information is exchanged from one person to another person or entity that stands in a special position of power. In the case of the FTB's disclosure, beyond implicit terms of confidentiality, the documents I reviewed indicate that Hyatt had a strong basis to assume confidentiality of his SSN, home address, and business and financial transactions. The documents I reviewed indicate that the FTB breached confidentiality. I will explain in more detail below the nature of the harm of breach of confidentiality and why it is my opinion that the FTB has breached Hyatt's confidentiality.

3. Third, it is my opinion that some of the FTB's investigatory practices were intrusive into Hyatt's private affairs. The auditor visited Hyatt's Las Vegas home on two separate occasions, and she trespassed onto Hyatt's property, peeked into his windows, rummaged through his mail and trash, and interrogated his neighbors.

4. Fourth, it is my opinion that the FTB's disclosure of the amount of tax Hyatt allegedly owed and his tax penalty not only constituted an irresponsible disclosure and a breach of confidentiality (as identified above) but also constituted information that cast Hyatt in a false light. The figures relating to Hyatt's tax liability were not those reached at the conclusion of the administrative appeal process, but they were presented as such. The FTB's disclosures of these figures were therefore misleading.

Below, in what follows, I will elaborate on the opinions above as well as provide other related opinions.

Government Responsibilities in Handling Personal Information

My first opinion (discussed briefly above) is that the FTB acted irresponsibly in disseminating Hyatt's personal information. In order to explain my opinion, I believe that some background is necessary about the nature of the generally-recognized duties and responsibilities that government agencies have for handling personal information.

During the past half-century, government agencies at the state and federal level have been collecting a vast amount of personal information. Handling personal information is an activity that has profound consequences. This is because personal information, if leaked or disclosed to the wrong parties, can be used in ways that can cause severe embarrassment to a person, damage to his or her reputation, and even harm to her physical, emotional, or financial well-being. Throughout the Twentieth Century, these facts were clearly recognized in American society and were embodied throughout the law.

One of the most direct statements about the responsibilities of government agencies that maintain personal information was uttered by the United States Supreme Court in 1977. In *Whalen v. Roe,*[1] the Court concluded that the right to privacy protects not only "independence in making certain kinds of important decisions" but also the "individual interest in avoiding disclosure of personal matters."[2] The case involved a government record system of individuals who were taking prescriptions for certain medications. Although the government promised that the information was confidential and secure, the plaintiffs contended that they feared the possibility of the information leaking out. The Court concluded that because the security was adequate, the state had met its constitutional obligations. In a key passage in the case, the Court stated:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data

[1] 429 U.S. 589 (1977).
[2] *Id.* at 599-600.