

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

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**APPENDIX OF EXHIBITS TO
APPELLANT'S OPENING BRIEF
VOLUME 14 OF 42**

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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 14 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

whether intentional or unintentional or by a system that did not contain comparable security provisions.³

There are at least two important principles articulated in the *Whalen* case. First, the Court noted that the U.S. Constitution recognizes and protects "individual interest in avoiding disclosure of personal matters."⁴ The Supreme Court has not elaborated much more on this strand of its substantive due process line of cases, but numerous federal circuit courts have interpreted *Whalen* to create what has become known as the "constitutional right to information privacy." The right has been recognized in a majority of circuit courts.⁵

The second important principle in *Whalen* is that when the government maintains personal information, it has the responsibility to keep it secure. The Court upheld the New York statutory scheme because it demonstrated "a proper concern with, and protection of, the individual's interest in privacy."⁶

The principle that when the government gathers and maintains personal information, it has duties to protect the privacy and security of that information is well-embodied in United States law. The principle of responsibility emerged with the development of the computer in the middle of the Twentieth Century. The computer revolutionized the way records and data were collected, disseminated, and used. Government agencies were among the first entities to take advantage of the computer and use it to manage their record systems. Indeed, many government agencies were among IBM's early customers.⁷

The increasing use of computers in the 1960s raised a considerable public concern about privacy.⁸ Commentators devoted significant attention to the issue.⁹ And legislatures

³ *Id.* at 605-06.

⁴ *Id.* at 599-600.

⁵ After *Whalen*, the Court has done little to develop the right of information privacy. As one court observed, the right "has been infrequently examined; as a result, its contours remain less than clear." *Davis v. Bucher*, 853 F.2d 718, 720 (9th Cir. 1988). Most circuit courts have recognized the constitutional right to information privacy. See, e.g., *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577-580 (3d Cir.1980); *Plante v. Gonzalez*, 575 F.2d 1119, 1132, 1134 (5th Cir.1978); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.1983); *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); *J.P. v. DeSanti*, 653 F.2d 1080, 1089 (6th Cir.1981); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); but see *American Federation of Government Employees, AFL-CIO v. Department of Housing & Urban Development*, 118 F.3d 786, 191-92 (D.C. Cir. 1997) (expressing "grave doubts" as the existence of the right but not directly addressing the issue of the existence of the right).

⁶ *Whalen*, 429 U.S. at 605.

⁷ See generally DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 14-15 (2004).

⁸ PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* 82 (1995).

⁹ See, e.g., VANCE PACKARD, *THE NAKED SOCIETY* (1964); MYRON BRENTON, *THE PRIVACY INVADERS* (1964); ALAN WESTIN, *PRIVACY AND FREEDOM* (1967); ARTHUR MILLER, *THE ATTACK ON PRIVACY* (1971); NOMOS XII: *PRIVACY* (J. Ronald Pennock & J.W. Chapman eds. 1971); ALAN WESTIN & MICHAEL A. BAKER, *DATABANKS IN A FREE SOCIETY: COMPUTERS, RECORD-KEEPING AND PRIVACY* (1972); Kenneth L. Karst, "The Files": *Legal Controls Over the Accuracy and Accessibility of Stored Personal*

responded. In 1966, for example, Congress passed the Freedom of Information Act (FOIA), dramatically reforming public access to government records.¹⁰ Many statutes followed suit, updating their open government laws. Today, all fifty states have freedom of information laws, many of which are based upon the FOIA. The drafters of FOIA were quite cognizant of privacy, and among the nine exemptions to disclosure, FOIA contains not one but two exemptions to protect privacy. Exception 6 exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹¹ Exemption (7)(C) exempts "records or information compiled for law enforcement purposes . . . which could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹²

The increasing computerization of information and the burgeoning repositories of personal data in federal agencies continued to be a topic of importance. In 1973, the United States Department of Health Education and Welfare (HEW) issued a report, *Records, Computers, and the Rights of Citizens*, which analyzed these problems in depth. This report has become one of the most important documents in privacy law, and it has influenced the development of privacy law around the world as well as has shaped the privacy practices of countless companies and organizations. The HEW report observed:

It is no wonder that people have come to distrust computer-based record-keeping operations. Even in non-governmental settings, an individual's control over the personal information that he gives to an organization, or that an organization obtains about him, is lessening as the relationship between the giver and receiver of personal data grows more attenuated, impersonal, and diffused. There was a time when information about an individual tended to be elicited in face-to-face contacts involving personal trust and a certain symmetry, or balance, between giver and receiver. Nowadays an individual must increasingly give information about himself to large and relatively faceless institutions, for handling and use by strangers-unknown, unseen and, all too frequently, unresponsive. Sometimes the individual does not even know that an organization maintains a record about him. Often he may not see it, much less contest its accuracy, control its dissemination, or challenge its use by others.

In more than one opinion survey, worries and anxieties about computers and personal privacy show up in the replies of about one third of those interviewed. More specific concerns are usually voiced by an even larger proportion. . . .

It may be that loss of control and confidence are more significant issues in the "computers and privacy" debate than the organizational appetite for information. An agrarian, frontier society undoubtedly permitted much less personal privacy than a modern urban society, and a small rural town today still permits less than a

Data, 31 L. & Contemp. Probs. 342 (1966); Symposium, *Computers, Data Banks, and Individual Privacy*, 53 Minn. L. Rev. 211-45 (1968); Symposium, *Privacy*, 31 L. & Contemp. Probs. 251-435 (1966).

¹⁰ 5 U.S.C. § 552(a)(3)(A).

¹¹ 5 U.S.C. § 552(b)(6).

¹² 5 U.S.C. § 552(b)(7)(C).

big city. The poet, the novelist, and the social scientist tell us, each in his own way, that the life of a small-town man, woman, or family is an open book compared to the more anonymous existence of urban dwellers. Yet the individual in a small town can retain his confidence because he can be more sure of retaining control. He lives in a face-to-face world, in a social system where irresponsible behavior can be identified and called to account. By contrast, the impersonal data system, and faceless users of the information it contains, tend to be accountable only in the formal sense of the word. In practice they are for the most part immune to whatever sanctions the individual can invoke.¹³

The report recommended the passage of a code of Fair Information Practices:

- There must be no personal data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.¹⁴

The Fair Information Practices "played a significant role in framing privacy laws in the United States,"¹⁵ and influenced privacy law around the world.

A year after the HEW report, Congress passed the Privacy Act of 1974.¹⁶ The Act responded to many of the concerns raised by HEW. It regulates the collection and use of records by federal agencies, and affords individuals right to access and correct their personal information.¹⁷ In passing the Privacy Act, Congress found that:

- (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
- (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use,

¹³ U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS: REPORT OF THE SECRETARY'S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYSTEMS 29 (1973).

¹⁴ *Id.* at 41-42.

¹⁵ See Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get)*, 2001 Stan. Tech. L. Rev. 1, 44.

¹⁶ Pub. L. No. 93-579, 88 Stat. 1896 (2000) (codified at 5 U.S.C. § 552a).

¹⁷ 5 U.S.C. § 552a(d).

or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

Subsequent to the articulation of the Fair Information Practices and the passage Privacy Act, a litany of laws have arisen at the state and federal level striving toward achieving these purposes. The federal Privacy Act only applies to federal agencies, not state ones, and some states therefore passed their own version of a Privacy Act. For example, in 1977, just a few years after the passage of the federal Privacy Act, California passed the Information Practices Act,¹⁸ a law that borrowed significantly from the Privacy Act.

As it relates to this case, the California Information Practices Act was passed to regulate the gathering, use, and dissemination of personal information by California governmental agencies. In its preamble, the California Information Practices Act states: "In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits."¹⁹ The term "personal information" is defined by the act as "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical and employment history. It includes statements made by, or attributed to, the individual."²⁰

The Act provides: "Each agency shall collect personal information to the extent practicable directly from the individual who is the subject of the information rather than from another source."²¹ In the documents I reviewed, there were numerous instances where the FTB attempted to obtain information from third parties that would seemingly be able to be obtained directly from Hyatt himself. For example, the FTB sought information about Hyatt's visits to doctors and medical facilities, his newspaper subscriptions, and other services he obtained from the third parties through demand letters. Some of this information could have been obtained from Hyatt himself by asking him to supply invoices and other documentation.

The Act also provides: "No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains. . . ."²² In this

¹⁸ Cal. Civ. Code, § 1798 *et seq.*

¹⁹ Cal. Civ. Code § 1798.1(c).

²⁰ Cal. Civ. Code § 1798.3(a).

²¹ Cal. Civ. Code § 1798.15.

²² Cal. Civ. Code § 1798.24.

case, the FTB disclosed in numerous demand letters sent to a variety of individuals and organizations Hyatt's SSN and his confidential residential address. This is "personal information" as defined by the Act. The Act does, however, have a number of exceptions to the disclosure restriction quoted above. The most relevant exception I could find in my examination of the Act was that information may be disclosed:

To another person or governmental organization to the extent necessary to obtain information from the person or governmental organization as necessary for an investigation by the agency of a failure to comply with a specific state law that the agency is responsible for enforcing.²³

A key phrase in this provision is "to the extent necessary." This exception does not allow for the broad dissemination of personal information in investigations; rather, it allows for limited disclosures to the extent they are necessary.

In reviewing the demand letters sent to third parties by the FTB, there were a number of disclosures in which I could not conceive of a rationale for their necessity. For example, the FTB sent demand letters to several newspapers (Times Orange County, Orange County Register, Las Vegas Sun) requesting information about Hyatt's subscriptions.²⁴ Included in these letters was a document entitled "Demand to Furnish Information" which included Hyatt's SSN. Although I do not know the specific practices of each newspaper's subscriptions department, it strikes me as highly anomalous for newspaper subscriptions to require a person to provide a SSN. Therefore, the SSN is an irrelevant piece of information, not necessary for the newspaper to locate its records on Hyatt to provide to the FTB.

Hyatt's SSN was also disclosed in demand letters to various stores such as Sam's Club,²⁵ The Sport's Authority,²⁶ and Bizmart.²⁷ Hyatt's SSN was disclosed in demand letters to Temple Beth Am,²⁸ Congregation Ner Tamid,²⁹ Licensing Executives Society,³⁰ the Association of Computer Machinery,³¹ Personal Computer Users Group,³² Copley Colony Cablevision,³³ Southwest Company Club,³⁴ Additionally, Hyatt's SSN was disclosed in demand letters to Great Expectations, a dating service, which were sent to two different branch addresses.³⁵ The letters demanded a copy of any original application for

²³ Cal. Civ. Code § 1798.24(p).

²⁴ FTB Letter and Demand to Furnish Information to Las Vegas Sun, Mar. 24, 1995; FTB Letter and Demand to Furnish Information to Times Orange County, Mar. 24, 1995; FTB Letter and Demand to Furnish Information to Orange County Register, Aug. 4, 1995;

²⁵ FTB Letter and Demand to Furnish Information to Sam's Club, Feb. 17, 1995.

²⁶ FTB Letter and Demand to Furnish Information to The Sport's Authority, Jan. 24, 1995.

²⁷ FTB Letter and Demand to Furnish Information to Bizmart, Feb. 17, 1995.

²⁸ FTB Letter and Demand to Furnish Information to Temple Beth Am, Jan. 24, 1995.

²⁹ FTB Letter and Demand to Furnish Information to Congregation [sic] Ner Tamid, Mar. 23, 1995.

³⁰ FTB Letter and Demand to Furnish Information to Licensing Executives Society, Jan. 24, 1995.

³¹ FTB Letter and Demand to Furnish Information to Association of Computer Machinery, Jan. 24, 1995.

³² FTB Letter and Demand to Furnish Information to Personal Computer Users Group, Jan. 26, 1995.

³³ FTB Letter and Demand to Furnish Information to Copley Colony Cablevision, Mar. 21, 1995.

³⁴ FTB Letter and Demand to Furnish Information to Southwest Company Club, Mar. 21, 1995.

³⁵ FTB Letter and Demand to Furnish Information to Great Expectations (Irvine, CA), Jan. 24, 1995; FTB

membership along with other information.³⁶ Hyatt's SSN was also disclosed in demand letters to the Nevada Development Authority,³⁷ Dale M. Fiola, Inc.,³⁸ and to a man named Roger McCaffrey.³⁹

Hyatt's SSN and Las Vegas home address were disclosed in demand letters to the Las Vegas Valley Water District,⁴⁰ Silver State Disposal Service,⁴¹ and Southwest Gas Corp.⁴² Hyatt had taken steps to conceal the fact that he resided at his home address by purchasing the home in a trust without his name and by placing his utility bills in the name of another person, G. Julia Jeng.⁴³

His home address was disclosed in a letter requesting information to Allstate Sand and Gravel⁴⁴ and in a letter requesting information from a person named "Kyle" at KB Plumbing.⁴⁵

There are several demand letters sent to various doctors with the last name "Shapiro," apparently because the FTB thought one of Hyatt's doctors had this name. Letters were sent to Dr. Eric Shapiro, Dr. Melvin Shapiro, Dr. Nathan Shapiro, Dr. Norman Shapiro, Dr. Richard Shapiro, and a Dr. Shapiro.⁴⁶ Interestingly, in contrast to other letters, these did not contain the "Demand to Furnish Information" form with Hyatt's SSN. Similarly, letters sent to Dr. Gerald Isenberg, the Association of Colo-Rectal Surgeons, and to Clark County School District also did not include a "Demand to Furnish Information" form with Hyatt's SSN.⁴⁷ Likewise, a letter to Ron's Repair and Remodeling did not include Hyatt's SSN.⁴⁸ There is no explanation why the FTB decided to disclose Hyatt's SSN to obtain information from newspapers, businesses, dating services, and religious temples yet not from physicians, remodeling services, or school districts.

In nearly all the demand letters I examined, SSNs were provided with little connection to whether they would actually be needed by the third party to locate the records or information on Hyatt the FTB was seeking. In several instances, Hyatt's confidential home address was provided as well, although under many circumstances, I believe that the

Letter and Demand to Furnish Information to Great Expectations (Los Angeles, CA), Jan. 24, 1995.

³⁶ FTB Letter and Demand to Furnish Information to Great Expectations (Irvine, CA), Jan. 24, 1995; FTB Letter and Demand to Furnish Information to Great Expectations (Los Angeles, CA), Jan. 24, 1995.

³⁷ FTB Letter and Demand to Furnish Information to the Nevada Development Authority, Jan. 24, 1995.

³⁸ FTB Letter and Demand to Furnish Information to Dale M. Fiola, Inc., Mar. 31, 1995.

³⁹ FTB Letter and Demand to Furnish Information to Roger McCaffrey, Mar. 31, 1995.

⁴⁰ FTB Letter and Demand to Furnish Information to the Las Vegas Valley Water District, Mar. 24, 1995.

⁴¹ FTB Letter and Demand to Furnish Information to Silver State Disposal Service, Mar. 24, 1995.

⁴² FTB Letter and Demand to Furnish Information to Southwest Gas Corp., Mar. 24, 1995.

⁴³ FTB Narrative Report on Gilbert Hyatt, TYE 1992, at pp. 7-8.

⁴⁴ FTB Letter to Allstate Sand and Gravel, Apr. 11, 1995.

⁴⁵ FTB Letter to Kyle at KB Plumbing, Mar. 10, 1995.

⁴⁶ FTB Letter to Dr. Eric Shapiro, Feb. 27, 1995; FTB Letter to Dr. Melvin Shapiro, Feb. 27, 1995; FTB Letter to Dr. Nathan Shapiro, Feb. 27, 1995; FTB Letter to Dr. Norman Shapiro, Feb. 27, 1995; FTB Letter to Dr. Richard Shapiro, Feb. 27, 1995; FTB Letter to Dr. Shapiro, Feb. 27, 1995.

⁴⁷ FTB Letter to Dr. Gerald Isenberg, Feb. 27, 1995; FTB Letter to Colo-Rectal Surgeons, Mar. 21, 1995; FTB Letter to Clark County School District, Mar. 28, 1995.

⁴⁸ FTB Letter to Ron's Repair and Remodeling, Mar. 28, 1995.

information requested from the third parties would not require the disclosure of Hyatt's home address. In short, the FTB demand letters disclosed Hyatt's personal information to a very wide range of third parties with virtually no attempt to ensure that the information disclosed was necessary in order to receive the responses the FTB was seeking from the third parties.

It is my opinion that few would quarrel with the principle that whenever a government agency collects personal information, it has certain obligations and responsibilities to ensure that the information is kept secure from unwarranted disclosures. The law embodies this basic principle in countless ways, from U.S. Supreme Court decisions to federal and state statutory law. As a government agency, the FTB had a responsibility to ensure that Hyatt's personal information would be kept secure and not disseminated unless necessary.

Moreover, government agencies, as well as all citizens and entities, have responsibilities to not disseminate the private information of individuals to others. Almost all of the states have recognized the tort of public disclosure of private facts. As described by the Restatement of Torts:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.⁴⁹

The public disclosure tort protects against a wide range of disclosures of personal information. For example, the tort applies to the dissemination of information about people's finances and debts.⁵⁰ A key issue is whether a person has a reasonable expectation of privacy in the matter that is publicized.

As I will discuss below in the section entitled "The Harms of Disclosing Personal Information," there is a strong legal recognition of one's privacy interest in one's private home address and confidential financial and business transactions. There is also a strong legal recognition of one's privacy interest in one's SSN. Although not a public disclosure of private facts case, the case of *Remsburg v. Docusearch, Inc.*,⁵¹ persuasively explains why there is a privacy interest in one's SSN:

A person's SSN has attained the status of a quasi-universal personal identification number. *Id.* at 531-32. At the same time, however, a person's privacy interest in his or her SSN is recognized by state and federal statutes, including RSA 260:14, IV-a (Supp.2002) which prohibits the release of SSNs contained within drivers' license records. *See also* Financial Services Modernization Act of 1999, 15 U.S.C. §§ 6801-6809 (2000); Privacy Act of 1974, 5 U.S.C. § 552a (2000). "[A]rmed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on

⁴⁹ Restatement (Second) of Torts § 652D.

⁵⁰ *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927).

⁵¹ 816 A.2d 1001 (N.H. 2003).

that person's checking account, obtain credit cards, or even obtain the person's paycheck." *Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir.1993).

Like the consequences of stalking, the consequences of identity theft can be severe. The best estimates place the number of victims in excess of 100,000 per year and the dollar loss in excess of \$2 billion per year. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 Tex. L.Rev. 89, 89 (2001). Victims of identity theft risk the destruction of their good credit histories. This often destroys a victim's ability to obtain credit from any source and may, in some cases, render the victim unemployable or even cause the victim to be incarcerated. *Id.* at 91.⁵²

In the context of discussing whether a person has an actionable intrusion upon seclusion tort claim when his or her SSN is improperly obtained, the New Hampshire Supreme Court concluded that people have a reasonable expectation of privacy in their SSN:

In addressing whether a person's SSN is something secret, secluded or private, we must determine whether a person has a reasonable expectation of privacy in the number. *See Fischer*, 143 N.H. at 589-90, 732 A.2d 396. SSNs are available in a wide variety of contexts. *Bodah v. Lakeville Motor Express Inc.*, 649 N.W.2d 859, 863 (Minn.Ct.App.2002). SSNs are used to identify people to track social security benefits, as well as when taxes and credit applications are filed. *See Greidinger*, 988 F.2d at 1352-53. In fact, "the widespread use of SSNs as universal identifiers in the public and private sectors is one of the most serious manifestations of privacy concerns in the Nation." *Id.* at 1353 (quotation omitted). As noted above, a person's interest in maintaining the privacy of his or her SSN has been recognized by numerous federal and state statutes. As a result, the entities to which this information is disclosed and their employees are bound by legal, and, perhaps, contractual constraints to hold SSNs in confidence to ensure that they remain private. *See Bodah*, 649 N.W.2d at 863. Thus, while a SSN must be disclosed in certain circumstances, a person may reasonably expect that the number will remain private.⁵³

Perhaps more than any state, California has demonstrated a strong commitment to protecting privacy in its laws. Pursuant to Article I, section 1 of the California Constitution: "All people are by nature free and independent and have inalienable rights. Among these are ... pursuing and obtaining safety, happiness, and privacy." In *White v. Davis*,⁵⁴ the California Supreme Court stated:

Although the general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief, the moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased

⁵² *Id.* at 1007-08.

⁵³ *Id.* at 1008.

⁵⁴ 13 Cal.3d 757 (Cal. 1975).

Confidential-NV Protective Order

surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy.⁵⁵

Accordingly, it is my opinion that Hyatt could certainly expect that the FTB would treat his personal data with the utmost care and responsibility and would limit its disclosures as narrowly as necessary to achieve its goals. He could expect that the FTB would seek data from him first before going out to seek it from third parties. It is my opinion that the FTB did not heed its responsibilities. It disclosed Hyatt's information in a cavalier fashion, with a kind of bureaucratic regularity and indifference.

Breach of Confidentiality

Beyond violating its basic responsibilities to maintain the privacy and security of the personal information it collected, it is my opinion that the FTB also breached the confidentiality it promised to Hyatt.

An important, and often underappreciated privacy interest in the law, is the notion of confidentiality. With breach of confidentiality, the trust in a relationship is being violated. Protection against breach of confidentiality helps ensure that certain relationships that depend upon trust are promoted. Protection against disclosure also protects one's relationships of trust, but the harm of disclosure turns on the damage wrought by the release of embarrassing secrets or data that renders one vulnerable. Breach of confidentiality involves a betrayal of trust, regardless of the nature of the data revealed.

Many states have recognized tort liability for breach of confidentiality. The "clear modern consensus of the case law" is to recognize the breach of confidentiality tort.⁵⁶ The tort of breach of confidentiality emerges from the concept of a fiduciary relationship, which is "founded on trust or confidence reposed by one person in the integrity and fidelity of another."⁵⁷ "A fiduciary relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another. Out of such a relation, the laws raise the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust[,] or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of utmost good faith."⁵⁸ According to the Restatement: "[O]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."⁵⁹

One of the most common contexts in which the tort of breach of confidentiality is applied is when a physician breaches a patient's confidences. For example, in *McCormick v.*

⁵⁵ *Id.* at 773-74.

⁵⁶ David A. Elder, *Privacy Torts* §5:2 (2002).

⁵⁷ See *Mobile Oil Corp. v. Rubinfeld*, 339 N.Y.S.2d 623, 632 (1972).

⁵⁸ *Mobile Oil Corp. v. Rubinfeld*, 339 N.Y.S.2d 623, 632 (1972).

⁵⁹ Restatement (Second) of Torts § 874.

England,⁶⁰ Mrs. McCormick was involved in a contentious divorce and custody battle with her husband. McCormick's doctor gave a letter to her husband that stated that McCormick was suffering from "major depression and alcoholism, acute and chronic." McCormick sued her doctor. According to the court, a "majority of jurisdictions faced with the issue have recognized a cause of action against a physician for the unauthorized disclosure of confidential information unless the disclosure is compelled by law or is in the patient's interest or the public interest."⁶¹ Unlike the tort of public disclosure, the tort of breach of confidentiality does not have the element that the disclosure be "highly offensive." The court reasoned that the public disclosure tort "focuses on the *content*, rather than the *source* of the information. The unauthorized revelation of confidential medical information should be protected without regard to the degree of its offensiveness."⁶² The tort applies not only to physicians, but also to bankers and other professionals who maintain relationships of trust.⁶³

Additionally, some courts have extended liability for breach of confidentiality to third parties who induce the physician to disclose. In *Hammonds v. AETNA Casualty & Surety Company*,⁶⁴ an insurance company persuaded the plaintiff's doctor to disclose confidential information about him for use in a legal proceeding. The court held that the insurance company could be liable for inducing the doctor to breach confidentiality: "The law is settled in Ohio and elsewhere that a third party who induces a breach of a trustee's duty of loyalty, or participates in such a breach, or knowingly accepts any benefit from such a breach, becomes directly liable to the aggrieved party." In the documents I reviewed, several demand letters are for information from Hyatt's physicians and medical institutions seeking dates of treatment. While the information requested does not ask for data about Hyatt's medical ailments, it does call for the disclosure details about the nature and duration of his treatment.

The breach of confidentiality tort is not just limited to disclosures by physicians. For example, it has been applied frequently to bankers. A number of jurisdictions extend the tort of breach of confidentiality to disclosures by banks and financial institutions of their customers' financial information.⁶⁵

Conceivably, the tort could apply whenever a fiduciary relationship exists. There are no fixed set of relationships that are fiduciary ones, and courts "have carefully refrained from defining instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded."⁶⁶ Courts look to the following factors in defining a

⁶⁰ 494 S.E.2d 431 (S.C. Ct. App. 1997).

⁶¹ *Id.* at 435.

⁶² *Id.* at 438.

⁶³ See, e.g., *Peterson v. Idaho First National Bank*, 367 P.2d 284 (Idaho 1961) (breach of confidentiality tort for disclosure by bank).

⁶⁴ 243 F. Supp. 793 (D. Ohio 1965).

⁶⁵ See, e.g., *Peterson v. Idaho First National Bank*, 367 P.2d 284 (Idaho 1961); *Barnett Bank of West Florida v. Hooper*, 498 So.2d 923 (Fla.1986); *Indiana National Bank v. Chapman*, 482 N.E.2d 474 (Ind.App.1985); *Suburban Trust Co. v. Waller*, 408 A.2d 758 (Md. App. 1979); *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W.2d 648 (Minn. 1976); *McGuire v. Shubert*, 722 A.2d 1087 (Pa. Super. 1998).

⁶⁶ *Swerhun v. General Motors Corp.*, 812 F. Supp. 1218 (M.D. Fla. 1993).

fiduciary relationship: "[T]he degree of kinship of the parties; the disparity in age, health, and mental condition; education and business experience between the parties; and the extent to which the allegedly subservient party entrusted the handling of . . . business affairs to the other and reposed faith and confidence in [that person or entity]."⁶⁷

The harm from a breach of confidence, then, is not simply that information has been disclosed, but that the victim has been betrayed. When it recognized a cause of action for breach of confidentiality in 1920, the court in *Simonsen v. Swenson*,⁶⁸ noted that "the physician is bound, not only upon his own professional honor and the ethics of his high profession, to keep secret [a patient's information] . . . A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for the damages naturally flowing from such wrong."⁶⁹

There are certainly instances where we might find the breach of confidentiality desirable. In *Tarasoff v. Regents of the University of California*,⁷⁰ a psychotherapy patient murdered a young woman with whom he was obsessed. The court concluded that the patient's psychotherapist had a duty to the woman because he had knowledge that his patient posed a danger to her. However, these instances generally involve the threat of injury or death to others or a threat to the public.

I am not opining as to whether, in fact, the FTB is liable under the breach of confidence tort. Rather, I mention these cases to illustrate that there is considerable recognition in the law and otherwise that breaching confidentiality constitutes a nontrivial injury. It is important to recognize that breach of confidentiality is a distinct harm that is related to, yet differs from, the disclosure of personal information. In essence, breach of confidentiality may be understood as a subset of disclosure of personal information. What makes breach of confidentiality a distinctive harm is that it is a violation of trust.

It is my opinion that the FTB owed Hyatt a duty of confidentiality. The documents I reviewed demonstrate that Hyatt requested that the information he supplied to the FTB remain confidential and that he had every reason to expect that the information would remain confidential.

First, the documents reveal direct assurances of confidentiality communicated to Hyatt and his representatives. According to Hyatt's affidavit, he states that "Ms. Cox expressly promised that she would keep my secret address private, and I therefore provided her with the address which I had so painstakingly kept secretive in a reasonable (but detrimental) reliance on her trustworthiness as an agent or employee of the State of California."⁷¹

⁶⁷ *Pottinger v. Pottinger*, 605 N.E.2d 1130 (Ill. App. 1992). For more information on the breach of confidentiality tort, see generally Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426 (1982); Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 Buffalo L. Rev. 1 (1995);

⁶⁸ 177 N.W. 831 (Neb. 1920).

⁶⁹ *Id.* at 832.

⁷⁰ 551 P.2d 334 (Cal. 1976).

⁷¹ Hyatt Affidavit, at ¶ 137.

In his deposition, Hyatt states:

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

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

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

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

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

A. Well, for example, in the contact letter, the initial Notice of Audit, the FTB promised me not only would it abide by the California Privacy -- I'm getting tired. You have to bear with me.

Q. Take your time.

A. Informational Practices Act, and the Federal Privacy Act, but that it would also disclose my information only to certain government agencies, such as the IRS.⁷²

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."⁷³

When the audit began, Hyatt had research done about the California Information Practices Act and his privacy rights:

Q. Why were you having this research done?

A. I was curious about what was in store for me in the audit and whether the FTB would keep my information private.

Q. What reason did you have, upon receipt of notice from the FTB, to be concerned about maintaining confidentiality of your information?

A. Well, the FTB made a, an important point of privacy, so I knew that it would be an issue, and wanted to be familiar with it.

Q. Did you have any reason to believe at that time the FTB would not maintain your privacy?

A. No. I believed what they promised at that time.⁷⁴

Hyatt also testified in his deposition that: "The FTB accepted my secret address in confidence -- in secrecy and confidentiality, promised to keep it confidential, and then without notifying me sent it out to newspapers and utilities."⁷⁵

⁷² Videotape Deposition of Gilbert Hyatt, Aug. 17, 2005, Vol. III, pp. 497-98.

⁷³ *Id.* at p. 499.

⁷⁴ Videotape Deposition of Gilbert Hyatt, Aug. 16, 2005, Vol. II, p. 312.

⁷⁵ Videotape Deposition of Gilbert Hyatt, Dec. 5, 2005, Vol. IV, p. 714.

Second, whenever Hyatt or his representatives submitted information to the FTB, they sought assurances of confidentiality and clearly expressed that the information and documents conveyed to the FTB were to remain confidential. Frequently, FTB officials provided acknowledgment that they understood Hyatt's strong desire for confidentiality and assurances that Hyatt's information would remain confidential. For example, in a 1997 memo from Eugene Cowan (Hyatt's tax attorney) memorializing conversations with Anna Jovanovich of the FTB, he stated:

Ms. Jovanovich asked if we would supply her with certain agreements that the FTB had previously reviewed and had copied excerpts from. She reiterated her understanding that Mr. Hyatt was extremely concerned over the confidential nature of his agreements and his case in total.⁷⁶

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."⁷⁷

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."⁷⁸ 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."⁷⁹ 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."⁸⁰ 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."⁸¹ Cowan references a conversation he had with Mr. Soriano "regarding the taxpayer's desire to keep his home address private and confidential."⁸² On February 23, 1995, Cox made a visit to Cowan's offices to review Hyatt's documents. According to Cowan's description of the visit: "I told Ms. Cox that the taxpayer is very concerned for his privacy and tried to maintain a very low profile in Nevada. Ms. Cox assured me that everyone in the FTB was subject to the security and disclosure policy of the FTB the violation of which would cause an FTB employee to lose his job or worse."⁸³ Throughout the memo, Cowan writes about numerous oral and

⁷⁶ Memorandum from Eugene Cowan to file (Dec. 3, 1997).

⁷⁷ Letters from Eugene Cowan to Anna Jovanovich (Dec. 22, 1997).

⁷⁸ Memo from Eugene Cowan to file (June 25, 1998), p. 1.

⁷⁹ Memo from Eugene Cowan to file (June 25, 1998), p. 1.

⁸⁰ *Id.* at p. 1.

⁸¹ *Id.* at p. 1.

⁸² *Id.* at p. 2.

⁸³ *Id.* at pp. 2-3.

written communications with FTB officials, including Mr. Soriano and Ms. Cox, in which Cowan repeatedly stated that Hyatt expected confidentiality and privacy, and the FTB officials assured him that they would maintain confidentiality.⁸⁴

In an August 29, 1995 letter to the FTB, Cowan states that "Mr. Hyatt has been careful to protect his privacy as a result of past harassment and disruption of his work."⁸⁵ 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.⁸⁶

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."⁸⁷

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."⁸⁸ In another parts of his deposition, Cowan states that he discussed the importance of protecting Hyatt's confidentiality with the FTB officials.⁸⁹

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,

⁸⁴ *Id.* at pp. 1-6.

⁸⁵ Letter from Eugene Cowan to FTB, Aug. 29, 1995, at p. 2.

⁸⁶ *Id.* at pp. 4-5 (emphasis in original).

⁸⁷ Letter from Sheila Cox to Eugene Cowan, Aug. 31, 1995, at pp. 1-2 (emphasis in original).

⁸⁸ Cowan Deposition, Apr. 17, 2000, Vol. II, p. 268.

⁸⁹ Cowan Deposition, Apr. 17, 2000, Vol. III, p. 492 ("Q. BY MR. BRADSHAW: You helped preserve the taxpayer's — A. Confidential rights and discussed that issue with the auditors.").

or filing status.”⁹⁰ On that page are four text graphics with the words “CONFIDENTIAL,” “TOP SECRET,” “NEED TO KNOW,” and “CLASSIFIED.”

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

Your Rights to Confidentiality

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

If, however, you are no longer married or living with your spouse and you filed a joint return with an amount due, upon written request, we can tell you whether we have tried to collect from your spouse, the general nature of the collection activities, and the amount we have collected.⁹¹

On documents requesting information from Hyatt, a Privacy Notice appears describing the privacy rights established in the California Information Practices Act of 1977.⁹²

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.⁹³

The promise of confidentiality is broad and clear: “Confidential treatment of *any* personal and financial information that you provide to us.”⁹⁴ In the Privacy Notice (FTB 1131), the FTB states:

⁹⁰ FTB Disclosure Education Training Manual, p. 5.

⁹¹ FTB, *California Taxpayers Bill of Rights – 1988: A Guide for Taxpayers*, at p. 2.

⁹² See Information Concerning Resident Status Form p. 2 (Privacy Notice).

⁹³ Letter from FTB to Hyatt, June 17, 1993 and Audit Scheduling Information Form.

⁹⁴ *Id.* (emphasis added).

We may give the information you furnish us to the United States Internal Revenue Service, the proper official of any state imposing an income tax or a tax measured by income, the Multistate Tax Commission and to California government agencies and officials, as provided by law. If you owe any monies, we may disclose the amount due to employers, financial institutions, County Recorders, vacation trust funds, process agents and other payers.⁹⁵

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

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

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

Information Disclosure

We may disclose your tax information to:

- The Internal Revenue Service.
- Other states' income tax officials.
- The Multistate Tax Commission.
- Appropriate Californian government agencies and officials.
- Third parties when necessary to determine or collect your tax liabilities.⁹⁶

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

⁹⁵ FTB Privacy Notice, FTB 1131, included in the Audit Scheduling Information Form *supra*.

⁹⁶ FTB 1131, 08-2004, available at <http://www.ftb.ca.gov/forms/misc/1131.pdf>.

personal information lack any apparent justification. But Hyatt received the older Privacy Notice, which enumerated the entities and officials that might receive his personal information. Nowhere in the notice Hyatt received are third parties mentioned.

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

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

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

A. No, I wasn't aware. I was aware that on the audit forms and letters that the Franchise Tax Board sends to you is the promise of following the Information Practices Act and all the requirements that are imposed on the Franchise Tax Board in doing so."⁹⁷

In the private sector context, businesses often make promises to consumers that their personal data will remain confidential and will not be disclosed to third parties. In a number of instances, companies violating their privacy policies by disclosing information to third parties have had actions brought against them by the Federal Trade Commission.⁹⁸ The FTB's promises of confidentiality are more than mere promises. They are based in the FTB's legal duties under the California Constitution and the California Information Practices Act. Indeed, the Privacy Notice on the FTB's forms begins by invoking the California Information Practices Act.

Therefore, it is my opinion that the FTB clearly owed a duty of confidentiality to Hyatt with regard to the information he supplied to the FTB – his SSN, home address, and business and financial documents. This duty was established by the FTB's express promises of confidentiality conveyed to Hyatt and his representatives, the nature of the FTB's relationship with Hyatt, the FTB's own policies regarding maintaining strict confidentiality, the FTB privacy notices and other literature conveyed to taxpayers about its maintenance of confidentiality, the California Constitution, and the California Information Practices Act, among other sources.

It is my opinion that in spite of the duty of confidentiality the FTB owed to Hyatt, the FTB in this case breached confidentiality by disseminating Hyatt's personal information.

⁹⁷ Eugene Cowan Deposition, May 17, 2000, Vol. IV, p. 540.

⁹⁸ See, e.g., *In Re GeoCities*, 1999 FTC LEXIS 17 (Feb. 5, 1999); *FTC v. Eli Lilly*, No. 012-3214; *In re Gateway Learning Corp.*, No. C-4120.

As discussed above, in numerous instances, the FTB disclosed Hyatt's SSN and private home address in demand letters sent to a panoply of individuals and entities. The FTB also disclosed Hyatt's business documents to two Japanese companies (Fujitsu and Matsushita) that did business with Hyatt. Hyatt was concerned about the Japanese companies finding out about his being audited with the FTB, as well as the fact that Hyatt had allowed the FTB to examine his business documents with these companies. According to Hyatt, the Japanese companies had "been targeted by U.S. taxing authorities, which has caused them a lot of grief and a lot of belief that they were being discriminated against."⁹⁹ Hyatt believed that the FTB's contacting the Japanese companies would strain or ruin his business relationship with them. Therefore, Eugene Cowan repeatedly sought assurances from the FTB of confidentiality, and when he transmitted Hyatt's licensing agreements to the FTB, he explicitly stated that:

Copies of these agreements are being sent to you under your assurance that the agreements will be kept confidential and secure. Please limit access to these agreements only to those persons who must review the agreements in connection with the case. There have been lapses in confidentiality in this case previously and so we must admonish you and your colleagues to maintain the upmost care in respecting the confidentiality of the materials provided to you and the information contained in the files of this case.¹⁰⁰

The FTB, however, went ahead and sent letters to Tadashi Sekizawa, President and Representative Director of Fujitsu and Akiri Kokaji, Assistant Director of Matsushita requesting "dates wire transfers were made to Gilbert P. Hyatt."¹⁰¹ The FTB's letter to Fujitsu contains a page from Hyatt's agreement with Fujitsu. The FTB's letter to Matsushita contains a letter from Kokaji to Hyatt about his Patent Agreement with the company. These disclosures are in breach of the FTB's duty of confidentiality as established by the sources discussed above. I am perplexed at why the FTB did not try other ways to gather information about the wire transfers in lieu of contacting the companies. Nor can I conceive of a reason why enclosing portions of business documents and correspondence was necessary. In his deposition, Hyatt states: "The FTB sent out the letters to Matsushita and Fujitsu, and all of a sudden my licensing program came to a halt. That is a, I think a significant cause-and-effect relationship. And in fact, the FTB did so in blatant violation of the privacy agreements that they had with me."¹⁰²

My review of the documents indicates that there appears to have been a substantial relationship developed between Hyatt and the FTB during the course of the investigation. There are numerous communications between Hyatt, his representatives, and the FTB. As a result, this is not akin to a situation of a government bureaucracy disclosing data as a matter of course, without having the benefit of knowing each individual's particular circumstances and preferences. Instead, from my review of the documents, it is my

⁹⁹ Videotape Deposition of Gilbert P. Hyatt, Aug. 15, 2005, Vol. I, p. 139.

¹⁰⁰ Letters from Eugene Cowan to Anna Jovanovich (Dec. 22, 1997).

¹⁰¹ Letter from Sheila Cox to Tadashi Sekizawa, Fujitsu, Apr. 11, 1995, H01710, and Letter from Sheila Cox to Akiri Kokaji, Matsushita, Apr. 11, 1995, H01713.

¹⁰² Videotape Deposition of Gilbert P. Hyatt, Aug. 15, 2005, Vol. I, p. 139.

opinion that the FTB had extensive contact with Hyatt and his representatives and was well aware of his strong desire to keep his information confidential. For example, in an August 31, 1995 letter from Sheila Cox to Eugene Cowan, Cox writes: "The FTB acknowledges that the taxpayer is a private person who puts a significant effort into protecting his privacy."¹⁰³ The FTB's relationship with Hyatt and his representatives and its acknowledgement of Hyatt's desire for confidentiality makes the FTB's breaches of confidence all the more difficult to justify in my opinion.

The Harms of Disclosing Personal Information

It is my opinion that Hyatt has a privacy interest in his SSN, home address, and business and financial transactions and that he has bona fide reasons for wanting to keep this information private.

Hyatt is a prominent inventor, having developed computer technology that revolutionized the industry. As a result, he has received significant media attention and has also accumulated substantial wealth. Hyatt thus has several good reasons to attempt to keep a low profile. First, his activities are not those of a person who wants to seek out the limelight. He is not striving to become a public figure such as Bill Gates or Donald Trump or others. Rather, Hyatt desires to keep a low profile and to continue to work on and license his inventions.

According to Hyatt's affidavit, he has many legitimate concerns about others learning about his home address. His address is where he also maintains his laboratory and does his research. Accordingly, he has an interest in preventing others from engaging in industrial espionage or the theft of his ideas.¹⁰⁴ He keeps his "most sensitive documents in [his] private home-office."¹⁰⁵ He has also been "harassed by three abusive estranged relatives."¹⁰⁶ In his August 29, 1995 letter to the FTB, Cowan explains: "Mr. Hyatt made up his mind to leave California in mid-1990. Since receiving public recognition about mid-1990, certain members and former members of his family (such as his brother) had been constantly harassing him (legally and otherwise) and he grew fed up with their interference. Mr. Hyatt's work was constantly interrupted by the press and the public. He was harassed by anonymous callers. Additionally, the nature of his patent and research work required a quieter, more remote environment."¹⁰⁷ One can imagine that when it becomes known that a person is worth millions of dollars, all sorts of individuals surface who would like a piece of one's success.

Hyatt took steps to ensure that his address would not appear on public records. He had his home purchased through a trust so his name would not appear on public property.

¹⁰³ Letter from Sheila Cox to Eugene Cowan (Aug. 31, 1995).

¹⁰⁴ Hyatt Affidavit, at ¶ 18.

¹⁰⁵ Hyatt Affidavit, at ¶ 18.

¹⁰⁶ Hyatt Affidavit, at ¶ 140.

¹⁰⁷ Letter from Eugene Cowan to FTB, Aug. 29, 1995, at pp. 2-3.

records, and he took steps to shield his name and address from appearing on various other public records.¹⁰⁸

Nevertheless, the FTB disseminated Hyatt's SSN, home address, and business and financial transactions.

1. SSNs

Exposure of SSNs creates a risk of identity theft. The FTB included Hyatt's SSNs on numerous demand letters sent to dozens of individuals and organizations without regard for whether there was any need to disclose them. The more that a person's sensitive personal data is disseminated, the more that the individual is exposed to the risk of an identity theft. All it takes for an identity theft to occur is for one unscrupulous individual to use one's SSN to access accounts. Hyatt's considerable wealth makes him a particularly attractive target for identity theft.

As defined by the United States General Accounting Office, "identity theft or identity fraud generally involves 'stealing' another person's personal identifying information . . . and then using that information to fraudulently establish credit, run up debt, or take over existing financial accounts."¹⁰⁹

According to the FBI, identity theft is the most rapidly growing type of white-collar criminal activity.¹¹⁰ According to estimates by the Federal Office of the Comptroller of the Currency, there are half a million victims of identity theft each year.¹¹¹

Identity theft can be a harrowing experience, and it can be devastating to victims. According to estimates, a victim must spend over two years and close to 200 hours to repair the damage that identity theft causes.¹¹² Further, victims often have to spend thousands of dollars to remedy the harm.¹¹³ Victims experience great anxiety, leading to psychological harm in certain cases.¹¹⁴ Victims have difficulty "obtaining loans,

¹⁰⁸ Hyatt Affidavit, at ¶ 18.

¹⁰⁹ U.S. General Accounting Office, Report to the Honorable Sam Johnson House of Representatives, Identity Theft: Greater Awareness and Use of Existing Data Are Needed 1 (June 2002); see also Jennifer 8. Lee, *Fighting Back When Someone Steals Your Name*, N.Y. Times, Apr. 8, 2001. For more background, see generally BETH GIVENS, THE PRIVACY RIGHTS HANDBOOK 227-48 (1997).

¹¹⁰ See Jennifer 8. Lee, *Fighting Back When Someone Steals Your Name*, N.Y. Times, April 8, 2001.

¹¹¹ See Robert O'Harrow Jr., *Identity Thieves Thrive in Information Age: Rise of Online Data Brokers Makes Criminal Impersonation Easier*, Wash. Post, May 31, 2001, at A1.

¹¹² See JANINE BENNER, BETH GIVENS, & ED MIERZWINSKI, NOWHERE TO TURN: VICTIMS SPEAK OUT ON IDENTITY THEFT: A CALPIRG/PRIVACY RIGHTS CLEARINGHOUSE REPORT (May 2000) available at <<http://www.privacyrights.org/ar/idtheft2000.htm>>; see also Jennifer 8. Lee, *Fighting Back When Someone Steals Your Name*, N.Y. Times, April 8, 2001; Brandon McKelvey, *Financial Institutions' Duty of Confidentiality to Keep Personal Information Secure from the Threat of Identity Theft*, 34 U.C. Davis L. Rev. 1077, 1086-87 (2001).

¹¹³ Christopher P. Couch, Commentary, *Forcing the Choice Between Commerce and Consumers: Application of the FCRA to Identity Theft*, 53 Ala. L. Rev. 583, 586 (2002).

¹¹⁴ Christopher P. Couch, Commentary, *Forcing the Choice Between Commerce and Consumers: Application of the FCRA to Identity Theft*, 53 Ala. L. Rev. 583, 586 (2002).

mortgages, security clearances, promotions and even gaining employment.”¹¹⁵ In certain cases, victims are even arrested based on warrants for the crimes of the identity thieves.¹¹⁶

SSNs are a key piece of information for identity theft. SSNs can unlock a host of other information held by the government and the private sector.¹¹⁷ The identity thief, as Lynn LoPucki observes, “ordinarily needs personal information about the victim, such as the victim’s name, social security number, birth date, or mother’s maiden name.”¹¹⁸ Thus, information enables the identity thief to apply for credit or open accounts in the victim’s name.¹¹⁹

SSNs are used as passwords to obtain access to a host of personal records from banks, investment companies, schools, hospitals, doctors, and so on.¹²⁰ The SSN is a powerful number, for with it a person can open and close accounts, change addresses, obtain loans, access personal information, make financial transactions, and more. Indeed, several courts have noted the myriad ways SSNs can be misused to gain access to an individual’s personal information or accounts. In *Greidinger v. Davis*,¹²¹ the court struck down a voter registration system requiring voters to provide SSNs (which were then made publicly available). This system forced people to risk public disclosure of their SSNs in order to vote, exposing them to undue risks by creating a burden on their right to vote.¹²² In *Beacon Journal v. City of Akron*,¹²³ a court held that a state freedom of information act did not extend to public employees’ SSNs:

Thanks to the abundance of data bases in the private sector that include the SSNs of persons listed in their files, an intruder using an SSN can quietly discover the intimate details of a victim’s personal life without the victim ever knowing of the intrusion.¹²⁴

According to the Court, the disclosure of SSNs would create a “high potential for fraud

¹¹⁵ Martha A. Sabol, *The Identity Theft and Assumption Deterrence Act of 1998: Do Individual Victims Finally Get Their Day in Court?*, 11 Loy. Consumer L. Rev. 165, 167 (1999); see also Maria Ramirez-Palafox, *Identity Theft on the Rise: Will the Real John Doe Please Step Forward?*, 29 McGeorge L. Rev. 483, 484 (1998); Brandon McKelvey, *Financial Institutions’ Duty of Confidentiality to Keep Personal Information Secure from the Threat of Identity Theft*, 34 U.C. Davis L. Rev. 1077, 1087 (2001).

¹¹⁶ Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 Tex. L. Rev. 89, 90 (2001); see also Privacy Rights Clearinghouse and Identity Theft Resource Center, *Criminal Identity Theft* (May 2002), <http://www.privacyrights.org/fs/fs11g-CrimIdTheft.htm>.

¹¹⁷ U.S. General Accounting Office, Report to the Honorable Sam Johnson House of Representatives, *Identity Theft: Greater Awareness and Use of Existing Data Are Needed* 7 (June 2002).

¹¹⁸ Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 Tex. L. Rev. 89, 94 (2001).

¹¹⁹ LoPucki, *Identity Theft*, *supra* note XX, at 104.

¹²⁰ For example, an identity thief purchased the SSNs of several top corporate executives from Internet database companies. The thief then used the SSNs to obtain more personal information about the victims. Benjamin Weiser, *Identity Theft, and These Were Big Identities*, N.Y. Times, May 29, 2002.

¹²¹ 988 F.2d 1344 (4th Cir. 1993).

¹²² *Id.* at 1354.

¹²³ 70 Ohio St.3d 605 (Ohio 1994).

¹²⁴ *Id.* at 611.

and victimization.”¹²⁵ Likewise, in *City of Kirkland v. Sheehan*,¹²⁶ a court restricted the disclosure of law enforcement personnel’s SSNs because:

Access to an individual’s SSN enables a new holder to obtain access to and to control, manipulate or alter other personal information. In effect, access to an SSN allows a person, agency or company to more efficiently and effectively search for and seize information and assets of another.¹²⁷

In short, The SSN functions as a magic key that can unlock vast stores of records as well as financial accounts. Thus, the SSN is the identity thief’s best tool.

Because the SSN can be used in such pernicious ways to harm an individual, it is incumbent upon any entity that maintains people’s SSNs to keep them secure.

2. Home Addresses

The facts in this case also indicate that the FTB disclosed Hyatt’s home address. Without knowing much on the issue, people might be tempted to glibly say: “What possible privacy interest could a person have in her home address? Isn’t this information typically contained in the phone book?” Such a view is clearly uninformed. There can be very important privacy interests in one’s home address. Of course, there are many people for whom the disclosure of their home address and phone number will not present any problems; but for others, it could make the difference between life or death.

The federal Driver’s Privacy Protection Act (DPPA) of 1994,¹²⁸ was passed in response to the state DMV’s disclosure of a home address. In 1989, a fan obsessed with actress Rebecca Shaeffer hired a private investigator to find out where she lived. The investigator obtained the address from California’s DMV. The fan then went to Shaeffer’s home and murdered her. This murder was a major impetus leading Congress to pass the DPPA, which prohibits states from disclosing personal information in DMV records without an individual’s consent.¹²⁹ The key point is that Congress recognized the importance of protecting the privacy of home addresses – so much so that it even passed a law about it.

Many people have a strong interest in keeping their addresses confidential. Celebrities want to protect themselves from being harassed by obsessed fans, stalkers, and paparazzi. Victims of stalkers and domestic abuse victims who have fled their abusive partners also need to safeguard the privacy of their home addresses. They often move to a new location to hide themselves (and their children) from an abusive partner. If their addresses are made public in public records, then they could be hunted down and perhaps

¹²⁵ *Id.* at 612.

¹²⁶ 29 Media L. Rep. 2367, 2001 WL 1751590 (Wash. Sup. Ct. 2001).

¹²⁷ *Id.* at *7.

¹²⁸ 18 U.S.C. §§ 2721-2725.

¹²⁹ See Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* 102 (1995) for background into the legislative history of this law.

killed. Witnesses in a criminal case may need to conceal where they live to prevent retaliation against themselves and their families.

Another group of people needing protection of their home addresses are abortion doctors. There are many people who want to kill or maim these doctors and their families. For example, an Internet site known as the "Nuremberg Files" posted information about doctors working in abortion clinics, including their home addresses. The site also listed doctors who had been killed or wounded. The doctors feared for the safety of themselves and their families, and they won a \$107 million lawsuit, which was upheld on appeal.¹³⁰ Clearly, the interests in safeguarding the privacy of residential addresses is not trivial.

Yet another group of people whose safety can be compromised by the disclosure of home addresses are police officers. In *Kallstrom v. City of Columbus*,¹³¹ Ohio was planning to disclose police officers' home addresses under its public records law to the defense counsel of members of the Short North Posse, a violent drug conspiracy ring. The 6th Circuit concluded that the release of this information would violate the officers' constitutional rights: "[T]he City's release of private information concerning the officers to defense counsel . . . rises to constitutional dimensions by threatening the personal security and bodily integrity of the officers and their family members." The court further concluded that "[w]hile there may be situations in which the release of this type of personal information might further the public's understanding of the workings of its law enforcement agencies, the facts presented here do not support such a conclusion."

The Third Circuit also embraces the constitutional right to information privacy (the constitutional right implicated in *Kallstrom*), and it has held that there are privacy interests in home addresses. In *Paul P. V. Verniero*,¹³² the Third Circuit observed that case law "reflect[s] the general understanding that home addresses are entitled to some privacy protection, whether or not so required by a statute." What is particularly interesting about *Paul P.* is that the home addresses entitled to privacy protection were those of convicted sex offenders. Indeed, under the constitutional right to information privacy, even convicted sex offenders have a privacy interest in their home addresses.

California also acknowledges privacy interests in addresses. In *Planned Parenthood Golden Gate v. Superior Court*,¹³³ the California Court of Appeals struck down a discovery order that a Planned Parenthood facility disclose the names, residential addresses, and phone numbers of staff and volunteers who had knowledge relevant to the litigation:

Perhaps more importantly in the present circumstances, the discovery order also impinges on non-parties' residential privacy interests by compelling disclosure of residential addresses and telephone numbers. Courts have frequently recognized

¹³⁰ See *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

¹³¹ 136 F.3d 1055 (6th Cir. 1998).

¹³² 170 F.3d 396 (3d Cir. 1999).

¹³³ 99 Cal. Rptr.2d 627 (Cal. Ct. App. 2000).

that individuals have a substantial interest in the privacy of their home. (Lorig v. Medical Board (2000) 78 Cal.App.4th 462, 468, 92 Cal.Rptr.2d 862; City of San Jose v. Superior Court (1999) 74 Cal.App.4th 1008, 1019-1020, 88 Cal.Rptr.2d 552 (City of San Jose), and cases discussed therein.) Indeed, as the United Supreme Court recently confirmed "[t]he recognizable privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when 'strolling through Central Park' than when 'in the confines of one's own home,' or when persons are 'powerless to avoid' it. [Citation.]" (Hill v. Colorado (2000) 530 U.S. 703, 716, 120 S.Ct. 2480, 2489, 147 L.Ed.2d 597.) This residential privacy interest is particularly potent in the context of a dispute relating to the ability of women to seek and obtain lawful services related to pregnancy. (See Planned Parenthood Assn. v. Operation Rescue (1996) 50 Cal.App.4th 290, 299, 57 Cal.Rptr.2d 736 ["if a home is involved the state interest in preserving residential privacy is exceptionally potent"].)

The court concluded that "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings" was outweighed by the privacy interests in the home addresses and phone numbers. The court mentioned the Nuremberg Files case and stated that "Planned Parenthood's staff and volunteers could well face unique and very real threats not just to their privacy, but to their safety and well-being if personal information about them is disclosed." The Court noted that the privacy interest could even outweigh a criminal defendant's Sixth Amendment right to confrontation:

Even in a criminal proceeding in which a defendant has a constitutional right of confrontation, a court has discretion to bar disclosure of the address and telephone number of an eyewitness to a crime in order to protect that person's safety, particularly when the facts raise no issue as to the witness's reputation in the community for veracity. (See *Montez v. Superior Court* (1992) 5 Cal.App.4th 763, 7 Cal.Rptr.2d 76; cf. also *People v. Ramirez* (1997) 55 Cal.App.4th 47, 56-57, 64 Cal.Rptr.2d 9.) In a later case discussing *Montez* and its holding, another Court of Appeal held that the determinative factor was whether there is evidence of "harassment, threats, or danger to the safety" of the potential witnesses to justify an order preventing disclosure of witness information to defense counsel. (See *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1329, 1336-1339, 64 Cal.Rptr.2d 714.).

Likewise, in *People v. Lewis*,¹³⁴ a criminal defendant wanted to obtain through discovery the home addresses of two police officers in order to "investigate their reputations within their home communities for possible impeachment purposes." The court refused to order the disclosure:

The constitutionally guaranteed right to confront witnesses is not without limitations. One such limitation is where the disclosure of certain information about the witness, such as his residence address, would endanger the witness or his

¹³⁴ 184 Cal.Rptr. 31 (Cal. Ct. App. 1982).

family. In California, the Legislature has seen fit to include peace officers within this protected group by enacting Penal Code section 1328.5, which provides:

"Whenever any peace officer is a witness before any court or magistrate in any criminal action or proceeding in connection with a matter regarding an event or transaction which he has perceived or investigated in the course of his duties, where his testimony would become a matter of public record, and where he is required to state the place of his residence, he need not state the place of his residence, but in lieu thereof, he may state his business address."

The United States Supreme Court has also recognized that there are substantial privacy interests in home addresses and phone numbers. In *Department of Defense v. FLRA*,¹³⁵ for example, the Court held that FOIA did not permit agencies to disclose their employees' home addresses to collective bargaining representatives. This disclosure would constitute a "clearly unwarranted invasion" of privacy.¹³⁶ Moreover, the Court noted that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."¹³⁷

In a report by the New Jersey Privacy Study Commission,¹³⁸ which was created out of the enactment of the New Jersey Open Public Records Act,¹³⁹ to address whether home addresses and other personal information should be disclosed in public records, the Commission recommended:

- Individuals should be permitted to provide an address of record for disclosure purposes, in addition to their home address when interacting with public agencies.
- The Governor or Legislature should establish objective guidelines defining when and from which government records home addresses should be redacted.
- Individuals should be permitted to opt out of disclosure of their home addresses.¹⁴⁰

Accordingly, there are many legitimate reasons why people may want to keep their home addresses private. In many circumstances, courts recognize privacy interests in home addresses, although there certainly are instances to the contrary. But the important principle is that it is clear that there are bona fide reasons for maintaining the privacy of home addresses and many authorities recognize such reasons and protect the privacy of

¹³⁵ 510 U.S. 487 (1994).

¹³⁶ *Id.* at 489.

¹³⁷ *Id.* at 500.

¹³⁸ See FINAL REPORT OF THE PRIVACY STUDY COMMISSION, Submitted to Governor Richard J. Codey and The New Jersey State Legislature (Dec. 2004). The report is available at http://nj.gov/privacy/prc_final_report_v21.pdf. I submitted testimony, making many of the points I have made herein, to the Commission. My testimony is referenced and discussed in the report.

¹³⁹ N.J.S.A. 47A:1A-1 *et seq.*

¹⁴⁰ FINAL REPORT OF THE PRIVACY STUDY COMMISSION at 2.

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home addresses. It is imperative that the government act with care when handling information about people's home addresses, as the reasons why people often desire their residential addresses to remain private are often ones relating to safety and security. These reasons are highly contextual and vary depending upon each individual's circumstances. An individual may have good reasons for keeping their home addresses private, and it is best to leave this determination to the individual, who is much more well-aware of the situation and circumstances giving rise to his or her desire to maintain the confidentiality of this information, than to leave it to the whim of government bureaucrats who lack the knowledge of each individual's particular situation.

In the case at bar, the FTB disclosed Hyatt's home address to third parties. Hyatt had taken significant steps to ensure that his home address would remain private. From the facts, it does not appear that the FTB considered or weighed Hyatt's reasons for keeping his home address private before disclosing it. Of course, it is possible that the FTB weighed Hyatt's reasons for keeping his home address confidential and rejected them after careful consideration. The documents I reviewed, however, seem to point to another possibility -- that the FTB simply disclosed the information without considering Hyatt's wishes at all and without considering any effects it might have on Hyatt's safety, welfare, or other interests.

Of course, government agencies cannot be required to give individualized hearings to each person before disclosing his or her home address. But this case differs in that the FTB had an ongoing relationship with Hyatt where his desires were clearly communicated to the FTB on numerous occasions. It strikes me as especially problematic that the FTB would disclose Hyatt's home address under these circumstances, without at least attempting to formulate a way to minimize the dissemination of Hyatt's data while obtaining the information it needed for its investigation.

3. Business and Financial Transactions

It is my opinion that in the course of investigating Hyatt, the FTB disclosed sensitive information relating to his business and financial transactions in breach of its promises to keep it confidential.

There is a longstanding and significant recognition of the importance of protecting the privacy of financial transactions. For example, in *Peterson v. Idaho First Nat'l Bank*,¹⁴¹ the court held that a bank could be sued for breach of confidentiality for disclosing customer information:

To give such information to third persons or to the public at the instance of the customer or depositor is certainly not beyond the scope of banking powers. It is a different matter, however, when such information is sought from the bank without the consent of the depositor or customer of the bank. Indeed, it is an implied term of the contract between the banker and his customer that the banker will not divulge to

¹⁴¹ 367 P.2d 284 (Idaho 1961).

third persons, without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account. . .

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

In *City of Carmel-by-the-Sea v. Young*,¹⁴² the California Supreme Court proclaimed the importance of financial privacy:

As plaintiff city points out, the right of privacy concerns one's feelings and one's own peace of mind (*Fairfield v. American Photocopy etc. Co.* (1955) 138 Cal.App.2d 82, 86, 291 P.2d 194), and certainly one's personal financial affairs are an essential element of such peace of mind. Moreover, personal financial affairs are clearly more than the 'adjunct to the domestic economy' referred to in *Edwards*, *Supra* (p. 1149 of 71 A.C., 80 Cal.Rptr. 633, 458 P.2d 713); instead they would appear to constitute the primary supporting pillar of that economy.¹⁴³

It is my opinion that the FTB interfered in Hyatt's business relationships by disclosing to his Japanese licensees portions of their confidential communications to Hyatt.

Intrusive Investigatory Activities

It is my opinion that during its investigation of Hyatt, the FTB engaged in activities that were highly intrusive into Hyatt's private life.

The documents also reveal that Cox snooped around Hyatt's Las Vegas home and talked to his neighbors.¹⁴⁴ But Hyatt's Las Vegas residency during the time he resided at his home was not in dispute. Instead, what was in dispute was whether Hyatt was a resident while he was living in a Las Vegas apartment before purchasing his home. Therefore, I am puzzled at why Cox would be snooping around the Las Vegas home and talking to Hyatt's neighbors there when there was no dispute over Hyatt's residency at the time he began residing in that home.

It is my opinion that several of Cox's actions are intrusive into Hyatt's private affairs. Cox wandered about Hyatt's property,¹⁴⁵ peered through his window,¹⁴⁶ looked into his trash,¹⁴⁷ and rooted through his mail.¹⁴⁸ These are the activities of a television gumshoe, but unlike the world of Hollywood where private investigators can snoop around and

¹⁴² 466 P.2d 225 (Cal. 1970).

¹⁴³ *Id.* at 231.

¹⁴⁴ FTB Letter to Mr. Harold Pryor, Mar. 10, 1995; FTB Letter to G.C. Eggers, Mar. 10, 1995.

¹⁴⁵ Deposition of Candace Vanessa Les, Jan. 12, 2000, Vol. II, p. 269.

¹⁴⁶ Deposition of Candace Vanessa Les, Jan. 12, 2000, Vol. II, p. 269.

¹⁴⁷ Deposition of Candace Vanessa Les, Jan. 12, 2000, Vol. II, p. 269.

¹⁴⁸ Deposition of Candace Vanessa Les, Jan. 12, 2000, Vol. II, p. 269.

trespass with virtual impunity, there are strong protections of people's private matters and property in the law.

The law recognizes and protects against intrusive activities that invade a person's privacy. For example, the intrusion upon seclusion creates a cause of action when one intrudes "upon the solitude or seclusion of another or his private affairs or concerns" if the intrusion is "highly offensive to a reasonable person."¹⁴⁹ For example, courts have found viable intrusion upon seclusion actions for peering into a person's home windows.¹⁵⁰

Disclosures of Tax Information in the Litigation Rosters and to Others

The FTB disseminated information about Hyatt's civil litigation against the FTB in its litigation roster. FTB litigation rosters are made available to anybody who want to access them on its Internet website, <http://www.ftb.ca.gov/law/documents.html>. In several litigation rosters, Hyatt's civil case against the FTB is listed. Included in the listing is the amount of tax Hyatt allegedly owes and his tax penalty.¹⁵¹

It is my opinion that the FTB acted irresponsibly in including the tax information about Hyatt in this listing. The litigation rosters do not appear to be a legally-mandated court docket. Instead, they constitute information the FTB has decided to release to the public regarding tax appeals. The Hyatt case listed in the litigation roster, however, is not his appeal over his tax assessment and audit. Instead, it is the civil case Hyatt initiated against the FTB for tortious conduct and other causes of action in connection with its audit. I cannot think of a rationale for why the amount of tax and the tax penalty are relevant to this case, which focuses on the conduct of the FTB, not on the merits of the tax issues in Hyatt's audit.

One possible explanation why the FTB discloses Hyatt's tax information in the roster is that it is part of a general pattern, as the tax information for other cases is listed in the roster. However, Hyatt's case is very different from the cases listed on the roster. Unlike the other cases in the roster, which had been finally decided by the FTB, Hyatt's case was still in the administrative process. Accordingly, the disclosures of tax information for Hyatt did not represent information in the stage it would be in *after* the administrative process had been completed. These disclosures of Hyatt's information were premature as well as misleading, since they appeared as the equivalent to the disclosures in other cases (which were at a very different stage in the process).

It is my opinion that in disclosing Hyatt's tax information on the litigation roster, the FTB irresponsibly violated Hyatt's privacy, breached confidentiality, and cast him in a false light.

¹⁴⁹ Restatement of Law: Torts (2d. 1977) § 652B.

¹⁵⁰ Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 132 S.E.2d 119 (Ga. App. 1963).

¹⁵¹ For example, see Franchise and Income Tax Monthly Refund Litigation Roster (May 30, 2005) at 5.

There is a long and powerful tradition in the United States of maintaining the privacy of tax records. In the early days of federal tax records, Congress sometimes flirted with making tax records public. In 1924, Congress required the public disclosure of taxpayer income. But it then repealed the requirement two years later. In 1934, Congress once again required this disclosure – by requiring taxpayers to submit a form called a “pink slip” which contained name, address, gross income, deductions, net income, credit against net income, tax payable. The law was repealed a year later.¹⁵² Ever since, the confidentiality of tax information has been well-established.

The implementation of taxation requires that the government gather extensive information about a person’s private financial affairs. As I discussed above, financial information has long been protected as private in our traditions and laws.

Moreover, to be carried out effectively, tax systems require an extensive amount of voluntary participation. They depend upon people’s willingness to disclose relevant facts and documents to government tax agencies. Accordingly, the maintenance of confidentiality takes on a role of significant importance, as it facilitates cooperation and disclosure on the part of the taxpayer. Thus, for example, the U.S. Internal Revenue Code provides that tax “[r]eturns and return information shall be confidential.”¹⁵³ There are some enumerated exceptions, but the general rule is one of confidentiality.¹⁵⁴ Beyond the law, there is a deeply-rooted sentiment that tax records shall remain confidential. This was demonstrated recently in late 2004 when a provision that authorized two members of the House to read people’s tax returns was errantly inserted into an appropriations bill passed by the U.S. House of Representatives. The provision resulted in a significant outcry, and it was quickly eliminated.¹⁵⁵

As discussed above, the California Information Practices Act mandates confidentiality, and numerous statements in FTB literature ensure confidentiality as well. I will not repeat my discussion of the establishment of the FTB’s duty of confidentiality, and will therefore incorporate it in this section by reference. I will, however, point out one source directly on point. The FTB’s publication, *California Taxpayer’s Bill of Rights: A Comprehensive Guide* provides:

*We keep confidential the information you provide us on your state income tax returns and the amounts you owe us. If, however, you are no longer married or living with your spouse and you previously filed a joint return with an amount due, we can tell you whether we have tried to collect from your spouse, the general nature of the collection activities and the amount we have collected.*¹⁵⁶

¹⁵² See ERIK LARSON, THE NAKED CONSUMER: HOW OUR PRIVATE LIVES BECOME PUBLIC COMMODITIES 10 (1992).

¹⁵³ 26 U.S.C.A. § 6103.

¹⁵⁴ 26 U.S.C.A. § 6103.

¹⁵⁵ Dan Morgan, *Aide Takes Blame for Tax Return Provision: Staffer Surprised by Privacy Uproar*, Wash. Post, Dec. 3, 2004, at A1.

¹⁵⁶ FTB, *California Taxpayer’s Bill of Rights: A Comprehensive Guide*, ¶22 (emphasis added).

This states quite explicitly that "the amounts you owe us" are kept confidential. Indeed, the California Taxpayers' Bill of Rights begins with a legislative finding that:

It is the intent of the Legislature to place guarantees in California law to ensure that the rights, privacy, and property of California taxpayers are adequately protected during the process of the assessment and collection of taxes.¹⁵⁷

The disclosure of Hyatt's tax information in the litigation roster was a violation of his privacy and a breach of confidentiality. Had Hyatt not brought the civil case against the FTB, his tax information would not have been disclosed in the litigation roster at this stage of his tax appeal process.

It is also my opinion that the disclosure of the information in this premature stage is misleading. Since the administrative process was not completed on Hyatt's case, the figures disclosed about Hyatt's tax liability did not reflect the final amounts that are reached at the conclusion of the process (as with the other cases listed in the roster). Accordingly, the figures are misleading, in that they are presented in an equivalent manner to figures at the end of the process, thus suggesting that they have the same status and stature, which they do not.

The law recognizes the injury caused by spreading falsehoods about individuals. The defamation torts – libel and slander – provide redress when one makes a "false and defamatory statement concerning another."¹⁵⁸ A "defamatory" statement "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."¹⁵⁹ False light, a more recent tort inspired by the Warren and Brandeis article, protects against giving "publicity to a matter concerning another that places the other before the public in a false light" that is "highly offensive to a reasonable person."¹⁶⁰ It safeguards the "interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is."¹⁶¹

Beyond the litigation rosters, the FTB disclosed information about Hyatt's tax liability to others. In particular, FTB auditor Sheila Cox spoke with Hyatt's ex-wife, Priscilla Maystead, and said, in Maystead's recollection, that "Hyatt had been convicted and had – or had to pay some taxes or something to that effect" and that Hyatt "was in very serious trouble."¹⁶² It is my opinion that such a disclosure is highly inappropriate and improper. Although made at a general level, it is revealing information about Hyatt's tax liability. It

¹⁵⁷ Cal. Rev. & Taxation Code § 21002.

¹⁵⁸ Restatement (Second) of Torts § 559.

¹⁵⁹ Restatement (Second) of Torts § 559.

¹⁶⁰ Restatement (Second) of Torts § 652E. Although there is a significant amount of overlap between the two torts, false light has a more expansive view of the harm caused by distortion. While defamation requires the proof of reputational harm, false light does not, and plaintiffs can be compensated solely for emotional distress. See Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 Case W. Res. L. Rev. 885 (1991).

¹⁶¹ Restatement (Second) of Torts § 652E, comment b.

¹⁶² Deposition of Priscilla Maystead, Dec. 15, 1999, Vol. I, pp. 182-183.

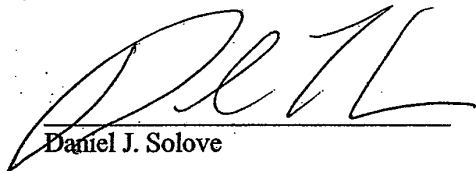
is also misleading in that Hyatt's case was not even close to being finished in the administrative process. Moreover, Cox's statements gave the impression that Hyatt was engaging in criminal activity even though no criminal charges had been brought – let alone a conviction been secured. Accordingly, this statement strikes me as both invasive of Hyatt's privacy as well as potentially defamatory.

Additionally, to gather information about Hyatt, the FTB disseminated dozens of letters along with an accompanying form with bold capital letters: "DEMAND TO FURNISH INFORMATION." These forms then stated: "The People of the State of California to: [recipient's address]," followed by "In the Matter of Gilbert P. Hyatt." The forms then contained the following statement:

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

In Hyatt's case, this form was sent out to numerous businesses, entities, and individuals whom Hyatt knew, did business with, or obtained services from.

The form is rather imposing. Many people, after receiving such a form, might conclude that they were being required to furnish information in connection with a criminal matter. It is my opinion that this form could have misled recipients into believing that Hyatt was under criminal investigation. The words "People of the State of California" are typically associated with criminal matters. The form never explicitly stated that this was for a civil matter rather than a criminal one. Indeed, most of the recipients were laypeople without legal training. Thus, it is my opinion that the form cast Hyatt in a false light by giving the impression that he was under criminal investigation.


Daniel J. Solove

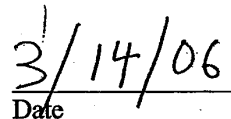

Date

Exhibit 3

AA003087

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FILED

JUN 3 3 59 PM '05

Shirley B. Thompson
CLERK

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 GILBERT P. HYATT,

17 Plaintiffs,

18 v.

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

21 Defendants.

Case No.: A382999

Dept. No.: X

**PLAINTIFF GILBERT P. HYATT'S
OPPOSITION TO THE FTB'S MOTION TO
DISMISS, OR IN THE ALTERNATIVE, FOR
PARTIAL SUMMARY JUDGMENT RE:
STATUTORY INFORMATION PRIVACY
CLAIMS**

Date of Hearing: June 20, 2005

Time of Hearing: 9:00 a.m.

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

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*Case is cited in the lengthy quotation on pages 14 through 19 taken from Hyatt's Opposition to the FTB's Summary Judgment Motion.

1
2 Plaintiff Gilbert P. Hyatt ("Hyatt") opposes the FTB's Motion to Dismiss, or In the
3 Alternative, for Partial Summary Judgment Re: Statutory Information Privacy Claims ("the
4 Motion").

5
6 **1. Issues presented:**

7 *Invasion of privacy claims.* Hyatt has pled and otherwise given notice of his Nevada
8 common law invasion of privacy claims, including, but not limited to, invasion of Hyatt's
9 informational privacy. The District Court and the Nevada Supreme Court have each considered
10 the scope and supporting evidence for these and Hyatt's other intentional tort claims, and
11 rejected the FTB's summary judgment motion as to each claim because Hyatt has set forth
12 evidence establishing a *prima facie* case for each claim and has established that disputed issues
13 of material fact exist as to each claim. Hyatt has *not* pled a California statutory "Informational
14 Practices Act" ("IPA") claim. Given the "law of the case" that establishes summary judgment is
15 *not* appropriate for any of Hyatt's intentional tort claims (including that summary judgment is
16 not appropriate for any of the various forms of invasion of privacy pled by Hyatt), and given
17 Hyatt's lack of pleading a California statutory IPA claim, does this motion raise any issue for
18 which judicial resolution is required?

19 *Scope of discovery.* The Discovery Commissioner has handled all discovery issues and
20 disputes in this case since its inception and has made dozens of significant rulings on discovery
21 over the last 6 plus years. The Discovery Commissioner has ruled that Hyatt may take discovery
22 of FTB policies and procedures, and/or regulations and laws applicable to the FTB, *that relate to*
23 *the Hyatt audits*. In other words, Hyatt may discover what the FTB did concerning the Hyatt
24 audits, and what the FTB should have done or should not have done regarding the Hyatt audits.
25 Failure by the FTB to follow its own policies and procedures, as well as State regulations and
26 laws, during the Hyatt audits may constitute, or at least may lead to the discovery of, admissible
27 evidence of the FTB's torts, including various forms of common-law invasions of privacy and
28 whether the FTB conducted a bad-faith fraudulent audit. Certain provisions of the IPA address

1 what the FTB is suppose to do or not do during audits such as the Hyatt audits. Hyatt has sought
2 to take discovery of these Hyatt-related provisions. Should any questions relative to Hyatt's
3 compliance with the Discovery Commissioner's rulings in this case on discovery directed at the
4 IPA be referred in the first instance to the Discovery Commissioner?

5
6 **2. Summary of argument.**

7 *Invasion of privacy claims.* The FTB fails to inform this Court that Hyatt has pled
8 and/or presented Nevada common law invasion of privacy claims, including the FTB's violation
9 of Hyatt's informational privacy. Hyatt's common law invasion of privacy claims have already
10 been subjected to a summary judgment motion by the FTB, and this Court's ruling that disputed
11 issues of material fact preclude issuance of summary judgment was affirmed by the Nevada
12 Supreme Court, which considered but rejected an FTB writ petition. None of Hyatt's invasion of
13 privacy claims are based on California's IPA. Hyatt makes no statutory IPA claim. As a result,
14 there is simply no legitimate issue for the Court to rule on relative to this motion.

15 To the extent the FTB is using the motion to attack earlier rulings of the Court, the "law
16 of the case" prevents the FTB from doing so. Hyatt's common law invasion of privacy claims,
17 including his informational privacy claims, must be tried given the past rulings of the Court.

18 *Scope of discovery.* Alternatively, the FTB's motion is a thinly disguised attempt to
19 obtain a discovery limitation *without first presenting the issue to the Discovery Commissioner.*
20 The FTB is simply wrong in suggesting that discovery relating to the FTB's violations of the IPA
21 are not within the bounds of discovery ordered by the Discovery Commissioner. Such violations
22 are evidence, or may lead to the discovery of admissible evidence, of the torts at issue here. To
23 the extent the FTB disagrees, the matter should be presented to the Discovery Commissioner.
24 The FTB's request relative to discovery should therefore be stricken so that there is no
25 misunderstanding as to whether the Court's ruling on this motion is intended to effect, change, or
26 any way limit the Discovery Commissioner's rulings.

1 **3. There is no statutory IPA claim at issue, and therefore nothing for the**
2 **Court to dismiss.**

3 The California statutory IPA claim that the FTB seeks to dismiss is not and never has
4 been asserted by Hyatt. Hyatt has not and does not assert a statutory claim under California's
5 IPA. Rather, Hyatt has asserted Nevada common law claims for invasion of privacy, one form
6 of which is the violation of "informational privacy" as discussed further below. Hyatt's Nevada
7 common law tort claims have already been reviewed and approved by this Court via multiple
8 motions filed by the FTB. This includes all forms of Hyatt's invasion of privacy claims. This is
9 also discussed in further detail below.¹

10 The FTB's extensive discussion in its moving papers relating to comity, sovereign
11 immunity, and so forth is therefore simply wasted. There is no such issue here as Hyatt is not
12 asserting a California statutory IPA claim. The FTB seeks dismissal of a non-existent claim.
13 Consequently, there is no issue ripe for judicial resolution.

14 The significance of the California IPA for this case is that FTB violations of the
15 California IPA have, and may again, lead to the discovery of admissible evidence of the common
16 law torts committed by the FTB. Any dispute over the scope of this discovery must be referred
17 to the Discovery Commissioner.

18
19 **4. Any dispute over the scope of Hyatt's discovery regarding the IPA must**
20 **be referred to the Discovery Commissioner.**

21 This motion, if nothing else, is a collateral attack on the Discovery Commissioner and the
22 rulings he has issued in this case. The FTB seeks a ruling by this motion to prohibit discovery
23 relating to FTB violations of the IPA. The appropriateness of discovery relating to the IPA has
24 been addressed by the Discovery Commissioner, and any violations, further limitations, or
25 expansions of those rulings must first be presented to the Discovery Commissioner pursuant to

26 ¹ On page 11 of its motion, the FTB accurately quotes, but inaccurately argues, a statement made by Hyatt's counsel
27 during the hearing on summary judgment in this matter. As the FTB quotes, Hyatt's counsel said, "we are suing for
28 the same sort of thing in Nevada [referring to Hyatt's Nevada common law claim for invasion of privacy based on
 "informational privacy."] Hyatt's invasion of privacy/informational privacy claim, and the manner in which it has
 been reviewed and approved for trial by this Court and the Nevada Supreme Court is discussed in Section VI, *infra*.

1 Local Rule 2.34(a) ("Unless otherwise ordered, all discovery disputes. . . must first be heard by
2 the Discovery Commissioner.").

3 From the outset of this case, the Discovery Commissioner has taken a very active role in
4 guiding, shaping, and — where appropriate — limiting the discovery process. To date, at least
5 18 hearings have been conducted relating to approximately 24 discovery motions filed by the
6 parties. Contrary to the out-of-context reference the FTB makes to a statement made by the
7 Discovery Commissioner during an early hearing, the Discovery Commissioner has made
8 abundantly clear that the FTB's violations of its own policies and procedures and/or regulations
9 and laws that relate to the Hyatt audits are appropriate subjects for discovery. The most salient
10 ruling on this point is set forth in a January 8, 2004 Order, which approved the Discovery
11 Commissioner's Report and Recommendation. It specifically provided in Paragraph 2 of the
12 Findings:

13 The scope of discovery will be the FTB process dealing with Hyatt
14 during the audit and subsequent activity and how the FTB acted in regard
15 to Hyatt. *It will be about as broad as it can be* in regards to the FTB's
16 actions relating to Hyatt. *Hyatt shall be permitted to conduct discovery*
17 *directed at gaining an understanding about the FTB's conduct or process*
18 *as applied to Hyatt.*

19 ...

20 The conduct of any of the people who worked on the Hyatt audit
21 can be examined in light of *what FTB's manual at that time said they*
22 *should do and what they did.* If there is such a manual that said what they
23 should do in a particular instance, that's it. For example, if the manual
24 instructed an auditor on how to do something, and the auditor who worked
25 on Hyatt's audit chose to ignore those instructions, then Hyatt has a right
26 to know what the manual said and what the auditor did.²

27 The Discovery Commissioner previously ruled that Hyatt may discover the full scope of
28 the FTB's fraudulent conduct during the audits:

29 Well, I am kind of confused on why the file shouldn't be an open book,
30 Mr. Leatherwood. *If there is nothing to conceal why shouldn't the process*
31 *be open to the taxpayer when they are claiming that there is fraud.* You
32 are claiming that he is defrauding you. He is claiming that your conduct is
33 fraudulent. I say yours, the FTB's conduct is fraudulent. I can't say I
34 completely agree with you that all of the taxpayer's machinations here,

35 ² See January 8, 2004 Order Approving Discovery Commissioner's Report and Recommendation, attached to the
36 Appendix of Evidence as Exhibit 1 (emphasis added).

1 however they are done, should be completely explored, and you are
2 certainly entitled to do that.

3 I am concerned, and I think there is concern countrywide about the tax
4 collecting services using methods that are not appropriate and, you know,
5 we all are completely aware of that in regard to the IRS and methods like
6 that, and *I think that these processes should be explored in the proper*
7 *context.*

8 You indicate that Mr. Hyatt has all of his rights and remedies in California
9 to challenge the tax. I don't know if those rights and remedies include
10 exploration of the process and availability to all the information that he
11 could get by way of the claims that the Court has left intact here. *If there*
12 *is fraud to be discovered, I think it should be discovered on one side or the*
13 *other.*³

14 Hyatt's fraud claim as pled and presented in opposing the FTB's unsuccessful motions
15 described above seeks recovery for the FTB conducting a fraudulent, bad faith audit. In short,
16 the FTB represented it would conduct a fair and unbiased audit and maintain the confidentiality
17 of the information provided by Hyatt as part of the audits. The FTB provided neither.

18 In sum, the FTB's violations of certain provisions of the IPA demonstrate, or at least
19 arguably evidence, bad faith conduct by the FTB directed at Hyatt. As Hyatt argued in opposing
20 the FTB's summary judgment motion, at the outset of the audit the FTB sent Hyatt the FTB's
21 official privacy notice⁴ that stated that the FTB complies with the Federal Privacy Act of 1974
22 and the IPA (*i.e.*, California Information Practices Act of 1977, California Civil Code §§ 1798 et
23 seq.) Both statutes assure individuals that government agencies compiling personal information
24 will do so under strict limits, that disclosure will be strictly limited and accounted for, that
25 individuals will have access to their entire file upon request, and that individuals can request
26 corrections to their records. This "informational privacy" that was promised to Hyatt by the FTB
27 at the outset of his audits provides that an individual under audit has a reasonable expectation of
28 privacy upon which the individual, in this case Hyatt, relies in turning over extensive and
29 confidential information.⁵

³ Transcript of November 9, 1999 hearing before Discovery Commissioner, at 55-56, excerpts attached to the Appendix as Exhibit 2 (emphasis added).

⁴ FTB Privacy Notice, attached to the Appendix of Evidence as Exhibit 3.

⁵ See *infra*, at 16-19, full discussion regarding Hyatt's "informational privacy" claims.

1 The FTB itself therefore injected the informational privacy issue into this case, including
2 its compliance, or lack of compliance, with the IPA. This relates directly to Hyatt's invasion of
3 privacy claims as he was promised confidentiality, and the FTB was obliged to provide the
4 promised confidentiality. Hyatt has therefore rightly pursued discovery of FTB violations of
5 Hyatt's informational privacy rights, including violations of the IPA, as part of Hyatt's fraud
6 claim and common law invasion of privacy claims. The Discovery Commissioner has allowed
7 appropriate discovery, particularly on the fraud claim as quoted above. Hyatt has strictly
8 complied with all rulings of the Discovery Commissioner in pursuing limited discovery relating
9 to the FTB's violations of the IPA, and for that matter all discovery that he has pursued. To the
10 extent the FTB asserts Hyatt is conducting discovery beyond the bounds of the Discovery
11 Commissioner's rulings (as seems to be the FTB's real complaint in this motion), the matter
12 should be directed to the Discovery Commissioner.

13 Any and all requests in the FTB's motion relating to discovery, such as limiting Hyatt's
14 discovery in any way, should be stricken as improperly requested and in direct violation of
15 Local Rules requiring all discovery disputes be presented first to the Discovery Commissioner.
16 Hyatt therefore, and hereby, formally requests that the Court strike the following portions of the
17 FTB's motion:

- 18 • page 5, lines 17-19;
- 19 • page 11, line 20 - page 12, line 25.

20
21 **5. Hyatt's intentional tort claims, including common law invasion of**
22 **privacy based on informational privacy rights, are intact and have**
withstood a summary judgment challenge.

23 Contrary to the FTB's implicit suggestion, almost all of Hyatt's case as pled remains
24 intact. The FTB's motions for judgment on the pleadings and summary judgment were
25 overwhelmingly rejected. The Nevada Supreme Court review also left intact almost the entirety
26 of Hyatt's case, dismissing only a single negligence claim and remanding for trial all intentional
27 tort claims.

28 *Motion for judgment on the pleadings.* The FTB first sought to dismiss Hyatt's claims

1 through a motion challenging the sufficiency of Hyatt's First Amended Complaint. For Hyatt's
2 tort claims, the FTB argued Hyatt failed to even plead facts sufficient to state claims for the
3 asserted torts.⁶ Hyatt set forth in detail the factual allegation supporting his Nevada common law
4 tort claims for the various forms of invasion of privacy — including violation of his
5 informational privacy.⁷ That Hyatt was seeking to recover under a Nevada common law claim
6 for FTB disclosures of his private and confidential information gathered and maintained by the
7 FTB was obvious on the face of Hyatt's opposition.⁸ Judge Nancy Saitta unequivocally rejected
8 the FTB's request to dismiss this claim and all of Hyatt's other tort claims.⁹

9 ***Motion for Summary Judgment.*** The FTB then sought a Motion for Summary Judgment
10 making essentially two separate arguments: (i) Hyatt's claims were barred by the sovereign
11 immunity that the FTB was accorded in California under California law and (ii) Hyatt did not
12 have sufficient evidence to establish the necessary elements of his Nevada common law tort
13 claims. The FTB directly argued, unsuccessfully, in its motion for summary judgment that Hyatt
14 did not have evidence of genuine issues of material facts. The FTB argued this point claim by
15 claim for over 10 pages.¹⁰

16 In other words, and despite statements to the contrary in the FTB's motion, the FTB did
17 unequivocally challenge, unsuccessfully, at summary judgment the sufficiency of Hyatt's
18 evidence for each claim via summary judgment. Hyatt, in turn, provided detailed and supporting
19 evidence for each element of each Nevada common law tort claim — including extensive
20 discussion and presentation of evidence concerning his claim for breach of informational privacy
21

22 ⁶ FTB Motion for Judgment on the Pleadings, at 15-30, attached to accompanying Appendix of Evidence as Exhibit
23 14.

24 ⁷ Hyatt Opposition to Motion for Judgment on the Pleadings, at 24-43, attached to accompanying Appendix of
25 Evidence as Exhibit 4.

26 ⁸ *Id.*, at 25-30.

27 ⁹ Order re Motion for Judgment on the Pleadings, at 2, attached to accompanying Appendix of Evidence as Exhibit
28 5; Transcript from April 7, 1999 hearing on Motion for Judgment on the Pleadings, at 56, attached to accompanying
Appendix of Evidence as Exhibit 6.

¹⁰ Reply of FTB in Support of Motion for Summary Judgment, at 7-18, attached to accompanying Appendix of
Evidence as Exhibit 7.

1 under his multi-prong invasion of privacy claim. After presenting extensive discussion of the
2 development of the law concerning informational privacy claims as a new and accepted form of
3 invasion of privacy,¹¹ Hyatt demonstrated substantial supporting evidence for each element of
4 each claim.¹² Regarding informational privacy, Hyatt argued in opposing summary judgment:¹³

5 As the cases cited above demonstrate, courts recognize an
6 individual's rights to privacy in personal information gathered by
7 government agencies and then placed in government records. The right of
8 informational privacy is a significant part of Hyatt's invasion of privacy
9 claim.

10 This right of privacy was violated when the FTB contacted
11 neighbors, businesses, government officials and others within Nevada,
12 Japan and California, either in person or by mail, gave them secret
13 information such as Hyatt's secret Las Vegas address and social security
14 number, and led them to believe that Hyatt was under investigation in
15 California, thereby casting doubt upon Hyatt's honesty, integrity and moral
16 character.¹⁴ This conduct by the FTB did in fact harass, annoy, vex and
17 embarrass Hyatt and siphon off his time, energy and money from his
18 productive work.¹⁵ Even as the FTB and its agents were continuing to
19 provide assurances of confidentiality to Hyatt, Sheila Cox and the FTB
20 were in the process of sending bogus "DEMAND[S] TO FURNISH
21 INFORMATION" to Las Vegas utility companies including Southwest
22 Gas Corp., Silver State Disposal Service and Las Vegas Valley Water
23 District, providing each company with Hyatt's secret personal home
24 address, disregarding Hyatt, his privacy rights and the FTB's assurances of
25 confidentiality.¹⁶ Cox also sent them to four newspapers.¹⁷

26 The District Court agreed with Hyatt's position finding material issues of fact for each of
27 Hyatt's Nevada common law tort claims, and denying summary judgment on any of Hyatt's tort
28 claims.¹⁸ The District Court also denied the FTB's alternative theory that the FTB's sovereign

20 ¹¹ Opposition to FTB Motion for Summary Judgment, at 21-28, attached to accompanying Appendix of Evidence
21 as Exhibit 17.

22 ¹² *Id.* at 27-48.

23 ¹³ *Id.* at 49-64.

24 ¹⁴ Original footnote: "See, e.g., Hyatt Affid., ¶¶ 129-138, 196, 200."

25 ¹⁵ Original footnote: "See, e.g., Hyatt Affid., ¶ 138."

26 ¹⁶ Original footnote: "H 01639, 01641, 01643 . . ."

27 ¹⁷ Original footnote: "H 01637, 01853, 01855, 01857, 01899 . . ."

28 ¹⁸ Order re Motion for Summary Judgment, at 2, attached to accompanying Appendix of Evidence as Exhibit 15;
Transcript from April 21, 2000 hearing on Motion for Summary Judgment, at 47:6-8; 49:20-23, attached to
accompanying Appendix of Evidence as Exhibit 16.

1 immunity under California law prohibited this suit against the FTB in Nevada.¹⁹

2 ***FTB writ petition re summary judgment ruling.*** The FTB then eventually filed a writ
3 petition with the Nevada Supreme Court seeking review of the District Court's ruling on
4 summary judgment relating to the denial of the recognition of the FTB's asserted right to
5 sovereign immunity under California law. The FTB argued that it should be granted complete
6 sovereign immunity under principles of comity and other constitutionally related arguments.²⁰
7 The FTB specifically did *not* seek writ review of the District Court's ruling that material issues
8 of fact existed that precluded summary judgment for any of Hyatt's common law tort claims.²¹
9 Hyatt's response to the FTB's writ petition therefore only addressed the sovereign immunity
10 argument, without addressing the evidence presented at summary judgment that demonstrated
11 and supported the District Court's ruling that material issues of fact existed that precluded
12 summary judgment.²²

13 ***The Nevada Supreme Court's first ruling.*** After extensive briefing and oral argument
14 relative to the sovereign immunity argument presented by the FTB, the Nevada Supreme Court
15 issued a ruling in which it admitted that it was going beyond the issues presented in the writ
16 petition, had examined the record presented, determined Hyatt had not presented evidence
17 sufficient to establish his tort claims, and therefore saw no issues of material fact thereby
18 requiring the District Court to grant the FTB's request for summary judgment on that ground.²³
19 In this initial ruling, the Nevada Supreme Court did not address the sovereign immunity issue
20

21

¹⁹ *Id.* at 2.

22 ²⁰ FTB' Petition for a Writ of Mandamus ordering Dismissal, or Prohibition and Mandamus Limiting the Scope of
23 This Case, at 22 (describing issues presented) attached the accompanying Appendix of Evidence as Exhibit 8. This
24 was the FTB's second writ petition, as the Nevada Supreme Court had already agreed to consider the FTB's first
writ petition relating to certain discovery rulings of the District Court.

25 ²¹ *Id.* at 22.

26 ²² Hyatt's Answer to FTB's Petition for a Writ of Mandamus ordering Dismissal, or Prohibition and Mandamus
27 Limiting the Scope of This Case at 1-2 (describing issues presented) attached to the accompanying Appendix of
Evidence as Exhibit 9.

28 ²³ Nevada Supreme Court ruling dated June 13, 2001, attached to the accompanying Appendix of Evidence as
Exhibit 10.

1 presented in the FTB's writ petition and briefs of the parties.²⁴

2 *Hyatt's petition for rehearing.* Based on the Nevada Supreme Court's acknowledged
3 reaching beyond the issues presented and briefed by the parties, Hyatt filed a petition for
4 rehearing arguing that he had not presented the substantial evidentiary support that established
5 his common law tort claims because that issue was not before the Court in the FTB's writ
6 petition. Hyatt initially presented a 10 page petition for review.²⁵ But based on the Nevada
7 Supreme Court's order agreeing to consider the petition, Hyatt was given leave to submit an
8 additional 15 pages of argument supporting his petition.²⁶ In these two briefs, Hyatt presented
9 and addressed the significant factual record supporting Hyatt's common law tort claims that had
10 been presented in the District Court in opposing the FTB's motion for summary judgment. In
11 particular, Hyatt addressed the FTB's invasion of privacy claims, including the informational
12 privacy prong of this tort. He demonstrated that there was evidentiary support for each element
13 of each tort thereby prohibiting the granting of summary judgment.

14 The FTB opposed Hyatt's petition for rehearing arguing that Hyatt had not established
15 the elements for each of his tort claims. Indeed at the outset of its answer to Hyatt's petition for
16 rehearing, the FTB asserts:

17 [Hyatt] had not met his threshold burden under Rule 56 to present
18 evidence to support any of his tort claims.²⁷

19 The FTB then proceeds throughout its 25 page answer to argue that Hyatt did not present
20 sufficient evidence of his various tort claims. Indeed, the section headings from the FTB's
21 answer are instructive and demonstrate precisely what the FTB unsuccessfully argued to the
22 Nevada Supreme Court. The FTB argued:

23
24 ²⁴ *Id.*

25 ²⁵ Hyatt's 10 page petition for rehearing filed with the Nevada Supreme Court is attached to the accompanying
Appendix of Evidence as Exhibit 11.

26 ²⁶ Hyatt's 15 page supplemental argument to his petition for rehearing filed with the Nevada Supreme Court is
27 attached to the accompanying Appendix of Evidence as Exhibit 12.

28 ²⁷ FTB's Answer to Hyatt Petition for Rehearing and Supplemental Petition for Rehearing, at 4, attached to the
accompanying Appendix of Evidence as Exhibit 13.

1 HYATT HAS FAILED TO PRESENT EVIDENCE TO SUPPORT HIS
2 INVASION OF PRIVACY CLAIMS;²⁸

3 HYATT HAS FAILED TO PRODUCE EVIDENCE TO SUPPORT HIS
4 ABUSE OF PROCESS CLAIM.²⁹

5 Further, the FTB spent 10 of its allotted 25 pages arguing Hyatt had not submitted
6 sufficient evidence relating to the nature and scope of the FTB's investigation and audits of
7 Hyatt.³⁰ The FTB cannot credibly dispute that the primary issue argued by the parties, and
8 decided by the Nevada Supreme Court, was not whether Hyatt had submitted sufficient
9 evidentiary support for his claims to withstand Rule 56 review. Any argument to the contrary by
10 the FTB is belied by its answer opposing Hyatt's petition for rehearing.

11 Without question therefore, and contrary to FTB's representations in its moving papers,
12 the Nevada Supreme Court was directly presented with and determined whether Hyatt presented
13 sufficient evidentiary support for his tort claims so that material issues of fact existed preventing
14 summary judgment. That was precisely the issue the Court decided in ruling on Hyatt's petition
15 for rehearing.

16 *The Nevada Supreme Court's second ruling.* The FTB submitted as Exhibit 1 to its
17 moving papers the Nevada Supreme Court's decision dated April 4, 2002 granting Hyatt's
18 petition for rehearing, vacating its prior ruling, and remanding Hyatt's intentional tort claims to
19 the District Court. At the outset of its decision the Nevada Supreme Court states its earlier ruling
20 had "granted the [FTB's] petition . . . on the basis that Hyatt did not produce sufficient facts to
21 establish the existence of a genuine dispute justifying denial of the summary judgment
22 motion."³¹ The Court then held: "Having considered the parties documents and the entire record
23 before us, we grant Hyatt's petition for rehearing, vacate our June 13, 2001 order and issue this
24

25 ²⁸ *Id.* at 22.

26 ²⁹ *Id.* at 23.

27 ³⁰ *Id.* at 11-21.

28 ³¹ See April 4, 2002 Order, at 2, attached as Exhibit 1 to FTB moving papers.

1 order in its place.”³² The Court also denied the FTB’s alternative request in its original petition
2 to “limit the scope of the trial.”³³

3 In short, the Nevada Supreme Court held, upon actual review of the evidentiary record,
4 that Hyatt had presented sufficient facts supporting his tort claims thereby creating “the existence
5 of a genuine dispute justifying denial of the summary judgment motion.”³⁴ The Court then
6 addressed the sovereign immunity issue raised in the FTB’s initial writ petition, ruling that for
7 Hyatt’s intentional tort claims, including all prongs of his asserted common law invasion of
8 privacy claim, Nevada courts should not and would not recognize as a matter of comity that the
9 FTB was immune from the alleged intentional torts because a Nevada government agency would
10 not be immune under Nevada law. Conversely, the Court held that Hyatt’s sole negligence claim
11 should be dismissed as a matter of comity because a Nevada government agency would have
12 immunity for the alleged negligence under Nevada law.

13 *United States Supreme Court review.* The FTB attached as Exhibit 5 to its moving
14 papers the decision of the United States Supreme Court in this case. The FTB’s moving papers
15 make reference that the United States Supreme Court did not address whether material facts were
16 in dispute. However, this issue was not before the U. S. Supreme Court, and it never would
17 address that kind of an issue. Consistent with its limitation to review matters only with
18 constitutional significance, the Court did not review the Nevada Supreme Court’s decision
19 relative to finding disputed material facts. Rather, the United States Supreme Court’s review,
20 consistent with the FTB’s certiorari petition, was limited to the sovereign immunity issue and the
21 Nevada Supreme Court’s refusal to grant comity to California in regard to Hyatt’s intentional tort
22 claim. On this issue, the United States Supreme Court unanimously upheld the Nevada Supreme
23 Court.

24
25
26 _____
³² *Id.*

27 ³³ *Id.*

28 ³⁴ *Id.*

1
2 **6. Hyatt has presented a Nevada common law informational privacy claim**
3 **as part of his broader invasion of privacy claims, but he had not and**
4 **does not assert a statutory IPA claim.**

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

15 To be clear, and as the FTB knows and should have referenced in its motion, Hyatt has
16 presented and is pursuing a common law claim for informational privacy as part of his invasion
17 of privacy tort. Hyatt has extensively briefed this issue in the proceedings described above
18 demonstrating the development of the common law for informational privacy as a now accepted
19 part of the invasion of privacy tort. In opposing the FTB's summary judgment motion, Hyatt
20 explained as quoted extensively below (including headings and footnotes³⁵) his informational
21 invasion of privacy claim:

22 **"1. The right to privacy — in particular "informational privacy"**
23 **— protects an individual such as Hyatt from the type of abuse**
24 **committed by the FTB**

25 The U.S. Constitution (specifically the Fourth Amendment) and
26 the constitutions of many states — including Nevada and California —
27 forbid unreasonable searches and seizures. Springing forth from this

28 ³⁵ See Hyatt's Opposition to the FTB's Motion for Summary Judgment, at 27-48, attached to the accompanying
Appendix of Evidence as Exhibit 17. The footnotes in the quoted language below from the Opposition reflect
different footnote numbers from the actual Opposition as quoted language has been inserted directly into this
document such that the footnote numbering is consecutive based on this document.

1 Constitutional right is the right of privacy.³⁶ Nevada, California, and the
2 U.S. Supreme Court enshrine privacy as a fundamental right.³⁷

3 Nevada has "long recognized the existence of the right to
4 privacy."³⁸ Nevada law further requires that, in determining whether a
5 particular action is "highly offensive," courts should and do consider the
6 degree of intrusion, the intruder's objectives, and *the expectations of those*
7 *whose privacy is invaded.*³⁹

8 The Nevada Supreme Court articulated one of the reasons that the
9 FTB's massive intrusion into Hyatt's life infringed on his privacy: "The
10 principle is well established that searches conducted outside the judicial
11 process, without prior approval by judge or magistrate, are *per se*
12 unreasonable under the Fourth Amendment — subject only to a few
13 specifically established and well-delineated exceptions."⁴⁰

14 There is a two part test for assessing whether governmental action
15 violates the Fourth Amendment. The first question is whether a person
16 has exhibited an actual or *subjective* expectation of privacy. Hyatt easily
17 establishes this subjective prong of the test, for he is very private.⁴¹ Even
18 though Hyatt received considerable publicity after his micro-computer
19 patent issued in 1990 and during his patent interference dispute with Texas
20 Instruments, the publicity was primarily business-related, not personal.⁴²

21 The second question is whether that expectation of privacy is one
22 that *society* deems to be reasonable. Here the FTB announced in its first
23 contact letter with Hyatt that he could expect confidential treatment of all
24 of his personal information.⁴³ Subsequently, FTB auditors promised Hyatt

25 ³⁶ *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The Fourth
26 Amendment, including the right to privacy, applies in a civil context as well as criminal. *Soldal v. Cook County*,
27 506 U.S. 56, 87, n. 11, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) (holding "the protection against unreasonable
28 searches and seizures fully applies in the civil context").

³⁷ See Request for Judicial Notice, at 5, submitted with opposition to motion for judgment on the pleadings,
[attached to Appendix submitted with the original Opposition to Motion for Summary Judgment].

³⁸ *People for Ethical Treatment of Animals (PETA) v. Bobby Berosini, Ltd.*, 111 Nev. 615, 895 P.2d 1269
(1995), *modified on other grounds*, 113 Nev. 632, 940 P.2d 127 (1997) (crediting Justice Louis Brandeis and
Professor William Prosser for the invention of the tort of privacy, noting that the *Restatement* language, drafted by
Dean Prosser, has been "adopted, often verbatim, by the vast majority of American jurisdictions.").

³⁹ *PETA*, 111 Nev. at 634 (emphasis added).

⁴⁰ *Alward v. State*, 112 Nev. 141, 151, 912 P.2d 243, 250 (1996) (citing to U.S. Supreme Court precedent and
earlier Nevada Supreme Court precedent).

⁴¹ See, e.g., Hyatt Affid., ¶ 6-8, 127-138.

⁴² *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

⁴³ June 17, 1993 letter from Marc Shayer, H 01213, [attached to Appendix submitted with the original
Opposition to Motion for Summary Judgment].

1 confidential treatment both orally and in writing.⁴⁴ In addition, the FTB
2 publishes statements on its web page and in booklets saying that taxpayers
3 have a right to confidential treatment.⁴⁵

4 Ironically, the FTB's own internal policies, notices, regulations,
5 handbooks, guidelines — which were ignored by the FTB in this case —
6 also promise the right to privacy.⁴⁶

7 Notwithstanding Hyatt's high expectation of privacy, the FTB
8 made mandatory "Demands for Information" about him to individuals,
9 government agencies, and businesses for which no judicial permission was
10 sought or received and for which no notice was given to Hyatt.⁴⁷

11 **(a) Actions for invasion of privacy against a taxing body are**
12 **increasingly frequent.**

13 Of importance to Hyatt's action, "[d]uring the past five years about
14 150 lawsuits have been filed against the IRS claiming wrongful disclosure
15 of confidential information."⁴⁸ In 1997, a Colorado judge awarded
16 \$250,000 in punitive damages against the IRS for being "grossly
17 negligent" and "reckless" in placing a woman in a false light by claiming
18 she owed \$380,000 more than she in fact owed.⁴⁹

19 Another recent large verdict against tax authorities for invasion of
20 privacy rights and abuse of authority is *Jones v. United States*.⁵⁰ The
21 district court awarded two taxpayers over \$5,700,000, including over
22 \$325,000 in emotional distress damages for the destruction of their
23 business caused by an IRS agent leaking confidential information which
24 damaged their reputation in the oil business. There are striking parallels
25 between this case and *Jones*. In each case, morals, character, and integrity
26 are extremely important for the business involved.⁵¹

27 The abusive tactics of taxing agencies are increasingly the subject
28 of not only judicial action, but also Congressional investigation.⁵²

44 Cowan Affid., ¶ 6-29.

45 Bourke Affid., ¶ 25.

46 Bourke Affid., ¶ 25.

47 See, e.g., Hyatt Affid., ¶ 49-51, 143-147

48 Louis R. Mizell, Jr., *Invasion of Privacy*, of 127, (Berkeley Books 1998), see excerpts attached [to
Appendix submitted with the original Opposition to Motion for Summary Judgment].

49 *Id.* at 127-128.

50 9 F. Supp. 2d 1119 (D. Neb. 1998).

51 *Id.* at 1134.

52 U.S. Congressional Record excerpt, [attached to Appendix submitted with the original Opposition to
Motion for Summary Judgment].

1
2 (b) Courts are particularly vigilant in enforcing informational
3 privacy rights related to social security numbers, addresses, and other
4 private information.

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

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

10 The U. S. Supreme Court has issued three opinions bearing on the
11 issue. *United States Department of Defense v. Federal Labor Relations*
12 *Authority (FLRA)*, held that disclosure of employees' home addresses to
13 their union was a "clearly unwarranted invasion of privacy."⁵³ That case
14 was largely based on *United States Dept. of Justice v. Reporters*
15 *Committee for Freedom of Press*,⁵⁴ which recognized that "both the
16 common law and the literal understandings of privacy encompass the
17 individual's control of information concerning his or her person." Finally,
18 *United States Department of State v. Ray*,⁵⁵ held that the disclosure of
19 names and addresses would be a clearly unwarranted invasion of privacy
20 because *confidentiality had been promised* and disclosure of the
21 information would be "a special affront to his or her privacy."

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

24 *State ex rel. Beacon Journal Publishing Co. v. City of Akron*,⁵⁶
25 found that the disclosure of social security numbers "would violate the
26 federal constitutional right of privacy" and held that because the Privacy
27 Act of 1974 regulates the use of Social Security numbers, individuals
28 "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,⁵⁷ 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.*

23 ⁵³ 510 U.S. 487, 489, 502, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994) (emphasis added).

24 ⁵⁴ 489 U.S. 749, 763, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989).

25 ⁵⁵ 502 U.S. 164, 177, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991).

26 ⁵⁶ 70 Ohio St. 3d 605, 607, 640 N.E.2d 164, 166 (Ohio 1994).

27 ⁵⁷ 125 Wash. 2d 243, 884 P.2d 592 (Wash. 1994).

1 Woessner,⁵⁸ the Court similarly held that "[w]e agree that release of
2 employees' identification number would be highly offensive."⁵⁹

3 Other cases concluded that certain citizens — such as Gil Hyatt —
4 have a particular need or desire to keep their address confidential.
5 *National Association of Retired Federal Employees v. Horner*,⁶⁰ held that
6 "[i]n our society, individuals generally have a large measure of control
7 over the disclosure of their own identities and whereabouts. That people
8 expect to be able to exercise that control is evidenced by . . . unlisted
9 telephone numbers by which subscribers may avoid publication of an
10 address in public directory, and postal boxes, which permit the receipt of
11 mail without disclosing the location of one's residence." Moreover, the
12 court could have had Gil Hyatt in mind when it noted that it is public
13 knowledge that when one gains wealth, "that individual may become a
14 target for those who would like to secure a share of that sum by means
15 scrupulous or otherwise."⁶¹

16 *American Federation of Government Employees, AFL-CIO, Local*
17 *1923 v. United States*,⁶² expresses privacy concerns similar to those
18 alleged by Hyatt in this case. The court held that union members had a
19 privacy right not to disclose their home addresses to their own union
20 because disclosure could subject the employees to an unchecked barrage

21 ⁵⁸ 90 Wash. App. 205, 951 P.2d 357 (Wash. App. 1998), opinion amended on remand on other grounds, 972
22 P.2d 932 (Wash. App. 1999).

23 ⁵⁹ See also *Sheet Metal Workers International Association, Local Union No. 19 v. United States Department*
24 *of Veterans Affairs*, 135 F. 3d 891 (3d Cir. 1998) (holding that disclosures of names, social security numbers and
25 addresses of employees would constitute an unwarranted invasion of personal privacy); *Greidinger v. Davis*, 988
26 F.2d 1344, 1352, 1354 (4th Cir. 1993) (finding that the Virginia voter registrar's public disclosure of voters' social
27 security numbers brought the attendant possibility of "a serious invasion of privacy" and detailing horror stories of
28 stolen identities and concluding that "the harm that can be inflicted from the disclosure of a social security number
to an unscrupulous individual is alarming and potentially financially ruinous."); *Yeager v. Hackensack Water Co.*,
615 F. Supp. 1087, 1091-92 (D.N.J. 1985) (citing to Federal Privacy Act, Public Law No. 93-579 and holding that
social security numbers were "within the constitutionally protected right of privacy" as Congress designed the
Federal Privacy Act of 1974 to discourage improper uses of social security numbers and to allow individuals the
opportunity to make an intelligent decision regarding disclosure). Hyatt's opposition to the FTB's motion on the
judgment for pleadings at note 14 cites additional authorities.

⁶⁰ 879 F.2d 873 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

⁶¹ *Id.* at 876 (emphasis added). See also *Painting Industry of Hawaii Market Recovery Fund v. United States*,
Dept. of Air Force, 26 F.3d 1479, 1486-1487 (9th Cir. 1994) (forbidding disclosure of social security numbers,
names, and home addresses with concurring opinion stating "publishing your phone number may invite annoying
phone calls, but publishing your address can lead to far more intrusive breaches of privacy, and even physical
danger."); *Painting and Drywall Work Preservation Fund, Inc. v. Dept. of HUD*, 936 F.2d 1300, 1303 (D.C. Cir.
1991) (concluding that disclosure of names and addresses of construction workers would be "a substantial invasion
of privacy," indeed, "a clearly unwarranted invasion of personal privacy."); *Hopkins v. United States Dept. of HUD*,
929 F.2d 81 (2d Cir. 1991) (holding that because privacy encompasses all interest involving the individual's control
of information concerning his or her person, "we have no doubt that individual private employees have a significant
privacy interest in avoiding disclosure of their names and addresses."). Additional supporting authority is cited in
note to Hyatt's opposition to the motion for judgment on the pleadings at note 15 cites additional authorities.

⁶² 712 F.2d 931 (4th Cir. 1983).

1 of mailings and perhaps personal solicitations. The court then observed
2 that no effective constraints could be placed on the range of uses to which
3 the information, once revealed, might be employed.⁶³ The dissent pointed
4 out that only a rare person — like Hyatt — conceals his address from real
5 property records, voting lists, motor vehicle registration, licensing records
6 and telephone directories. The court majority nevertheless recognized the
7 privacy right *even for those less sensitive about secrecy*.⁶⁴

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

10 This claim [invasion of privacy by illegal disclosure of private facts] is
11 really two: the more recently emerged invasion of
12 informational/constitutional privacy and the more traditional branch of
13 disclosure of private facts. Each claim involves the disclosure of private
14 facts for which an expectation of privacy had been created and for which a
15 reasonable person would find offensive — particularly
16 informational/constitutional privacy under which disclosure of private,
17 personal information gathered by the government is *per se* unlawful.⁶⁵

18 Again, both this Court and the Nevada Supreme Court have rejected the FTB's attempts
19 to dismiss this and Hyatt's other intentional tort claims finding genuine issues of fact in dispute.
20 Common law informational privacy, as a prong of Hyatt's asserted invasion of privacy tort, is
21 very much a part of this case. But Hyatt asserts no IPA claim.⁶⁶

22 ⁶³ *Id.* at 932.

23 ⁶⁴ One of the first home address cases, *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 n. 15 (3d Cir. 1974),
24 forbade disclosure of individual home-wine-maker names and home addresses since "there are few things which
25 pertain to an individual in which his privacy has traditionally been more respected than his own home. Mr. Chief
26 Justice Burger recently stated: "The ancient concept that "a man's home is his castle" into which "not even the king
27 may enter" has lost none of its vitality." It also held "That society recognizes an interest in keeping his address
28 private is indicated in such practices as non-listing of telephone numbers and the renting of post office boxes." One
of the most recent cases, *Scottsdale Unified School Dist. of Maricopa County v. KPNX Broadcasting Co.*, 191 Ariz.
297, 955 P.2d 534, 536 (1998), held that school districts need not disclose the home addresses or birth dates of
teachers to reporters since "birth dates, like social security numbers are private information."

⁶⁵ See Hyatt's 10 page petition for rehearing, at 1, n. 1, attached to the accompanying Appendix of Evidence as
Exhibit 11.

⁶⁶ Hyatt does not directly address the FTB's various arguments as to why an IPA claim is barred (e.g., statute of
limitation, California tort claims act, comity) because the FTB's arguments are moot. Hyatt's silence on these issues
is because they are moot, not because he concedes the FTB is right. Hyatt's silence is not, and should not be
construed as, an admission of any kind regarding these moot issues.

1
2 **7. Any issues relating to the admissibility at trial of evidence of FTB**
3 **violations of the IPA, or any other evidence, can only be resolved after**
4 **completion of all discovery and through an appropriate motion in**
5 **limine.**

6 To the extent this motion seeks a ruling now as to the admissibility of any evidence,
7 particularly the FTB's violations of the IPA, such a request by the FTB is grossly premature.
8 Discovery is not complete, trial is not set to commence until August 2006, and no motions in
9 limine have been filed, let alone argued and ruled upon. The Court should deny any request
10 seeking a ruling as to admissibility at trial of any evidence.

11 **8. Conclusion.**

12 There is no issue for the Court to resolve in this motion. Hyatt does not assert California
13 statutory IPA claim. Any dispute over discovery relating the California's IPA and what
14 discovery Hyatt may take regarding the FTB's violations of the IPA as evidence of Hyatt's
15 Nevada common law informational privacy claim must be referred to the Discovery
16 Commissioner who, contrary to FTB suggestions, has allowed discovery on IPA violations that
17 relate to Hyatt and the Hyatt audits.
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1 This motion should therefore not only be denied but the motion should be stricken as
2 there is no legal basis for seeking to dismiss a non-existent claim.
3

4
5 Dated this 3rd day of June, 2005.

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9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 GILBERT P. HYATT,

12 Plaintiffs,

13 v.

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

16 Defendants.

Case No.: A382999

Dept. No.: X

**RECEIPT OF COPY AND CERTIFICATE
OF SERVICE OF PLAINTIFF GILBERT P.
HYATT'S OPPOSITION TO THE FTB'S
MOTION TO DISMISS, OR IN THE
ALTERNATIVE, FOR PARTIAL
SUMMARY JUDGMENT RE: STATUTORY
INFORMATION PRIVACY CLAIMS AND
APPENDIX OF EXHIBITS**

Date of Hearing: June 20, 2005

Time of Hearing: 9:00 a.m.

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

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RECEIPT OF COPY

RECEIPT OF COPY of PLAINTIFF GILBERT P. HYATT'S OPPOSITION TO
THE FTB'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR PARTIAL
SUMMARY JUDGMENT RE: STATUTORY INFORMATION PRIVACY CLAIMS
AND APPENDIX OF EXHIBITS is hereby acknowledged this ____ June, 2005.

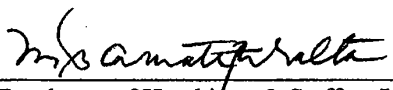
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b) I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 3rd day of June, 2005, I delivered a true copy of **PLAINTIFF GILBERT P. HYATT'S OPPOSITION TO THE FTB'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT RE: STATUTORY INFORMATION PRIVACY CLAIMS AND APPENDIX OF EXHIBITS** via federal express, in a sealed envelope and addressed to:

James W. Bradshaw, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street, 10th Floor
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An Employee of Hutchison & Steffen, LLC

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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

**APPENDIX OF EXHIBITS IN SUPPORT OF
PLAINTIFF GILBERT P. HYATT'S
OPPOSITION TO THE FTB'S MOTION TO
DISMISS, OR IN THE ALTERNATIVE, FOR
PARTIAL SUMMARY JUDGMENT RE:
STATUTORY INFORMATION PRIVACY
CLAIMS**

**Date of Hearing: June 20, 2005
Time of Hearing: 9:00 a.m.**

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

23 Plaintiff Gilbert P. Hyatt submits this Appendix of Exhibits in Opposition to the FTB's
24 Motion To Dismiss, or in the Alternative, for Partial Summary Judgment Re: Statutory
25 Information Privacy Claims. Set forth below is an index of the exhibits.
26

27 Exhibit 1 January 8, 2004 Order Approving Discovery Commissioner's Report and
28 Recommendation.

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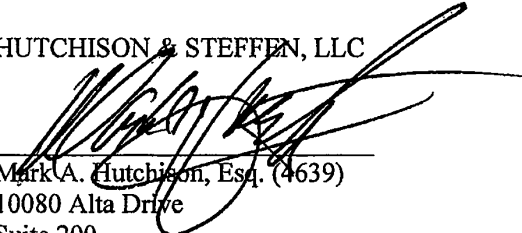
- 1 Exhibit 2 Excerpts of transcript of November 9, 1999 hearing before Discovery
- 2 Commissioner, at 55-56.
- 3 Exhibit 3 FTB Privacy Notice.
- 4
- 5 Exhibit 4 Hyatt's Opposition to the FTB's Motion for Judgment on the Pleadings.
- 6
- 7 Exhibit 5 Order re Motion for Judgment on the Pleadings.
- 8
- 9 Exhibit 6 Transcript from April 7, 1999 hearing on Motion for Judgment on the
- 10 Pleadings.
- 11
- 12 Exhibit 7 Reply of FTB in Support of Motion for Summary Judgment.
- 13
- 14 Exhibit 8 FTB's Petition for a Writ of Mandamus ordering Dismissal, or
- 15 Prohibition and Mandamus Limiting the Scope of This Case.
- 16
- 17 Exhibit 9 Hyatt's Answer to FTB's Petition for a Writ of Mandamus ordering
- 18 Dismissal, or Prohibition and Mandamus Limiting the Scope of This
- 19 Case.
- 20
- 21 Exhibit 10 Nevada Supreme Court ruling dated June 13, 2001.
- 22
- 23 Exhibit 11 Hyatt's 10 page petition for rehearing filed with the Nevada Supreme
- 24 Court.
- 25
- 26 Exhibit 12 Hyatt's 15 page supplemental petition for rehearing filed with the Nevada
- 27 Supreme Court.
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1 Exhibit 17 Opposition to FTB Motion for Summary Judgment.

2 Dated this 3rd day of June, 2005.

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16 *Attorneys for Plaintiff Gilbert P. Hyatt*
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Exhibit 4

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
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CLERK

GILBERT P. HYATT

Plaintiff

vs.

CALIFORNIA STATE FRANCHISE
TAX BOARD

Defendant

CASE NO. A-382999

DEPT. X

Transcript of
Proceedings

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

HEARING ON DEFENDANT'S OBJECTION TO
REFEREE'S REPORT AND RECOMMENDATION

WEDNESDAY, MARCH 22, 2006

APPEARANCES:

FOR PLAINTIFF:

PETER C. BERNHARD, ESQ.

FOR DEFENDANT:

JAMES W. BRADSHAW, ESQ.
PAT LUNDVALL, ESQ.

COURT RECORDER:

TRANSCRIPTION BY:

VICTORIA BOYD
District Court

FLORENCE M. HOYT
Las Vegas, Nevada
(702) 221-0246

Proceedings recorded by audio-visual recording, transcript
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AA003119

1 LAS VEGAS, NEVADA, WEDNESDAY, MARCH 22, 2006, 10:40 A.M.

2 (Court was called to order)

3 THE CLERK: Case A-382999, Hyatt versus California
4 State Franchise Tax Board.

5 MR. BRADSHAW: 'Morning, Your Honor. Jim Bradshaw
6 for the Franchise Tax Board. With me is my partner Pat
7 Lundvall.

8 THE COURT: Good morning.

9 MR. BERNHARD: Peter Bernhard, Your Honor, on behalf
10 of Mr. Hyatt.

11 THE COURT: Good morning.

12 This is the Franchise Tax Board's objections to the
13 Discovery Commissioner's recommendations.

14 MR. BRADSHAW: Yes. Rarely do we object to the
15 Discovery Commissioner's recommendations. He has an enormous
16 job. The vast majority of time he does it well and accurately
17 and fairly. However, today we object because relevant
18 information in plaintiff Mr. Hyatt's possession and control is
19 being denied us.

20 Specifically we seek to discover compensation paid
21 by Mr. Hyatt to his material witnesses identified by him
22 formally in discovery as witnesses who will testify on his
23 behalf at trial; and we also seek their billing records,
24 because some of these witnesses are attorneys and accountants
25 who meticulously document their activities, date, task and

1 type of activity, time. We seek to discover those records,
2 because what's at issue in this case, of course, is what
3 happened and when it happened between the Franchise Tax Board
4 and Mr. Hyatt.

5 As Your Honor knows from prior motion practice, the
6 Franchise Tax Board is the state agency tasked with enforcing
7 the income tax laws in the state of California. That's
8 basically an honor system, much like the IRS income tax
9 system, but the honor system's enforced by audit. And that's
10 what happened to Mr. Hyatt. He did not deal directly with the
11 Franchise Tax Board, however. He engaged California Tax
12 Attorney Eugene Cowan of the Riordan McKenzie law firm, now
13 known as the Bingham McCutchen law firm, attorney of record
14 for -- attorneys of record for Mr. Hyatt in this case. He
15 engaged Mr. Cowan to do his '91 tax return, which is at issue
16 in this case. It's pled in his complaint. And Mr. Cowan
17 represented Mr. Hyatt in the audit, a residency audit that
18 occurred between mid-1993 and 1997. As you know, Mr. Hyatt
19 protested the result, and that administrative proceeding is
20 pending in California.

21 Mr. Hyatt also engaged local tax accountant Michael
22 Kern of the Piercy Bowler Taylor Kern firm to represent him in
23 his '91 and '92 tax returns and in the audit and subsequent
24 protest. These are his witnesses. We seek to discover how
25 much these witnesses have been compensated and their billings,

1 which would be a diary of their activities with the Franchise
2 Tax Board auditors.

3 Picture us at trial today if Mr. Cowan or Mr. Kern
4 were on the witness stand and had just testified favorably for
5 Mr. Hyatt on his case in chief, then on cross-examination I
6 might ask Mr. Cowan or Mr. Kern, sir, how much money did Mr.
7 Hyatt pay you in 2006. Objection, irrelevant, embarrassing,
8 oppressive, whatever the objection might be. How would the
9 Court rule as to compensation of a witness? Well, in our view
10 what a party compensates his witnesses, whether lay witnesses
11 or expert witnesses, is always discoverable, and the jury gets
12 to hear that, because it goes to their bias or their motive.

13 Now, if any material witness in a case keeps a diary
14 of activities with the opposing party and those are at issue,
15 then I'd be remiss not to discover that diary. Well, that's
16 what attorneys' and accountants' billings are, is diaries of
17 their activities. And according to Mr. Hyatt's pleadings,
18 these tax representatives' activities with the Franchise Tax
19 Board are relevant. So we seek to discover them.

20 We did not bring our -- we're here on a DCR&R from a
21 motion to compel, but that's not the first one. In 2000 we
22 made a motion to compel the same type of discovery, and we
23 obtained the Court's order dated February 2nd, 2004. It
24 ordered Mr. Hyatt to produce -- and I'm quoting from the order
25 -- "information on compensation pertaining to any of Hyatt's

1 witnesses." Further that order required that Cowan and Kern,
2 who are under subpoena, and their firm "shall produce any fee
3 agreements they had with plaintiff and their timekeeping and
4 billing documents." Well, that's the Court's order, and
5 indeed after a time billings were produced for those firms'
6 activities through 1997. Mr. Hyatt filed his complaint
7 January of 1998. So the contention then was these are the
8 relevant records because only the facts and circumstances
9 preceding the filing of the complaint are relevant.

10 Well, more recently, as you know, Mr. Hyatt's taken
11 issue with the protest and whether or not there's a bad-faith
12 delay. So we've been forced to do discovery and the FTB's tax
13 attorneys involved in the protest submit to protest on the
14 reasons for the delay. Well, that puts at issue Mr. Hyatt's
15 own tax representatives' activities concerning that delay. So
16 we should have those diaries or those billings to show that.
17 And because Mr. Cowan's firm and Mr. Kern's firm are engaged
18 in this litigation, the firms are also compensated, and we
19 believe the jury is entitled to know how much money these
20 material witnesses and their firms have been paid by Mr. Hyatt
21 in order to gauge their bias and motives.

22 Now, Discovery Commissioner Biggar did something
23 extraordinary, and this is the language we would ask the Court
24 to strike from his DCR&R. And it's -- I'm reading from
25 page 4, paragraph 3. "If the amount paid to any of these

1 witnesses is more than \$100,000 a year, that is all the
2 Discovery Commissioner is going to have Hyatt produce. But if
3 the amount is less than that for a particular witness, the FTB
4 may further explore the issue by seeking additional production
5 of records concerning that witness."

6 We think that is error. If the witness and his firm
7 has been paid a million dollars a year or a hundred thousand
8 dollars a month for 15 years, which spans the length of time
9 these witnesses have worked for Mr. Hyatt, I think the jury
10 can appreciate the difference between a witness who's paid
11 some unknown amount over a hundred thousand dollars over 15
12 years and a witness who's paid millions of dollars over those
13 same years. I don't think the argument can be made that
14 that's not relevant and discoverable, nor the diaries that
15 would be apparent from the billings of these professionals.

16 There are other witnesses that are compensated by
17 Mr. Hyatt. His close associate Grace Jane, who is the only
18 person who can corroborate much of his story about the facts
19 and circumstances concerning his Nevada residency. There's
20 another attorney of record in this case, Greg Roth. He has
21 other attorneys he's identified as material witnesses, Roger
22 McAffrey, Dale Fiola, his son, Dan Hyatt, his girlfriend,
23 Carolyn Cosgrove, his associate Barry Lee. All of these are
24 compensated witnesses, and we believe we're entitled to
25 discover the records of that compensation.

1 Now, we've been allowed some deposition testimony.
2 For the most part, because of the span of years, these
3 witnesses can't recall without reference to their records,
4 certainly not Mr. Kern or Mr. Cowan without reference to their
5 billings over many years, they can't recall how much they were
6 paid or what the tasks were. And this diary or chronology we
7 think we're entitled to, as well as the amount of
8 compensation.

9 This, of course, is information in Mr. Hyatt's
10 possession and control. He's been provided these billings,
11 he's paid them over these many years. He would have cancelled
12 checks. These -- I think there's contentions of privilege or
13 work product here, but attorneys and accountants know that
14 their billings can come under scrutiny. There's a number of
15 reasons. We're audited by the IRS or the State Bar or the
16 Board of CPAs, or clients make the application for attorneys'
17 fees at the end of the case. They expect that these are going
18 to be published to the Court, and in most cases they're
19 public. So these billings become publicly known. We keep
20 records in a manner so that they can be made available in the
21 event of a fee dispute with a client. Mr. Hyatt in this case
22 has pled -- has asked in his prayer for an award of attorneys'
23 fees and costs.

24 So we think for all of these reasons we're entitled
25 to know and discover complete information about Hyatt's

1 compensation of his witnesses and their documentation of their
2 activities that might be apparent from their billing.

3 THE COURT: Mr. Bradshaw, it's my view that the
4 Court is often at a disadvantage with respect to ruling on the
5 Discovery Commissioner's recommendations because, while
6 counsel has had an opportunity to make their case before the
7 Discovery Commissioner and hear the Discovery Commissioner's
8 thought process, the Court has only the written pleadings,
9 oral argument, and the Discovery Commissioner's order, the
10 transcript. So I'm at a loss sometimes to understand the
11 thought process, and I'm not clear at all as to what he means,
12 perhaps you can enlighten me, when he states, as you read into
13 the record a moment ago, "If the amount paid to any of these
14 witnesses is more than \$100,000 a year, that is all the
15 Discovery Commissioner is going to have Hyatt produce." I
16 don't understand what he means by that. Can you tell -- can
17 you elaborate a bit on that?

18 MR. BRADSHAW: I could not. This blows us away.
19 This takes us by surprise. I don't know what he had in mind.
20 Mr. Hyatt's interpreted it as if there -- if the witness has
21 been paid more than a hundred thousand a year that's all they
22 have to testify at deposition is, I've been paid more than a
23 hundred thousand a year, and that's the end of it.

24 Now, he has produced some additional information or
25 some has come out at other depositions about compensation of

1 these witnesses, but not the records of these amounts, amounts
2 as to some witnesses only based on recollection because their
3 work spans many years. And if Mr. Hyatt has these records,
4 they need to be produced. They're not identified on a log.
5 Usually the Discovery Commissioner, if a party's withholding
6 records, there's got to be some basis in privilege, and they
7 have to be properly identified on a Vaughn index, on a
8 privilege log. That's not been done in this case. I think
9 he's simply overwhelmed, and we're late in this litigation and
10 he's trying to contain it. And although most of the time his
11 rulings are correct, we've never seen anything like this,
12 can't explain it to the Court, don't see a basis for it, and
13 believe that language should be stricken.

14 THE COURT: Do you interpret that statement to mean
15 that what the plaintiff has to produce in order to comply with
16 that order would simply be a sheet of paper indicating Mr.
17 Hyatt paid such and such a firm \$100,000, another firm
18 \$100,000, but not to actually produce any billings? Is that
19 how you interpret that?

20 MR. BRADSHAW: I think so. I think so. And if it's
21 less than a hundred thousand dollars, then Mr. Hyatt's
22 burdened with producing the records. So the less important
23 the witness, the more the burden to produce the substantiating
24 documents. We don't understand.

25 THE COURT: And are you of the opinion that how much

1 a particular witness may have been paid is going to have an
2 impact on bias and motive? Is that your position?

3 MR. BRADSHAW: Sure. And for that very reason Mr.
4 Hyatt has indeed discovered how much each and every FTB
5 employee witness has been compensated. We always ask
6 witnesses how much they're paid by a party. We always ask
7 experts how much they're paid by a party, and the jury always
8 hears that.

9 THE COURT: Well, I think the issue of bias and
10 motive is always an issue for purposes of impeachment. But
11 I'm a little curious about this benchmark figure. So --

12 MR. BRADSHAW: I don't know where it came from.

13 THE COURT: I'm sorry?

14 MR. BRADSHAW: We don't know where it came from. I
15 don't even think Mr. Hyatt asked for that relief, it was
16 simply what was fashioned.

17 MS. LUNDVALL: The Discovery Commissioner I recall
18 -- sat there, and I recall the body language when we were
19 arguing this issue. He kind of cocked his head one way and
20 then another and then out popped a hundred thousand dollars as
21 far as limit. It just came out of the blue. It had not been
22 requested by Mr. Hyatt in his motion practice. It hadn't even
23 been mentioned in the briefing then by the parties in their
24 motion practice.

25 THE COURT: Mr. Bernhard.

1 MR. BERNHARD: Thank you, Your Honor. And I
2 appreciate the Court's disadvantage, and frankly we're at the
3 same disadvantage. And I don't whine about technical
4 compliance with rules like matters to be decided on the
5 merits, but you don't have a complete record in front of you.
6 Under Rule 2.34(f) we were not allowed to submit points and
7 authorities or briefs or supplement the record. The FTB, on
8 the other hand, did submit what I think are improper points
9 and authorities, and they attached these for exhibits, but
10 what they chose to give you as their Exhibit B was their
11 motion to compel which was in front of Commissioner Biggar.
12 But they didn't see fit to attach our opposition where we laid
13 out some of these problems. And because you did not in your
14 order justifiably grant leave for us to supplement, we have
15 not given you our side of that even to the point of attaching
16 our opposition, which Commissioner Biggar had in front of him
17 during the time that he made this obviously a compromise
18 ruling, which was fair to address their bias concern, and yet
19 also protective of the attorney-client and work product
20 privileged information that we were objecting to.

21 So, frankly, Your Honor, my position today is that
22 I'm at a disadvantage because I know you don't have the
23 information you need to uphold Commissioner Biggar's decision.
24 However, if you're willing to do so today, there's no need for
25 me to submit all this material and encumber the record

1 further.

2 However, if for some reason after you've heard our
3 arguments you feel that Commissioner Biggar was wrong, then
4 I'm entitled to, I believe, an opportunity to present the
5 briefing. And that's what Rule 2.34(f) provides. Objections
6 to Discovery Commissioner recommendations are supposed to be
7 just a list of objections. And the rule expressly says, as we
8 point out, the objection must not contain argument and serve
9 as a memorandum of points and authorities seeking reversal of
10 the report and recommendations.

11 So the process should be very simple. The objection
12 the other side files should give you a bullet-point list of
13 what the objections are. Then the Court will either look at
14 those and decide, as the form indicates, I don't think your
15 bullet-point objections are warranted, I'm going to consider
16 those bullet points and still adopt the recommendation, and
17 you on the form have the option to sign that. Or you have the
18 option to order a hearing. And as their request provided,
19 they asked for leave to file a brief and points and
20 authorities if in fact the Court orders a hearing. And, of
21 course, in our opposition that we filed, just a response,
22 basic bullet-point positions, not arguing the merits, we said,
23 if in fact the Court wants to hear the merits whether or not
24 to overturn Discovery Commissioner Biggar's recommendation,
25 then we asked for leave to file our side to support this

1 recommendation.

2 So today the posture of this case that's before you
3 is that you've asked for a hearing to at least clarify the
4 questions you have, which I think is appropriate; but you have
5 not seen any briefing, any points and authorities, or even the
6 opposition that Commissioner Biggar had before him. So I
7 submit if you're willing to adopt that recommendation, then
8 we're fine and we can go forward and proceed with the case.
9 If, however, you're inclined to think that Commissioner Biggar
10 made an error, at a minimum we're entitled to be given leave
11 to file a copy of our opposition before Commissioner Biggar
12 and explain why it is that he came up with the ruling he did.

13 And as I say, I don't like that kind of technical
14 argument. I'm more than happy to address on the merits. I
15 think what's significant for the Court in considering today's
16 proceeding is that the next significant event in which this
17 issue is relevant will occur April 4th and 5th, and that's
18 when Mr. Cowan will be deposed again in Los Angeles.

19 So if the Court is inclined to rule against --
20 overturn Commissioner Biggar, I would ask that we defer this
21 matter for say a week and come back next week. In the
22 meantime I can submit to our opposition to the very motion
23 that they submitted to you from their standpoint, and we can
24 just continue this matter and still get a decision from you
25 before Mr. Bradshaw has to ask Mr. Cowan the questions. So we

1 have time to do that.

2 However, I don't think that's necessary, because I
3 think Commissioner Biggar's report and recommendation is
4 correct. And I think the issues that he wrestled with at that
5 time was this claim that Mr. Bradshaw's making that bias and
6 prejudice is always at issue for credibility, for impeachment
7 purposes at trial. And we agree. What Commissioner Biggar
8 was looking at was whether or not Mr. Bradshaw and the
9 Franchise Tax Board would be prejudiced if they could get
10 testimony from Mr. Cowan, Mr. Kern, Ms. Jennings, Mr. McAffrey,
11 Mr. Roth, any of these people receive more than a hundred
12 thousand dollars, can they make the argument that that would
13 constitute some incentive for these professionals to lie.
14 We'll argue no, it does not, that these professionals,
15 accountants and attorneys would not lie no matter how much
16 money they're paid. But the flexibility that Commissioner
17 Biggar gave to the Franchise Tax Board is to tell the jury
18 this guy got at least a hundred thousand dollars, and Mr.
19 Hyatt's not going to tell you how much more he paid them.

20 Now, if I were Mr. Bradshaw, I would love to make
21 that argument, it could be millions, it could be tens of
22 millions, it could be a hundred million dollars, maybe this
23 man is bought and paid for. Commissioner Biggar gave them the
24 flexibility to make that argument. If Mr. Hyatt chooses not
25 to produce the actual amounts, if it's more than a hundred

1 thousand dollars, then the jury can hear that and the FTB be
2 make whatever arguments it wants about why that witness should
3 not be believed because that witness is bought and paid for.

4 Now, from our perspective, yes, we did ask the
5 Franchise Tax Board employees how much they were paid, because
6 all of these people are State employees, 100 percent of their
7 compensation is from the Franchise Tax Board. So Commissioner
8 Biggar again, as part of weighing these competing interests,
9 allows me to make the argument at trial, these witnesses,
10 their credibility can be challenged because 100 percent of
11 their income, 100 percent of their retirement as a State
12 employee is based on their continuing employment with the
13 Franchise Tax Board. So I can make the argument that their
14 testimony is going to be biased in favor of Franchise Tax
15 Board. So he compromised and he said, I'll let both of you
16 make these arguments on bias and credibility and it'll be up
17 to the jury to decide. And that's a very fair and valid
18 decision that he could make.

19 Why a hundred thousand dollars? I don't know,
20 except that that number is a big enough number to where the
21 jury -- most jurors will look at that as substantial
22 compensation. We know it's much more than what the State
23 employees of the Franchise Tax Board make, so we know that
24 they can make the credibility argument based on a higher
25 dollar amount than what we can.

1 So that's all in play, and that's all going to be
2 considered at the time of trial. But for purposes of
3 discovery at this stage of the proceeding they don't need the
4 detail they're asking for in order to make the bias argument.
5 Because we have these competing interests of the attorney-
6 client issues and work product issues and the details
7 concerning strategy, not just with the tort case that we have
8 here in front of you, but also with the protest that is still
9 pending in California, Commissioner Biggar was very sensitive
10 not to require my client and his professionals to proceed and
11 produce that kind of information.

12 So the decision makes a whole lot of sense. If bias
13 and prejudice is the reason why the Franchise Tax Board wants
14 to know how much my witnesses -- my client's witnesses are
15 being paid, he's got that and then some. He can make that
16 argument at trial. On the other hand, we don't have to fight
17 over each particular time entry, each particular strategy
18 decision that was made and come before you again and again and
19 again to see what can or can't be testified to because of the
20 protections of the privileges.

21 So the Franchise Tax Board has what it needs to make
22 the bias and prejudice argument, we have what we need to make
23 the bias and prejudice argument as to their clients, and
24 frankly I think it weighs a lot better from their side with
25 this particular ruling. So it makes sense. It makes a lot of

1 sense.

2 I can't speak to Ms. Lundvall's body language. I
3 don't think it's evidence, I don't think it should be
4 persuasive. Commissioner Biggar made a decision that's well
5 grounded in law, well grounded in fact based on the specific
6 facts and circumstances of this case. So I submit if you're
7 willing to accept that as a limitation that's fair to both
8 sides, we can walk out of the courtroom today, go forward on
9 April 4th and 5th, Mr. Cowan will say, yes, I got more than a
10 hundred thousand dollars from Mr. Hyatt for my legal services
11 from 1991 to the present, and we'll go forward.

12 However, if you do feel that there's some legal
13 deficiency in what Commissioner Biggar did, which we don't
14 think there is, give us the chance to show you what our
15 opposition was, what it was that he was considering when he
16 made this decision. That's only fair to us. We'll come back
17 in a week and we'll argue the merits of it again. I think
18 that's what the rule contemplates. Franchise Tax Board has
19 not followed that rule, and it's placed us at a disadvantage
20 because you don't have in front of you what we submitted in
21 opposition to their motion to compel. Thank you, Your Honor.

22 THE COURT: Well, Mr. Bernhard, I think you
23 articulate your position rather well. I guess the difference
24 is that the Court views this case from the perspective of
25 trying to visualize what the trial is going to look like,

1 while the Discovery Commissioner tries to narrow the focus of
2 the issues so that the case might be streamlined for trial.
3 And this Court appreciates his role very much for that reason
4 and for those reasons.

5 The only thing I would say to you, though, Mr.
6 Bernhard, is that the whole notion of discovery is that it's a
7 fairly open process. Not all of the information gained and
8 gleaned by way of discovery is going to be admissible at trial
9 necessarily. And so I can't help thinking as we discuss these
10 issues of compensation to witnesses and how much or how little
11 a particular witness is compensated, I can't help thinking,
12 gee, is that the subject of a motion in limine at some point
13 in the future. I don't know.

14 I would like to have the benefit of seeing your
15 written response to defendant's objections to the Discovery
16 Commissioner's report and recommendations. I'd like to have
17 an opportunity to think about the thought process, to think
18 about the analysis, to view this from whatever perspective you
19 intend to take, however you intend to draft these issues and
20 frame them for the Court. So I suppose that means we need to
21 continue this so that you might have an opportunity to do
22 that.

23 I will say to you this. You've had an opportunity
24 to sit through our morning court, and you've seen that there
25 were some number of objections to Discovery Commissioner's

1 recommendations calendared today. I think that Rule 2.34,
2 that is the correct number, is flawed in that it proposes a
3 method for counsel to object to Discovery Commissioner's
4 recommendations, but without giving the Court really anything
5 to review in the way of authority or analysis. And so I think
6 that rule is flawed.

7 This Court will quite often schedule a hearing when
8 I do receive an objection to Discovery Commissioner's report
9 for the purposes of being able to assess the analysis. I know
10 of no other fair way to do that. And when we schedule the
11 hearing I would say to counsel, I think that's an invitation
12 for you to file any pleadings you want to file. I'll take a
13 look at anything you submit. You can criticize me for a lot
14 of things, but you can't criticize me for not being prepared.
15 So I hope you'll keep that in mind not only with respect to
16 this case, but to other cases, as well.

17 When do we need to set this back on calendar, do you
18 think, that I might have an opportunity to review your
19 pleadings?

20 MR. BERNHARD: We can submit a copy of our
21 opposition with a very short three- or four-page cover within
22 -- oh, by Monday at the latest, and if it could be set for
23 hearing for the end of next week, we still have time before
24 April 4th and 5th.

25 THE COURT: April 4th?

1 MR. BERNHARD: April 4th is the deposition in Los
2 Angeles, so -- that's a Tuesday. So if we could have it heard
3 by a week from Friday --

4 MR. BRADSHAW: Do we have a Discovery Commissioner
5 hearing that week of the 4th?

6 MR. BERNHARD: I don't believe so.

7 THE COURT: Are you available on the 29th of March?
8 Would be next Wednesday.

9 MR. BRADSHAW: We'll make a point of being
10 available.

11 MR. BERNHARD: That's fine, Your Honor.

12 MR. BRADSHAW: I -- they might have -- they did
13 oppose our objection, and our objection isn't really points
14 and authorities. We -- our interpretation of the rule was the
15 Court receives the objection, we try and frame the issues.
16 But the points and authorities are the motion and the
17 opposition that have been heard. But what I'm hearing is the
18 Court would like additional points and authorities. Because
19 what the Discovery Commissioner ruled on was many other
20 things, and they aren't objected to. Just this one issue,
21 discovery of witness compensation and billings, that's what
22 we're focused on now. Would the Court like brief points and
23 authorities on that issue alone?

24 THE COURT: If you want to submit them, I'll look at
25 anything you submit, Mr. Bradshaw. I will tell you that I

1 particularly liked this statement contained within the
2 Commissioner's recommendation, "Hyatt need not produce every
3 scrap of paper relating to compensation paid to these
4 individuals." I think the Commissioner was right on target in
5 their assessment.

6 MR. BRADSHAW: All right. Well, we don't know what
7 exists, but if he's got checks that he's paid, and if he's got
8 billings, those ought to be easy. Attorneys and accountants,
9 these professional witnesses, by law they preserve, protect,
10 and maintain those kinds of records, and all the client has to
11 do is ask for a copy. And I can't believe during the course
12 of this litigation, asking for an award of attorneys' fees as
13 he has, he's thrown away those cancelled checks that would
14 prove up such an award on application. So just those two
15 things, the billings, the proof of payment, that would
16 suffice.

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

22 MR. BERNHARD: That is correct.

23 THE COURT: What about with respect to other damages
24 as it relates to these other witnesses?

25 MR. BERNHARD: Yes. To the extent that these are

1 attorneys or accountants whose fees are being sought as part
2 of our substantive causes of action, yes. And we understand
3 that we have to produce those, and we have.

4 The other issue I would make in our opposition that
5 you're allowing us to file, we have provided detailed
6 information concerning those amounts at least through the year
7 1997. And to the extent we're going on further toward the
8 protest through trial, then, yes, we will produce these
9 statements and amounts for those particular items, and that
10 does avoid the privilege issues that we were concerned about
11 before Commissioner Biggar.

12 THE COURT: Defense couldn't expect to be blindsided
13 on the issues of damages without being provided those specific
14 numbers. That would be the Court's view.

15 MR. BERNHARD: Oh. And I think Nevada Supreme Court
16 precedent is very clear that you're correct on that, and
17 there's no doubt in our mind that if we're going to ask for it
18 we have to give them the amounts so that they know what it is
19 we're asking for.

20 THE COURT: Okay.

21 MR. BERNHARD: Is Monday sufficient, Your Honor?
22 Would you like us to try to get something to you by Friday,
23 before our Wednesday hearing?

24 THE COURT: Monday will be fine if -- well, actually
25 I would prefer it Friday, if you can.

1 MR. BERNHARD: All right.
2 THE COURT: If you can get it to me Friday, I would
3 appreciate it. Will that work for both of you? I don't know
4 if you'll be submitting anything, Mr. Bradshaw. If you do,
5 I'll look at it carefully, as I do.
6 MR. BRADSHAW: I appreciate that, Your Honor.
7 THE COURT: All right. Thank you, counsel.
8 MR. BERNHARD: And what time on the 29th?
9 THE COURT: It'd have to be about -- why don't we
10 say 10:00 o'clock. Did that work well for counsel?
11 MR. BERNHARD: That's fine.
12 MR. BRADSHAW: Thank you.
13 THE COURT: All right. 10:00 o'clock it is.
14 MR. BRADSHAW: Thank you, Your Honor.
15 THE COURT: Save the best for last.
16 MR. BERNHARD: It's always a pleasure.
17 THE COURT: Same here.
18 THE PROCEEDINGS CONCLUDED AT 11:10 A.M.
19 * * * * *
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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

FLORENCE HOYT
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EXHIBIT 57

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9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 GILBERT P. HYATT,

12 Plaintiffs,

13 v.

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

16 Defendants.

Case No.: A382999

Dept. No.: X

SECOND AMENDED COMPLAINT

Jury Trial Demanded

Exempt from Arbitration:
Declaratory Relief, Significant
Public Policy and Amount in Excess
Of \$40,000

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

FILED

APR 18 3 22 PM '06

Shirley B. Langston
CLERK

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

3 PARTIES

4 1. Plaintiff resides in Clark County, Nevada and has done so since September 26,
5 1991.

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

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

25 4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in
26 acting or omitting to act as alleged, acted or omitted to act within the course and scope of their
27 employment or agency, and in furtherance of their employer's or principal's business, whether
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1 the employer or principal be the FTB or some other governmental agency or employer or
2 principal whose identity is not yet known; and that FTB and defendants were otherwise
3 responsible and liable for the acts and omissions alleged herein.

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

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

14 SUMMARY OF CLAIMS

15 7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 et seq. to
16 confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and
17 continuing to the present and, correspondingly, his non-residency during said period in
18 California (FIRST CAUSE OF ACTION) — *re-pled in this Second Amended Complaint to*
19 *preserve plaintiff's right to appeal the District Court's April 3, 1999 ruling dismissing this*
20 *cause of action; this cause of action is therefore no longer at issue in the District Court;* (2)
21 recovery of compensatory and punitive damages against the FTB and the defendants for
22 invasion of plaintiff's right of privacy, including and in particular his informational privacy as
23 well as the FTB's failure to abide by the confidential relationship created by the FTB's request
24 for and receipt of Hyatt's highly personal and confidential information, resulting from their still
25 ongoing investigation in Nevada of plaintiff's residency, domicile and place of abode and
26 causing (a) an unreasonable intrusion upon plaintiff's seclusion (SECOND CAUSE OF
27 ACTION); (b) an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION);
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1 (c) casting plaintiff in a false light (FOURTH CAUSE OF ACTION); (3) recovery of
2 compensatory and punitive damages against the FTB and the defendants for their outrageous
3 conduct in regard to their continuing investigation in Nevada of plaintiff's residency, domicile
4 and place of abode, including but not limited to the FTB's failure to abide by the confidential
5 relationship created by the FTB's request for and receipt of Hyatt's highly personal and
6 confidential information (FIFTH CAUSE OF ACTION); (4) recovery of compensatory and
7 punitive damages against the FTB and defendants for an abuse of process (SIXTH CAUSE OF
8 ACTION); (5) recovery of compensatory and punitive damages against the FTB and defendants
9 for fraud, including but not limited to the FTB's failure to abide by the confidential relationship
10 created by the FTB's request for and receipt of Hyatt's highly personal and confidential
11 information (SEVENTH CAUSE OF ACTION); and (6) recovery of compensatory and punitive
12 damages against the FTB and defendants for breach of confidentiality in regard to the FTB's
13 breach of its duty not to disclose Hyatt's personal and confidential information (EIGHTH
14 CAUSE OF ACTION). The claims specified in this paragraph constitute EIGHT separate
15 causes of action as hereinafter set forth in this complaint.

16 FACTUAL BACKGROUND

17 Plaintiff's Residency in Nevada

18 8. Plaintiff moved to the State of Nevada, County of Clark, and established full-
19 time residency here on September 26, 1991 and has remained a full-time, permanent resident
20 since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California.
21 Plaintiff is a highly successful inventor. Specifically, plaintiff has been granted numerous
22 important patents for a wide range of inventions relating to computer technology. Plaintiff
23 primarily works alone in the creation and development of his inventions and greatly values his
24 privacy both in his personal life and business affairs. After certain of his important inventions
25 were granted patents in 1990, plaintiff began receiving a great deal of unwanted and unsolicited
26 publicity, notoriety and attention. To greater protect his privacy, to enjoy the social,
27 recreational, and financial advantages Nevada has to offer, and to generally enhance the quality
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1 of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move
2 took place after much consideration and almost an entire year of planning.

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

20 The FTB and Defendants' Investigation of Plaintiff in Nevada

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

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

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

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

20 14. Subsequent to the documentary and “hands on” forays into Nevada by the FTB
21 and defendants, the FTB also sent correspondence, rather than “quasi-subpoenas,” to Nevada
22 Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and
23 agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is
24 further informed and believes, and therefore alleges, that the FTB intentionally sent
25 unauthorized “quasi-subpoenas” (i.e., “Demand to Furnish Information”) to private individuals
26 and businesses in a successful attempt to coerce their cooperation through deception and the
27 pretense of an authoritative demand, while on the other hand, sending respectful letter requests
28 for information to Nevada governmental agencies and officials who undoubtedly would have

1 recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the
2 outrageous means of the bogus subpoenas.

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

12 Assessment for 1991

13 16. On April 23, 1996, after the FTB had completed its audit and investigation of the
14 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are
15 owed) to plaintiff in which the FTB claimed plaintiff was a resident of California — not Nevada
16 — until April 3, 1992. The FTB therefore assessed plaintiff California state income tax for the
17 period of September 26 through December 31 of 1991 in a substantial amount. Moreover, the
18 FTB also assessed a penalty against plaintiff in an amount almost equal to the assessed tax after
19 summarily concluding that plaintiff's non-payment of the assessed tax, based upon his asserted
20 residency in Nevada and non-residency in California, was fraudulent.

21 17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide
22 resident of Nevada should not be forced into a California forum to seek relief from the bad faith,
23 unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident.
24 Plaintiff avers that liability for the bad faith actions of the FTB during the audits and continuing
25 until the present in the still ongoing California tax proceedings should be determined in Nevada,
26 the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on
27 plaintiff. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that
28

1 plaintiff remained a California resident until he purchased and closed escrow on a new home in
2 Las Vegas on April 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a
3 way — any way — to effectively assess additional income taxes against plaintiff after he
4 changed his residency from California to Nevada is based on governmental bad faith and greed
5 arising from the FTB's eventual awareness of the financial success plaintiff has realized since
6 leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date
7 of Nevada residency accepted by the FTB with respect to the 1991 Report was not supported by
8 the information gathered by the FTB's during its audits of plaintiff and was accepted by the
9 FTB in bad faith as it was over six months after plaintiff moved to Nevada with the intent to
10 stay and began, he thought, to enjoy all the privileges and advantages of residency in his new
11 state.

12 The FTB's Continuing Pursuit of Plaintiff in Nevada

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

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

22 20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992
23 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes
24 over such assessments by the FTB always settle at this stage as taxpayers do not want to risk
25 their personal financial information being made public. Plaintiff understood this statement to be
26 a strong suggestion by the FTB that he settle the dispute by payment of some portion of the
27 assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not
28

1 been a resident of California since his move to Nevada on September 26, 1991, and it remains
2 clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties"
3 from him that he does not legally or morally owe.

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

20 22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to
21 engage in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within
22 the State of Nevada in an effort to conjure up a colorable basis for justifying its frivolous,
23 extortionate Noticed of Proposed Assessment for the 1992 tax year.

24 23. Plaintiff is informed and believes, and therefore alleges, that the FTB may
25 continue to assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996
26 and beyond since the FTB has now disregarded its own conclusion regarding plaintiff's
27 residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount
28 of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It

1 appears from its actions concerning plaintiff, that the FTB has embraced a new theory of
2 liability that in effect declares "once a California resident always a California resident" as long
3 as the victim continues to generate significant amounts of income. Thus, the FTB has raised an
4 invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing
5 jurisdiction of the FTB.

6 The FTB's Motive

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

13 25. Plaintiff is informed and believes, and therefore alleges, that the assessments by
14 the FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after
15 plaintiff moved from California to Nevada an FTB investigator read a magazine article about
16 plaintiff's wealth and the FTB thereafter launched its investigation in the hope of extracting a
17 significant settlement from plaintiff. Plaintiff is further informed and believes, and therefore
18 alleges, that the FTB has acted in bad faith and assessed a fraud penalty against plaintiff for the
19 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff for the entire 1992
20 tax year and a fraud penalty for the same year to intimidate plaintiff and coerce him into paying
21 some significant amount of tax for income earned after September 26, 1991, despite its
22 awareness that plaintiff actually became a Nevada resident at that time. Plaintiff alleges that the
23 FTB's efforts to coerce plaintiff into sharing his hard-earned wealth despite having no lawful
24 basis for doing so, constitutes malice and oppression.

25 Jurisdiction

26 26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-
27 arm" statute, NRS 14.065 et seq., because of the FTB's tortious extraterritorial contacts and
28

1 investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to
2 undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for
3 maintaining that plaintiff continued his residency in California during the period September 26,
4 1991 to December 31, 1991 and beyond.

5 27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a
6 pattern and practice of entering into Nevada to investigate Nevada residents who were formerly
7 residents of California, and then assessing such residents California state income taxes for time
8 periods subsequent to the date when such individuals moved to and established residency in
9 Nevada.

10 FIRST CAUSE OF ACTION

11 (For Declaratory Relief)

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

17 29. Pursuant to California law, in determining whether an individual was a resident
18 of California for a certain time period thereby making such individual's income subject to
19 California state income tax during such period, the individual must have been domiciled in
20 California during such period for "other than a temporary or transitory purpose." See Cal. Rev.
21 & Tax Code § 17014. The FTB's own regulations and precedents require that it apply certain
22 factors in determining an individual's domicile and/or whether the individual's presence in
23 California (or outside of California) was more than temporary or transitory.

24 a) Domicile.

25 Domicile is determined by the individual's physical presence in California with intent to stay or
26 if absent temporarily from California an intent to return. Such intent is determined by the acts
27 and conduct of the individual such as: (1) where the individual is registered to vote and votes;
28

1 (2) location of the individual's permanent home; (3) comparative size of homes maintained by
2 the individual in different states; (4) where the individual files federal income tax returns; (5)
3 comparative time spent by the individual in different states; (6) cancellation of the individual's
4 California homeowner's property tax exemption; (7) obtaining a driver's license from another
5 state; (8) registering a car in another state; (9) joining religious, business and/or social
6 organizations in another state; and (10) establishment of a successful business in another state
7 by an individual who is self employed.
8

9 (b) Temporary or Transitory Purpose.

10 The following contacts which are similar although not identical to those used to determine
11 domicile are important in determining whether an individual was in California (or left
12 California) for a temporary or transitory purpose: (1) physical presence of the individual in
13 California in comparison to the other state or states; (2) establishment of a successful business in
14 another state by an individual who is self employed; (3) extensive business interest outside of
15 California and active participation in such business by the individual; (4) banking activity in
16 California by the individual is given some, although not a great deal of, weight; (5) rental of
17 property in another state by the individual; (6) cancellation of the individual's California
18 homeowner's property tax exemption; (7) hiring professionals by the individual located in
19 another state; (8) obtaining a driver's license from another state; (9) registering a car in another
20 state; (10) joining religious, business and/or social organizations in another state; and (11)
21 where the individual is registered to vote and votes.
22
23

24 30. The FTB's assessment of taxes and a penalty for 1991 is based on the FTB's
25 conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3,
26 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such
27 a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which
28

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

15 31. An actual controversy exists as to whether plaintiff was a full-time resident of
16 Nevada — not California — commencing on September 26, 1991 through December 31, 1991
17 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either
18 Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout
19 the referenced periods and down to the present, and that the FTB ignored its own regulations
20 and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax
21 obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB had no
22 authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to
23 propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the
24 cooperation of said Nevada residents and businesses through an unlawful and tortious deception,
25 to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges,
26 that the FTB contends in all respects to the contrary.

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

1 September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial
2 investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada
3 residents without approval from a Nevada court or governmental agency, as alleged above, to be
4 without authority and violative of Nevada's sovereignty and territorial integrity.

5 SECOND CAUSE OF ACTION

6 (For Invasion of Privacy — Unreasonable Intrusion Upon The
7 Seclusion of Another, including Intrusion Upon Informational
8 Privacy)
9

10 33. Plaintiff realleges and incorporates herein by reference each and every allegation
11 contained in paragraphs 1 through 32, above, as though set forth herein verbatim.

12 34. Plaintiff is informed and believes, and therefore alleges, that neighbors,
13 businesses, government officials and others within Nevada with whom plaintiff has had and
14 would reasonably expect in the future to have social or business interactions, were approached
15 and questioned by the FTB and defendants who disclosed or implied that plaintiff was under
16 investigation in California, and otherwise acted in such a manner as to cause doubts to arise
17 concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation
18 in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential
19 information with the understanding that it would remain confidential, thereby creating a
20 confidential relationship in which the FTB was required not to disclose Hyatt's highly personal
21 and confidential information. The FTB even noted in its own internal documentation that
22 plaintiff had a significant concern in regard to the protection of his privacy in turning over such
23 information. At the time this occurred, plaintiff was still hopeful that the FTB was actually
24 operating in good faith, a proposition that, as noted throughout this complaint, proved to be
25 utterly false.

26 35. Plaintiff is informed and believes, and therefore alleges, that the FTB and
27 defendants nevertheless violated plaintiff's right to privacy in regard to such information by
28 revealing it to third parties and otherwise conducting an investigation in Nevada, and continuing

1 to conduct such an investigation, through which the FTB and defendants revealed to third
2 parties personal and confidential information, which plaintiff had every right to expect would
3 not be revealed to such parties.

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

12 37. Plaintiff is informed and believes, and therefore alleges, that the FTB and
13 defendants through their investigative actions, and in particular the manner in which they were
14 carried out in Nevada, intentionally intruded, and continues to intentionally intrude, into the
15 solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The
16 intrusion by the FTB and defendants was such that any reasonable person, including plaintiff,
17 would find highly offensive.

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

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

27
28

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 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

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

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

10 THIRD CAUSE OF ACTION

11 (For Invasion of Privacy — Unreasonable Publicity Given To

12 Private Facts, Including Publicity Given to Matters Protected

13 Under the Concept of Informational Privacy)

14 44. Plaintiff realleges and incorporates herein by reference each and every allegation
15 contained in paragraphs 1 through 43, above, as though set forth herein verbatim.

16 45. As set forth above, plaintiff revealed to the FTB highly personal and confidential
17 information at the request of the FTB as an ostensible part of its audit and investigation into
18 plaintiff's residency during the disputed time periods, thereby creating a confidential
19 relationship in which the FTB was required not to disclose Hyatt's highly personal and
20 confidential information. Plaintiff had a reasonable expectation that said information would be
21 kept confidential and not revealed to third parties and the FTB and defendants knew and
22 understood that said information was to be kept confidential and not revealed to third parties.

23 46. The FTB and defendants, without necessity or justification, nevertheless
24 disclosed to third parties, and continue to disclose to third parties, in Nevada certain of
25 plaintiff's personal and confidential information which had been cooperatively disclosed to the
26 FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and
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1 investigative efforts, or which the FTB had acquired via other means but was required by its
2 own rules and regulations or state law not to disclose to third parties.

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

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

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

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

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

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

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

21 FOURTH CAUSE OF ACTION

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

23 53. Plaintiff realleges and incorporates herein by reference each and every allegation
24 contained in paragraphs 1 through 52, above, as if set forth herein verbatim.

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

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

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

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

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

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

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

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

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

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

1 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
2 thereof to be proved according to the evidence at trial.

3 FIFTH CAUSE OF ACTION

4 (For the Tort of Outrage)

5 62. Plaintiff realleges and incorporates herein by reference each and every allegation
6 contained in paragraphs 1 through 61, above, as if set forth herein verbatim.

7 63. The clandestine and reprehensible manner in which the FTB and defendants
8 carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of
9 authority from the State of California, but without permission from the State of Nevada, and the
10 FTB and defendants' clear intent to continue to investigate and assess plaintiff staggeringly high
11 California state income taxes, interest, and penalties for the entire year of 1992 — and possibly
12 continuing into future years — despite the FTB's own finding that plaintiff was a Nevada
13 resident at least as of April of 1992, was, and continues to be, extreme, oppressive and
14 outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California,
15 disdaining and abandoning all reason in its reprehensible, all-out effort to extort significant
16 amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes,
17 and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for
18 the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of
19 which was, and continue to be, to so harass, annoy, embarrass, and intimidate plaintiff, and to
20 cause him such severe emotional distress and worry as to coerce him into paying significant
21 sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the
22 disputed periods. As a result of such extremely outrageous and oppressive conduct on the part
23 of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment,
24 anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel
25 if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful
26 and determined adversaries.

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

4 65. Plaintiff is informed and believes, and therefore alleges, that said extreme,
5 unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was
6 despicable conduct by the FTB and defendants, entered into with a willful and conscious
7 disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive
8 damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

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

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

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

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

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

18 SIXTH CAUSE OF ACTION

19 (For Abuse of Process)

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

22 71. Despite plaintiff's ongoing effort, both personally and through his professional
23 representatives, to reasonably provide the FTB with every form of information it requested in
24 order to convince the FTB that plaintiff has been a bona fide resident of the State of Nevada
25 since September 26, 1991, the FTB has willfully sought to extort vast sums of money from
26 plaintiff through administrative proceedings unrelated to the legitimate taxing purposes for
27 which the FTB is empowered to act as an agency of the government of the State of California;
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1 said administrative proceedings have been lawlessly and abusively directed into the State of
2 Nevada through means of administrative “quasi-subpoenas” that have been unlawfully utilized
3 in the attempt to extort money from plaintiff as aforesaid.

4 72. The FTB, without authorization from any Nevada court or governmental agency,
5 directed facially authoritative “DEMAND[S] TO FURNISH INFORMATION,” also referred to
6 herein by plaintiff as “quasi-subpoenas,” to various Nevada residents, professionals and
7 businesses, *requiring* specific information about plaintiff. The aforesaid “Demands” constituted
8 an actionable abuse of process with respect to plaintiff for the following reasons:

9 (a) Despite the fact that each such “Demand” was without force of law, they were
10 specifically represented to be “Authorized by California Revenue & Taxation Code Section
11 19504 (formerly 19254 (a) and 26423 (a)[I]),” sent out by the State of California, Franchise Tax
12 Board on behalf of “The People of the State of California” to each specific recipient, and were
13 prominently identified as relating to “*In the Matter of: Gilbert P. Hyatt;*” Plaintiff was also
14 identified by his social security number, and in certain instances by his actual home address in
15 violation of express promises of confidentiality by the FTB; although the aforesaid “Demands”
16 were not directed to plaintiff, the perversion of administrative process which they represented
17 was motivated by the intent to make plaintiff both the target and the victim of the illicit
18 documents;

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

24 (c) Each such “Demand” was submitted to Nevada residents, professionals and
25 businesses for the ulterior purpose of coercing plaintiff into paying extortionate sums of money
26 to the FTB without factual or constitutional justification, and without the intent or prospect of
27 resolving any legal dispute; indeed, as noted above, many of the “Demands” were used as
28 vehicles for publicly violating express promises of confidentiality by the FTB, thus adding to

1 the pressure and anxiety felt by plaintiff as intended by the FTB in furtherance of its unlawful
2 scheme;

3 (d) Although the FTB was allegedly investigating plaintiff for the audit years 1991 and
4 1992, such audits were and are a "sham" asserted for the purposes of attempting to extort non-
5 owed monies from plaintiff, as demonstrated by the fact that several of the "Demands" indicated
6 that they were issued to secure information (about plaintiff) "for investigation, audit or
7 collection purposes pertaining to the above-named taxpayer for the years indicated," and then
8 proceeded to demand information pertaining to the years 1993, 1994, and 1995 "to present;"

9 (e) Sheila Cox, a tax auditor for the FTB who has invested hundreds of hours in
10 attempting to gain unlawful access to plaintiff's wallet through means of extortion, was the
11 "Authorized Representative" who issued these abusive, deceptive and outrageous "Demands;"
12 and each of the "Demands" or quasi-subpoenas constituted legal or administrative process
13 targeting plaintiff that was not proper in the regular conduct of the FTB's administrative
14 proceedings against plaintiff;

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

22 (g) In conjunction with and in addition to the issuance of the aforesaid "Demands," and
23 the personal, investigative forays into Nevada by FTB agents, as detailed above, a representative
24 of the FTB, Anna Jovanovich, stated to plaintiff's tax counsel, Eugene Cowan, Esq., that at this
25 "stage" of the proceedings, these types of disputes involving wealthy or well-known taxpayers
26 over their contested assessments almost always settle because these taxpayers do not want to
27 risk having their personal financial information being made public, thus the "suggestion" by Ms.
28 Jovanovich concerning settlement was made with the implied threat that the FTB would release

1 highly confidential financial information concerning plaintiff if he refused to settle, another
2 deceptive and improper abuse of the proceedings instigated by the FTB to coerce settlement by
3 plaintiff;

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

11 (i) The FTB and Sheila Cox knew that they had no authority to issue "DEMAND[S] TO
12 FURNISH INFORMATION" to any Nevada resident, business or entity, and that it was a gross
13 abuse of Section 19504 of the California Revenue and Taxation Code, under which the aforesaid
14 "Demands" were purportedly authorized; that the aforesaid section of the California Revenue
15 and Taxation Code contains no provision that remotely purports to empower or authorize the
16 FTB to issue such facially coercive documents to residents and citizens of Nevada in Nevada;
17 and despite knowing that it was highly improper and unlawful to attempt to deceive Nevada
18 citizens and businesses into believing that they were under a compulsion to respond to the
19 "Demands" under pain of some type of punitive consequences, Sheila Cox and the FTB
20 nevertheless deliberately and calculatingly abused the process authorized by the aforesaid
21 section of the California Revenue and Taxation Code in order to promote their attempts to extort
22 money from plaintiff;

23 (j) From the outset, the determination by Sheila Cox and the FTB to utilize the
24 "DEMAND[S] TO FURNISH INFORMATION" in Nevada, constituted a deliberate, unlawful,
25 and despicable decision to embark on a course of concealment in the effort to produce material,
26 information, pressure and sources of distortion that would culminate in a combination of
27 sufficient strength and adversity to force plaintiff to yield to the FTB's extortionate demands for
28 money; and the course of concealment consisted of concealing from plaintiff the fact that the

1 aforesaid "Demands" were being sent to Nevada residents, professional persons and businesses,
2 and in hiding from the recipients of the "Demands" the fact that despite their stated support in
3 California law, the documents had no such support and were deceitful and bogus documents;
4 and

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

9 73. As a direct, proximate and foreseeable result of the FTB and defendants'
10 intentional and malicious abuse of the administrative processes, which the FTB initiated and
11 unrelentingly pursued against plaintiff, as aforesaid, plaintiff has suffered actual and
12 consequential damages, including but not limited to fear, anxiety, mental and emotional distress
13 in an amount in excess of \$10,000.

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

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

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

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

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

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

1 as special damages, his attorneys' fees in an amount in excess of \$10,000.00, the total amount
2 thereof to be proved according to the evidence at trial.

3 SEVENTH CAUSE OF ACTION

4 (For Fraud)

5 79. Plaintiff realleges and incorporates herein by reference each and every allegation
6 contained in paragraphs 1 through 78, above, as if set forth herein verbatim.

7 80. Plaintiff, who prior to September 26, 1991 had been a long-standing resident and
8 taxpayer of the State of California, placed trust and confidence in the bona fides of the FTB as
9 the taxing authority of the State of California when the FTB first contacted him on or about June
10 1993 regarding the 1991 audit of his California tax obligation; by the time of this first contact,
11 plaintiff had become a recognized and prominent force in the computer electronics industry, and
12 he was vitally interested in maintaining both his personal and business security, as well as the
13 integrity of his reputation as a highly successful inventor and owner and licensor of significantly
14 valuable patents.

15 81. During the course of seeking information and documents relating to the 1991
16 "audit," and repeatedly thereafter, the FTB absolutely promised to (i) conduct an unbiased, good
17 faith audit and (ii) maintain in the strictest of confidence, various aspects of plaintiff's
18 circumstances, including, but not limited to, his personal home address and his business and
19 financial transactions and status; and plaintiff's professional representatives took special
20 measures to maintain the confidentiality of plaintiff's affairs, including and especially obtaining
21 solemn commitments from FTB agents to maintain in the strictest of confidence (assured by
22 supposedly secure arrangements) all of plaintiff's confidential information and documents; and
23 the said confidential information and documents were given to the FTB in return for its solemn
24 guarantees and assurances of confidentiality, as aforesaid, thereby creating a confidential
25 relationship in which the FTB was required not to disclose Hyatt's highly personal and
26 confidential information.

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1 82. Despite the aforesaid assurances and representations of (i) an unbiased, good
2 faith audit and (ii) confidentiality by the FTB, said assurances and representations were false,
3 and the FTB knew they were false or believed they were false, or were without a sufficient basis
4 for making said assurances and representations. Even as the FTB and its agents were continuing
5 to provide assurances of confidentiality to plaintiff and his professional representatives, and
6 without notice to either, Sheila Cox and the FTB were in the process of sending the bogus
7 "DEMAND[S] TO FURNISH INFORMATION" to the utility companies in Las Vegas which
8 demonstrated that the aforesaid assurances and representations were false, as the FTB revealed
9 plaintiff's personal home address in Las Vegas, thus making this highly sensitive and
10 confidential information essentially available to the world through access to the databases
11 maintained by the utility companies. Specific representative indices of the FTB's fraud include:

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

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

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

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

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

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

18 (v) 8/31/95 - In a letter sent to Eugene Cowan, Esq. by Sheila Cox on
19 8/31/95 regarding the 1991 audit, Cox stated: "The FTB acknowledges that the taxpayer is a
20 private person who puts a significant effort into protecting his privacy[;]"

21 (c) Despite the meeting Sheila Cox had with Mr. Cowan on February 23, 1995, and Mr.
22 Cowan's expression of plaintiff's concern for his privacy, and the explanation by Cox of the
23 FTB's stringent Security and Disclosure policy (the violation of which may subject the
24 offending FTB employee to criminal sanctions or termination); and despite Mr. Cowan's letter
25 to Sheila Cox of February 28, 1995, discussing the highly confidential nature of "all
26 correspondence and materials furnished to the Franchise Tax Board" and his and plaintiff's
27 "understanding that you will retain these materials in locked facilities with limited access"
28 (thereby again underscoring the understanding that all information and documents provided to

1 the FTB would be confidential, including plaintiff's personal residence address), Sheila Cox
2 sent a "DEMAND TO FURNISH INFORMATION" to the Las Vegas utility companies
3 including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water
4 District, providing each such company with the plaintiff's personal home address, thereby
5 demonstrating disdain for plaintiff, his privacy concerns and the FTB's assurances of
6 confidentiality.

7 83. Plaintiff further alleges that from the very beginning of the FTB's notification to
8 plaintiff and his professional representatives of its intention to audit his 1991 California taxes,
9 express and implied assurances and representations were made to plaintiff through his
10 representatives, that the audit was to be an objective, unbiased, and good faith inquiry into the
11 status of his 1991 tax obligation; and that upon information and belief, based on the FTB's
12 subsequent actions, the aforesaid representations were untrue, as the FTB and certain of its
13 agents were determined to share in the highly successful produce of plaintiff's painstaking labor
14 through means of truth-defying extortion. Indications of this aspect of the fraud perpetrated by
15 the FTB include:

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

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

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

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

12 (e) The FTB's gamesmanship, illustrated in part, above, constituted an ongoing
13 misrepresentation of a bona fide audit of plaintiff's 1991 tax year, a factor compounded
14 egregiously by the quasi-subpoenas sent to Nevada residents, professionals and businesses
15 without prior notice to plaintiff, and concerning which a number of such official documents
16 indicated that plaintiff was being investigated from January 1995 to the present, all with the
17 intent of defrauding plaintiff into believing that he would owe an enormous tax obligation to the
18 State of California.

19 84. The FTB and its agents intended to induce plaintiff and his professional
20 representatives to act in reliance on the aforesaid false assurances and representations in order to
21 acquire highly sensitive and confidential information from plaintiff and his professional
22 representatives, and place plaintiff in a position where he would be vulnerable to the FTB's
23 plans to extort large sums of money from him. The FTB was keenly aware of the importance
24 plaintiff assigned to his privacy because of the danger of industrial espionage and other hazards
25 involving the extreme need for security in plaintiff's work and place of residence. The FTB also
26 knew that it would not be able to obtain (at least without the uncertain prospects of judicial
27 intervention) the desired information and documents with which to develop colorable, ostensible
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1 tax assessments and penalties against plaintiff, without providing plaintiff and his professional
2 representatives with solemn commitments of secure confidentiality.

3 85. Plaintiff, reasonably relying on the truthfulness of the aforesaid assurances and
4 representations by the FTB and its agents, and having no reason to believe that an agency of the
5 State of California would misrepresent its commitments and assurances, did agree both
6 personally and through his authorized professional representatives to cooperate with the FTB
7 and provide it with his highly sensitive and confidential information and documents; in fact,
8 plaintiff relied on the false representations and assurances of the FTB and its agents to his
9 extreme detriment.

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

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

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

19 88. Plaintiff was drawn into the FTB's audit without choice and as an innocent party.
20 As such, plaintiff had every right to expect that the FTB's demand for an audit would be
21 processed in good faith, according to the law and the facts. Instead, he was subjected to, and
22 continues to be subjected to, a determined and malicious bad-faith attempt to extort money from
23 plaintiff under abuse and betrayal of the FTB's lawful taxing powers. The FTB's fraudulent and
24 oppressive scheme includes the intimidating imposition of enormous, indefensible "fraud
25 penalty" assessments designed to force plaintiff to yield to a major compromise or suffer
26 significant financial and reputational destruction. The threatened (and consummated) tortious
27 actions included the outrageously intrusive invasion of his privacy, as aforesaid, and the
28

1 publicity of private facts that were expressly extracted from plaintiff under false promises of
2 strict confidentiality. Plaintiff repeatedly relied on these promises to his extreme and permanent
3 detriment.

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

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

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

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EIGHTH CAUSE OF ACTION

(For Breach of Confidentiality — Including Informational
Privacy)

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

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.

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.

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

6 96. As a direct, proximate, and foreseeable result of the FTB's aforementioned
7 invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total
8 amount in excess of \$10,000.

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

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

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

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

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

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

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

3 FIRST CAUSE OF ACTION

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

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

12 3. For costs of suit; and

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

14 SECOND CAUSE OF ACTION

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

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

18 3. For costs of suit;

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

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

21 THIRD CAUSE OF ACTION

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

24 2. For costs of suit;

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

26 4. For such other and further relief as the Court deems just and proper.
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FOURTH CAUSE OF ACTION

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

FIFTH CAUSE OF ACTION

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

SIXTH CAUSE OF ACTION

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

SEVENTH CAUSE OF ACTION

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

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

EIGHTH CAUSE OF ACTION

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

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

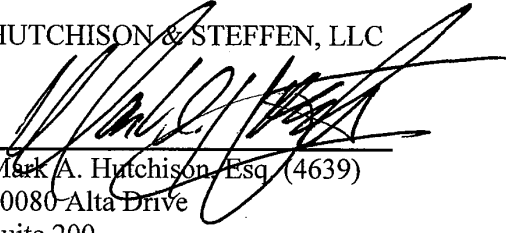
3. For costs of suit;

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

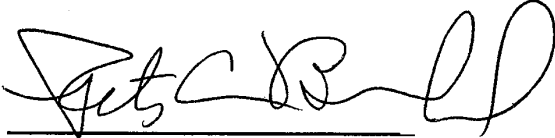
5. For such other and further relief as the Court deems just and proper.

Dated this 18th day of April, 2006.

HUTCHISON & STEFFEN, LLC


Mark A. Hutchison, Esq. (4639)
10080 Alta Drive
Suite 200
Las Vegas, Nevada 89145

BULLIVANT HOUSER BAILEY PC


Peter C. Bernhard, Esq. (734)
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Suite 550
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(702) 650-6565

Attorneys for Plaintiff Gilbert P. Hyatt

EXHIBIT 58

ORDR

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Telephone: (702) 650-6565
Attorneys for Plaintiff Gilbert P. Hyatt

FILED

APR 19 4 32 PM '06

Shirley B. Ruggins
CLERK

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

**ORDER GRANTING MOTION FOR
LEAVE TO FILE SECOND AMENDED
COMPLAINT**

DATE: April 17, 2006**TIME: 10:00 a.m.**

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

This matter having come before the Court on April 17, 2006, for hearing the Plaintiff Gilbert P. Hyatt's Motion for Leave to File Second Amended Complaint, Plaintiff having been represented by Mark A. Hutchison and Peter C. Bernhard, and the Franchise Tax Board having been represented by James W. Bradshaw and Pat Lundvall; the Court having considered the papers submitted by counsel as well as oral arguments at the hearing; and GOOD CAUSE APPEARING;

///

1 IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File Second
2 Amended Complaint be and the same hereby is GRANTED, and Plaintiff be and he hereby is
3 directed to serve and file his Second Amended Complaint.

4 DATED this 19 day of April, 2006

6 JESSIE WALSH

7 DISTRICT COURT JUDGE

8 SUBMITTED BY:

9 BULLIVANT HOUSER BAILEY PC
10 

11 Peter C. Bernhard, Esq. (734)
12 3980 Howard Hughes Pkwy.
13 Suite 550
14 Las Vegas, Nevada 89109
15 (702) 650-6565
16 Attorneys for Plaintiff Gilbert P. Hyatt

16 APPROVED AS TO FORM BY:

17 McDONALD CARANO WILSON

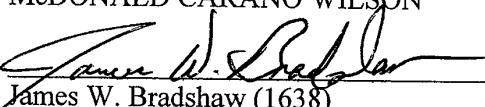
18 
19 James W. Bradshaw (1638)
20 100 West Liberty Street, 10th Floor
21 Reno, NV 89505-2670
22 Attorneys for Defendant Franchise Tax
23 Board of the State of California
24
25
26
27
28

EXHIBIT 59

1 **ROC**

2 JAMES W. BRADSHAW (NSBN 1638)
3 PAT LUNDVALL (NSBN 3761)
4 CARLA HIGGINBOTHAM (NSBN 8495)
5 McDONALD CARANO WILSON LLP
6 2300 West Sahara Avenue, Suite 1000
7 Las Vegas, Nevada 89102
8 Telephone No. (702) 873-4100

9 Attorneys for Defendant Franchise Tax Board of
10 the State of California

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 * * * *

14 GILBERT P. HYATT,
15 Plaintiff,

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

16 vs.

17 **RECEIPT OF COPY**

18 FRANCHISE TAX BOARD OF THE
19 STATE OF CALIFORNIA, and DOES 1-
20 100, inclusive,
21 Defendants.

22 RECEIPT OF COPY of the foregoing FTB'S OFFER OF JUDGMENT is hereby
23 acknowledged this 26th day of November, 2007.

24 **BULLIVANT HOUSER BAILEY PC**

25 *Peter C Bernhard / gwr*
26 Peter C. Bernhard, Esq.
27 3883 H. Hughes Parkway, No. 550
28 Las Vegas, Nevada 89169

OFFER

JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
McDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Telephone No. (702) 873-4100

Attorneys for Defendant Franchise Tax Board

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT,

Plaintiff,

vs.

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

Defendants.

Case No. : A 382999

Dept. No. : X

Docket No. : R

FTB'S OFFER OF JUDGMENT

Hearing Date:

Hearing Time:

TO: Plaintiff Gilbert P. Hyatt and his attorneys of record:

Pursuant to Rule 68 of the Nevada Rules of Civil Procedure and Nevada Revised Statute 17.115, defendant Franchise Tax Board of the State of California ("FTB") offers to allow judgment to be taken against it and in favor of plaintiff Gilbert P. Hyatt ("Hyatt") in the amount of One Hundred Ten Thousand Dollars (\$110,000) inclusive of all pre-offer, prejudgment interest, taxable costs and attorneys fees. This Offer of Judgment is for the amount of One Hundred Ten Thousand Dollars (\$110,000) only. No amount in excess of this One Hundred Ten Thousand Dollars (\$110,000) is being offered. This inclusive amount is expressly intended to preclude a separate award of costs, fees, interest or any other form of compensation. This Offer of Judgment shall apply to all claims asserted by Hyatt against FTB in the above referenced action and if accepted, shall completely resolve this matter.

This Offer of Judgment is made for the purposes specified in NRCP 68 and Nevada Revised

1 Statute 17.115, is expressly designated a compromise settlement, and it is not to be construed as an
2 admission of any kind whatsoever in any administrative proceeding or court of law in any forum or
3 jurisdiction, including Nevada and California. If this Offer of Judgment is acceptable, Hyatt should
4 send the original of his written acceptance to FTB attorneys at the address listed below. If this Offer
5 of Judgment is accepted, FTB intends to pay the amount of the offer within a reasonable time and
6 exercise its option to obtain a dismissal of this action rather than a judgment. See NRCF 68(d) and
7 NRS 17.115(2)(a)((1).

8 Dated this 26 day of November, 2007.

9 McDONALD CARANO WILSON LLP

10
11 By:


12 JAMES W. BRADSHAW (NSBN 1638)
13 PAT LUNDVALL (NSBN 3761)
14 CARLA HIGGINBOTHAM (NSBN 8495)
15 2300 West Sahara Avenue, Suite 1000
16 Las Vegas, Nevada 89102
17 Telephone No. (702) 873-4100

18 Attorneys for Defendant
19 Franchise Tax Board of the State of California
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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 OFFER OF JUDGMENT** on this 26th day of November, 2007 by hand delivery upon the following:

Peter C. Bernhard, Esq.
Bullivant Houser Bailey PC
3883 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89169

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 OFFER OF JUDGMENT** on this 26th day of November, 2007 by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

Mark A. Hutchison, Esq.
Hutchison & Steffen
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Donald Kula, Esq.
Perkins Coie
1620 - 26th Street
Sixth Floor, South Tower
Santa Monica, CA 90404-4013



An Employee of McDonald Carano Wilson LLP

EXHIBIT 60

FILED IN OPEN COURT
AUG 16 2008 20
DISTRICT COURT
CLARK COUNTY, NEVADA
CHARLES J. SHORT
CLERK OF THE COURT

**** BY TERI BRAEGELMANN DEPUTY
236 PM

GILBERT P. HYATT,
Plaintiff,

vs.

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

Defendants.

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

SPECIAL VERDICT FORM

We, the jury in the above entitled action, answer the questions submitted to us as follows:

1. On Gilbert P. Hyatt's second cause of action for invasion of privacy intrusion upon seclusion against Defendant California Franchise Tax Board ("FTB"), we find in favor of GILBERT P. HYATT [insert Gilbert P. Hyatt or FTB].

2. On Gilbert P. Hyatt's third cause of action for invasion of privacy publicity of private facts against FTB, we find in favor of GILBERT P. HYATT [insert Gilbert P. Hyatt or FTB].

3. On Plaintiff Gilbert P. Hyatt's fourth cause of action for invasion of privacy false light against FTB, we find in favor of GILBERT P. HYATT [insert Gilbert P. Hyatt or FTB].

4. On Gilbert P. Hyatt's fifth cause of action for intentional infliction of emotional distress against FTB, we find in favor of GILBERT P. HYATT [insert Gilbert P. Hyatt or FTB].

1 5. On Gilbert P. Hyatt's sixth cause of action for abuse of process against FTB, we
2 find in favor of GILBERT P. HYATT [insert Gilbert P. Hyatt or FTB].

3 6. On Gilbert P. Hyatt's seventh cause of action for fraud against FTB, we find in
4 favor of GILBERT P. HYATT [insert Gilbert P. Hyatt or FTB].

5 7. On Gilbert P. Hyatt's eighth cause of action for breach of confidential
6 relationship against FTB, we find in favor of GILBERT P. HYATT
7 [insert Gilbert P. Hyatt or FTB].

8
9 If you found in favor of FTB on all seven questions above, then proceed no further. If
10 you found in favor of Gilbert P. Hyatt on any of the above questions, then proceed to the next
11 question.

12 8. We the jury award damages in favor of Gilbert P. Hyatt, and against FTB, in the
13 following amounts:

14 a. The amount of money that will fully and fairly compensate Gilbert P. Hyatt
15 for the emotional distress he suffered is \$ 85,000,000.00.

16 b. The amount of money that will fully and fairly compensate Gilbert P. Hyatt
17 for the FTB's invasion of privacy interest \$ 52,000,000.00

18 9. If you found in favor of Gilbert P. Hyatt, and against FTB on Gilbert P. Hyatt's
19 seventh cause of action for Fraud, we the jury award damages in favor of Gilbert P. Hyatt, and
20 against FTB, in the following amount of money that will fully and fairly compensate Gilbert P.
21 Hyatt for attorneys fees as special damages he suffered \$ 1,085,281.86.

22
23
24
25 Dated this 6TH day of AUGUST, 2008.

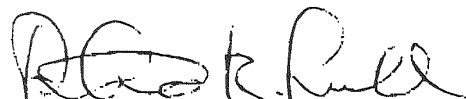
26
27 
28 FOREPERSON

EXHIBIT 61

FILED IN OPEN COURT

AUG 11 2008 20

CHARLES J. SHORT
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

TERI BRAEGELMANN DEPUTY

FUS

1148 AM

GILBERT P. HYATT,

Plaintiff,

vs.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Defendant.

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

SPECIAL VERDICT FORM NUMBER 2

We, the jury in the above entitled action, answer the question submitted to us as follows:

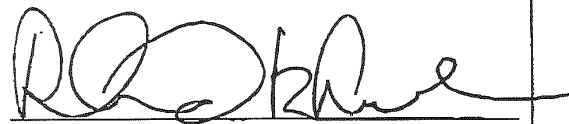
Based on the evidence presented, was the Defendant Franchise Tax Board of the State of
California guilty of oppression, fraud or malice, express or implied, against Plaintiff Gilbert P.
Hyatt?X YES NODated this 8/11/ day of August, 2008.
FOREPERSON

EXHIBIT 62

FILED IN OPEN COURT

AUG 14 2008

20

CHARLES J. SHORT
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

BY TERI BRAEGELMAN DEPUTY

FUS

2:15 PM

GILBERT P. HYATT,

Plaintiff,

vs.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Defendants.

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

SPECIAL VERDICT FORM NUMBER 3

We, the jury in the above entitled action, having found that the Defendant Franchise Tax Board of the State of California ("FTB") has been guilty of oppression, fraud or malice, express or implied, against Plaintiff Gilbert P. Hyatt ("Hyatt"), award damages in favor of Hyatt and against FTB, for the sake of example and by way of punishing the defendant FTB, in the amount of \$ 250 MILLION.

Dated this 14 day of AUGUST, 2008.



FOREPERSON

EXHIBIT 63

FILED

SEP 8 10 21 AM '08



CLERK OF THE COURT

JGJV

Mark A. Hutchison (4639)
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Telephone: (702) 669-3600
Attorneys for Plaintiff Gilbert P. Hyatt

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Defendant.

Case No.: A382999

Dept. No.: X

JUDGMENT

Date of Hearing: N/A

Time of Hearing: N/A

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

This matter came on for trial before the Court and a jury, beginning on April 14, 2008, and concluding with the verdicts of the jury on August 6, 2008 (liability for and amount of compensatory damages), on August 12, 2008 (liability for punitive damages), and on August 14, 2008 (amount of punitive damages), the Honorable Jessie Walsh, District Judge, presiding. Plaintiff Gilbert P. Hyatt appeared with his counsel Mark A. Hutchison, Esq. of Hutchison & Steffen, LLC, Peter C. Bernhard, Esq. of Bullivant Houser Bailey, PC, and Donald J. Kula Esq. of Perkins Coie. Defendant Franchise Tax Board of the State of California appeared with its

BullivantHouserBailey PC

3883 Howard Hughes Pkwy., Suite. 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

1 representative and its counsel, Pat Lundvall Esq., and James Bradshaw Esq., of McDonald
2 Carano Wilson, LLP.

3 Testimony was taken under oath, and evidence was offered, introduced and admitted.
4 Counsel argued the merits of their clients' cases, the issues have been duly tried, and the jury
5 duly rendered its verdict. The jury rendered a verdict in favor of Plaintiff Gilbert P. Hyatt and
6 against Franchise Tax Board on all causes of action presented to the jury, including Plaintiff's
7 second cause of action for invasion of privacy intrusion upon seclusion, third cause of action for
8 invasion of privacy publicity of private facts, fourth cause of action for invasion of privacy false
9 light, fifth cause of action for intentional infliction of emotional distress, sixth cause of action
10 for abuse of process, seventh cause of action for fraud and eighth cause of action for breach of
11 confidential relationship. This Court previously dismissed Plaintiff's first cause of action for
12 declaratory relief, and that cause of action was not presented to the jury.

14 The jury returned its verdict awarding Plaintiff Gilbert P. Hyatt compensatory damages
15 of EIGHTY-FIVE MILLION DOLLARS AND NO CENTS (\$85,000,000.00) for emotional
16 distress; compensatory damages of FIFTY-TWO MILLION DOLLARS AND NO CENTS
17 (\$52,000,000.00) for invasion of privacy; attorneys' fees as special damages of ONE MILLION,
18 EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS
19 (\$1,085,281.56); and punitive damages of TWO HUNDRED FIFTY MILLION DOLLARS
20 AND NO CENTS (\$250,000,000.00).

22 At the conclusion of the verdict reached on August 6, 2008, the jury was polled, and
23 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that
24 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to liability and the
25 amount of compensatory damages awarded on each of Plaintiff's seven claims. At the
26 conclusion of the verdict on punitive damages on August 12, 2008, the jury was polled, and
27
28

1 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that
2 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to whether the conduct
3 of the Defendant warranted punitive damages. At the conclusion of the verdict on punitive
4 damages on August 14, 2008, the jury was polled, and seven jurors responded that the verdict as
5 read by the Clerk of the Court was the verdict of that juror, with one juror responding in the
6 negative, resulting in a verdict of seven (7) in favor and one (1) opposed, as to the amount of
7 punitive damages awarded against Defendant.

8
9 NOW, THEREFORE, based on the foregoing, judgment upon the jury verdicts is entered
10 in favor of Plaintiff Gilbert P. Hyatt and against Defendant Franchise Tax Board, as follows:

11 IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is
12 awarded compensatory damages in the amount of EIGHTY-FIVE MILLION DOLLARS AND
13 NO CENTS (\$85,000,000.00) for emotional distress, plus prejudgment interest at the rate of
14 seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of
15 \$63,184,110.12 from the date the Complaint was served (calculated through August 27, 2008,
16 and accruing from August 27, 2008 at the rate of \$ 16,301.37 per day until the date of this
17 Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from
18 the date of this Judgment until satisfied in full;
19

20 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
21 Hyatt is awarded compensatory damages in the amount of FIFTY-TWO MILLION DOLLARS
22 AND NO CENTS (\$52,000,000.00) for invasion of privacy, plus prejudgment interest at the rate
23 of seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of
24 \$38,653,797.60 from the date the Complaint was served (calculated through August 27, 2008,
25 and accruing from August 27, 2008 at the rate of \$ 9,972.60 per day until the date of this
26
27
28

Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is awarded attorneys' fees as special damages in the amount of ONE MILLION, EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS (\$1,085,281.56), plus prejudgment interest at the rate of seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of \$497,824.53 from the dates the special damages were incurred (calculated through August 27, 2008, and accruing from August 27, 2008 at the rate of \$ 208.14 per day until the date of this Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is awarded punitive damages in the amount of TWO HUNDRED FIFTY MILLION DOLLARS AND NO/100 CENTS (\$250,000,000.00), with interest to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is awarded costs in the amount of to be determined with interest to accrue at the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full.

DATED this 5 day of SEP August, 2008.

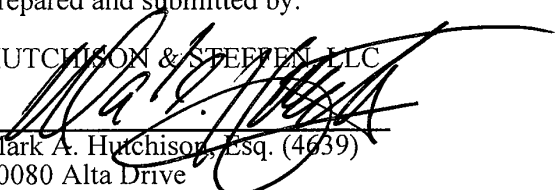
JESSIE WALCH

DISTRICT JUDGE

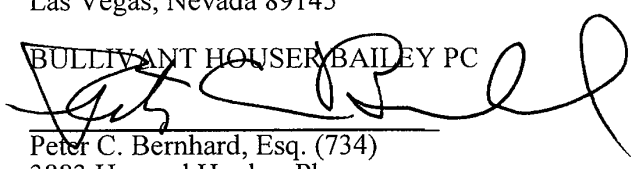
Prepared and submitted by:

Prepared and submitted by:

HUTCHISON & STEEFEN, LLC


Mark A. Hutchison, Esq. (4639)
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BULLIVANT HOUSER BAILEY PC


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Attorneys for Plaintiff Gilbert P. Hyatt

EXHIBIT 64

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Attorneys for Defendant Franchise Tax Board of the State of California

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT,

Plaintiff,

vs.

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

Defendants.

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

RECEIPT OF COPY

A receipt of copy of the **NOTICE OF APPEAL AND CASE APPEAL**

STATEMENT is hereby acknowledged this 10th day of February, 2009.

BULLIVANT HOUSER BAILEY PC

Peter C. Bernhard
Peter C. Bernhard, Esq.
3883 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89169

AA003208

FILED

2009 FEB 10 A 10:07

Enl. B. Smith
CLERK OF THE COURT

1 **STAT**

2 JAMES W. BRADSHAW (NSBN 1638)
3 PAT LUNDVALL (NSBN 3761)
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13 Facsimile No.: (775) 786-9716
14 rle@lge.net

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

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 * * * *

16 GILBERT P. HYATT,
17 Plaintiff,

18 vs.

19 FRANCHISE TAX BOARD OF THE
20 STATE OF CALIFORNIA,

21 Defendant.

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

CASE APPEAL STATEMENT

Hearing Date: N/A
Hearing Time: N/A

23
24 Defendant Franchise Tax Board of the State of California submits the following Case
25 Appeal Statement pursuant to Nevada Rules of Appellate Procedure 3(a)(1):

26 ///

27 ///

28 ///

- 1 **1. Appellant filing this Case Appeal Statement:**
2 Franchise Tax Board of the State of California
- 3 **2. Judge issuing the decision, judgment, or order appealed from:**
4 The Honorable Jessie Walsh, Eighth Judicial District Court for the State of Nevada
- 5 **3. Parties to the proceedings in the District Court:**
6 Plaintiff: Gilbert P. Hyatt
7 Defendant: Franchise Tax Board of the State of California
- 8 **4. Parties Involved in this Appeal:**
9 Plaintiff: Gilbert P. Hyatt
10 Defendant: Franchise Tax Board of the State of California
- 11 **5. The name, law firm, address and telephone number of all counsel on appeal and the**
12 **party or parties whom they represent:**
13 Attorneys for Plaintiff Gilbert P. Hyatt:
14 Peter C. Bernhard, Esq.
15 Bullivant Houser Bailey PC
16 3883 H. Hughes Parkway, No. 550
17 Las Vegas, Nevada 89169
18 (702) 669-3600
19 Mark A. Hutchison, Esq.
20 Hutchison & Steffen
21 Peccole Professional Park
22 10080 West Alta Drive, Suite 200
23 Las Vegas, NV 89145
24 (702) 385-2500
25 Donald Kula, Esq.
26 Perkins Coie
27 1620 - 26th Street
28 Sixth Floor, South Tower
Santa Monica, CA 90404-4013
(310) 788-9900
Attorneys for Defendant Franchise Tax Board of the State of California:
James W. Bradshaw
Pat Lundvall
Carla Higginbotham
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(702) 873-4100

Robert L. Eisenberg
LEMONS, GRUNDY, & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
(775) 786-6868

6. Indicate whether Appellee was represented by appointed or retained counsel in the district court:

Appellee was represented by retained counsel.

7. Indicate whether Appellant was represented by appointed or retained counsel on appeal:

Appellant is represented by retained counsel.

8. Indicate whether Appellant was granted leave to proceed in forma pauperis and the date of entry of the District Court order granting such leave:

Not applicable.

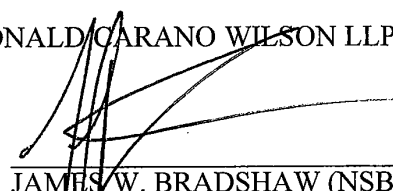
9. Indicate the date the proceedings commenced in the District Court:

The original complaint in this case was filed on January 6, 1998.

Dated this 9th day of February, 2009.

McDONALD • CARANO • WILSON LLP

By:


JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
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Facsimile No. (702) 873-9966

Attorneys for Defendant
Franchise Tax Board of the State of California

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served a true and correct copy of the foregoing **CASE APPEAL STATEMENT** on this 10th day of February, 2009 by hand delivery upon the following:

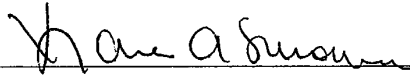
Peter C. Bernhard, Esq.
Bullivant Houser Bailey PC
3883 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89169

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served true and correct copies of the foregoing **CASE APPEAL STATEMENT** on this 10th day of February, 2009 by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

Mark A. Hutchison, Esq.
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An Employee of McDonald Carano Wilson LLP

NOTC

JAMES W. BRADSHAW (NSBN 1638)
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rlc@lge.net

Attorneys for Defendant Franchise Tax Board of the State of California

**DISTRICT COURT
CLARK COUNTY, NEVADA**

* * * *

GILBERT P. HYATT,

Plaintiff,

vs.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Defendant.

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

NOTICE OF APPEAL

Hearing Date: N/A
Hearing Time: N/A

Notice is hereby given that Defendant Franchise Tax Board of the State of California ("FTB") hereby appeals to the Supreme Court of Nevada from the following judgment and orders:

1. Judgment entered upon jury verdict in favor of Plaintiff Gilbert P. Hyatt entered on September 8, 2008 (Exhibit 1);

FILED

2009 FEB 10 A 10:06

E. J. [Signature]
CLERK OF THE COURT

- 1 2. Order denying FTB's Motion For Judgment as a Matter of Law or Alternatively And
2 Conditionally Motion for New Trial Pursuant to NRCP 50; and FTB's Alternative
3 Motion for New Trial and Other Relief Pursuant to NRCP 59 entered on February 5,
4 2009 (Exhibit 2); and
5 3. All other judgments and orders made final and appealable by the foregoing.

6 Dated this 9th day of February, 2009.

7 McDONALD-CARANO-WILSON LLP

8
9 By:

JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
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Facsimile No. (702) 873-9966

Attorneys for Defendant
Franchise Tax Board of the State of California

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served a true and correct copy of the foregoing **NOTICE OF APPEAL** on this 10th day of February, 2009 by hand delivery upon the following:

Peter C. Bernhard, Esq.
Bullivant Houser Bailey PC
3883 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89169

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served true and correct copies of the foregoing **NOTICE OF APPEAL** on this 10th day of February, 2009 by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

Mark A. Hutchison, Esq.
Hutchison & Steffen
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Donald Kula, Esq.
Perkins Coie
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Sixth Floor, South Tower
Santa Monica, CA 90404-4013

Robert L. Eisenberg
Lemons, Grundy & Eisenberg
6005 Plumb Street, Suite 300
Reno, NV 89519

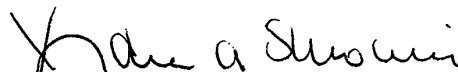

An Employee of McDonald Carano Wilson LLP

EXHIBIT “1”

EXHIBIT “1”

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 3 Hutchison & Steffen
 4 10080 Alta Drive
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 5 Peter C. Bernhard (734)
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 7 Telephone: (702) 669-3600
 8 *Attorneys for Plaintiff Gilbert P. Hyatt*

FILED

SEP 8 3 54 PM '08



CLERK OF THE COURT

DISTRICT COURT
 CLARK COUNTY, NEVADA

Bullivant/Houser/Bailey PC
 3883 Howard Hughes Pkwy., Ste. 550
 Las Vegas, NV 89169
 Telephone: (702) 669-3600
 Facsimile: (702) 650-2995

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

NOTICE OF ENTRY OF JUDGMENT

Date of Hearing: N/A

Time of Hearing: N/A

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

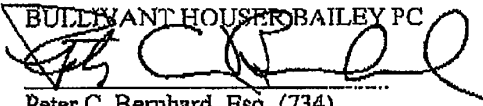
1 TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

2 PLEASE TAKE NOTICE that a Judgment was entered in the above-entitled matter, on
3 the 8th day of September, 2008, a copy of which is attached hereto as Exhibit "A".

4 DATED this 8 day of September, 2008.

5 HUTCHISON & STEFFEN, LTD.
6 Mark A. Hutchison, Esq. (4639)
7 10080 Alta Drive
8 Suite 200
9 Las Vegas, Nevada 89145

10 ~~BULLIVANT_HOUSER_BAILEY PC~~

11 
12 Peter C. Bernhard, Esq. (734)
13 3883 Howard Hughes Pkwy.
14 Suite 550
15 Las Vegas, Nevada 89169
16 (702) 669-3600
17 Attorneys for Plaintiff Gilbert P. Hyatt

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Telephone (702) 669-3600
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RECEIPT OF COPY

RECEIPT OF COPY of NOTICE OF ENTRY OF JUDGMENT is hereby
acknowledged this 8th of September, 2008.

McDonald Carano Wilson LLP

By: Karin L. Christmas
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102

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JG JV

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 11 Telephone: (702) 669-3600
 12 Attorneys for Plaintiff Gilbert P. Hyatt

FILED

SEP 8 10 21 AM '08



CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

11 GILBERT P. HYATT,

12 Plaintiff,

13 v.

14 FRANCHISE TAX BOARD OF THE STATE
15 OF CALIFORNIA,

16 Defendant.

Case No.: A382999

Dept. No.: X

JUDGMENT

Date of Hearing: N/A

Time of Hearing: N/A

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

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 Telephone: (702) 669-3600
 Facsimile: (702) 650-2995

17
 18
 19
 20 This matter came on for trial before the Court and a jury, beginning on April 14, 2008,
 21 and concluding with the verdicts of the jury on August 6, 2008 (liability for and amount of
 22 compensatory damages), on August 12, 2008 (liability for punitive damages), and on August 14,
 23 2008 (amount of punitive damages), the Honorable Jessie Walsh, District Judge, presiding.
 24 Plaintiff Gilbert P. Hyatt appeared with his counsel Mark A. Hutchison, Esq. of Hutchison &
 25 Steffen, L.L.C., Peter C. Bernhard, Esq. of Bullivant Houser Bailey, PC, and Donald J. Kula Esq.
 26 of Perkins Coie. Defendant Franchise Tax Board of the State of California appeared with its
 27
 28

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1 representative and its counsel, Pat Lundvall Esq., and James Bradshaw Esq., of McDonald
2 Carano Wilson, LLP.

3 Testimony was taken under oath, and evidence was offered, introduced and admitted.
4 Counsel argued the merits of their clients' cases, the issues have been duly tried, and the jury
5 duly rendered its verdict. The jury rendered a verdict in favor of Plaintiff Gilbert P. Hyatt and
6 against Franchise Tax Board on all causes of action presented to the jury, including Plaintiff's
7 second cause of action for invasion of privacy intrusion upon seclusion, third cause of action for
8 invasion of privacy publicity of private facts, fourth cause of action for invasion of privacy false
9 light, fifth cause of action for intentional infliction of emotional distress, sixth cause of action
10 for abuse of process, seventh cause of action for fraud and eighth cause of action for breach of
11 confidential relationship. This Court previously dismissed Plaintiff's first cause of action for
12 declaratory relief, and that cause of action was not presented to the jury.

13
14 The jury returned its verdict awarding Plaintiff Gilbert P. Hyatt compensatory damages
15 of EIGHTY-FIVE MILLION DOLLARS AND NO CENTS (\$85,000,000.00) for emotional
16 distress; compensatory damages of FIFTY-TWO MILLION DOLLARS AND NO CENTS
17 (\$52,000,000.00) for invasion of privacy; attorneys' fees as special damages of ONE MILLION,
18 EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS
19 (\$1,085,281.56); and punitive damages of TWO HUNDRED FIFTY MILLION DOLLARS
20 AND NO CENTS (\$250,000,000.00).

21
22 At the conclusion of the verdict reached on August 6, 2008, the jury was polled, and
23 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that
24 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to liability and the
25 amount of compensatory damages awarded on each of Plaintiff's seven claims. At the
26 conclusion of the verdict on punitive damages on August 12, 2008, the jury was polled, and
27
28

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1 each juror responded that the verdict as read by the Clerk of the Court was the verdict of that
2 juror, resulting in a verdict of eight (8) in favor and zero (0) opposed, as to whether the conduct
3 of the Defendant warranted punitive damages. At the conclusion of the verdict on punitive
4 damages on August 14, 2008, the jury was polled, and seven jurors responded that the verdict as
5 read by the Clerk of the Court was the verdict of that juror, with one juror responding in the
6 negative, resulting in a verdict of seven (7) in favor and one (1) opposed, as to the amount of
7 punitive damages awarded against Defendant.

8 NOW, THEREFORE, based on the foregoing, judgment upon the jury verdicts is entered
9 in favor of Plaintiff Gilbert P. Hyatt and against Defendant Franchise Tax Board, as follows:
10

11 IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P. Hyatt is
12 awarded compensatory damages in the amount of EIGHTY-FIVE MILLION DOLLARS AND
13 NO CENTS (\$85,000,000.00) for emotional distress, plus prejudgment interest at the rate of
14 seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of
15 \$63,184,110.12 from the date the Complaint was served (calculated through August 27, 2008,
16 and accruing from August 27, 2008 at the rate of \$ 16,301.37 per day until the date of this
17 Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from
18 the date of this Judgment until satisfied in full;
19

20 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
21 Hyatt is awarded compensatory damages in the amount of FIFTY-TWO MILLION DOLLARS
22 AND NO CENTS (\$52,000,000.00) for invasion of privacy, plus prejudgment interest at the rate
23 of seven percent per annum (7%) (the applicable prejudgment statutory rate) in the amount of
24 \$38,653,797.60 from the date the Complaint was served (calculated through August 27, 2008,
25 and accruing from August 27, 2008 at the rate of \$ 9,972.60 per day until the date of this
26
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1 Judgment), with interest continuing to accrue at the applicable postjudgment statutory rate from
2 the date of this Judgment until satisfied in full;

3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
4 Hyatt is awarded attorneys' fees as special damages in the amount of ONE MILLION,
5 EIGHTY-FIVE THOUSAND, TWO HUNDRED EIGHTY-ONE DOLLARS AND 56 CENTS
6 (\$1,085,281.56), plus prejudgment interest at the rate of seven percent per annum (7%) (the
7 applicable prejudgment statutory rate) in the amount of \$497,824.53 from the dates the special
8 damages were incurred (calculated through August 27, 2008, and accruing from August 27,
9 2008 at the rate of \$ 208.14 per day until the date of this Judgment), with interest continuing to
10 accrue at the applicable postjudgment statutory rate from the date of this Judgment until
11 satisfied in full; and
12

13 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
14 Hyatt is awarded punitive damages in the amount of TWO HUNDRED FIFTY MILLION
15 DOLLARS AND NO/100 CENTS (\$250,000,000.00), with interest to accrue at the applicable
16 postjudgment statutory rate from the date of this Judgment until satisfied in full.
17

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1 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Gilbert P.
 2 Hyatt is awarded costs in the amount of to be determined with interest to accrue at
 3 the applicable postjudgment statutory rate from the date of this Judgment until satisfied in full.

4 DATED this 5 day of Sept August, 2008.

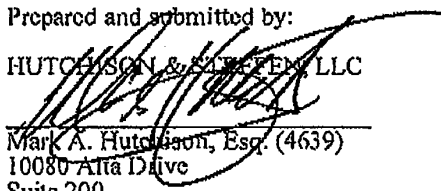
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6 JESSIE WALSH

7 DISTRICT JUDGE

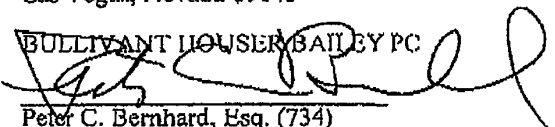
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EXHIBIT “2”

EXHIBIT “2”

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15 *Attorneys for Plaintiff Gilbert P. Hyatt*

DISTRICT COURT
CLARK COUNTY, NEVADA

12 GILBERT P. HYATT,

13 Plaintiffs,

14 v.

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

17 Defendants.

Case No.: A382999

Dept. No.: X

NOTICE OF ENTRY OF ORDER

Date of Hearing: N/A

Time of Hearing: N/A

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

FILED

2009 FEB -5 P 2:18

E. J. Smith
CLERK OF THE COURT

BullivantHouserBailey PC

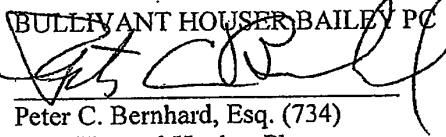
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1 TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

2 PLEASE TAKE NOTICE that an Order was entered in the above-entitled matter, on the
3 3rd day of February, 2009, a copy of which is attached hereto as Exhibit "A".

4 DATED this 5 day of February, 2009.

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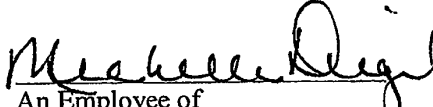
CERTIFICATE OF MAILING

I hereby certify that I am an employee of Bullivant Houser Bailey PC, and that on the
5th day of February, 2009, I caused to be deposited, postage fully prepaid, at Las Vegas,
Nevada, a true copy if the foregoing, NOTICE OF ENTRY OF ORDER to all parties below.

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An Employee of
Bullivant Houser Bailey PC

ORIGINAL

1 **ORDER**

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12 *Attorneys for Plaintiff Gilbert P. Hyatt*

FILED

2009 FEB -3 A 9 50

[Signature]
CLERK OF THE COURT

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 **GILBERT P. HYATT,**

16 **Plaintiffs,**

17 **v.**

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

20 **Defendants.**

Case No.: A382999

Dept. No.: X

ORDER DENYING:

**(1) FTB'S MOTION FOR JUDGMENT AS A
MATTER OF LAW OR ALTERNATIVELY,
AND CONDITIONALLY MOTION FOR
NEW TRIAL PURSUANT TO NRCP 50;
AND**

**(2) FTB'S ALTERNATIVE MOTION FOR
NEW TRIAL AND OTHER RELIEF
PURSUANT TO NRCP 59**

DATE: January 29, 2009

TIME: 9:00 a.m.

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

21 This matter having come before the Court on January 29, 2009, for hearing the
22 Defendant California Franchise Tax Board's ("FTB") Motion for Judgment as a Matter of Law
23 or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's
24 Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59, Plaintiff having been
25
26
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1 represented by Mark A. Hutchison, Peter C. Bernhard, Donald J. Kula, and Michael K. Wall and
2 the Franchise Tax Board having been represented by Pat Lundvall, Carla Higginbotham, and
3 Robert L. Eisenberg; the Court having considered the papers submitted by counsel as well as
4 oral arguments at the hearing; and GOOD CAUSE APPEARING;

5 IT IS HEREBY ORDERED that the FTB's Motion for Judgment as a Matter of
6 Law or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's
7 Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59 be and the same
8 hereby are denied.

9 DATED this 2 day of Feb, 2009

JESSIE WALSH

DISTRICT JUDGE

10 SUBMITTED BY:

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24 Attorneys for Defendant Franchise Tax Board of the State of California
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28

EXHIBIT 65

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,

No. 53264

Appellant/Cross-Respondent,

vs.

GILBERT P. HYATT,

Respondent/Cross-Appellant.

FILED

AUG 07 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

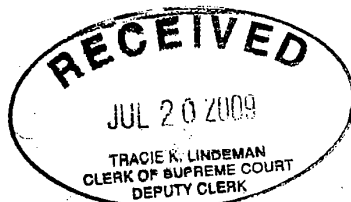
APPEAL FROM JUDGMENT – EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent,

vs.

GILBERT P. HYATT,

Respondent/Cross-Appellant.

No. 53264

APPEAL FROM JUDGMENT – EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

* * * * *

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1 I. SUMMARY OF LITIGATION AND ARGUMENTS¹

2 This is an appeal from a \$490 million judgment in favor of Gilbert Hyatt, an
3 individual, against the California Franchise Tax Board (FTB). The judgment includes,
4 among other awards, \$52 million for invasion of privacy damages, \$85 million for
5 emotional distress damages, and \$250 million in punitive damages.

6 A. Summary Of Litigation

7 FTB is a state agency responsible for administering and enforcing California's
8 personal income tax laws. This lawsuit arose out of an investigation of Hyatt by FTB for
9 the 1991 and 1992 tax years, FTB's tax and penalty assessments made at the conclusion
10 of that investigation, and the administrative appeal of those assessments. Hyatt put those
11 tax years at issue when he claimed that he changed residency from California to Nevada
12 in 1991 shortly before he received millions of dollars of income. Ultimately, FTB
13 determined that Hyatt remained a California resident – as defined by California law –
14 until April 1992, and he simply pretended to move earlier than that, to avoid tax liability.
15 Accordingly, FTB assessed Hyatt additional income taxes and civil fraud penalties. Not
16 liking that result, Hyatt filed an administrative appeal in California and a lawsuit against
17 FTB in Nevada.

18 California statutes provide FTB with complete government immunity. Early on,
19 FTB requested application of those statutes. When the district court declined to dismiss,
20 FTB sought extraordinary relief in this court. On April 4, 2002, the court issued a writ of
21 mandamus, requiring the district court to apply the doctrine of comity and to dismiss
22 Hyatt's negligence-based claims. The court determined that FTB should be afforded the
23 same discretionary function immunity as a similarly situated Nevada government
24 agency. The United States Supreme Court affirmed in Franchise Tax Board v. Hyatt, 538
25 U.S. 488 (2003). Hyatt's remaining claims were those alleging intentional torts.

26 A four-month jury trial was held in 2008. The jury awarded Hyatt \$52 million for
27

28 ¹ For ease of reading, appendix citations are omitted in this overview, but will be provided as
required herein.

1 invasion of privacy damages, \$85 million for emotional distress, over \$1 million in
2 attorneys fees as special damages, and \$250 million in punitive damages. The district
3 court added another \$102 million in prejudgment interest and denied all post-trial relief
4 sought by FTB from these staggering awards.²

5 B. Summary Of Argument

6 This extraordinary judgment is the result of a series of fundamental errors. First, a
7 newly assigned District Judge, Jessie Walsh, repeatedly refused to apply the doctrine of
8 comity in a manner that was consistent with this court's April 2002 order, as affirmed by
9 the United States Supreme Court. Those decisions required the district court to treat FTB
10 no worse than a Nevada government agency in similar circumstances, but she failed to
11 provide FTB with any of the protections and limitations to which a similarly situated
12 Nevada government agency would have been afforded. More important, since 2002 this
13 court adopted a new test, that has been applied and refined in a series of new cases, to
14 determine the scope of government discretionary function immunity. The policy behind
15 this new rule is "to prevent judicial 'second guessing' of the legislative and
16 administrative decisions grounded in social, economic, and political policy through the
17 medium of an action in tort." Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720, 728
18 (2007). FTB's conduct, as presented by Hyatt to the jury, met the two-part test, but the
19 district court refused to apply it.

20 Instead, the district court permitted Hyatt to ask the jury to re-analyze and re-
21 evaluate purely discretionary decisions made by FTB. In fact, Hyatt's case at trial was
22 nothing more than an attack on discretionary decisions made by California government
23 employees on a regular basis, e.g., decisions concerning what personnel to assign to
24 Hyatt's audit, whether to seek additional information, the manner in which to seek
25 information, the weight to be given to information, what California legal principles
26

27 ² The district court also denied FTB's post-trial motion for a stay of execution of the judgment
28 without a bond, pending this appeal. On April 8, 2009, this court reviewed the district court's
decision and ordered a stay without a bond, essentially determining that the district court erred
by requiring a bond.

1 applied, conclusions reached using those principles, and deciding if and when they had
2 sufficient information to resolve Hyatt's protests. In sum, a Las Vegas jury was allowed
3 to impose its judgment on California's vitally important tax collection policies and
4 procedures, reviewing the analysis of evidence made by FTB, and then questioning
5 whether those decisions were "fair and impartial." This was error of the highest
6 magnitude, with nationwide consequences, as emphasized by the numerous amici from
7 around the country, who are urging a reversal of the judgment.

8 The district court also erroneously allowed Hyatt's sundry claims to survive,
9 despite the absence of law and evidence supporting such claims. For example, Hyatt's
10 fraud claim was based primarily on his contention that FTB breached an implied promise
11 to be "fair and impartial." Case law provides no basis for such a vague and nebulous
12 claim, yet the district court refused to dismiss it. The district court allowed Hyatt's
13 multiple breach of information privacy claims to proceed, despite the fact that all of the
14 "confidential information" used by FTB as they gathered evidence to ensure they were
15 getting information about the right Gilbert Hyatt, i.e. name, address and social security
16 number, was already in the public realm. The district court allowed a claim for abuse of
17 process to survive, despite the fact that FTB never used, let alone abused, any legal
18 process, and she allowed Hyatt to advance a claim for intentional infliction of emotional
19 distress without the required proof of severe emotional distress after Hyatt had been
20 limited to recovery for "garden variety" emotional distress as a discovery sanction for
21 refusing to produce his medical records. In addition, the district court committed
22 numerous other reversible errors – too many to list here or fully brief within.

23 On issues dealing with damages, the district court erroneously refused to provide
24 any relief from the jury's compensatory damage verdicts which were obviously products
25 of passion and prejudice, and had no support in evidence. And after the jury returned its
26 award of \$250 million in punitive damages, an award which could not possibly have
27 withstood scrutiny under any standard, the district court once again did nothing –
28 allowing the entire award to stand.

1 Based upon the errors described herein, the judgment in this case must be
2 reversed.

3 II. STATEMENT OF ISSUES

- 4 1. Should all of Hyatt's claims, as tried, have been dismissed under the
5 doctrines of comity, discretionary function immunity, and applicable
6 United States Constitutional provisions?
- 7 2. Did the district court impermissively allow the jury to impose liability on
8 FTB based exclusively upon its discretionary functions of gathering,
9 weighing and evaluating of evidence to reach administrative conclusions,
10 which effectively allowed the jury to sit as a "court of appeal" for FTB's
11 tax assessments, after jurisdictional limitations placed on this case by an
12 earlier and now-final district court decision, this court, the United States
13 Supreme Court and United States Constitutional provisions prohibited the
14 imposition of such liability?
- 15 3. Should Hyatt's individual tort claims have been dismissed, when there was
16 no law or evidence to support essential elements of each claim?
- 17 4. Did the district court make erroneous evidentiary and procedural rulings?
- 18 5. Are the compensatory damage awards of \$52 million for invasion of
19 privacy and \$85 million for emotional distress unsupported by evidence,
20 and do these awards violate government damage caps, excessiveness
21 standards and applicable United States Constitutional provisions?
- 22 6. Must the punitive damages award against a government entity be reversed
23 under the common law, standards of excessiveness in Nevada law, and
24 applicable United States Constitutional provisions?
- 25 7. Did the prejudgment interest award violate Nevada law?

19 III. STATEMENT OF THE CASE

20 A. Statement of Facts

21 1. General Background: Hyatt's Tax Audit Begins

22 In 1990, Hyatt obtained a patent, which resulted in over \$350 million in income
23 beginning in 1991. 37 AA 9186 (155).³ Substantial publicity, originally generated by
24 Hyatt and his publicist, surrounded his 1990 patent and, ultimately, his loss of that patent
25 in 1995. 89 AA 22068-137.

26 In June 1993, two FTB employees read a newspaper article discussing Hyatt and
27

28 ³ The trial transcript consists of four-to-one condensed pages. Trial transcripts appendix
citations will include the specific condensed page number, in parentheses.

1 his patent; they decided to determine if he filed California tax returns. 93 AA 23090; 45
2 AA 11210 (116-17). They reviewed and noted three concerns with his 1991 return,
3 which represented that he moved to Nevada on October 1, 1991. 63 AA 15528-29. First,
4 even though Hyatt admitted being a California resident for at least 75% of the year, he
5 only declared 3.57% of his income taxable to California.⁴ *Id.* Second, they questioned
6 whether all of his income should have been sourced to California.⁵ 63 AA 15528-29.
7 Finally, they noted that Hyatt deducted no moving expenses on his 1991 return. 63 AA
8 15528-29; 45 AA 11210-12 (117-124).

9 FTB decided to open a tax and residency audit, focusing on the origin of Hyatt's
10 income and the specific date he terminated his California residency. 63 AA 15605. Tax
11 professionals, like Hyatt's, know and advise their clients of the type of information FTB
12 will gather and evaluate during a residency audit: business contacts, physical presence
13 information, financial accounts, ownership of property, voter registrations, car
14 registrations, drivers licenses, use of licensed professionals, and membership in
15 organizations. 77 AA 19081-86.

16 Pursuant to its standard practice, FTB began by sending Hyatt a letter informing
17 him of the audit, and a standard FTB form which requested certain basic information. 63
18 AA 15605, 15621-23. Included with the letter was FTB's standard privacy notice. 54 AA
19 13401. In relevant part, that notice stated:

20 The Information Practices Act of 1977 and the Federal Privacy Act require
21 the Franchise Tax Board to tell you why we ask you for information.
22 [FTB's] Operations and Compliance Divisions ask for tax return
information to carry out the Personal Income Tax Law of the State of
California.

23 54 AA 13401. Hyatt hired a Nevada accountant and a California attorney to represent
24

25 ⁴ Under California law, taxpayers are presumed to have lived in California for the full year if
26 they lived in California for any aggregate of nine months. Cal. Rev. & Tax. Code § 17016. If, as
27 reported on his 1991 tax return, Hyatt met the legal presumption for a full-year residency by
28 living nine months in California, then all of Hyatt's income reported on his 1991 tax return was
taxable to California. *Id.*

⁵ Sourcing is an important legal theory to FTB, and many other states with state income taxes. It
is best explained by example: If an author writes a book in California, but moves before it is
published, the income earned from the book may be "sourced" to California and is taxable.

1 him during the audit.⁶ 63 AA 15607-14. They conducted no investigation into the
2 accuracy or honesty or completeness of the information Hyatt supplied them; rather, they
3 simply passed on Hyatt's information, given to them by Hyatt, in response to FTB's
4 multiple requests for information. 34 AA 8393 (11-13). The accountant was expressly
5 told by one of FTB's auditors, after he complained about FTB's multiple requests for
6 information, that FTB was particularly looking for the specific date Hyatt terminated his
7 California residency. 64 AA 15886; 68 AA 16967. In response to FTB's initial request
8 for information, Hyatt changed his story to claim he actually departed California on
9 September 24, 1991, rather than October 1, 1991, as sworn on his tax return. 62 AA
10 15348; 63 AA 15623.

11 2. FTB Auditors Decide to Verify Information Provided by Hyatt

12 FTB auditors began investigating information provided by Hyatt, and obtaining
13 relevant information available from public sources and third parties. 62 AA 15429-33.
14 Over time, three FTB auditors were assigned to perform this task. 93 AA 23090-126; 72
15 AA 17964-70. Their work was subjected to continuing supervision and review by a
16 multitude of FTB employees. 41 AA 10217 (128-29); 62 AA 15489 – 63 AA 15526; 72
17 AA 17964-70.

18 FTB tried to verify Hyatt's first personal and business address that he claimed in
19 Las Vegas – the Wagon Trails Apartment. 63 AA 15628-29. The lease given to FTB
20 revealed the lease period began on November 1, 1991, over a month after Hyatt's
21 claimed move date. 63 AA 15641. The lease had been faxed to Hyatt at his home in La
22 Palma, California on October 9, 1991 – almost two weeks after Hyatt claimed that he
23 had sold this property. 63 AA 15645-47. Hyatt offered no evidence that he actually
24 resided in the Wagon Trails apartment, other than the lease itself. One question became –
25 a question which continued throughout the entire audit – where did Hyatt and his
26 belongings reside in Nevada, at the very minimum, from September 24, 1991, the new
27 date Hyatt alleged that he moved to Nevada, until the date Hyatt's Wagon Trails

28 ⁶ There was no evidence that Hyatt, himself, had personal dealings with any FTB representative.

1 apartment lease began? 63 AA 15438, 15500; 66 AA 16396, 16456; 67 AA 16729-31;
2 72 AA 17866; 73 AA 18017. This question was repeatedly raised by FTB, but never
3 answered by Hyatt during the audit.⁷ Id.

4 Hyatt claimed he was self-employed, but conducting business in Nevada. 54 AA
5 13365. FTB tried to verify a claimed business lease at "6600 W. Charleston, Suite 118,
6 Las Vegas, Nevada." 68 AA 16776. Hyatt never provided any proof that a lease ever
7 existed. 63 AA 15619. It was eventually learned this was the address of Hyatt's tax
8 accountant, who was acting as Hyatt's taxpayer representative during the audit. 66 AA
9 16449-50. FTB researched public records to determine whether Hyatt obtained a
10 business license in Las Vegas or Clark County or owned real property. 93 AA 23090-91.
11 FTB learned that Hyatt was not issued a business license until December 10, 1992 – over
12 a year after Hyatt alleged he moved. 67 AA 16557; 78 AA 19426. From multiple
13 Nevada public records, FTB learned Hyatt was not an owner of any real property in
14 Nevada. 63 AA 15724-28. In contrast, FTB learned from public records in Orange
15 County that Hyatt remained a California homeowner until June 1993. 68 AA 16973-74.

16 FTB then decided to verify the information provided by Hyatt regarding business
17 and social connections in Nevada, which he claimed could support his alleged move date
18 of September 24, 1991. 63 AA 15621-27. None supported his claim. 62 AA 15429-33.

19 FTB investigated Hyatt's assertions that he sold his home in La Palma, California,
20 on October 1, 1991, and never spent another night there. 66 AA 16388. Hyatt did not
21 record a deed evidencing a transfer until June 1993 – over eighteen months after the sale
22 allegedly took place. 64 AA 15868-69. He did not list the home for sale with a licensed
23 real estate agent. 63 AA 15631. He never provided FTB with documents evidencing a
24 sale or an escrow. Id. Rather, he told FTB he sold his La Palma home to his personal
25 assistant and close confidant, Grace Jeng, who paid a \$15,000 down payment; but he
26 never provided any documentation of the payment. 66 AA 16388. Neighbors and

27 ⁷ FTB believed Hyatt's non-answers on this issue deeply impugned his credibility and did not
28 allow him to overcome the nine-month presumption of residency. 54 AA 13412-42; 66 AA
15438; 66 AA 16396, 16456; 67 AA 16731.

1 repairmen placed him living at the house (68 AA 16816; 69 AA 17017; 70 AA 17372),
2 he was served with a summons and complaint (in another lawsuit) coming out of the
3 house in the early morning hours (68 AA 16907-12; 76 AA 18802), and he continued to
4 receive mail and faxes at the house, all after October 1, 1991. 70 AA 17465, 17481; 71
5 AA 17507; 72 AA 17790, 17793, 17824; 77 AA 19048-60, 19068-71.

6 Further evidence gathered by FTB contradicted Hyatt's assertion that he sold the
7 La Palma property on October 1, 1991. For example, the City of La Palma Water service
8 remained in Hyatt's name, long after he allegedly sold the property to Jeng. 63 AA
9 15736-38. He paid property taxes on the home into 1992. 63 AA 15706-07. He paid for
10 repairs to the home in 1992, and the handyman informed FTB that Hyatt was living in
11 the house in Spring 1992. 69 AA 17017; 70 AA 17372. Hyatt did not submit a
12 homeowner's exemption termination (a public document required by California law)
13 until 1992. 54 AA 13310-11.

14 FTB requested from Hyatt a list of professional service providers, but it was
15 incomplete. 64 AA 15952. After reviewing cancelled checks and credit card statements
16 provided by Hyatt, FTB discovered Hyatt had utilized doctors, lawyers and accountants
17 in California long after he allegedly moved to Nevada; FTB decided to contact them
18 about dates and locations of service. 69 AA 17205-06; 70 AA 17272-73, 17404-05; 71
19 AA 17617-18; 74 AA 18316-17, 18355. When FTB disclosed to Hyatt information
20 received from these professionals, which placed Hyatt in their offices for appointments
21 long after his claimed move date, Hyatt again changed the date, this time to September
22 26, 1991. 63 AA 15623; 66 AA 16486-88.

23 Further information undermined Hyatt's claim that he moved to Las Vegas in
24 September 1991. For example, he continued to use his California post office box long
25 after he alleged that he moved. 63 AA 15675. He signed two multimillion dollar
26 licensing agreements in mid-October and mid-November 1991. 63 AA 15743-50; 64 AA
27 15756-62. Although each agreement was signed after Hyatt allegedly moved to Nevada,
28 each listed Hyatt's California address and required the application of California law. 63

1 AA 15743-50; 64 AA 15756-62. Important business associates continued to send letters
2 to Hyatt in California after his alleged move. 63 AA 15659, 15742. He continued to
3 receive faxes from many sources at his California home well after its alleged sale date.
4 63 AA 15643; 77 AA 19048-60, 19068-71. Hyatt did not claim any moving expenses in
5 1991 as tax deductions. 62 AA 15346-61. Newspaper articles, in which he was
6 interviewed by reporters, placed him living in California, not Nevada, during the
7 disputed six month period. 69 AA 17022; 79 AA 19732-38. Travel documents revealed
8 origination and completion of flights out of LAX, not Las Vegas. 67 AA 16577, 16586;
9 72 AA 17772. Credit card and bank statements were addressed to his California home;
10 none were addressed to an address in Nevada. 70 AA 17465, 17481; 71 AA 17507; 72
11 AA 17790, 17793, 17824. Credit card statements had him buying meals in California. 72
12 AA 17792, 17797, 17813.

13 3. FTB's Third-Party Contacts

14 FTB employed common investigative techniques to gather the information
15 described above and other information found during the audit. 51 AA 12750 (136) –
16 12755 (156). FTB training manuals instructed on the use of those investigative
17 techniques. 59 AA 14644-51. These manuals and other training aids provided general
18 guidance outlining the multitude of ways an auditor could obtain information, but
19 advised that since each residency audit is unique, it was up to each auditor's discretion to
20 determine how best to gather relevant information. 56 AA 13913 – 60; 60 AA 14884,
21 14970; 61 AA 15107.

22 In addition to a review of public records, FTB auditors elected to use three
23 investigatory methods: mail requests, telephone calls, and field visits including in-person
24 interviews of third parties. 76 AA 18817-41; 93 AA 23090-126. In compliance with
25 California law, each third-party contact was informed of the purpose for the inquiry:
26 "For the purpose of administering the Personal Income Tax Law of the State of
27 California, we would appreciate your cooperation in" See e.g., 59 AA 14644, 63 AA
28 15615, 15723, 15731, 15734; 64 AA 15867, 15879, 15883, 15898.

1 a. FTB's Mail Requests

2 FTB's mail requests were made in one of three ways: (1) by a letter requesting
3 information; (2) by a letter accompanied by a "Demand to Furnish Information," a
4 standard FTB form; or (3) by a letter accompanied by an FTB questionnaire.

5 FTB's letter-only correspondence was sent to the third parties in both Nevada⁸
6 and California.⁹ Each letter was tailored to the recipient regardless of whether the letter
7 was sent to California or Nevada; and each letter was customized to obtain only that
8 information which would reasonably be expected to be in the possession of the specific
9 recipient. 42 AA 10317 (182) – 10320 (196); 42 AA 10363 (32) – 10385 (120). For
10 example, FTB's letter to the Orange County Tax Collector specifically requested
11 information related to the property tax payments made on Hyatt's California residence
12 (63 AA 15701), whereas FTB's letter sent to the Clark County Department of Elections
13 requested documentation related to Hyatt's voter registration. 63 AA 15668. FTB's letter
14 to the Nevada DMV requested specific information about Hyatt that would be in the
15 possession of the DMV, and provided necessary identifying information to ensure that
16 the information provided related to the specific Gilbert Hyatt at issue, i.e. Hyatt's name,
17 social security number, date of birth, and Hyatt's post office box address – information
18 that would have been in the possession of the DMV if Hyatt had actually obtained a
19 driver's license in Nevada. 63 AA 15615.

20 Letters sent to the Clark County and Orange County Recorders requested copies

21 ⁸ Department of Motor Vehicles (two letters) 63 AA 15615; 65 AA 16079, Las Vegas
22 Postmaster (three letters) 63 AA 15676, 15679; 65 AA 16034, Clark County Department of
23 Elections (2 letters) 63 AA 15668; 65 AA 16109, Clark County Assessor 63 AA 15723, Clark
24 County Treasurer, Clark County Recorder 64 AA 15879, Clark County School District 65 AA
25 16108, Nevada Governor Robert Miller 65 AA 16191, Nevada Senator Richard Bryan 65 AA
16192, Dr. Steven Hall (Hyatt's dentist beginning May 1992) 64 AA 15968, University Medical
Center 64 AA 15970, KB Plumbing 64 AA 15999, Harold Pryor (a resident in Hyatt's claimed
Las Vegas neighborhood) 64 AA 15995-96, G.C. Eggers (another neighborhood resident) 64
AA 15997-98, and Allstate Sand and Gravel 65 AA 16174.

26 ⁹ Orange County Voter Registration Department 63 AA 15694, Orange County Tax Collector
27 63 AA 15701, Orange County Recorder 64 AA 15867, Orange County Registrar 66 AA 16386,
28 several of Hyatt's treating physicians and medical providers (eleven letters) 64 AA 15957-70,
Jerry Hicks (a reporter for the LA Times who interviewed Hyatt for an article published during
the disputed time period) 66 AA 16281, Chris Woodyard (same) 66 AA 16282, Ron's Repair (a
handyman service) 65 AA 16107, and the La Palma Postmaster. 66 AA 16469.

1 of deeds recorded on certain properties in California and Nevada. 64 AA 15867, 15879.
2 In this case, however, FTB did not provide personal identifying information about Hyatt
3 – not even his name.¹⁰ 64 AA 15867, 15879. Rather, FTB only provided the property
4 addresses to be searched. 64 AA 15867, 15879. This was similarly the case with FTB's
5 letter to KB Plumbing, a business that allegedly provided plumbing work at Hyatt's
6 Nevada house, 7335 Tara Avenue, purchased in April 1992. 64 AA 15999.

7 The various letters FTB sent to Hyatt's doctors were similarly customized. 64 AA
8 15957-70. FTB requested information regarding the dates these professionals provided
9 Hyatt treatment. Id. Not one of these letters referenced any personal or identifying
10 information related to Hyatt – beyond his name. Id.

11 In addition to the above letters, FTB also sent correspondence by cover letter
12 accompanied by a "Demand to Furnish Information" form ("letters with demand") to
13 Nevada third parties¹¹ and California third parties.¹² Each letter with demand sent by
14 FTB requested the recipient's cooperation and was sent with an FTB form which
15 included Hyatt's name and social security number in the caption as an identifier. 63 AA

16 ¹⁰ In fact, none of the third-party contacts made by FTB disclosed that Hyatt purchased the Las
17 Vegas home on Tara Avenue. 63 AA 15723, 15717; 64 AA 15879, 15995-99; 65 AA 16233,
18 16143, 16154, 16174.

19 ¹¹ U.S. Postmaster 63 AA 15673, Clark County Assessor 63 AA 15723, Temple Beth Am (two
20 letters requesting membership information) 63 AA 15896-97; 64 AA 15945-46, Sports
21 Authority (believed to be a health club, therefore requesting membership information) 64
22 AA 15904-05, 15939-40, Nevada Development Authority (requesting membership information) 64
23 AA 15910-11, Personal Computer Users Group (same) 64 AA 15912-13, Bizmart (same) 64 AA
24 15941-42, Sam's Club (same) 64 AA 15943-44, 15973-74, Congregation Ner Tamid (same) 65
25 AA 16080-81, Las Vegas Valley Water District 65 AA 16095-96, Silver State Disposal Service
26 65 AA 16097-97, Southwest Gas Corp. 65 AA 16099-16100, Las Vegas Sun (two letters
27 requesting subscription information) 65 AA 16093-94; 66 AA 16382-83, and Wagon Trails
28 Apartments (requesting rental information). 64 AA 15990-93.

¹² The Post Master (three letters) 63 AA 15673, 65 AA 16077-78, Orange County Tax
Collector/Treasurer (2 letters) 63 AA 15697, 15701-02, Southern California Edison (the power
company) 63 AA 15731-32, Great Expectations (a social club Hyatt belonged to requesting
membership information) 64 AA 15906-09, La Palma City Water Service 63 AA 15733-35,
Sam's Club 64 AA 15973-74, Commerce National Bank 64 AA 15971-72, Copley Conley (the
cable company) 65 AA 16023-24, Orange County Registrar (a local newspaper requesting
subscription information) 66 AA 16386-87, Orange County Times (same), Hyatt's attorneys
Dale Fiola 65 AA 16123-24, Loeb and Loeb 65 AA 16121-22, Roger McCaffrey 65 AA 16125-
26, Greg Roth 65 AA 16139-40, and Lesley Anne Andres (all requesting dates and locations of
service) 65 AA 16141-42, and Block, Plant & Eglin (an accounting firm requesting same) 65
AA 16127-28.

1 15896-97; 64 AA 15904-05, 15945-46, 15910-13, 15943-44, 15973-74, 15990-93; 65
2 AA 16080-81, 16093-100; 66 AA 16382-83. These letters with demand were also
3 narrowly tailored to seek only information reasonably likely to be in the possession of
4 the recipients. Id.

5 Hyatt was well apprised of these third-party requests. By March 1995, some of
6 the recipients advised Hyatt personally that FTB was soliciting information in such a
7 fashion about him. 78 AA 19338-42. Hyatt did not complain to FTB about any of these
8 requests. 42 AA 10379 (96-97). Nor was there evidence that any of the attorneys or other
9 professionals receiving these letters with demands ever complained about FTB's
10 requests for information, suggesting somehow that Hyatt's "privacy" was being invaded,
11 as he later claimed at trial. One of Hyatt's attorneys receiving a letter with demand
12 claimed an expertise in privacy laws, but even he did not complain of an invasion of
13 Hyatt's privacy. 48 AA 11881 (15-16); 49 AA 12054 (35-37).

14 Finally, FTB sent letters that were accompanied by a questionnaire. 63 AA
15 16227; 65 AA 16163-82. These questionnaires asked a series of questions seeking
16 information regarding Hyatt's residency claim. 65 AA 16164-68. The questionnaires
17 were customized depending on the specific recipient. For example, FTB sent
18 questionnaires to Hyatt's neighbors at his La Palma, California home, asking innocuous
19 questions such as: "Do you know the owners of 7841 La Palma Circle?" Id. Of particular
20 significance, there was no reference to Hyatt in any one of these questionnaires – not
21 even his name. 65 AA 16163-68; 66 AA 16198-227. FTB sent two questionnaires to
22 Hyatt's friends, asking questions such as: "To the best of your knowledge, where does
23 Mr. Hyatt reside and how long has he resided there?" 65 AA 16169-73; 66 AA 16362-
24 65. By August 1995, Hyatt was fully apprised of all such requests sent out by FTB and
25 the full scope of FTB's investigation. 66 AA 16388-16416.

26 b. FTB Field Visits and In-person Interviews

27 FTB employees decided to conduct interviews of members of Hyatt's family, and
28

1 took affidavits from three individuals believed to have relevant knowledge.¹³ 76 AA
2 18802-16. FTB began with Hyatt's ex-wife, who had been referenced in many news
3 articles published about Hyatt; she then gave FTB the names and numbers of other
4 family members believed to have information about Hyatt's living arrangements. 93 AA
5 23104.

6 FTB was able to interview some of Hyatt's neighbors in both La Palma and Las
7 Vegas. 68 AA 16796-800, 16984-85. Some individuals refused to speak to FTB. Id.
8 Others were not at home or not available during FTB's field visits or gave vague and
9 inconclusive information. Id. As expected, FTB employees used their discretion to gauge
10 the accuracy or credibility of the information received from the neighbors in deciding to
11 ask further questions. 40 AA 9884 (67) – 9885 (70), 9911 (175), 9978 (56-57); 41 AA
12 10082 (99-100).

13 FTB auditors made two field visits to Nevada. First, in March 1995 Sheila Cox
14 and Sheila Semana spent three days trying to confirm Hyatt's change of residency claim.
15 68 AA 16796. They made decisions, based on their training, concerning where to look
16 for relevant information. For example, they went to a local library looking for articles
17 about Hyatt in local newspapers and to the location of Hyatt's post office box to see if
18 Hyatt received mail there. 68 AA 16796. They drove to the neighborhood where Hyatt
19 allegedly lived, to look at the Tara Avenue house that he bought in April 1992. 68 AA
20 16796-800. During a visit to Hyatt's neighborhood, the auditors spoke to a mail carrier
21 (68 AA 16797), some construction workers (68 AA 16799), and the trash man. 68 AA
22 16800. They saw a package on the house's front porch, walked up to the porch, and
23 looked at the address that was in plain view, noting it was not addressed to Hyatt. 68 AA
24 16799. The auditors also talked to a total of five people in surrounding homes, without
25 identifying Hyatt, to see if they had seen anyone living at the house. 68 AA 16796-801.

26 The rest of the FTB's March 1995 field visit involved visits to the apartment

27 ¹³ FTB did not take an affidavit from the fourth relative, who although she had disparaging
28 opinions of Hyatt, did not appear to have relevant evidence of his living arrangements. 40 AA
9908 (165) – 9909 (166).

1 complex where Hyatt claimed to have lived when he first moved to Las Vegas, a Sam's
2 Club membership store, and the office of Hyatt's accountant, which Hyatt claimed was
3 his Nevada business address. 68 AA 16796-801. At the apartment, the auditors looked at
4 the low-income apartment complex, asked the managers for their memory of Hyatt,
5 spoke with one woman who lived just across from Hyatt's rented unit, and reviewed the
6 items in Hyatt's rental file. 68 AA 16798-99; 76 AA 18817-41. At the Sam's Club, the
7 auditors met with the manager to determine if he could provide membership information.
8 Id. At the office of Hyatt's accountant, the auditors asked the receptionist if Hyatt's
9 accountant or Hyatt himself was there; the receptionist indicated she did not know Hyatt.
10 66 AA 16409; 68 AA 16801.

11 During late November 1995, Sheila Cox accompanied another FTB auditor,
12 Candace Les, to Las Vegas to assist on Les' cases. 41 AA 10143 (94-96). During this
13 visit Cox made an observation of the Tara Avenue residence to evaluate recent
14 information provided by Hyatt's representatives (i.e. that a privacy berm that had been
15 recently constructed) and took a photograph of the Tara Avenue house. Id.

16 While FTB was requesting information from third parties, FTB was also making
17 information requests from Hyatt himself. 64 AA 15886-87, 15975-77. FTB believed
18 Hyatt displayed a lack of cooperation in responding to these requests. 66 AA 16426.
19 FTB requested telephone records (64 AA 15887) (Hyatt claimed he had none, 66 AA
20 16426), credit card statements, banking statements, and receipt of income information.
21 64 AA 15886-87. FTB never received all banking account information no matter how
22 many times requested. 63 AA 15680-81; 64 AA 15884, 15886-87, 15891-92; 65 AA
23 16177-79; 66 AA 16349, 16366. FTB asked for the specific date of income received
24 from two contracts Hyatt executed in October and November 1991, respectively (63 AA
25 15628) and when Hyatt refused to give that information, FTB had to seek it directly from
26 Matsushita and Fujitsu. 65 AA 16187, 16189.

27 At trial, Hyatt was very critical of FTB's auditors and their investigative efforts,
28 claiming that they should have done their jobs better. Hyatt's criticism included nit-

1 picking instances like not noticing from new stationery that his representative (Kern)
2 changed office locations, and thus a letter was sent to an old address (37 AA 9016 (155-
3 56)); and when the letter requesting information was re-sent, the time to respond was not
4 changed (37 AA 9001 (97)); FTB made improper assumptions about lifestyles of the rich
5 and famous in evaluating Hyatt's residence (43 AA 10661 (63-64)); FTB did not follow
6 up on potentially favorable-to-Hyatt witnesses and other leads (40 AA 9898-900; 43 AA
7 10776 (204)); FTB should have taped-recorded interviews, rather than taken notes (46
8 AA 11464 (91-93)); FTB should have kept copies of the handwritten notes after they
9 were typed up, rather than discard them (53 AA 13189 (113)); FTB failed to properly
10 maintain Hyatt's audit file since the photograph taken in November 1995 was not found
11 in the audit file. See 41 AA 10143 (94) – 10147 (110).

12 At trial Hyatt was particularly critical of Sheila Cox, the third auditor assigned to
13 investigate his claims. Hyatt criticized FTB for: (1) selecting her in the first place (40
14 AA 9881 (57) – 9882 (58)); (2) allowing her to be tenacious in pursuing evidence (see
15 40 AA 9880 (27) (characterizing Cox as "obsessed")); (3) allowing her to consult with
16 other more experienced members of FTB's residency unit (52 AA 12838 (96) – 12839
17 (101)); (4) allowing her to rely on third-party information rather than Hyatt's
18 unsupported explanations (52 AA 12925 (152-53)); and (5) assisting her with her
19 deposition and trial testimony by giving her access to Hyatt's audit file after she had left
20 FTB's employ (52 AA 12892 (21) – 12893 (22)). At trial Cox endured nine days of
21 examination on topics such as why she gathered certain evidence, but not other; why she
22 weighed certain evidence more heavily than other; why she used past tense versus
23 present tense of verbs in preparing reports; why she recommended a fraud penalty for
24 1991, but not for 1992. 40 AA 9878 (42) – 43 AA 10524 (156).

25 Hyatt's primary criticism, however, was that FTB sought information about him
26 through independent, third-party sources rather than ask him for that same information.
27 37 AA 9239 (77) – 9240 (79). At trial, Hyatt claimed that he would have readily given
28 FTB the information they obtained from independent, third-party sources, "if FTB had

1 only asked.” Id. At trial Hyatt further claimed that rather than adhere to methods in FTB
2 training manuals, the auditors should have employed other methods of conducting its
3 audit that Hyatt believed were more fair. For example Hyatt suggested: FTB should have
4 provided Hyatt with witness affidavits, when he requested copies, rather than waiting
5 until the conclusion of the audit as the manuals suggest (35 AA 8553 (42)); an auditor
6 should not have utilized proposed edits from an FTB Legal staff member in drafting a
7 fraud memorandum (41 AA 10199 (57) – 10202 (68)); FTB should not have used
8 Hyatt’s social security number as an identifier (44 AA 10777 (208-09), 10778 (211)), as
9 was commonplace and allowed at the time (1993 to 1997) (48 AA 11802 (99)).

10 4. FTB Supervision and Review of Auditors

11 Although the three auditors were the primary employees working on Hyatt’s
12 audits, their work was regularly supervised, reviewed and approved by FTB
13 management and other experienced FTB employees. 72 AA 17964-70; 93 AA 23090-
14 126. Supervision and review for the 1991 audit began immediately upon the opening of
15 the audit investigation. 93 AA 23090. If new auditors were assigned to the case, their
16 work was also supervised and reviewed. 93 AA 23101, 23103, 23105, 23111. FTB
17 records show extensive supervisory and review oversight of the auditors’ work. 72 AA
18 17964-70; 93 AA 23090-126.

19 In addition to supervision and review, the auditors also regularly consulted and
20 relied upon the guidance of other more experienced auditors and employees as specific
21 issues arose. For example: A sourcing issue required the consultation and assistance of a
22 “technical review team” that engaged to conduct a review of the facts then-gathered by
23 the auditors and California income source tax rules. 89 AA 22138-42; 93 AA 23122-23.
24 Horace Pitts, an investigator in FTB’s Special Investigations Unit, was consulted to
25 determine whether Hyatt should be turned over for criminal investigation. 42 AA 10448
26 (59-60); 93 AA 23111.

27 ///

28 ///

1 5. Results of FTB Audit: FTB Proposed Increased Tax, Interest, and
2 Penalty Assessments Against Hyatt

3 Upon completion of the audits, FTB weighed and analyzed the available evidence
4 in accord with applicable California legal standards concerning both sourcing and
5 residency. FTB preliminarily concluded that sourcing theories, i.e. federal earned income
6 theory and the evidence then-available, did not apply to Hyatt's income. 89 AA 22138-
7 42. Concerning residency, however, that analysis revealed Hyatt remained a California
8 resident until April 1992 (six months after the date asserted by Hyatt). 72 AA 17895.
9 Their analysis also concluded that Hyatt simply pretended to move earlier than he
10 actually did, by renting an apartment but never living there, and getting a Nevada driver
11 license, a post office box, bank account, and registering to vote at DMV, to create a
12 façade of Nevada residency. 72 AA 17894.

13 In August 1995, FTB sent Hyatt and his representatives a detailed 39-page notice
14 of FTB's audit activities and its initial conclusions, and gave Hyatt ample opportunity to
15 rebut those tentative findings. 66 AA 16388-427. Thereafter, many letters were
16 exchanged between FTB and Hyatt's representatives. 66 AA 16433-64, 16481-83, 16499
17 – 67 AA 16511, 16638-75, 16690-16741. Each FTB letter invited Hyatt to offer
18 additional evidence or explanation addressing FTB's preliminary conclusions. 66 AA
19 16456-59; 67 AA 16638-41. Hyatt did offer some additional evidence, but even that
20 evidence further supported FTB's initial conclusions on residency and imposition of the
21 fraud penalty. 66 AA 16499 - 67 AA 16727. At trial Hyatt was highly critical of how
22 FTB auditors weighed and evaluated the evidence they relied upon in forming their
23 conclusions; Hyatt offered his own interpretation of how FTB should have weighed and
24 evaluated the evidence it had gathered. 66 AA 16433-54.

25 Before an official notice of proposed assessment¹⁴ could be issued, formally
26 concluding an audit, the preliminary determinations reached by FTB auditors were
27

28 ¹⁴ The notice of proposed assessment is the document that ends the audit period, and triggers
various administrative appeal rights. 54 AA 13326-29.

1 subject to three separate levels of internal review. 41 AA 10217 (128-129). A notice of
2 proposed assessment is issued only if all levels of review are convinced that the
3 determinations reached in the audit are correct. Id. In this case, the first level of review
4 was a supervisor, who agreed with the determinations and sent the results on to its
5 second level of review, an "on-line" reviewer, who, like the supervisors, agreed with the
6 determinations reached by audit; and then the audit file was forwarded to the Sacramento
7 Residency Unit. 93 AA 23117 – 226. Based on their uniqueness, all residency cases are
8 reviewed by the Sacramento Residency Unit, which conducts an in-depth review of these
9 files. 46 AA 11296 (77) – 11297 (78); 72 AA 17964 – 970. That unit is a specialized
10 group of auditors and FTB managers with experience and expertise in residency audits.
11 Id. In this case, Carol Ford was the Sacramento Residency Unit reviewer for Hyatt's
12 1991 and 1992 audits. 48 AA 11919 (167-169); 54 AA 13392; 54 AA 13409, 72 AA
13 17964 – 970. Ford had years of experience performing residency audits. Id. Upon
14 completion of her review, Ford discussed the audits with her supervisor, who was
15 ultimately responsible for signing off on the case after all levels of review were
16 completed; they both agreed with the audit determinations.¹⁵ 48 AA 11891 (55) – 11893
17 (64).

18 At trial, Hyatt was critical of FTB's supervisors and reviewers, claiming they too
19 should have performed their jobs better. Particularly, Hyatt claimed that the supervisors
20 and reviewers did not spend enough time doing their jobs; did not adequately supervise
21 the auditors; should not have recommended a fraud penalty for tax year 1992; and
22 generally contending the quality of their work did not meet "reasonable professional
23 standards." 44 AA 10823 (40) – 10825 (46).

24 At the completion of the audits, FTB sent Hyatt two notices of proposed

25 ¹⁵ At the conclusion of the 1991 audit, Ford recommended that FTB open an audit for the 1992
26 tax year based on audit's determination that Hyatt had become a California non-resident on
27 April 3, 1992. 48 AA 11922 (181) – 11923 (182). Hyatt had not filed a 1992 California tax
28 return. 48 AA 11893 (65) – 11895 (71). The same general audit steps, supervision and review
were applied to the 1992 audit that had been applied to the 1991 audit. The 1992 audit was
significantly abbreviated since most of the evidence had been gathered during the 1991 audit. 72
AA 17963 – 70; 72 AA 17862 – 95.

1 assessments, informing him that FTB proposed increased tax amounts, penalties, and
2 interest. 54 AA 13326-29, 13398-403; 73 AA 18075, 18078 – 82. At trial, Hyatt claimed
3 that the Las Vegas jury was empowered to act as a “check and balance” against those
4 administrative actions taken by FTB in California.¹⁶ 52 AA 12837 (90). The following
5 questioning of Hyatt’s key expert, Malcolm Jumelet, sums up Hyatt’s focus at trial:

6 Q: Now, tell the jury what is was that you were asked to do specifically once you
7 got the assignment and you said, okay, I understand what my role is now?

8 A: I was asked to review the file pertaining to the assessments of Mr. Hyatt for the
9 years 1991 and 1992. And form an opinion on the practices, procedures, actions,
10 methodology and conclusions used by the Franchise Tax Board in reaching those
11 assessments. And also to include my conclusions on the actions of the protest
12 that was not yet final.

13 Q: [O]n the whole are your opinions critical of the way in which information
14 was gathered or the way in which information was analyzed and weighed?

15 A: It was the way the information was analyzed and weighed.

16 44 AA 10760 (138-39), 10943 (65) (emphasis added). Notably Jumelet, who was Hyatt’s
17 lead expert, acknowledged he found no evidence of Hyatt’s extortion allegations (which
18 were the foundation to Hyatt’s bad faith allegations). 44 AA 10846 (130). Instead, he
19 opined that one of FTB’s auditors got overly ambitious with her conclusions to gain a
20 promotion, and the many supervisors and reviewers assigned to Hyatt’s audit simply
21 went along with her conclusions. 44 AA 10834 (83).

22 Hyatt’s expert witnesses at trial attacked, in one form or another, the discretionary
23 decisions made by FTB’s audit staff in gathering, evaluating and weighing the evidence
24 concerning Hyatt’s residency. 36 AA 8785 - 76 (Antolin’s testimony); 43 AA 1064 –
25 724, 10729 (14) – 778 (212) (testimony of Jumelet and Schervish). Hyatt was permitted
26 to ask the jurors to look at the evidence in the audit file and determine for themselves
27 whether they believed FTB’s proposed assessments were fair. 52 AA 12827 (51).
28 Implicit in that question, Hyatt was asking the jury to determine if FTB made the “right”

¹⁶ Hyatt’s closing argument included a traditional separation of powers argument, but with a twist. Hyatt’s counsel described California’s Legislature enacting tax laws, with FTB as a component of the Executive Branch enforcing those laws, and then the Las Vegas jury was the appropriate Judicial Branch acting as a “check and balance” on the exercise of those California powers. 52 AA 12837 (90).

1 decision.¹⁷ Id. The district judge herself informed the jury they were entitled to analyze
2 whether FTB's analysis and conclusions were correct. 53 AA 13242-43.

3 6. Hyatt's Responses to FTB's Proposed Assessments

4 A notice of proposed assessment becomes final and enforceable in 60 days, unless
5 the taxpayer files a written challenge or protest, which triggers a protest proceeding. Cal.
6 Rev. & Tax Code § 19041. This is an internal administrative review or appeal of the
7 determinations reached during the audit. 54 AA 13329. Once a protest is filed, a Protest
8 Hearing Officer (PHO) is assigned to the case, to further develop the facts, conduct
9 additional research, and consider whether the conclusions reached on the notice of
10 proposed assessment were accurate. 49 AA 12083 (151-152). PHOs describe this
11 process as taking a "fresh look" at an audit's recommendations. 34 AA 8325 (77). Upon
12 completion of that fresh look, the PHO can withdraw the assessments, modify the
13 assessment, or sustain the assessments. 50 AA 12286 (32-33).

14 a. Hyatt's California Administrative Protest Proceedings

15 Hyatt made two responses to FTB's notices of proposed assessments. First, on
16 June 20, 1996, he filed a protest for the 1991 audit. 54 AA 13330-91. At that time, the
17 1992 tax audit was still ongoing. 72 AA 17964 - 970. As a result, Hyatt's attorney
18 requested that the 1991 Protest Proceedings be put on hold until the conclusion of the
19 1992 audit, so that the two protests could be consolidated. 72 AA 17967. FTB complied
20 with Hyatt's request, which consumed over 17 months. 54 AA 13398-403.

21 Ultimately the district court allowed Hyatt to introduce his Protest Proceedings
22 into the trial as well. 12 AA 2998-99; e.g. 34 AA 8325 (76-77). She allowed Hyatt to
23 argue that the amount of time it took FTB to resolve his Protest Proceedings was "bad
24 faith" on the part of FTB, but she would not allow FTB to mention the substantive issues
25 contributing to the length of time it took to resolve Hyatt's Protest Proceedings. For

26 ¹⁷ While Hyatt was allowed the opportunity to present witnesses opining that FTB had not made
27 the right conclusion at the audit level (34 AA 8259 (149) – 8260 (150)), during FTB's case in
28 chief, District Judge Walsh prohibited any FTB witness from opining, after their own review of
the evidence, whether FTB properly weighed and evaluated the evidence to reach the right
conclusion. 45 AA 11233 (208) – 11237 (222); 46 AA 11304 (108-09).

1 example, FTB was foreclosed from introducing its requests for information sent to Hyatt,
2 or to examine the incomplete evidence Hyatt was sending in response. E.g., 76 AA
3 18886-891. Also, FTB was prohibited from introducing the masses of evidence
4 concerning Hyatt's residence gathered during the litigation, to compare and contrast to
5 the evidence Hyatt was supplying to the PHO (it was different), so the jury could
6 understand the additional analysis being undertaken by FTB across the span of the
7 Protest Proceedings. 27 AA 6507-08. And, FTB was prohibited from introducing as
8 evidence the Nevada Protective Order (to be explained shortly) (36 AA 8899 (96) – 8901
9 (104)), which had a significant impact on the timeliness of FTB's resolution of the
10 Protest Proceedings

11 Anna Jovanovich, an FTB in-house attorney, was assigned as the first PHO, and
12 once the two protests were consolidated, Jovanovich began processing Hyatt's protests.
13 50 AA 12368 (11). When Jovanovich retired, Robert Dunn was assigned as the second
14 PHO, who served until his workload required reassignment to another PHO, Charlene
15 Woodward. 50 AA 12368 (11-13). After she requested transfer to another department,
16 Hyatt's Protest Proceedings were assigned to Cody Cinnamon, who served until their
17 conclusion. 45 AA 11077 (41). FTB is compelled to recite these mundane reassignments
18 because at trial Hyatt criticized FTB's choice of personnel assigned to resolve his Protest
19 Proceedings, contending that FTB did not choose a PHO who might side with him and
20 that was bad faith too. 52 AA 12891 (17) – 12892 (19). And then across trial, Hyatt was
21 permitted to contend that the PHO's decision was made in bad faith as well. 37 AA 9167
22 (80-81); 52 AA 12834 (81); 53 AA 13181 (78-79).

23 b. Hyatt's Nevada Litigation

24 Hyatt also responded to the assessments by filing this litigation on January 6,
25 1998, in the Eighth Judicial District Court. 1 AA 1-16. The first claim of a First
26 Amended Complaint, and ultimately his Second (and final) Amended Complaint, sought
27 declaratory relief, requesting the district court, among other things, declare that he was a
28 Nevada resident as of September 26, 1991. 14 AA 3257-3300. The balance of his

1 complaint sought a declaration that FTB's demands for information (the requests sent to
2 third parties) were illegal. Id. And he asserted multiple tort claims, all of which were
3 predicated upon extortion allegations, i.e. Hyatt alleged FTB had no evidence to support
4 its tax and penalty conclusions and every action taken toward him was designed to extort
5 a settlement out of him. Id. Before trial Hyatt relied extensively upon his extortion
6 allegations, but at trial, he presented no evidence of extortion, and even his two experts
7 admitted they found no evidence of extortion practiced by FTB.¹⁸ During closing
8 argument, after FTB pointed out the complete lack of evidence supporting Hyatt's
9 critical extortion allegation, Hyatt responded by asserting that FTB's counsel gave a mis-
10 impression to the jury by claiming that "we have to prove everything in the complaint."
11 53 AA 13167 (24).

12 Hyatt hired a consultant for the Nevada litigation, Candace Les, a former FTB
13 employee who had been terminated. 33 AA 8234 (46); 34 AA 8257. Les testified (at trial
14 via deposition) that she was a former friend of Sheila Cox, one of the auditors assigned
15 to Hyatt's audit. 33 AA 8178 (163-65). Initially, Les claimed that in private moments
16 Cox referred to Hyatt as a "Jew bastard." Id. In subsequent testimony, Les backtracked
17 on her anti-Semitic allegations after she read some of Hyatt's briefs that made Les and
18 her original testimony the centerpiece of those submissions. 34 AA 8256 (135-36). Cox
19 vehemently denied making any anti-Semitic remarks (41 AA 10151 (128-29)), and her
20

21 ¹⁸ Hyatt's lead expert, Malcolm Jumelet, testified as follows:

22 Q And from your review of the audit file or the protest file, did you find evidence
of extortion on behalf of the FTB?

23 A No, I did not.

24 44 AA 10846 (130) (emphasis added).

25 In addition, Hyatt called the former State Auditor for California, Kurt Sjoberg. 33 AA
26 8060 (67). As the State Auditor, Sjoberg was responsible for auditing California's various state
27 agencies, including FTB. Id. (68-69). Sjoberg further testified that he conducted audits of FTB
28 between 1993 and 1997, the years during which Hyatt's audits and tax assessments were
proceeding. Id. (69). When auditing FTB, Sjoberg indicated that he would review a sampling of
tax assessments and audits conducted by FTB. 33 AA 8060 (69) - 8061 (73). In the sampling of
audits he reviewed during these years, Sjoberg specifically testified that he saw "no instances"
in which the "auditors artificially inflated assessments, fabricated assessments, made bogus or
phony assessments." 33 AA 8161 (95-96) (emphasis added).

1 friends and co-workers testified that they never heard her make any such remarks. 46
2 AA 11390 (138); 11461 (78).

3 c. Inter-relationship between California Administrative Protest
4 Proceedings and Nevada Litigation

5 In September 1999, Hyatt began to erect a wall between the California Protest
6 Proceedings and the Nevada litigation, even though both proceedings were doing
7 discovery into Hyatt's residency. Hyatt sought and received a protective order from the
8 Nevada court (the Nevada Protective Order) which "prevent[ed] the viewing of
9 information produced in the litigation by the Protest Hearing Officer." 94 AA 23166-
10 177. Specifically, the Nevada Protective Order prevented the PHO, without Hyatt's
11 consent, from obtaining or viewing any documents Hyatt designated as off-limits or
12 confidential in the litigation. *Id.* Thereafter Hyatt designated nearly everything
13 confidential. 50 AA 12315 (146-47). At trial, the district judge prohibited FTB from
14 discussing the Nevada Protective Order. 36 AA 8899 (96) – 8901 (104).

15 FTB believes its compliance with the Nevada Protective Order and Hyatt's use of
16 the order significantly delayed its resolution of the Protest Proceedings. To comply with
17 the Nevada Protective Order and at the same time ensure that both sides of FTB (the
18 litigation attorneys and the PHOs) were aware of and getting the same information from
19 Hyatt during both the Nevada litigation and the Protest Proceedings, FTB put in place an
20 internal one-way system of communication. 76 AA 18880-83. This ensured compliance
21 with the Nevada Protective Order, and also ensured that the answers being provided by
22 Hyatt in the Protest Proceedings were complete, and the same as information Hyatt was
23 providing in the Nevada litigation. *Id.* Dunn, FTB's in-house counsel working with
24 FTB's trial counsel, was tasked with reviewing the discovery responses provided by
25 Hyatt in the Protest Proceedings and comparing them to Hyatt's litigation responses. 50
26 AA 12369 (14-16). If they were deficient, Dunn was merely permitted to say that they
27 were, but not how or why they were deficient, without violating the Nevada Protective
28 Order. *Id.* For example: In June of 2000, Hyatt provided two boxes of documents to the

1 PHO in response to a request made six months earlier. 54 AA 13443 – 55 AA 13543.
2 Dunn reviewed Hyatt's documents and discovered that they were grossly incomplete,
3 based upon the information that Hyatt had previously disclosed in the Nevada litigation.
4 50 AA 12380 (58) – 12381 (62). To comply with the Nevada Protective Order, Dunn
5 could only tell the PHO that the responses were inadequate, but not how or why, 50 AA
6 12369 (14-16). This drill happened numerous times. 50 AA 12307 (116) - 50 AA 12311
7 (132). FTB's PHO would review and process Hyatt's protests, and Dunn continued to
8 review Hyatt's documents to ensure that they were complete, and in compliance with the
9 Nevada Protective Order; each time such a review took place, however, it was
10 discovered that Hyatt had not given complete information, which necessitated additional
11 requests for information. 50 AA 12380 (58); 55 AA 13544-45, 13552-62. At trial, FTB
12 was prohibited from giving examples of how or why they were defective, thus
13 preventing FTB was fully defending itself against Hyatt's charge of bad faith delay. 27
14 AA 6509-10 (order granting motion to exclude after-acquired evidence).

15 After Hyatt's repeated failure to provide complete information, FTB's PHO could
16 go no further; thus, FTB then made numerous requests of Hyatt and his counsel to
17 consent, as allowed by the Nevada Protective Order, to giving the PHO information
18 which had previously been disclosed to FTB during the Nevada litigation. 76 AA 18892-
19 93; 77 AA 19025-28. Hyatt steadfastly refused. 49 AA 12073 (110-111). As a result,
20 FTB issued a California administrative subpoena. 76 AA 18894-97. The administrative
21 subpoena simply requested that the information FTB had gathered in the Nevada
22 litigation be shared with the PHO. *Id.* This literally meant moving documents across the
23 hall from one FTB attorney to another. 49 AA 12240 (130). Hyatt refused to consent and
24 forced FTB to engage in costly and time-consuming litigation to enforce the
25 administrative subpoena, first before the California Superior Court and then on appeal to
26 the California Court of Appeal. 76 AA 18901-10; State Franchise Tax Bd. v. Hyatt,
27 C043627, 2003 WL 23100266 (Cal. Ct. App. Dec. 31, 2003) (unpublished disposition).
28 Before those courts, Hyatt claimed that the documents were confidential, the disclosure

1 of which would invade his privacy, and that FTB was pursuing him in bad faith. Id. The
2 California Court of Appeals found that the disclosure of documents would not invade his
3 privacy, and that FTB was not acting in bad faith in pursuing the subpoena as part of the
4 Protest Proceedings.¹⁹ Id. Hyatt's tactics consumed almost two years.²⁰ Id.

5 At the completion of the subpoena litigation, FTB spent months copying,
6 organizing and analyzing the voluminous litigation documents. 50 AA 12393 (112-113)
7 – 12394 (114). The PHO then discovered that these documents still did not provide her
8 with specific information relating to a schedule of 1992 payments received by Hyatt
9 from his patents and about which Hyatt had complained bitterly, suggesting that FTB
10 had made an error concerning \$24 million in income. 54 AA 13404-06; 55 AA 13564-
11 65. In June 2005, the PHO made additional requests for this necessary information. 77
12 AA 19006.²¹

13 Throughout 2005, the PHO continued to work on Hyatt's Protest Proceedings and
14 make requests for additional necessary information and documents from Hyatt. 76 AA
15 18920 – 77 AA 19024. Hyatt either sought additional time to respond, or simply refused
16 to comply with the requests outright. 77 AA 19025-28; 19030-32. In October 2005, FTB
17 again requested – actually twice – that Hyatt consent to the release of additional
18 documents and deposition testimony that accumulated in the Nevada litigation since the
19 first disclosure. 77 AA 19025-27. Hyatt flatly refused. 77 AA 19028. FTB was once
20 again forced to issue a second administrative subpoena. 77 AA 19028-47. And FTB was
21 forced to go through that same drill again in the Spring 2007. 50 AA 12398 (130-132).
22 The PHO finally received most of the requested documents and continued the arduous
23

24 ¹⁹ Before trial FTB requested that the district judge apply the doctrine of collateral estoppel to
25 prevent Hyatt from re-litigating the bad faith protest issue in Nevada, that had already been
decided in California against Hyatt. 8 AA 1879-84. The district court refused. 12 AA 298-99.

26 ²⁰ Obviously, the PHO was unable to proceed with the protest proceedings until the subpoena
27 litigation was completed.

28 ²¹ About the same time, Hyatt engaged in another stall tactic. He requested that FTB copy and
produce all of the documents that were disclosed to the PHO pursuant to the subpoena – in spite
of the fact that all of these documents were already in Hyatt's possession. 17 AA 19006.

1 process of analyzing and reviewing thousands of documents.²² 49 AA 12241 (137) – 42
2 (138).

3 Eventually, the PHO was able to analyze all of the information, and in November
4 2007, the PHO affirmed, in all respects, the determinations made during the audit –
5 including the determinations that Hyatt did not become a non-resident of California until
6 April 1992, the tax assessments for both the 1991 and 1992 tax years, and the imposition
7 of the fraud penalties for each tax year. 93 AA 23182-231. Because evidence was
8 discovered during the protest supporting a sourcing theory, that finding was also made
9 against Hyatt.²³ 93 AA 23211-30.

10 The amount of additional information gathered by FTB during the Protest
11 Proceeding was massive. 49 AA 12155 (159-160) (explaining audit file consisted of two
12 bankers boxes, but by conclusion of protest, FTB had a file consisting of 48 bankers
13 boxes). Analysis of that information bolstered the proposed assessments originally
14 reached by FTB's auditors concerning Hyatt's residency, and provided the foundation
15 for a sourcing theory. 93 AA 23211-30. For example: FTB discovered additional flight
16 records concerning Hyatt during the disputed six month period, all originating (in the
17 early morning hours) and concluding out of LAX, not Las Vegas; FTB discovered
18 equipment repair records for equipment that Hyatt had in his California home, where
19 Hyatt's actual presence in the home was noted on the dates of service after his alleged
20 move to Nevada; FTB discovered mortgage documents concerning Hyatt's California
21 home that further showed that his claimed sale in October 1, 1991 to his personal
22 assistant was a sham; FTB discovered that Hyatt falsified notary documents to support
23 that sham transaction; extensive income documents and business records in support of
24

25 ²² In this case 155 depositions were taken and over 168,000 documents were exchanged. FTB
26 turned over all that information, so not to be accused later of cherry-picking the evidence
favorable-to-FTB. 18 AA 4328.

27 ²³ At trial Hyatt claimed it was bad faith for FTB to revisit its earlier sourcing decision after it
28 uncovered evidence in support of that theory. See 49 AA 12234 (107-08). At trial FTB was
forced to defend against that allegation, but was prohibited from offering the evidence gathered
during the protests to explain why it revisited the issue. 27 AA 6509-10.

1 the sourcing theory were found. 93 AA 23182-231.

2 Before trial Hyatt moved to exclude all evidence FTB gathered during the Protest
3 Proceedings. 20 AA 4983-96. Such evidence, at the very minimum, would have been
4 powerful impeachment material against Hyatt. 22 AA 5349-56. Additionally, at trial
5 Hyatt extensively challenged, as bad faith, FTB's conclusion that Hyatt failed to fully
6 cooperate during the audit; the evidence gathered during the Protest Proceedings
7 unequivocally demonstrated that Hyatt had truly not fully cooperated by failing to
8 disclose all requested documents in his possession. However, the district judge granted
9 Hyatt's motion in limine, excluding that evidence as irrelevant. 27 AA 6509-10.

10 d. Hyatt's Appeal to the California State Board of Equalization

11 Hyatt has now moved to his next stage of his administrative appeal. He filed an
12 appeal to the California State Board of Equalization. 92 AA 22908, 22939-45. His
13 appeal is still pending as of the time of this opening brief. Hyatt's briefs to the California
14 State Board of Equalization contend that the Board is bound by the jury's findings in the
15 Nevada litigation. Id. Before his briefs were filed, Hyatt requested multiple extensions of
16 time to ensure that the briefs were not filed until after the jury's verdict – all the while
17 complaining to the jury that delays were causing him additional emotional distress. 92
18 AA 22908. If the Board of Equalization decides the administrative appeal against him,
19 Hyatt has even more remedies. He can file suit in California courts challenging that
20 decision, with the potential for even more appeals and delays.

21 7. FTB's Litigation Rosters

22 Shortly after Hyatt filed this litigation, FTB listed this case on its Litigation
23 Rosters. 83 AA 20694 – 89 AA 22050. Litigation Rosters are a monthly summarization
24 of litigation in which FTB is involved.²⁴ 50 AA 12296 (70). Numerous cases are listed at
25 any given time, including all cases involving residency. 83 AA 20694 – 89 AA 22050.
26 Information is drawn from documents filed in each case. See 13 AA 3109. When FTB
27 first began compiling Litigation Rosters, they were only available on paper, but in 2000,

28 ²⁴ The Litigation Rosters are quite similar to the docket sheets maintained by Nevada's courts.

1 FTB received a formal request from a member of the public to publish the Litigation
2 Rosters on FTB's website; FTB was then legally required to do so.²⁵ 50 AA 12296 (71-
3 73), 12297 (74-75).

4 8. California's Tax Amnesty Legislation

5 On August 16, 2004, the Governor of California signed a tax amnesty bill enacted
6 by California's Legislature which applied to any taxpayer who had a pending tax dispute
7 with the FTB. 89 AA 22051-67. At that time, Hyatt had two pending protests. Hyatt,
8 along with thousands of other taxpayers, received an application notifying him that he
9 "may be eligible to participate in California's tax amnesty program on any or all tax
10 years beginning before January 1, 2003." 55 AA 13567. The district court allowed Hyatt
11 to introduce the application as evidence at trial and discuss the amnesty program with the
12 jury. 55 AA 13566-70. Hyatt did not return the application, but instead claimed it was
13 further evidence of FTB's bad faith. 37 AA 9167 (78-81).

14 B. District Court Resolution Of The Nevada Litigation

15 A four-month jury trial was held in 2008. The jury found in Hyatt's favor,
16 awarding \$52 million for invasion of privacy damages, \$85 million for emotional
17 distress damages, more than \$1 million in attorney fees (the sum Hyatt expended during
18 FTB's audit and protest), and \$250 million, after phase 3 of the trial, in punitive
19 damages. 90 AA 22359-66; 54 AA 13308-09. The district court added over \$102 million
20 in prejudgment interest bringing the total judgment to over \$490 million. 90 AA 22359-
21 66. The district court denied FTB's motions for new trial, for judgment as a matter of
22 law, and to alter or amend the judgment. 93 AA 23032-36. This timely appeal followed.
23 93 AA 23037-41.

24 ///

25 ///

26 ²⁵ Like any state agency, FTB must follow certain statutory mandates which require openness in
27 FTB's activities and its conduct on behalf of the citizens of California. "Public Records" are
28 defined under California's Public Records Act as "any writing containing information relating
to the conduct of the public's business prepared . . . or retained by any state or local agency...".
Cal. Gov't Code § 6252(e). FTB's Litigation Rosters fall squarely within this definition. *Id.*

1 IV. LEGAL ARGUMENT

2 A. Standard Of Review

3 Almost every issue in this appeal is a legal issue, for which this court applies a de
4 novo standard of review. See Nelson v. Heer, 123 Nev. 26, 163 P.3d 420, 424-25 (2007)
5 (de novo standard of review for JNOV or motion for judgment as a matter of law); Stalk
6 v. Mushkin, 125 Nev. ___, 199 P.3d 838, 840 (2009) (de novo review of orders on
7 motions for summary judgment); Bongiovi v. Sullivan, 122 Nev. 556, 580-83, 138 P.3d
8 433 (2006) (de novo review of punitive damages guideposts); Martinez v. Maruszczak,
9 168 P.3d at 724 (de novo of legal questions involving application of sovereign
10 immunity); Callie v. Bowling, 123 Nev. 181, 160 P.3d 878, 879 (2007) (de novo review
11 of constitutional challenges); Cortinas v. State, 124 Nev. ___, 195 P.3d 315, 319 (2008)
12 (de novo review of whether jury instruction was correct statement of law).

13 B. The Doctrine Of Comity Applies To This Case

14 1. Nevada Supreme Court Proceedings

15 One of the early issues in this case was whether Hyatt's complaint should have
16 been dismissed under a California statute that provides full sovereign immunity from suit
17 to FTB. Cal. Gov't Code § 860.2. In 2000, FTB filed a motion asserting, among other
18 grounds, that the district court should dismiss Hyatt's complaint because FTB was
19 immune from liability. 2 AA 500; 3 AA 501-08. The district court (then District Judge
20 Saitta) denied the motion, without prejudice, based upon the belief that additional
21 discovery was needed on Hyatt's tort claims. 3 AA 649-50 (50-51).

22 FTB filed a writ of petition with this court. 2 AA 422-63; 3 AA 657-710. The writ
23 was based entirely upon the FTB's contention that the district court should have
24 dismissed this case based upon the doctrines of Full Faith and Credit, sovereign
25 immunity, choice of laws and comity. 3 AA 657-710. On April 4, 2002, this court
26 entered an order holding that parts of the case would survive, but that Hyatt's
27 negligence-based claims must be dismissed. 5 AA 1183-93. This court considered the
28 doctrine of comity. 5 AA 1189. Comity is an accommodation policy under which the

1 courts of one state voluntarily give effect to the laws of another state out of deference
2 and respect, "to promote harmonious interstate relations."²⁶ Id. In considering the scope
3 of immunity to grant to FTB, the court examined whether granting comity to the
4 California statute would "contravene Nevada's policies and interests" Id. To make this
5 determination, the court compared the governmental immunities that would be extended
6 to a Nevada state agency under the allegations of this case, in contrast to the complete
7 immunity extended to FTB under California law. 5 AA 1187-90.

8 This court noted that "Nevada provides its agencies with immunity for the
9 performance of a discretionary function even if the discretion is abused." 5 AA 1187; see
10 also NRS. 41.032(2). This court held that conducting an investigation is generally a
11 discretionary act. Therefore, under Nevada law, a Nevada agency could not be held
12 liable for its discretionary investigative acts or for claims sounding in negligence, even if
13 the agency abused its discretion. 5 AA 1189-90. Conversely, this court concluded that
14 Nevada law did not grant Nevada state agencies immunity for intentional torts or bad
15 faith committed by its employees.²⁷ Id. Based on this comparison, this court concluded
16 that both California and Nevada each provided their respective state agencies with
17 immunity from suit for abuse of discretionary acts or negligent actions. Id. The court
18 held Nevada's policies or interests would not be contravened by applying California's
19 sovereign immunity statute to the extent that statute provided FTB immunity for its
20 discretionary conduct or negligent acts. Id.

21 This court then turned to Hyatt's intentional tort claims. The court noted that
22

23 ²⁶ There can be no serious debate over the importance of promoting harmonious relations
24 between the residents of California and Nevada. These are not merely two sister states; they are
25 immediate neighbors, with a common border of more than 600 miles, sharing important
26 common goals and interest relating to natural resources, forest fire suppression, roads, interstate
27 border problems, economic issues, law enforcement, and a multitude of other common interests
28 and concerns. In this context, where a solitary plaintiff obtained a half-billion dollar judgment
against a California government agency, including \$250 million in punitive damages, comity's
goal of promoting harmonious interstate relations must be given great weight.

²⁷ The court offered no explanation or analysis for its bad faith exception to discretionary act
immunity found within NRS 41.032(2). A review of the legislative history of that statute does
not reveal any intent to create a bad faith exception for discretionary acts.

1 California's complete immunity statute encompassed such claims, but under Nevada
2 statutes, there is no immunity for such claims. 5 AA 1190. Thus, the court allowed the
3 intentional tort claims to avoid dismissal. By dismissing the negligence claims, but
4 allowing the intentional tort claims to survive, this court treated FTB the same as a
5 Nevada government agency would be treated in similar circumstances.

6 2. United States Supreme Court Proceedings

7 FTB appealed this decision to the United States Supreme Court, which affirmed
8 in Franchise Tax Board v. Hyatt, 538 U.S. 488 (2003). At oral argument, Hyatt argued
9 this court properly applied comity to this case because:

10 [A]n important principle emerging – emerging principle of comity, is
11 [states] have tended to look at their own immunity to see what kinds of
12 suits could be brought against them and to try, then, to grant to the – to the
outside sovereign that same type of immunity.

13 6 AA 1467 (Oral Argument, United States Supreme Court). Based on this principle,
14 Hyatt asserted that Nevada must treat FTB the same as it would treat a Nevada state
15 agency.

16 THE COURT: – do I understand – your comity argument basically is – it's
17 kind [of] a self-executing thing, because each time a state has to answer the
18 comity question, it asks the question, "What would I do if the tables were
reversed?" And as history teaches us, they generally treat the other sovereign
the way they would want to be treated themselves.

19 MR. FARR: That's correct, Justice Stevens. And, in fact, they have become
20 more specific as – (inaudible) – comity, I believe, in saying we want to treat
the other sovereign as we do treat ourselves, not just as we want to be treated.
21 **We are treating the other sovereign the way we treat ourselves.**

22 6 AA 1480 (emphasis added). According to Hyatt, Nevada properly applied the doctrine
23 of comity because this court treated FTB in the same way it would treat its own state
24 agencies under the same circumstances. Id.

25 Hyatt took the same position in his written briefs. Hyatt noted that "state courts
26 are fully capable of recognizing the sovereign interests of other States, using their own
27 sovereign interests as a benchmark." 6 AA 1360. Hyatt further recognized that this
28

1 court's "reference point was not the liability of private individuals for tortious conduct,
2 but the liability of the State[*of Nevada*] itself." 6 AA 1341 (emphasis in original). Hyatt
3 cited numerous state cases in support of the proposition that forum courts have "often
4 done what this court did below: looked to the immunity of the forum State in
5 determining what acts of the defendant State would be subject to suit." 6 AA 1359.

6 Ultimately, Hyatt's position prevailed. Franchise Tax Board, 538 U.S. at 499. The
7 United States Supreme Court concluded that, "[t]he Nevada Supreme Court sensitively
8 applied principles of comity with a healthy regard for California's sovereign status,
9 relying on the contours of Nevada's own sovereign immunity from suit as a
10 benchmark for its analysis." *Id.* at 499 (emphasis added).

11 3. Comity Has Been Similarly Applied in Other Cases

12 Comity has been applied in numerous cases where a sister state defendant's own
13 laws did not contravene the policies of the forum state. Where one state agency has been
14 sued in another state, the forum state looks to the manner in which its own state agencies
15 would be treated under similar circumstances, and the forum state provides that same
16 treatment to the sister state agency defendant. See e.g., Sam v. Sam, 134 P.3d 761, 768
17 (N.M. 2006) (applying comity treating sister state defendant same as forum state, citing
18 FTB v. Hyatt); Hansen v. Scott, 687 N.W.2d 247, 251 (N.D. 2004) (giving foreign state
19 agency sued in sister state same level of sovereign immunity that would be accorded to
20 forum state agency); Solomon v. Supreme Court of Florida, 816 A.2d 788, 789-90 (D.C.
21 2002) (same); McDonnell v. State of Ill., 748 A.2d 1105, 1107-08 (N.J. 2000) (same);
22 Schoeberlein v. Purdue University, 544 N.E.2d 283, 288 (Ill. 1989) (same).²⁸

23
24 ²⁸ In Fair Assessment In Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981), the Court held
25 that tort claims based upon administration of state taxes are barred in federal court due to the
26 principle of comity. The McNary Court recognized that the administration of state taxes is
27 complex and highly rule-oriented. *Id.* at 108, n.6. The Court identified numerous evils that
28 would result from tort litigation testing state tax assessments, including the fact that "state tax
administration might be thrown into disarray," taxpayers might escape ordinary state procedural
requirements, collection of necessary revenue would be obstructed, and there would be
"consequent damage to the State's budget." *Id.* Such tort suits "would cause disruption of the
states' revenue collection systems," and would improperly result in civil courts "being a source
of appellate review" of tax agency decisions. *Id.* at 114.

1 The present case is an example of application of these principles. This court held
2 that comity applies to California's immunity statute, regarding Hyatt's negligence
3 claims. In doing so, this court compared Nevada governmental immunity to the
4 immunity enjoyed by FTB under California law. This court then concluded that FTB
5 could be subject to liability in Nevada but only to the same extent that a similarly
6 situated Nevada agency could be held liable under Nevada law.

7 FTB asked the district court, and Hyatt objected, to similarly apply comity to
8 other protections routinely afforded to Nevada state agencies. The district court refused,
9 and instead took actions exhibiting hostility toward FTB and the State of California. See
10 section IV(C) (discretionary function immunity), section IV(G)(1) (statutory caps on
11 government liability), and section IV(H)(1) (punitive damages).

12 4. Other Legal Doctrines Also Require That Comity Apply Here

13 An appellate court's decision becomes the law of the case and must be adhered to
14 throughout the subsequent progress of the case, both in the district court and upon any
15 subsequent appeal. Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724, 728 (2007).
16 While there are exceptions to the law of the case doctrine (Hsu, 173 P.3d at 729-30),
17 none apply to the court's conclusion that comity must be applied to FTB, with FTB
18 being treated no worse than a Nevada state agency.

19 In addition, judicial estoppel prevents a party from taking inconsistent positions in
20 litigation, thereby guarding the judiciary's integrity. Marcuse v. Del Webb Communities,
21 Inc., 123 Nev. 278, 163 P.3d 462, 468-69 (2007). Judicial estoppel applies when the
22 same party has taken different positions in two judicial proceedings, the party was
23 successful in the first proceeding, the two positions are totally inconsistent, and the first
24 position was not taken as a result of ignorance, fraud, or mistake. Id.

25 In the present case, Hyatt contended in this court and the United States Supreme
26 Court that FTB's request for complete immunity under California law should be
27 rejected. In doing so, Hyatt took the position that because a Nevada government agency
28 would not have complete immunity in a Nevada lawsuit, so too should California be

1 denied complete immunity. He claimed both states should be treated the same. As noted
2 above, during oral argument at the United States Supreme Court, Hyatt's counsel
3 responded affirmatively when asked whether one state should treat another state "the
4 way they would want to be treated themselves." Hyatt's counsel took the position that
5 "we [Nevada] want to treat the other sovereign [California] as we do treat ourselves, . . ."
6 He also took the position: "We [Nevada] are treating the other sovereign [California] the
7 way we treat ourselves." 6 AA 1480.

8 Hyatt was successful in convincing both this court and the United States Supreme
9 Court that complete immunity should be rejected for FTB, based on the understanding
10 that California would not be treated worse than Nevada agencies themselves would be
11 treated. Having prevailed in his position, Hyatt should now be judicially estopped from
12 changing his position that California is not entitled to the same fundamental protections
13 as a similarly situated Nevada state agency.

14 C. Hyatt's Claims, As Tried, Are Precluded By The Discretionary Function
15 Immunity Doctrine

16 Nevada government entities and agencies are immune from lawsuits for
17 discretionary conduct taken by government employees. NRS 41.032(2). This court's
18 April 2002 order allowed Hyatt to proceed with his intentional tort claims, based on this
19 court's application of the law as it existed at that time, i.e. discretionary immunity under
20 NRS 41.032(2) did not extend to such claims. At the time this court rendered its 2002
21 decision, it had created two separate tests for examining the scope of government
22 discretionary function immunity – the "planning-versus-operational test" and the
23 "discretionary-versus-ministerial test." Martinez, 168 P.3d at 726-27. After the 2002
24 order, however, the court adopted an entirely new test governing Nevada's
25 "discretionary function immunity" doctrine. See Martinez, 168 P.3d at 729 (adopting test
26 created by Berkovitz v. United States, 486 U.S. 531 (1988) and United States v. Gaubert,
27 499 U.S. 315 (1991) (hereinafter the "Berkovitz-Gaubert test")); see also Butler ex. rel.
28 Butler v. Bayer, 123 Nev. 450, 168 P.3d 1055, 1066-67 (2007); City of Boulder City v.

1 Boulder Excavating, 124 Nev. ___, 191 P.3d 1175 (2008); Ransdell v. Clark County,
2 124 Nev. ___, 192 P.3d 756 (2008). This court expressly overruled and abandoned its
3 previous tests after concluding that they led to inconsistent results, and adopted its new
4 test. Martinez, 168 P.3d at 727-729.

5 1. Nevada's New Test Governing Discretionary Function Immunity

6 In fashioning its new test, this court noted that Nevada's discretionary function
7 immunity statute, NRS 41.032(2), "mirrors the Federal Tort Claims Act." Id. at 732.
8 Based on these parallels, this court turned to federal decisions interpreting the Federal
9 Torts Claims Act ("FTCA") to aid it formulating a new test. Id. at 727. After analyzing
10 the federal cases, this court expressly adopted the discretionary function immunity test
11 applied by the United States Supreme Court and the federal courts when analyzing
12 claims under the FCTA. See Martinez, 168 P.3d at 729.²⁹

13 The Berkovitz-Gaubert test is intended "to prevent judicial 'second guessing' of
14 the legislative and administrative decisions grounded in social, economic, and political
15 policy through the medium of an action in tort." Martinez, 168 P.3d. at 729. Government
16 actions are entitled to discretionary function immunity if two elements are satisfied: (1)
17 the actions at issue are discretionary; and (2) the actions are based upon considerations
18 of social, economic, or political policy. Martinez, 168 P.3d at 729; Butler, 168 P.3d at
19 1066.

20 As to the first element, an act is discretionary if it involves "an element of
21 judgment or choice." Martinez, 168 P.3d at 728 (internal quotations and citations
22 omitted). According to the federal courts interpreting this rule, if an act involves
23 mandatory compliance with a specific statute, regulation, or policy, however, this
24 element will not be satisfied because the government actor did not have a "rightful
25 option but to adhere to the directive." See Terbush v. United States, 516 F.3d 1125, 1129

26
27 ²⁹ This court has noted that federal case law addressing the Berkovitz-Gaubert test will be
28 considered when analyzing immunity claims pursuant to Nevada's discretionary function
immunity test. See Butler, 168 P.3d at 1066 n.50. Therefore, to the extent necessary, FTB has
relied upon and cited to analogous federal case law interpreting the this test.

1 (9th Cir. 2008); Rogers v. United States, 187 F.Supp.2d 626, 630 (N.D.Miss. 2001).

2 If the act is deemed “discretionary,” the court must then turn to the second
3 element and “determine if ‘the judgment is of the kind that the discretionary function
4 exception was designed to shield’ i.e., actions ‘based on considerations of social,
5 economic, or political policy.’” Butler, 168 P.3d at 1066 (quoting Martinez, 168 P.3d at
6 729). The focus on the second element is not on the government employee’s “subjective
7 intent in exercising the discretion conferred . . . but on the nature of the actions
8 taken and on whether they are susceptible to policy analysis.” Id. (internal quotations
9 omitted) (emphasis added). In making this determination, the government is not required
10 to produce any affirmative evidence that the government employee made a conscious
11 decision regarding policy factors. See Martinez, 168 P.3d at 728. The inquiry related to
12 this element looks specifically at the nature of the conduct at issue. Terbush, 516 F.3d at
13 1129. Therefore, this test applies to all levels of government decisions – including
14 frequent or routine decisions. Ransdell, 192 P.3d at 762.³⁰

15 Based on this new test, the scope of the immunities that are required to be
16 extended to FTB as a matter of comity have been completely changed. Application of
17 this new test reveals Hyatt’s claims as presented at trial must be dismissed. FTB
18 expressly requested that the district court analyze FTB’s conduct applying the court’s
19 new test, but the district court refused. 90 AA 22369-500; 91 AA 22501-559. In fact, the
20 district court adopted a policy of outright hostility to FTB and the public acts of the State

21
22 ³⁰ Where the legislative branch has specifically delegated authority to an executive branch
23 agency to implement or enforce the “general provisions of a regulatory statute and to issue
24 regulations to that end, there is no doubt that planning-level decisions establishing programs are
25 protected by the discretionary function exception.” Gaubert, 499 U.S. at 323. “If a regulation
26 allows the employee discretion, the very existence of the regulation creates a strong
presumption that a discretionary act authorized by the regulation involves consideration of the
same policies which led to the promulgation of the regulations.” Id. In other words, “[w]hen
established Governmental policy, as expressed or implied by statute, regulation, or agency
guidelines, allows a government agent to exercise discretion, it must be presumed that the
agent’s acts are grounded in the policy when exercising that discretion.” Id.

27 Therefore, if the actions at issue were “an integral part of governmental policy-making or
28 planning, if the imposition of liability might jeopardize the quality of the process, or if the
legislative or executive branch’s power or responsibility would be usurped,” this element is
satisfied. Martinez, 168 P.3d at 729 (internal citations and quotations omitted).