IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT P. HYATT, Appellants, v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Respondents.	Docket No. 84707 **APPENDIX OF EXHIBITS TO APPELLANT'S OPENING BRIEF** **VOLUME 16 OF 42**

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

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

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

Attorneys for Appellant Gilbert P. Hyatt

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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 16 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

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An employee of Hutchison & Steffen, PLLC

The Kansas Supreme Court, citing the *Restatement*, held that if the conduct is extreme and outrageous enough, there will be liability for the emotional distress, even without any bodily harm:

> The rule stated is not, however, limited to cases where there has been bodily harm; and if the conduct is sufficiently extreme and outrageous there may be liability for the emotional distress alone, without such harm. In such cases the court may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but *if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required.*"[444]

The Federal District Court in Connecticut similarly held that "[j]ust as the fact of treatment is not sufficient to prove the existence of severe emotional distress, the absence of treatment does not preclude proof of severe emotional distress."[445]

The FTB's citations on page 93 of its brief to two unpublished cases from outside Nevada, in which an emotional distress claim was dismissed after medical records were not produced, are limited by the facts of those cases, and certainly not controlling here or even consistent with established law. The two Nevada cases cited do not dismiss an emotional distress claim simply because medical records were not produced.[446]

Moreover, the primary form of emotional distress in this case was long-term, financial pressure from a party in a position of authority and is most analogous to insurance bad faith cases, where emotional distress damages are awarded for the financial pressures suffered by the victim, without evidence presented in the form of medical records or medical experts.[447]

For if the conduct is found to be outrageous, intentional, then causation and damage are virtually presumed.").

[444] *Sawyer v. Southwest Airlines Co.*, 243 F.Supp.2d 125, 1275-1276 (D. Kan., 2003) (quoting from the *Restatement (Second) of Torts* § 46 cmt., k (emphasis added).

[445] *Birdsall v. City of Hartford*, 249 F. Supp.2d 163, 175 (D. Conn., 2003).

[446] *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342 (1977), held that medical records "may" be ordered produced if a plaintiff puts his physical condition at issue, but in that case the Court actually reversed the discovery order finding it too broad. In *Potter v. W. Side Transp., Inc.*, 188 F.R.D. 362, 365 (D. Nev. 1999), the court issued a discovery order requiring production of therapy records. Both discovery rulings were specific to the facts of those cases.

[447] Nevada provides that a victim of insurance bad faith may recover damages for emotional distress caused by financial pressure. *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1261-62, 969 P.2d 949, 958 (1998) (holding that plaintiff was entitled to a compensatory damages award for emotional distress because insurer's and policy administrator's actions deprived plaintiff of peace of mind, sense of security, health, and

Particularly in the context of financial pressures being imposed, the length of time, *i.e.* duration of the distress, is a significant factor in determining an appropriate award for the emotional distress.[448] Moreover, the jurors in this case were properly instructed that duration, along with the severity and outrageousness of the FTB's conduct, are to be considered in determining what amount of damages are to be awarded for the emotional distress endured by the plaintiff.[449]

Bad faith insurance cases demonstrate that severe emotional distress can and does result from severe financial pressure imposed on a party, particularly when imposed over an extraordinary period of time. Here, the financial pressure was extreme, given the tens of millions the FTB sought from Hyatt, and the amount of time the FTB held the threat over Hyatt's head, which grew, with interest, to over $50 million. Given the nature of the misconduct (financial pressure over a long period of time stemming from governmental bad faith conduct), jurors can use their own experiences to determine the nature and severity of the distress.[450]

b. The FTB misconstrues the Discovery Commissioner's ruling regarding garden-variety emotional distress.

The Discovery Commissioner's ruling referencing garden-variety emotional distress was

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financial well-being based on plaintiff's own testimony without medical records or experts); *see also Guaranty Nat. Ins. Co. v. Potter*, 112 Nev. 199, 912 P.2d 267, (1996) (holding award for compensatory damages for emotional distress for plaintiff was proper due to dealing with two years of threats and the corresponding anxiety and concern, damage to plaintiff's credit reputation during that time, and anxiety and concerns caused by litigation expenses); *see also Farmers Home Mut. Ins. Co. v. Fiscus*, 102 Nev. 371, 374-375, 725 P.2d 234, 236 (1986) (holding that plaintiff was entitled to award of compensatory damages for emotional distress due to destruction of family assets and corresponding financial distresses).

[448] *Id.*; *see* generally *Boston Public Health Com'n v. Massachusetts Com'n Against Discrimination*, 67 Mass. App. Ct. 404, 411, 854 N.E.2d 111, 117 (2006) (holding that the length of time the plaintiff has suffered and reasonably expects to suffer is a factor that must be considered in determining an award for emotional distress).

[449] RT: July 21, 143:3-20.

[450] This is a long-standing policy in Nevada. *Powell v. Nevada, C. & O. Ry.*, 28 Nev. 40, 78 P. 978, 979 (1904), *aff'd.*, 28 Nev. 305, 82 P. 96 (1905) (holding that there is no fixed rule for the measure of damages, especially for mental anguish apart from physical suffering, except that it is to be left to the jury under proper instructions from the court). It is also a well-recognized principle in other jurisdictions. *See e.g., Merlo v. Standard Life & Acc. Ins. Co.*, 59 Cal.App.3d 5, 17, 130 Cal.Rptr. 416, 424 (Cal. Ct. App. 1976) (holding there is no fixed or absolute standard by which to compute the monetary value of emotional distress and that a reviewing court must give considerable deference in matters relating to damages to the jury); *Pearson ex rel. Latta v. Interstate Power and Light Co.*, 700 N.W.2d 333, 347 (Iowa 2005) (holding that emotional distress damages cannot be measured by any exact or mathematical standard and must be left to the sound judgment of the jury).

not intended to, and did not prevent Hyatt from establishing the severity element of his intentional infliction of emotional distress claim. Further, contrary to the FTB's arguments, the Discovery Commissioner's ruling protecting Hyatt's privacy in his medical records is entirely consistent with the law. The relevant hearing transcript shows that the Discovery Commissioner was simply balancing Hyatt's right to privacy in his medical records with fairness in discovery.[451] Because Hyatt exercised his right to privacy in his medical records, the Discovery Commissioner forbade him from using his medical records to support his claim for emotional distress, and allowed the FTB *to argue* that Hyatt's emotional distress was not so severe as to require that he seek medical attention.[452] In other words, the FTB could and did argue that Hyatt did not suffer severe emotional distress, because he did not seek or need medical help. But the Discovery Commissioner was clear that Hyatt could still seek emotional distress damages.

> Hyatt nonetheless *will not be prevented* from making a claim of emotional distress, *of the garden variety nature*, as many courts have referred to it, based on having some kind of stressful situation. But *Hyatt will not be allowed to allege that his distress*, however he may characterize it, *was severe enough in any way that he needed to seek any kind of medical care.* Any testimony by Hyatt to the contrary, prior to the designation given on December 12, 2005, will be stricken and cannot be used. (December 9, 2005 hearing transcript, 19: 13-19).[453]

The Discovery Commissioner viewed the lack of medical evidence as an additional hurdle for Hyatt, but certainly not a bar. The Discovery Commissioner was not intending to set a limit on the emotional distress damages Hyatt may recover, and certainly did not intend to prohibit Hyatt from pursuing his outrage claim as the FTB suggests. Indeed, that certainly was not the District Court's interpretation, as the FTB notes the District Court rejected the very same argument by the FTB in a pretrial motion.[454]

Given the obvious intent of the Discovery Commissioner's ruling, the "garden-variety" cases the FTB cites on page 94 of its brief use that term as a term of art, but it has no application to the Discovery Commissioner's use of the term. Moreover those cases are factually inapposite

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[451] 15 AA 3538-3539.

[452] *Id.*

[453] 12 AA 2959 (emphasis added).

[454] FTB Opening Brief, at 94, n. 79.

to the present case.[455]

c. Hyatt's emotional distress was severe and occurred over a long period of time.

Hyatt provided extensive and explicit testimony to the jury as to the severity of his distress. Hyatt testified to his initial concern upon receiving the August 2, 1995, Determination Letter from the FTB and Cox. He not only was being assessed taxes but he was being accused of fraud based on secret affidavits he was not entitled to see. But he thought it was all a big mistake and would be corrected.[456] But then, as he testified, he became depressed and upset, and started experiencing emotional and physical problems after receiving the FTB's audit file in October of 1996. He began to comprehend the conduct the FTB had engaged in, particularly the massive disclosures to all who seemingly had any connection to him, and the depths to which the FTB was apparently willing to go to get him. It was distressing and humiliating for him that virtually all of his professional and social contacts may view him as a tax dodger. Hyatt was very embarrassed and humiliated upon learning that seemingly all of his past and present neighbors learned he was under investigation. The FTB even contacted a dating service and learned that no one wanted to date Hyatt. Further, his past experiences with industrial espionage heightened his distress from the massive disclosures, since he previously had valuable technology misappropriated.[457] As time went on and he learned more about the FTB's disclosures, he became more depressed.[458]

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[455] *Jessamy v. Ehren*, 153 F. Supp.2d 398 (S.D.N.Y. 2001), was a Section 1983 case brought by prison inmates, and the court found that the plaintiffs were "not limited to nominal damages for their humiliation, embarrassment, and injury to reputation, should they prove defendants' liability at trial." *Ruhlmann v. Ulster County Depts. of Soc. Services*, 194 F.R.D. 445 (N.D. N.Y. 2000), held that medical records can be protected and not disclosed; while not holding there is any type of limit to recovery for emotional distress claim with no medical record support. *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp.2d 193 (N.D.N.Y. 2002), holds that plaintiff's testimony alone would be sufficient to "establish shock, sleepless nights, nightmares, moodiness, humiliation, upset and the like" as part of a claim for severe emotional distress. *Nelson v. City of Las Vegas,* 99 Nev. 548, 665 P. 2d 1141 (1983), involved a third party bystander claim rejected by this Court. *Alam v. Reno Hilton Corp*, 819 F. Supp. 905 (D. Nev. 1993), involved a class action claim.

[456] RT: May 12, 101:7-102:5.

[457] RT: May 12, 22:17-24:9, 59:5-25, 97:13-100:16, 145:14-146:6.

[458] RT: May 12, 100:17-101:6.

The audit file also revealed to Hyatt that the secret affidavits upon which the FTB relied were from estranged family members who had no personal knowledge of his move to and residency in Nevada. He felt sick to his stomach and became fearful of what the FTB was doing when he learned this was the evidence against him, and that the FTB had in fact boasted of his conviction to his ex wife.[459] His fear of what the FTB was doing to him grew over time, as he saw the FTB could make-up its own evidence and draw conclusions, realizing that their promises of fairness, impartiality, and confidentiality meant nothing.[460]

As the protest proceeded, Hyatt learned of Jovanovich's threat that if he did not settle like other wealthy people, he would face an even more invasive investigation.[461] This caused him great distress, frustration, and fear because he was realizing he would not obtain a "fair shake," as the FTB was creating a case against him and the same individuals involved in the audit were involved in the protest.[462]

He also testified to how upset he was when he later learned the FTB tried to bury internal FTB evidence questioning the proposed assessments against Hyatt (i.e., the Ford review notes for the 1991 audit) and that it ignored other dissents within the FTB (the 1992 audit reviewer Rhonda Marshall), as he realized he was being railroaded and there was nothing he could do about it.[463] He testified as to his distress from learning that the FTB was instructing auditors to use penalties as bargaining chips and that penalties were represented in a menacing way with a skull-and-cross-bones,[464] seemingly regardless of whether there was any basis to assert a penalty.

Hyatt also testified to his embarrassment and humiliation in regard to the FTB's *Litigation Roster* publicizing that he was assessed a fraud penalty, even though no final

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[459] RT: May 12, 12:6-14, 15:15-17:21

[460] RT: May 12, 103:2-104:6.

[461] RT: May 12, 102:17-103:10.

[462] RT: May 12, 60:1-15, 73:23-74:23, 104:7-106:3.

[463] RT: May 12, 44:11-49:21, 62:12-63:17, 106:4-107:1.

[464] RT: May 12, 105:14-106:20.

assessment had been made.[465] He also testified about the FTB amnesty offer, in which he would have had to drop his lawsuit against the FTB and admit that its tax assessment was correct, or face a 50% additional penalty.[466]

Hyatt testified as to his increasing distress when he later learned that Cox called him a "freak" in response to learning one of Hyatt's sons had been murdered years ago, as well as learning that this auditor was "obsessed" with Hyatt. It did not matter as much to Hyatt that Cox called him a "cheap bastard", but it greatly disturbed him that she made anti-Semitic comments about him, particularly in light of Hyatt having lost family members during the Holocaust.[467]

Hyatt also testified as to the deep depression, fear, and anger he experienced as the FTB's proposed assessment of taxes and fraud penalties hung over his head during the protest. He testified he would wake up every morning realizing about $10,000 was being added to his tax bill each day.[468]

Hyatt testified to not only the deep depression that ensued over the 11 year experience, but also the resulting physical problems and manifestations he experienced. He testified as the sick feeling in his stomach, tightness and breathing problems in his chest, even as he reads the audit file. He testified as to how over time the physical symptoms he experienced built over the decade. He developed back spasms, had reflux and heartburn, sleeplessness, and other symptoms. He also developed nightmares during sleep and developed a nervous reaction of grinding his teeth at night.[469] All of these symptoms became "worse and worse" over the decade.[470]

This is just a sampling of Hyatt's testimony concerning his emotional distress. His

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[465] RT: May 12, 76:23-78:16.

[466] RT: May 12, 78:17-81:12.

[467] RT: May 12, 110:23-113:8.

[468] RT: May 12, 108:16-109:13.

[469] RT: May 12, 96:2-:15-97:12, 103:19-104:4,105:23-106:3.

[470] RT: May 12, 96:17-21.

testimony in this regard took the better part of a day during trial.[471]

d. Lack of medical treatment does not bar Hyatt's claim, as other evidence provides objectively verifiable indicia of severity of the emotional distress.

The FTB argues that Hyatt has no medical evidence of the severity of his emotional distress, so his outrage claims should have been dismissed. However, testimony of third party witnesses can meet the required level of proof needed to establish severe emotional distress. Here, Hyatt put forth multiple witnesses and more than enough evidence of objectively verifiable evidence of the severity of his distress to meet the substantial evidence test.

Specifically, in Nevada, contrary to the FTB's focus on medical records and bodily harm, this Court has set no bar to establishing severe emotional distress where there was an absence of a physical impact injury and medical treatment for the emotional distress. In *Barmettler*, this Court held, addressing a claim for negligent infliction of emotional distress, that "where emotional distress damages . . . precipitate physical symptoms either a physical impact must have occurred or, in the absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness must be present."[472]

In *Miller v. Jones*,[473] on which the FTB so heavily relies, the plaintiff sought emotional distress damages based on an allegedly defamatory statement published about him during a mayoral campaign. But the opponent retracted and apologized for the statement *one week* after it was published. Under these circumstances, the plaintiff made no showing of severe emotional distress. The lack of medical treatment was simply one factor.[474]

The facts in *Miller* did not lend themselves to analyze whether severe emotional distress could be presumed or inferred from extreme and outrageous conduct over a long period of time, or whether less proof of physical injury is required from the plaintiff when defendant's conduct is extreme and outrageous. In *Miller*, the court plainly indicated that the plaintiff simply presented

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[471] *See* RT: May 12, 2:4-113:8.

[472] 114 Nev. at 448.

[473] 114 Nev. 1291, 1330, 970 P.2d 571 (1998).

[474] *Id.*, at 1294, 1300.

no "objectively verifiable indicia of the severity of his emotional distress."[475] While the Court referenced the lack of medical records, it did not hold that they are an absolute requirement. Thus, sufficient support for severe emotional distress can, but does not need to include, medical or psychiatric assistance.

Objectively verifiable evidence, in the absence of any medical evidence, may be provided instead by third party witnesses. In lieu of medical records, *"'the testimony of friends or family'" to corroborate [] allegations* of severe emotional distress" can provide objectively verifiable evidence.[476] In this context, the United States Supreme Court held that "genuine injury in this respect may be evidenced by one's conduct and observed by others."[477]

At trial, Hyatt presented specific details of the severity of the emotional distress he suffered as a result of the FTB's extreme and outrageous conduct.[478] But Hyatt also provided testimony from third party witnesses who knew him before and during the decade-long ordeal. These witnesses observed his emotional state deteriorate and attested to the physical ailments that manifested themselves over this time. These witnesses testified to their observations of Hyatt, and along with Hyatt's own testimony, establish the severity of Hyatt's emotional distress over a long period of time.[479]

(i) Dr. Thompson.

Hyatt's boyhood friend, Dr. William Thompson, has known Hyatt since approximately 1945 and their days growing up in Queens on Long Island, had stayed in regular contact and vacationed with Hyatt on a regular basis. Thompson testified as to the man he knew before the ordeal and the changes he saw over the course of a decade. He testified how beginning in the late 1990's he started noticing a change in Hyatt, to the point he did not want to be around Hyatt

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[475] *Id.*

[476] *Kalantar v. Lufthansa German Airlines*, 402 F. Supp.2d 130, 146 (D. D.C. 2005) (discussing and citing authority that provides alternatives to medical records) (emphasis added) (*quoting Dixon v. Denny's, Inc.*, 957 F. Supp. 792, 796 (E.D. Va. 1996)).

[477] *Carey v. Piphus,* 435 U.S. 247, 264, n.20 (1978).

[478] RT: May 12, 59:7-60:15, 95:15-109:13.

[479] RT: May 19, 22:17-32:1; June 18, 25:9-28:14, 45:3-48:4.

anymore, despite their lifelong friendship. He described Hyatt as getting "more and more uptight, more pre-occupied . . . with legal stuff." He saw Hyatt, whom Thompson never knew to be a drinker, taking Scotch at night to get to sleep, about which Thompson warned him to work out his sleep problems another way.[480]

Thompson recalled he started hearing about the FTB from Hyatt in the late 1990's, and Hyatt would go round and round about the legal battles he was having, and how he was feeling harassed, feeling threatened and that inappropriate surveillance may have been taking place. Thompson did not know that Hyatt was under audit in the mid 1990's, but recalls the changes in Hyatt and his references to the FTB started in the late 1990's.[481]

Thereafter, Thompson noticed that over time Hyatt's intellect and broader interest "started closing down." His sense of humor was going away. He was preoccupied and talking "over and over again about the same things [the FTB]" and that it was no longer fun for Thompson to vacation with Hyatt as they had done for years. On one occasion, Hyatt had to cancel a meeting with Thompson, and Thompson was glad because he would not have to listen to "this stuff [regarding the FTB]."[482]

In the early 2000's, Hyatt's preoccupation with the FTB and the change in his personality was getting hard for Thompson to take. He recalls one dinner in which Hyatt took five cell phone calls. He also recalls a hike he took with Hyatt in Red Rock Canyon in 2000 in which even more intensely Hyatt "kept going round and round and round in circles about legal issues that were going on and about the California Franchise Tax Board." Thompson found it no fun to be around Hyatt any longer; there was no freedom of speech because Hyatt was concerned about being under surveillance.[483]

Thompson also testified to Hyatt's sensitivities concerning his Jewish faith. Thompson

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[480] RT: May 19, 22:17-24:4.

[481] RT: May 19, 24:14-25:13.

[482] RT: May 19, 25:14-26:9.

[483] RT: May 19, 26:10-29:2. Hyatt also testified to distress upon learning of Cox's comments, recalling that he lost family members in the holocaust. RT: May 12, 112:17-113:6.

recalled that as boys growing up in a "very Jewish neighborhood" there were a lot of people that had escaped from Germany, even those who had been in concentration camps and had tattoo marks from that ordeal. Thompson remembers Hyatt's reaction to this.[484]

(ii) Dan Hyatt.

Another witness to Hyatt's severe emotional distress was his son, Dan. He testified that before the FTB audits and protests, Hyatt was happy and joyful. He had talked Dan into taking scuba diving classes and was planning diving trips. He went hiking and skiing with Dan. Dan described his father as optimistic and planning for the future, and planning to spend lots of time with his grandkids.[485]

Dan testified to how his father started to change. Since moving to Nevada, Hyatt had been regularly trying to convince Dan to join him in Nevada. But during a hike in Red Rock Canyon shortly after finishing his schooling Dan tried to bring up the subject of joining his father. But Hyatt did not want to talk about it. Hyatt stopped and sat on a rock and broke down crying. He mentioned fraud penalties and the FTB not leaving him alone. He had never seen his father break down like that.[486]

Before that incident, Hyatt would talk with Dan on his visits about Hyatt's inventions and patents and they would discuss and plan trips. But after that, Hyatt would not stop talking about the FTB, saying that they would not believe anything he told them, and he was scared. Dan saw his father as completely changed. He saw his father was obsessed with the situation with the FTB.[487] Dan saw that his father was depressed. He also saw physical symptoms and ailments in Hyatt, including Hyatt asking for Advil when they went for a walk or drive. Hyatt also asked for antacids and would run to the bathroom frequently due to gastrointestinal problems. Hyatt also cut their visits short.[488]

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[484] RT: May 19, 32:18-33:16.

[485] RT: June 18, 23:22-25:8.

[486] RT: June 18, 25:9-26:15.

[487] RT: June 18, 26:16-27:12.

[488] RT: June 18, 27:13-23.

Dan would have to try and talk Hyatt into doing things like skiing or hiking, but Hyatt was not interested "in much of anything." He no longer called Dan and asked him to visit. The changed in Hyatt affected Dan's relationship with his dad.[489]

(iii) Vince Turner.

Vince Turner is a former Administrator for the International Division in the United States Patent and Trademark Office and a former administrative patent judge. He has known Hyatt since 1982. Hyatt would regularly visit Turner on trips to Washington D.C. Their visits would consist of dinners, vigorous walks, and discussions. He found Hyatt to be extremely friendly, mild mannered, easy going, extremely intelligent and very kind.[490]

In 1996, when Turner was planning to retire from his position as a patent judge, Hyatt offered him a position to work for a company Hyatt started in Las Vegas that prepares and prosecutes patent applications. Turner accepted and moved to Nevada.[491] During his first year or so in Las Vegas, Turner enjoyed recreational activities with Hyatt, including hiking and rollerblading, something they took up together at his age of 55.[492]

In the 1997 timeframe, Hyatt began sharing with Turner what was happening with the FTB, in particular that he was being assessed taxes that he did not owe. Turner then started noticing changes in Hyatt, in his activities and emotional state. Hyatt started having migraine headaches and would sit in Turner's office unable to function. Hyatt was unable to communicate with Turner during these bouts and would simply leave Turner's office. Turner recalls times when Hyatt would walk very peculiarly because his back and neck were bothering him. The only subject Hyatt would talk about, other than patents, was the FTB.[493]

Turner began noticing that Hyatt was not as well kept. Hyatt had always been a very neat person. His hair was impeccably in place, as was his beard. Turner began noticing red bumps on

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[489] RT: June 18, 27:24-28:14.

[490] RT: June 18, 39:9-23, 40:24-43:22.

[491] RT: June 18, 39:24-40:20.

[492] RT: June 18, 44:2-11.

[493] RT: June 18, 45:3-46:22.

Hyatt's face. Turner could tell something was bothering Hyatt "pretty significantly." Over the years, this has substantially affected the relationship between Turner and Hyatt. Their outside activities diminished quite a bit. Since 2005, Hyatt and Turner had gone hiking only a couple of times, and during these times Hyatt was not the same type of person as he was prior to when the FTB matter surfaced.[494]

This third party evidence, combined with Hyatt's detailed and personal testimony of his ordeal,[495] and the magnitude and duration of the FTB's extreme and outrageous conduct, establish substantial evidence to support the jury's verdict on Hyatt's outrage claim, and the emotional distress damages the jury awarded.

6. The jury's awards to Hyatt for loss of privacy damages and emotional distress damages were appropriate, supported by substantial evidence, and should be upheld.[496]

a. The damages for loss of privacy were not excessive.

The FTB summarily argues that Hyatt presented no evidence "for invasion of privacy damages."[497] The FTB's one-page argument is that Hyatt's identity was never stolen, so therefore no harm, no foul. The FTB misunderstands the nature of the loss of privacy damages that Hyatt suffered, and that the jury determined. Hyatt sought and obtained damages for the loss of privacy, something he will never regain. This is different and separate from emotional distress damages. Emotional distress damages compensate for what happened to Hyatt relative to his well being. Loss of privacy damages compensate for the visceral loss of the privacy interest that is gone forever.[498]

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[494] RT: June 18, 46:23-48:4.

[495] *See* discussion, *supra* at 124-130.

[496] The FTB addressed this issue after arguing for a damages cap. FTB Opening Brief, at 102-107. Hyatt addresses the issue here following discussion of the tort claims. Hyatt addresses separately below the damage cap issue asserted by the FTB. *See* discussion, *infra*, at 146-162.

[497] FTB Opening Brief, at 102.

[498] *See Restatement (Second) of Torts* § 652H (1977); *Alderson v. Bonner,* 142 Idaho 733, 132 P.3d 1261 (App. 2006); *Doe v. Chao*, 540 U.S. 614, 621 (2004) ("Traditionally, the common law has provided [victims of privacy torts] with a claim for 'general' damages, which for privacy and defamation torts are presumed damages: a monetary award calculated without reference to specific harm."); *see PETA v. Berosini*, 110 Nev. 78, 100-01, 867 P.2d 1121, 1134-35 (Nev. 1994) (noting that "general damages" are

Once there was mass dissemination, a "bombardment" as expressed by senior auditor Les,[499] Hyatt lost his privacy and his confidentiality, not only in his personal information disclosed to the third parties, but even more so the very fact he was under investigation and audit. He no longer had privacy in this aspect of his life. This included not only friends and family members, but those he did business with, professional associations, his synagogue, *etc.*[500]

Similarly, when his tax obligation, although not actually owing and not even final, was posted continuously for almost ten years on the internet in the FTB's *Litigation Roster*, his privacy was further lost. When the FTB posted he was assessed a fraud penalty, thereby communicating this for all to see, he lost further privacy. He was publicly called out as a fraud, even though there had been no final assessment. Again, once a privacy interest is lost, the bell cannot be unrung.

Moreover, in this regard, Hyatt was treated differently than others under audit, who are not subject to a bombardment of their personal information and wide dissemination that they are under investigation and audit. He was also treated differently when for almost a decade he was listed in the *Litigation Roster* as owing taxes, even though no final determination had been made. The FTB did not do this to others under audit.

Some may value their privacy interest more than others, but it has been undisputed that Hyatt has always placed extreme value on his privacy. The FTB even made special note of Hyatt's sensitivity for privacy,[501] and tried to take advantage of it. The jury also heard evidence of Hyatt's special interest in privacy, and in particular how someone from the depression era (as was Hyatt) who attains great success and wealth through lifelong hard work (as did Hyatt),

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recoverable for invasion of privacy torts); *see also Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 517-18, 874 P.2d 762, 764-65 (1994).

[499] One of the many misstatements of the record was the FTB calling Les a consultant for Hyatt. FTB Opening Brief at 45. Les was not a consultant, she was a witness. She was a former FTB insider who, once discovered, felt compelled to tell the truth. She did agree to spend time with Hyatt's counsel giving background on the FTB. She obviously felt strongly about what happened to Hyatt. As referenced above, she had complained to the FTB concerning the FTB's treatment of Hyatt and felt her complaint was not adequately investigated. RT: April 23, 167:6-168:21.

[500] *See* discussion, *supra*, at 37-40, 41-43.

[501] *See* discussion, *supra*, at 35-36.

strives hard to maintain a private, low key, and unassuming lifestyle.[502] But here, the FTB put Hyatt in front of his circle of friends, family members, business associates, and patent sublicensees as a purported tax cheat and a fraud.

The jury weighed the substantial evidence in this regard, including that Hyatt had an extremely high privacy interest that was lost because of the FTB actions. There is no reason for the Court to substitute its judgment for the jury's in regard to the value of the privacy interest that Hyatt lost from the FTB's intentional invasions of privacy.

b. The emotional distress damages were not excessive.

The FTB argues that Hyatt was not entitled to recover the amount of emotional distress damages awarded because of (i) the Discovery Commissioner's "garden-variety" language in his order and (ii) the District Court not allowing evidence of other possible stressful events.

(i) Hyatt's emotional distress damages were not limited by the Discovery Commissioner's ruling.

The FTB's reference to "garden-variety" emotional distress cases and those in which no medical evidence was presented do not limit Hyatt's recovery in this case, just as the Discovery Commissioner was not intending to cap Hyatt's emotional distress damages. There is no such limitation. The proper award is dependent on the facts of each case, within the province of the jury.[503]

Here, Hyatt meets virtually every factor considered as a basis for large emotional distress damages. As discussed and cited above, severity, duration, and outrageousness of the conduct are the appropriate factors for the jury to weigh in awarding emotional distress damages. Moreover, financial pressure was exerted over a long period of time by a government agency. As stated above, emotional distress can be assumed by jurors, even without medical evidence when one's financial well being is at stake. Similarly, when the defendant's actions amount to bad faith conduct, they are often considered so extreme and outrageous that emotional distress is

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[502] RT: June 10, 56:4-57:9, 61:1-62:17, 68:4-20.

[503] This has long been the law in Nevada. *Powell v. Nevada, C. & O. Ry.*, 28 Nev. 40, 78 P. 978, 979 (1904), *aff'd.*, 28 Nev. 305, 82 P. 96 (1905) (holding that there is no fixed rule for the measure of damages, especially for mental anguish apart from physical suffering, except that it is to be left to the jury under proper instructions from the court).

presumed and no need of medical evidence is necessary.

In that regard, the bad faith cases involving financial pressure and delays are analogous and provide for a significant award of emotional distress damages. Hyatt has located no case of 11 plus years of continual financial pressure and combined with and caused by outrageous bad faith governmental misconduct and the resulting severe emotional distress. But awards for financial pressure, for shorter periods of time are comparable when adjusted for an "apples to apples" comparison in regard to the time and money involved. In *Albert H. Wohlers & Co. v. Bartgis*,[504] this Court did not disturb a compensatory award of $275,000 for emotional distress, where the financial distress from the carrier's failure to pay a $9,000 medical bill lasted approximately six months.[505] In *Guaranty Nat. Ins. Co. v. Potter*,[506] this Court did not disturb a $150,000 compensatory award for emotional distress where the carrier delayed paying the bills for medical exams totaling $6,500 subjecting the insureds to collections notices and eventually a lawsuit over approximately 18 months.[507]

In *State Farm Mutual Automobile Insur. Co. v. Campbell*[508] the United States Supreme Court did not question a $1 million compensatory award for a year and half of emotional distress. The Court explained: "The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." The minor economic injury referred to by the Court was the carrier's delay in paying its policy limit of $50,000.

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[504] 114 Nev. 1249, 969 P.2d 949 (1998).

[505] *Id.* at 1256 (plaintiff became upset and frustrated in January 1993, filed suit in July 1993, and carrier offered to pay entire amount right after complaint filed).

[506] 112 Nev. 199, 912 P.2d 267 (1996).

[507] *Id.* at 203-205 (formal demand for payment sent to insureds in October 1992, threat of litigation in November 1992, action filed and served in March 1993, and carrier made payment March 1994).

[508] 538 U.S. 408, 426 (2003).

In Hyatt's case, the financial pressure was extreme, growing to over $51 million dollars (increasing at the rate of $8,000 per day, which is approximately $3,000,000 per year), and the delay and duration of 11 years was unheard of and never justified by the FTB. The jury's verdicts reflect that it concluded that the delay was intended to pressure Hyatt. If $1 million dollars is appropriate for 18 months of relatively minor economic pressure, the jury in this case was well within reason in awarding $85 million for Hyatt's 11 year ordeal. The increase in distress over 11 years can properly be viewed as exponential. The FTB kept Hyatt under its proverbial thumb for 11 years, not letting him proceed through the administrative process — in fact Hyatt's only alternative would have been to skip the administrative process, but to do that *he would have had to pay all taxes, penalties and interest* before seeking a refund.[509] That was the very result the FTB wanted.

The garden-variety cases cited by the FTB are therefore not factually analogous. The bad faith cases involving financial pressure and delays are similar and provide for a significant award of emotional distress damages.

The FTB also complains that the jury arguably awarded more emotional distress damages than Hyatt's counsel suggested in closing argument. In fact, Hyatt's counsel left it to the sound discretion of the jury. Even so, there is no law prohibiting a jury from awarding more in emotional distress damages than counsel may have referenced in closing argument. Under the facts and circumstances of this case, the jury award of emotional distress damage was justified and should not be upset.

(ii) The District Court did not err in not allowing prejudicial evidence offered by the FTB.

The FTB argues that the District Court should have allowed evidence relating to other possible sources of stress. Both the patent litigation and the IRS proceeding were short-lived and do not explain the objectively-verified manifestations of distress to which Hyatt's witnesses testified occurred many years after these events. As Hyatt's counsel argued in the District Court,

[509] Cal. Tax & Rev. Code §§ 19381, 19382.

this evidence was properly excluded as it was being offered simply to prejudice the jury against Hyatt. The FTB wanted to argue Hyatt was a discredited inventor simply to bias the jury.[510]

Similarly, the FTB argues that Hyatt had undergone an IRS audit, which the FTB argues it should have been able to put into evidence to argue as an alternative source of distress. But as addressed with the District Court, Hyatt had actually sought a refund from the IRS on an accounting interpretation. Although the IRS disagreed with his interpretation, he negotiated a favorable settlement with the IRS. Moreover, the matter was unrelated to Hyatt's residency dispute with the FTB.[511] The District Court recognized these markedly-different factual circumstances and properly refused to allow the FTB to try and prejudice the jury by arguing that Hyatt was also under an IRS audit.

7. The District Court did not err in rejecting the FTB's statute of limitations defense.

Judge Walsh properly denied the FTB's partial summary judgment motions that argued that Hyatt's intentional tort claims for invasion of privacy, false light, breach of confidentiality, and abuse of process were not timely filed.[512] At trial, after the close of evidence, Judge Walsh also correctly ruled that the FTB had not as a matter of law established that Hyatt's claims were barred by the statute of limitations.

In regard to Judge Walsh's pretrial rulings, the FTB argued that the FTB's correspondence during the audits with two of Hyatt's California attorneys and one of his banks put him on inquiry notice, at least, of the FTB's massive invasion of privacy. The FTB also cites to the auditor's August 2, 1995, Determination Letter as notice to Hyatt of the massive invasion of privacy. But those documents provided no clue as to the nature, depth, and invasiveness of the FTB's violations of Hyatt's privacy.

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[510] *See* argument of Hyatt's counsel in District Court. RT: July 9, 6:15-30:13; 80 RA 019788-019853; RT: July 21, 170:2-199:22.

[511] *See* arguments of Hyatt's counsel in the District Court. RT: April 22, 5:5-28:10; April 29, 9:25-22:25; May 14, 5:13-24:20.

[512] The FTB's brief suggests that it moved to dismiss all but Hyatt's fraud claim on this ground. But the record demonstrates that the FTB also failed to raise this issue as to Hyatt's claim for intentional infliction of emotional distress.

The FTB actively prevented Hyatt from discovering in 1995 the FTB's massive invasion of his privacy and other intentionally tortious misconduct. Upon receipt of the August 2, 1995, Determination Letter, Hyatt requested the FTB's audit file, in an attempt to make sense of the FTB's stated position.[513] But the FTB refused to produce its audit file until September 30, 1996, after Hyatt formally protested the FTB's proposed assessment.[514] This was the first that Hyatt knew (or should have known) facts sufficient to alert him to the FTB's intentionally tortious misconduct. Hyatt then timely filed his original complaint in January 1998, well within the two-year statute of limitations.

The FTB's second statute of limitations argument is based on the premise that whether a party is on notice sufficient to trigger the statute of limitations is an issue of law for the court to decide. The trial court properly addressed and resolved that issue, ruling in favor of Hyatt that the FTB had not as a matter of law established a statute of limitations defense.

a. The FTB does not accurately state the law relative to the triggering of the statute of limitations.

The statute of limitations for an invasion of privacy claim is two years from when a party has notice of such claim.[515] But the two years do not begin to run until the party has notice of the wrong and incurs damage. Where the wrong and the damage are not immediately discovered, the statute of limitations is tolled.[516] The cases cited by the FTB are in accord; the statute begins to run only when a reasonable person would be on notice and has sufficient facts that, if true, would support a claim.

Further, in "a discovery based cause of action, a plaintiff must use due diligence in determining the existence of a cause of action . . ." and whether "plaintiffs exercised reasonable diligence in discovering their causes of action '*is a question of fact to be determined by the jury or*

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[513] RT: April 28, 17:13-15; April 30, 83:13-86:19; May 8, 145:8-24; May 9, 116:13-117:3, 118:15-18, 142:13-30.

[514] RT: April 30, 83:13-86:19, May 9, 116:13-117:3, 118:15-18, 142:13-20; May 28, 109:21-110:11, June 2, 102:12-103:21, 108:24-109:4.

[515] *See Turner v. County of Washoe*, 759 F. Supp. 630, 637 (Nev. 1991) ("[T]he limitations period for slander and invasion of privacy is two years (§11.190(4)(c) . . .").

[516] *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 440 (1998).

trial court after a full hearing.' . . . Dismissal on statute of limitations grounds is only appropriate 'when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered' the facts giving rise to the cause of action. . . . "[517]

Moreover, the continuing wrong doctrine tolls the statute of limitations when the plaintiff is repeatedly harmed. Under this doctrine, "'where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury.' In other words, 'the statute of limitations does not begin to run until the wrong is over and done with.' "[518]

The Ninth Circuit, in applying Nevada law, noted that the continuing wrong doctrine is applicable "where there is 'no single incident' that can 'fairly or realistically be identified as the cause of significant harm.'"[519] "[T]he 'continuing wrong' doctrine, a doctrine ... involving 'repeated instances or continuing acts of the same nature, as for instance, repeated acts of sexual harassment or repeated discriminatory employment practices.'"[520]

b. The statute of limitations did not begin to run, at the earliest, until Hyatt received the FTB's audit file in late 1996.

Hyatt's invasion of privacy claims, false light claim, breach of confidentiality claim, and abuse of process claim were not based on the FTB disclosures to one of Hyatt's banks during the FTB audit. Nor were these claims based upon two of his California attorneys receiving Demands for Information from the FTB. The fact that his bank and his attorneys received inquiries from the FTB did not provide notice of the FTB's widespread disclosures during the audit, nor of the Demands for Information sent to Nevada entities and individuals, nor the scope and magnitude of the FTB's outrageous conduct. Both Hyatt's bank and his attorneys had independent obligations to safeguard and not disclose his confidential information, including his social security number.

The fact that trusted confidants received Demands from the FTB would not and did not alert Hyatt to the fact the FTB was making indiscriminate, pervasive, repeated and unnecessary

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[517] *Id.* at 1025. (emphasis added).

[518] *Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1430-1431 (10th Cir. 1996).

[519] *Flowers v. Carville*, 310 F.3d 1118, 1126 (9th Cir. 2002).

[520] *Nesovic v. U.S.*, 71 F.3d 776, 778 (9th Cir. 1995).

disclosures of his private and confidential information to third-party individuals and businesses that had little or no relationship with Hyatt and no professional or legal obligation to keep such information confidential. Nor would it have alerted Hyatt to the scope of abuses revealed upon production of the audit file. There is simply nothing about disclosures to Hyatt's long-time attorneys and financial institution that would have alerted Hyatt that the FTB was mishandling and widely disseminating Hyatt's private and confidential information or engaging in other bad faith acts and committing intentional torts.[521]

Similarly, the information contained in the August 2, 1995, Determination Letter did not provide the identities of those whom the FTB had contacted, particularly the "affiants" on whom Cox placed such reliance. It did not disclose the Demands for Information or the fact that his address and social security number had been disclosed in those Demands. It did not otherwise provide sufficient information for Hyatt to put things together and figure out that his privacy had been violated, that his trust in FTB's confidentiality pledges had been violated, or that the FTB had abused the legal process. Also, the Determination Letter and subsequent correspondence from Cox invited Hyatt to submit responding information, misleading him to believe that the FTB was being fair, that errors would be corrected, and that the additional information he provided would be evaluated correctly to overturn the conclusions in that letter. Until Hyatt received the audit file in late 1996, he could not and did not comprehend the scope of FTB misconduct, and it was the audit file revelations that dramatically exacerbated his emotional distress.

Hyatt's first notice of the FTB's indiscriminate, pervasive, repeated and unnecessary disclosures of Hyatt's private and confidential information to third parties was not until, at the earliest, his receipt of the FTB "audit file" in late 1996 that revealed for the first time that the FTB was widely disclosing his private and confidential information.[522] Moreover, the FTB affirmatively prevented Hyatt from obtaining the audit file until late 1996, after completion of the FTB's audit

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[521] RT: May 14, 154:20-155:2.

[522] RT: May 8, 121:2-122:11; May 12, 103:2-18.

and his filing of the protest for the 1991 tax-year.[523]

Additionally, not all the Demands contained the same disclosures, so merely seeing a few Demands would not have informed Hyatt of the nature of all of the letters. For example, these few Demands did not contain Hyatt's confidential home/office address, nor reveal that these Demands were being sent to Nevada entities. Hyatt had no idea that his social security number and confidential home/office address had been disclosed to newspapers and utility companies and that Demands with his social security number were sent to a litany of businesses and others, particularly in Nevada, until he saw the actual Demands in the audit file.[524]

Further, as evidenced by the fact that Hyatt did not have the audit file until late 1996, Hyatt did not know that certain Demands were sent to Nevada entities unlawfully making demands under California law, or disclosing his confidential office/home address, or being sent to his Jewish temples seeking private religious information, or being sent to Las Vegas newspapers. The fact that a defendant makes a disclosure to a third party with a privileged professional relationship to the plaintiff does not put the plaintiff on notice that the defendant has or will make unfettered disclosures to over 100 other unrelated third parties that do not have a close or privileged professional relationship with the plaintiff.[525]

Indeed, as the jury was instructed in this case, a party cannot establish a claim for invasion of privacy based on publication of private facts or a false light claim unless there has been dissemination of the information by the defendant.[526] As a result, the few disclosures known to Hyatt before he received the FTB audit file in late 1996 did not provide a basis, by themselves, to

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[523] RT: April 30, 83:13-86:19; May 9, 116:13-117:3, 118:15-18, 142:13-20; 84 RA 020913-020933, 020946-020947; 85 RA 021063, 02176-021078.

[524] 83 RA 020531-020533, 020537, 020540-020546, 020548-020551, 020636-020654, 020662-020669, 020676-020703, 020719- 84 RA 020794, 020796-020797, 020802-020836, 020839-020840, 020905-020911.

[525] *See* the voluminous Demands and requests the FTB made to third parties that were not served on Hyatt during the audits and that he therefore did not know about until he reviewed the audit file at the earliest in late 1996. 83 RA 020531-020534, 020537, 020540-020546, 020548-020573, 020612-020613, 020636-020654, 020662-020669, 020676-020703, 020719 – 84 RA 020794, 020796-020797, 020802-020836, 020839-020840, 020905-020911.

[526] RT: July 21, 46:18-47:24.

assert those claims, especially since he did not know the form of the Demands and what information they conveyed to the many recipients. The first time Hyatt could discover what the FTB had done was when he received and reviewed the audit file.

In addition, the FTB's violations of Hyatt's rights were amplified by its crossing into Nevada under the guise of California law, as articulated on its correspondence demanding that Nevada citizens comply with California law. This was not shown by the early Demands sent to Hyatt's California attorneys and bank. Hyatt could not have known anything about nor the extent of the Nevada intrusions until he saw the audit file.[527]

Before he received and reviewed the FTB's audit file, Hyatt had not suspected how extensively the FTB had disseminated his private information. After he received the audit file, he began to learn of the FTB's widespread disclosures and other abuses. But he did not know the full extent of the FTB's abuses until years later, when he learned additional information from Candace Les (the former senior FTB residency auditor who met with him and his counsel), from the Reviewer's notes and other material that had been withheld from the audit file that contradicted the auditor's stated conclusions, and from FTB witnesses. It therefore took Hyatt years after receiving the audit file before fully *realizing* how significantly the FTB had violated his rights.[528]

Hyatt made repeated attempts to obtain the audit file, starting in August 1995, but the FTB refused to produce it until September, 1996.[529] The FTB treats the process not unlike a grand jury proceeding, in which the target has no right to see the evidence while the process is taking place. The FTB provided a copy only when the audit was complete, and the taxpayer filed a formal protest.[530]

Here, the FTB cannot credibly argue that Hyatt could have discovered the abuses he alleges prior to receiving the FTB's audit file in late 1996. Hyatt first requested his audit file in August

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[527] RT: May 9, 164:24-165:25.

[528] RT: May 9, 165:11-166:9; May 12, 100:17-101:6, 103:2-104:23, 106:4-108:5, 110:23-112:21.

[529] RT: April 25, 110:5-13;April 30, 83:13-86:19; May 9, 116:13-117:3, 118:15-18, 142:13-20; May 28, 109:21-110:11; June 2, 102:12-103:21, 108:24-109:4; 84 RA 020913-020933, 020946-020947; 85 RA 021063, 021076-021078.

[530] *Id.*

1995. Hyatt again requested the audit file in April, 1996, when the FTB finished the audit. After Hyatt filed his formal protest to the 1991 tax-year audit determination in June of 1996, he again requested a copy of the audit file. The FTB finally mailed the file to Hyatt's tax attorney on September 30, 1996.[531]

At best, therefore, the earliest date the statute of limitations could have commenced running against Hyatt for any claim was when he received the audit file for the first time some time *after September 30, 1996*. Hyatt filed his complaint in January of 1998, well within the statute of limitations for the intentional tort claims. The statute of limitations therefore provides no defense, and Judge Walsh properly denied the FTB's requests to dismiss Hyatt's claims.

c. The FTB's statute of limitations defense was correctly dismissed as a matter of law after the close of evidence at trial.

Judge Walsh's decision to grant Hyatt's motion to dismiss the FTB's statute of limitations defense after the close of evidence at trial was an issue of law for the court to decide. Hyatt's motion to the court argued that the only evidence that the FTB presented and which the FTB argued put Hyatt on notice relative to the statute of limitations were the few Demands that were sent to Hyatt's bank and two of his attorneys, a single letter to a social acquaintance of Hyatt, and the Determination Letter. These initial inquiries were in California. Again, the Determination Letter may have referenced some of the FTB's contacts and activities, but it clearly did not include the complete record of FTB abuses. There was no dispute over these facts, and these were the only facts upon which the FTB asserted its statute of limitations defense. Hyatt argued to the District Court that where the facts upon which a statute of limitations defense is based are not in dispute, when the statute of limitations began to run is a matter of law for the court to decide.[532] *See Day v. Zubel,*[533] where the facts upon which the statute of limitation defense are not in dispute, the date upon which a plaintiff was on notice for the purpose of commencing the statute of limitations is a question of law for the court. It was not the province of the jury to determine this issue of law.

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[531] 84 RA 020865-020904, 020913-020933, 020946-020947; 85 RA 021063, 021076-02178; 54 AA 13330.

[532] 50 AA 12452-12481.

[533] 112 Nev. 972, 977, 922 P.2d 536, 539 (1996).

The same concept applies to each of the claims the FTB attacked on the statute of limitations ground. Hyatt did not know his privacy was invaded or his confidential relationship breached until he received the audit file and could understand the scope and breadth of disclosures by the FTB. In regard to the abuse-of-process claim, Hyatt did not know, and could not possibly have known, until he received the audit file in late 1996 about the Demands and the form of the Demands that had been sent to Nevada residents. Also in regard to his intentional infliction of emotional distress claim, Hyatt did not know the FTB was making massive disclosures contrary to his sensitivity for privacy and confidentiality, again, until he saw the FTB's audit file in the fall of 1996.[534] The limited basis of the FTB's asserted statute of limitations defense was therefore refuted with this uncontroverted fact.

Judge Walsh therefore properly decided and dismissed the FTB's statute of limitation defense as a matter of law.[535]

8. The District Court properly sanctioned the FTB for its spoliation of electronic data.

The FTB devotes two pages of its brief to argue that Judge Walsh misapplied her own sanction order to the FTB after finding that the FTB destroyed key electronic data *after* the District Court had specifically ordered this data preserved. The spoliation motion was extensively briefed, argued and supported with evidence.[536] Not surprisingly, the FTB does not challenge the ruling against it, as it cannot explain why it destroyed electronic data after it had been requested in discovery and after the District Court had ordered it preserved. Instead, the FTB challenges Judge Walsh's application of her own ruling, suggesting that the adverse inference ordered by the District Court morphed into an irrebuttable presumption. But what the FTB actually complains about is Judge Walsh's refusal to allow the FTB to avoid the sanction ruling by making an attempted end-run around the ruling.

The FTB sought at trial to re-argue to the jury that it had not failed to preserve the electronic

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[534] *See* discussion, *supra*, at 124-131.

[535] RT: July 16, 26:22; 41: 2-4.

[536] 39 RA 009704 – 44 RA 010754; 58 RA 014364-014446.

data and that no data was actually lost. Of course, no one knows what was lost, because the evidence was destroyed. Judge Walsh therefore did not err in issuing an instruction to the jury consistent with *Bass-Davis v. Davis* that prohibited the FTB from re-arguing whether evidence was destroyed.[537] Instead, the FTB was limited to presenting and arguing that the lost data was not adverse to its position in this case. The FTB had no witness to attest to this, so it instead attempted to re-argue that no electronic data was lost. It was not allowed to do this, as the court had already decided that spoliation took place.

Under *Bass-Davis*, and a wealth of consistent authority from other jurisdictions, once spoliation is found by the court, the court can order that the spoliating party is not allowed to re-argue this issue to the jury.[538] The court can issue an irrebuttable presumption that the lost evidence was harmful to the offending party's position. Here, despite the overwhelming evidence that the FTB's spoliation was intentional, Judge Walsh issued a less harsh instruction that the jury may draw an inference that the lost evidence was adverse to the FTB's position in this case.[539] Yet the FTB sought at trial to re-argue to the jury the circumstances regarding the spoliation, as opposed to overcoming the inference that the lost evidence was adverse.

The FTB was not entitled to re-argue the circumstances of its spoliation. The District Court's ruling, instruction, and evidentiary limitations at trial were entirely consistent with *Bass-Davis*. The FTB's citations to certain other cases where a court provided other remedies for the spoliation have no application here. Sanctions for spoliation are dependent on the facts of each particular case. Indeed, the overwhelming record supported the issuing of an irrebuttable presumption against the FTB.[540] The FTB does not discuss or elaborate on the facts surrounding its spoliation of electronic data. Hyatt's motion set forth the egregious nature of the spoliation in vivid detail.[541] The FTB had no excuse to justify what it did.

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[537] 122 Nev. 442, 454, 134 P.3d 103 (2006).

[538] 39 RA 9744-9749.

[539] 54 AA 13278.

[540] *Id.*

[541] 39 RA 9717-9744.

There was no error by Judge Walsh in issuing the sanction ruling, nor in her application of the ruling. Further, the FTB does not even argue, as it must in regard to a sanction ruling, that Judge Walsh abused her discretion in issuing and/or applying its sanction ruling.[542] The FTB therefore raises no issue for which it is entitled to relief in regard to the issuance and application of the spoliation sanction imposed against it by Judge Walsh.

F. Nevada's statutory cap on damages does not apply to the FTB.

1. This Court need not, and should not, grant "equal immunity" to California officials who commit intentional torts against Nevada citizens.

The FTB's principal argument regarding damages is that the compensatory award must be reduced to $75,000 per occurrence, and the punitive award eliminated entirely, to conform to the permissible limits on damages against the State of Nevada under Nevada law. Although the FTB seemingly concedes that the relevant Nevada statutes, by their terms, do not contain limitations on damage awards against other States, it insists that this Court should create equivalent immunity as a matter of comity. But this "equal immunity" argument suffers from several serious flaws. To begin with, the case for extending comity is at its weakest when, as here, the State asking for immunity has repeatedly engaged in deliberate cross-boundary efforts to harm a citizen of the home State, ignoring the sovereign interest of the home State in protecting its citizens from purposeful attacks. Moreover, the FTB ignores the fact that significant damage awards are the only means of shielding Nevada citizens from harm inflicted by officials from other States – and of deterring such behavior in the future – whereas Nevada officials, by contrast, are subject to the full legislative and executive authority of the State of Nevada itself. When foreign-State officials have committed intentional torts, therefore, it would severely diminish Nevada's sovereign capacity to protect those within its borders, if Nevada courts gave those officials the benefit of damage limits intended for Nevada officials, regardless of the nature of their conduct and the extent of harm that they caused. Indeed, given the potential exposure of Nevada officials to unlimited damages in other States, *see*

[542] In reviewing a sanction ruling, the standard of review is abuse of discretion. *Bass-Davis*, 122 Nev. at 447-448.

Nevada v. Hall,[543] the extension of such immunity would actually create inequalities that are directly contrary to Nevada's sovereign interests.

2. This Court is not obliged to grant special immunity to the FTB.

The FTB takes the position, not just that this Court *should* grant partial immunity to the FTB as a matter of comity, but that this Court *must* do so. *See* FTB Br. 101-02, 108. But, insofar as the doctrine of comity is concerned, that argument is plainly incorrect.[544] The extension of immunity by one State to another – whether total or partial – is always a matter of grace, not obligation. Indeed, to grant such immunity would clearly be inappropriate when, as here, it would conflict with Nevada's own interests.

The case law is unmistakable on this point. Beginning with the early Nineteenth Century, the United States Supreme Court has made clear that a sovereign need not grant immunity to other sovereigns in its own courts. In *The Schooner Exchange v. McFaddon*,[545] the Court, speaking through Chief Justice Marshall, declared that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute," stressing that "[i]t is susceptible of no limitation not imposed by itself."[546] Since the decision in *Schooner Exchange,* the Court has consistently followed the guiding principle that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution."[547]

That same principle applies to relations between the individual States. In *Nevada v. Hall, supra,* the Court rejected a claim that Nevada had inherent sovereign immunity in California, noting that, unlike a sovereign's assertion of immunity in its own courts, "[s]uch a claim necessarily implicates the power and authority of a second sovereign . . . "[548] The Court thus concluded that

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[543] 440 U.S. 410 (1979).

[544] To the extent that the FTB bases its immunity argument on the doctrines of law of the case and judicial estoppel, Hyatt addresses these contentions, *infra*, at 160-163.

[545] *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

[546] *Id.* at 136,

[547] *Verlinden B.V. v. Central Bank of Nigeria*, 460 U.S. 480, 486 (1983).

[548] 440 U.S. at 416. *See also Alden v. Maine*, 527 U.S. 706, 738 (1999) (quoting *Hall*). Citing *Alden* among other cases, the FTB says that "it is questionable whether there is still validity" to the decision in *Hall*. FTB Opening Brief, at 101 n.80. But the decision in *Alden* not only raised no doubts about *Hall,* it quoted *Hall*

the source of any immunity for a State in the courts of another State "must be found either in an agreement, express or implied, between the two sovereigns, or in the *voluntary decision* of the second to respect the dignity of the first as a matter of comity."[549] Because "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another,"[550] it is for each State to decide, in its discretion, whether it would be consistent with its own sovereign interests to grant immunity to a sister State.[551]

This Court likewise has recognized that the granting of immunity to another State is entirely voluntary. In *Mianecki v. Second Judicial District Court*,[552] the Court observed that "[i]n general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect," adding that "[t]he principle is appropriately invoked according to the sound discretion of the court acting without obligation...."[553] Furthermore, the Court emphasized that "' [i]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction."'[554] In *Mianecki,* the Court ultimately rejected the State of Wisconsin's request to be accorded immunity as a matter of comity, finding a paramount interest in "protecting [Nevada's] citizens from injurious operational acts committed within its borders by employees of sister states."[555]

It is striking that, in its discussion of comity, the FTB pays no attention whatsoever to

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precisely to explain why a State has no immunity in the courts of another State. *See* 527 U.S. at 738. In addition, the FTB is simply wrong in suggesting this Court "may evaluate the continuing viability" of a Supreme Court holding. Rather, lower courts must "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions." *Tenet v. Doe*, 544 U.S. 1, 11 (2005), quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[549] *Id.* (emphasis added).

[550] Alden, 527 U.S. at 738.

[551] *See Hall*, 440 U.S. at 424-27.

[552] 99 Nev. 93, 658 P.2d 422 (1983).

[553] *Id.* at 96-98. *See also Oberson v. Federated Mut. Ins. Co.*, 126 P.3d 459, 462 (Mont. 2005) (comity is not a "rule of law" but rather "an expression of one state's entirely voluntary decision to defer to the policy of another").

[554] 99 Nev. at 98, quoting *State ex rel. Speer v. Haynes*, 392 So.2d 1187 (Ala. 1980).

[555] 99 Nev. at 98.

Nevada's need to give "due regard" to the welfare of its citizens. But the well-being of a State's citizens is necessarily a critical element of the comity analysis. "The Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens,"[556] and it is essential that a State has the power to protect those citizens from hostile acts committed by officials of other States. If California is free to cross state boundaries and commit deliberate torts against Nevada citizens with little concern about effective sanctions, then Nevada's authority to control acts within its borders will be seriously eroded. As we discuss next, the prospect of significant damages is the only effective means of sanction and deterrence that Nevada can exercise against out-of-state officials like those in the FTB.

3. Substantial damages are necessary to sanction and deter deliberate misconduct by officials from other states.

We begin with a simple point: A State's claim for comity is particularly weak when the State is seeking to avoid liability for continued intentional conduct directed at a citizen of another State.[557] Unlike acts of negligence – which are, by definition, unplanned and inadvertent – State acts that are meant to cause harm are a particular affront to the sovereignty of a sister State and require the strongest measures for deterrence. Although the FTB gives little weight to – in fact, largely denies – the egregious nature of its conduct, the facts of this case show that the FTB officials repeatedly invaded Hyatt's privacy, sought to use his concerns about privacy to force a settlement of the California tax claim, and subjected him to a series of bad faith administrative actions, all without any concern for propriety of their behavior under Nevada law. Having shown so little respect for the sovereignty of Nevada, the FTB stands on particularly shaky ground in now claiming that this Court must respect its sovereignty by granting immunity under the doctrine of comity.[558]

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[556] *Printz v. United States*, 527 U.S. 898, 920 (1997).

[557] Although there is a dispute between the parties about when Hyatt moved to Nevada, there is no question that the tortious acts at issue in this suit occurred after Hyatt became a Nevada resident.

[558] It is also clear that the "interstate" nature of the torts was anything but accidental. The FTB chose to go after Hyatt precisely because he had established residence in a state without an income tax, a circumstance that prompted California to initiate an aggressive campaign to challenge the legitimacy of that move.

The FTB nevertheless argues that, under principles of comity, Nevada must give California officials exactly the same immunity that it gives Nevada officials. But there is no such absolute rule of comity, nor should there be.[559] While equivalent treatment may sometimes be appropriate, it is not appropriate in every case, and certainly not appropriate for the kind of sustained, intentional misconduct at issue here. Indeed, if this Court granted California officials the identical immunity that Nevada officials are accorded by statute – even though Nevada has no other effective way to control the behavior of California officials – it would greatly lessen Nevada's ability to protect its citizens against calculated attacks.

In arguing that California and Nevada officials should be subject to the same limitations on damages, the FTB neglects a critical point: that is, in addition to damage awards, Nevada has direct means of deterring and punishing wrongful behavior by Nevada employees – means that it lacks with respect to employees of other States. For example, the Nevada Legislature has enacted a broad range of measures to regulate the conduct of state employees, including provisions that authorize dismissal of employees that abuse their positions. "An appointing authority may . . . [d]ismiss or demote any permanent classified employee when he considers that the good of the public service will be served thereby."[560] A Nevada employee engaging in serious improper behavior towards Nevada citizens thus would have to be concerned that, as a consequence, he or she could be fired, not just made subject to a lawsuit. In addition, the Legislature has specified that Nevada employees may be disciplined, with increasing degrees of severity, for other kinds of unacceptable conduct.[561]

These legislative provisions have been supplemented by an extensive body of implementing regulations. Those regulations subject Nevada employees to discipline for a wide-ranging series of offenses, including "[a]ctivity which is incompatible with an employee's conditions of

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Indeed, there was evidence that the FTB has had a practice of targeting high-income, former California residents. *See* RT: April 24, 44:20-45:6, 141:5-13.

[559] *See* discussion, *infra*, at 154-58.

[560] *See, e.g.*, NRS 284.385.

[561] *See* NRS 284.383.

employment," "disgraceful personal conduct which impairs the performance of a job or causes discredit to the agency," and "[d]iscourteous treatment of the public . . . while on duty."[562] These provisions, in turn, are enforced by Nevada officials exercising specific supervisory authority over their subordinates. Again, therefore, any Nevada employee necessarily carries out his or her job with full awareness that any misconduct can be dealt with head-on by sanctions administered within the Nevada personnel system.

These Nevada statutory and regulatory provisions give Nevada officials broad authority to assure that proceedings against Nevada citizens are carried out responsibly, and in good faith, without the sort of discriminatory targeting exemplified by this case. For example, if employees of a Nevada agency had sought to exact a settlement from Hyatt by grossly improper means – such as threatening him with a further loss of privacy if he did not agree to their demands – their immediate supervisors could have promptly intervened to prevent an abuse of government power. Moreover, if they found evidence of discriminatory animus by employees assigned to the case, more senior Nevada officials could have undertaken a thorough review of the underlying dispute, ultimately making their own determination about the merits of the government's claim and prohibiting any efforts to prosecute a claim in bad faith. These powers, reinforced by the disciplinary measures discussed above, would give Nevada full sovereign capacity to correct ongoing misconduct and to inhibit similar misconduct in the future.

The damage limits in NRS 41.035 do not stand alone, therefore, but must be seen in the context of these other provisions.[563] While the limits plainly safeguard the Nevada state treasury, they also serve the broader purpose of helping Nevada to develop an honest and capable workforce.[564] All in all, therefore, the State of Nevada has sought to prevent improper behavior by

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[562] *See* Nev. Admin. Code § 284.650.

[563] The legislative limitation on damages is, by its nature, a condition on Nevada's waiver of sovereign immunity in its own courts. Not surprisingly, it does not apply to other States, which do not have sovereign immunity in Nevada courts. *See Hall*, 440 U.S. at 414-21.

[564] *See Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720, 731 (2007) (limits "advanc[e] a legitimate state interest in encouraging qualified professionals to accept state employment to serve the people of Nevada").

Nevada employees through a number of complementary mechanisms: by attracting qualified employees in the first place, by subjecting those employees to continuing oversight in the course of their duties, by providing for discipline (including termination of employment) for wrongful acts, and, finally, by limiting the damages awarded for their misconduct. No one method is intended to be effective in and of itself; rather, the system is meant to operate as an integrated whole.

The relation of Nevada to officials of other States is very different. Because Nevada is generally able to exercise sovereign powers only within its borders,[565] it has no legislative or executive authority over employees of other States. As a consequence, although the FTB acted in a lawless fashion for a number of years, the State of Nevada had no opportunity to review the FTB's activities, much less to stop them before they caused greater harm. At all times, the FTB's employees were under the sovereign authority of California, and all executive and legislative oversight was exercised by California alone.

The authority of the State of California over the FTB certainly did little to shield Hyatt from wrongful conduct. Far from condemning the behavior of FTB officials, and taking strong corrective action, the State seems to have endorsed that behavior. Thus, while the jury in this case plainly regarded the actions of the FTB as well beyond the bounds of legitimate government conduct – indeed, so far beyond those bounds as to merit the strong sanction of punitive damages – the FTB is still insisting that "[a]t worst, the FTB's conduct might be characterized as a zealous effort to collect taxes."[566] This is a telling assertion. If the FTB sees nothing wrong with its "zealous" conduct in Nevada, it presumably will have no incentive to avoid repeating that conduct, especially if it can anticipate that, by virtue of comity, it will face only modest damages for doing so.

We also note that the FTB's argument for limited damages is by no means restricted to its conduct in this case, offensive as that conduct was. If accepted, it would mean that, no matter what the FTB (or any other foreign State's agency) chose to do in Nevada, the damages to be paid could

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[565] *See generally, Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838).

[566] FTB Opening Brief, at 113.

never be more than $75,000 per occurrence. For example, California officials could intentionally disseminate false statements about Nevada citizens in Nevada newspapers, or freely distribute private confidential material to anyone of their choosing, all the while knowing that their conduct could be subject to only that relatively minimal restraint. Having purposefully abused its sovereign power, the State could nonetheless retreat behind the wall of that same sovereign power, insisting that it should not be seriously sanctioned because of principles of comity.

Full damages offer at least a partial defense to that kind of unrestrained misconduct. While damages are necessarily awarded after wrongful actions have taken place, they nevertheless provide a penalty for those actions and a strong dose of deterrence against repeated offenses. Thus, the Supreme Court has recognized that even compensatory damages serve to advance the critical goal of deterring tortious behavior. "Deterrence is also an important purpose of [the tort] system, but it operates through the mechanism of damages that are *compensatory* – damages grounded in determinations of plaintiffs' actual losses."[567] Especially where intentional torts are at issue, a potential wrongdoer is far more likely to refrain from unlawful conduct if he knows that he will be subject to full liability for the harm that he causes, rather than excused for just a fractional amount. And, of course, punitive damages can be awarded both to punish and to deter particularly extreme misbehavior. "Punitive damages are designed to punish and deter a defendant's culpable conduct and act as a means for the community to express outrage and distaste for such conduct."[568]

Under the FTB's "equal immunity" theory, however, these disciplining effects would largely be lost, even in cases of deliberate pervasive misconduct and severe harm. No foreign-State agency determined to extort a multi-million dollar tax settlement from a Nevada resident will be significantly discouraged by the prospect of paying a small damage award in the event that its efforts are successfully challenged. That is particularly true of an agency like the FTB, which has become accustomed to operating with complete immunity in its home state.[569] In the absence of

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[567] *See, Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 (1986).

[568] *See*, e.g., *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 252 (Nev. 2008).

[569] *See* California Govt. Code § 860.2.

direct legislative and executive authority over FTB officials, therefore, the threat of sizeable damage awards is the only effective means of deterrence available to the State of Nevada.

In short, the problem with the FTB's "equal immunity" theory is that the State of Nevada stands in a different position with respect to FTB officials than it does with respect to Nevada officials. Whereas a certain level of immunity may be justified for intentional torts committed by Nevada officials, it would be directly contrary to Nevada's sovereign interest in protecting its citizens to apply the same limitations to intentional torts by officials from other States, when Nevada has no authority to correct and deter their deliberate misconduct by other means. Nothing in the comity doctrine compels Nevada to act in a manner that would subordinate its own legitimate interests.

4. A sovereign is not required to give "equal treatment" to other sovereigns.

The FTB argues that the doctrine of comity has been understood to require complete equality among States.[570] But that assertion is insupportable. Many courts, including the Supreme Court, have expressly acknowledged that there is a distinction between the absolute sovereignty of a State within its own territory and the non-sovereign status of a State outside of that territory. That fundamental distinction means that States are generally entitled to treat themselves more favorably than other States within their borders, and States, in fact, often provide advantages for themselves that they do not extend to foreign States.

To take one example: States commonly provide that interest from their state debt obligations will be exempt from their own state taxes, although they provide no exemption for bonds issued by other States. That taxation scheme plainly does not follow a principle of equal treatment, but the Supreme Court nevertheless has upheld such favoritism, finding that it was justified by the fact that the taxing State is sovereign within its borders, whereas other States are not. In *Department of Revenue of Kentucky v. Davis,*[571] the Court noted that it had drawn that same

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[570] *See* FTB Opening Brief, at 32-33.

[571] 128 S.Ct. 1801 (2008).

distinction between States in a much earlier case,[572] determining "that a foreign State is properly treated *as a private entity* with respect to state-issued bonds that have traveled outside its borders."[573] Consequently, it concluded that the differential tax policy was permissible because the taxing State was not in a "substantially similar" position to other States with respect to the bond obligations held by its citizens.[574]

Likewise, it has long been recognized that a State need not exempt real or personal property owned by another State from taxation, even though it has chosen to exempt its own property.[575] Dismissing a claim that other States should be entitled to a comparable exemption, the Kansas Supreme Court in *Holcomb*, like the Supreme Court in *Bonaparte*, reasoned that, "[w]hen a state . . . comes within the boundaries of another state, it does not carry with it any of the attributes of sovereignty and is subject to the laws of such other state the same as any other proprietor." *Id.* Indeed, following that principle, the Nevada Legislature has itself drawn a distinction between taxation of Nevada's own property and property owned by other States, specifying that "[a]ll lands and other property owned by the State are exempt from taxation [except certain lands assigned to the Department of Wildlife],"[576] without establishing an equivalent exemption for other States' lands and property. If comity required equal treatment between States under all circumstances, however, as the FTB suggests, Nevada would be forced to exempt any property owned by California within the State, despite the fact that California has no sovereign standing in Nevada.

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[572] *See Bonaparte v. Tax Court*, 104 U.S. 592 (1892).

[573] 128 S.Ct at 1811 (emphasis added). The Court in *Bonaparte* reached that conclusion even though it acknowledged that the denial of a tax exemption for bonds issued by a foreign State could raise the rate at which it was forced to borrow. *See* 104 U.S. at 595.

[574] Finding that the Constitution – in particular, the Full Faith and Credit Clause – did not require States to exempt foreign States' bonds, the Court in *Bonaparte* stated plainly that "the [taxing] States are left free to extend the comity which is sought, or not, *as they please.*" 104 U.S. at 595 (emphasis added). As it has turned out, comity has not, in fact, been the norm: as we have noted, most States exempt their own bonds, but not bonds of other States, from taxation.

[575] *See, e.g., State v. Holcomb*, 116 P. 251 (Kan. 1911); *State v. City of Hudson*, 42 N.W. 2d 546, 548 (Minn. 1950); *Warren County, Miss. v. Hester*, 54 So.2d 12 (La.1951). *See also Hall v. Nevada*, 8 Cal.3d 522, 524, 105 Cal. Rptr. 355, 357 (Cal. Ct. App. 1972) (endorsing *Holcomb*).

[576] *See*, NRS 361.055 (1).

The cases cited by the FTB are not to the contrary.[577] None of those cases holds that equal treatment between the host State and a foreign State is mandatory. At most, they conclude that, under the particular circumstances in question, it would not be contrary to the interests of the host State to grant equivalent treatment. Indeed, far from saying that equal treatment is required as a matter of comity, the various State courts typically make a point of declaring that there is no obligation to extend comity at all if it would conflict with home-state interests.[578]

It is also significant that none of the cases relied on by the FTB involved the kind of sustained intentional misconduct at issue in this case, where the need for enhanced deterrence is especially pronounced. To the contrary, both *Hansen* and *Sam* involved claims of mere negligence, while a third cited case involved only a garden-variety product liability suit.[579] Even the two cases that do raise charges of intentional behavior involve allegations that fall well short of the widespread abuse of government power found by the jury here.[580]

Even more importantly, the FTB neglects cases that have expressly rejected the "equal immunity" argument. Most notably, the Alabama Supreme Court declined to grant immunity to the University of Tennessee as a matter of comity, noting, as this Court did in *Mianecki*, that "[i]n determining whether to apply comity, we must remain sensitive to the rights of our own citizens and our duties and obligations to them.[581] Although the University of Tennessee had argued that it should receive the same immunity enjoyed by Alabama universities, the Alabama court found that the agencies of the two States were not in the same relative position vis-à-vis the State of Alabama:

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[577] *See* FTB Opening Brief, at 32.

[578] *See, e.g., Hansen v. Scott*, 687 N.W.2d 247, 250 (N.D. 2004) ("[a] primary concern is whether the forum state's public policies will be compromised if comity is applied"); *Sam v. Sam*, 134 P.3d 761, 767 (N.M. 2006) (extending comity not appropriate "if doing so would undermine New Mexico's own public policy").

[579] *See Schoeberlein v. Purdue University*, 544 N.E.2d 283, 288 (Ill. 1989).

[580] *See Solomon v. Supreme Court of Florida*, 816 A.2d 788 (D.C. 2002) (defamatory statements at a single meeting, causing no harm in the forum State); *McDonnell v. State of Illinois*, 748 A.2d 1105 (N.J. 2000) (discrimination on the basis of age).We note that, in *McDonnell*, the New Jersey court ultimately *declined* to extend comity to Illinois, concluding that it would be contrary to the public policy of New Jersey. *See* 748 A.2d at 1108.

[581] *Faulkner v. University of Tennessee*, 627 So.2d 362, 366 (Ala. 1992), *cert. denied*, 510 U.S. 1101 (1994).

"Agencies of the State of Alabama are subject to legislative control, administrative oversight, and public accountability in Alabama; UT is not."[582] The court concluded by emphasizing that, whereas "[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in Alabama," the University of Tennessee "operates outside such controls in this State."[583]

Finally, the FTB fails to note that a strict "equal immunity" rule would often result in very *unequal* treatment for States beyond their own borders, as the decision in *Nevada v. Hall* readily demonstrates. There, the State of Nevada was held to be subject to unlimited damages for a traffic accident in California – even though there was a cap on damages under Nevada law – because it was treated just as California would have been under the uncapped California law.[584] Yet if California were involved in an identical accident in Nevada, the FTB's theory would mean that California could claim the benefit of the Nevada statutory cap, thereby limiting its own out-of state exposure to a modest level of damages. As the FTB sees "equality," therefore, Nevada would be subject to much greater liability for accidents in California than California would face for accidents in Nevada.

There is, of course, a pronounced irony in the fact that the FTB now seeks to take advantage of a Nevada damages limitation that the California courts refused to apply to Nevada officials, even though the statute was specifically written to protect the latter and not the former. And, while this odd turnabout is said to be in aid of comity between the two States, it is not at all clear that the California courts would demonstrate the same degree of comity if the positions were reversed – that is, if the question were whether the California courts should apply California immunity statutes to officials of other States. The FTB cites no case in which the California courts have ever done so, and the language of the various California immunity statutes applies solely to California officials. Indeed, the only basis for positing equal treatment by California seems to be the *Hall* case, where

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[582] *Id.* at 366.

[583] *Id. See also Bowden v. Lincoln County Health System*, 2009 WL 323082 (11th Cir. 2009).

[584] *See* 440 U.S. at 426.

the result of such treatment was not a grant of immunity for Nevada, but rather the exposure of Nevada to unlimited liability.[585]

At bottom, our position is not that Nevada should never extend equal immunity to a sister State as a matter of comity, only that the decision necessarily depends upon the particular circumstances. Here the circumstances argue strongly against such treatment. The facts show, *first,* that the FTB engaged in a long and calculated campaign against a Nevada citizen, with little regard for the boundaries established by Nevada law, and, *second*, that Nevada has no ready means – other than significant damage awards – of sanctioning that behavior or of deterring its repetition in the future. Nevada cannot take direct action against the offending employees, and the FTB's resolute position – even in the face of the jury's verdict – is that its conduct amounted to nothing more than "zealous" tax collection, indicating that California itself is unlikely to take any direct action, either now or later. To allow the FTB to escape the full consequences of its actions, therefore, would be contrary to Nevada's legitimate interest in protecting its own citizens, and the FTB's request for comity should be denied.

5. The FTB's other immunity arguments are without merit.

Quite apart from comity, the FTB makes several other "equal immunity" arguments, claiming that the extension of such immunity is required by the Full Faith and Credit Clause, the law of the case doctrine, and the judicial estoppel doctrine. None of these arguments is correct.

a. Full Faith and Credit.

The FTB and its amici try to revive their previously unsuccessful Full Faith and Credit argument by contending that, if this Court declines to extend equal immunity to the FTB, it would be exhibiting impermissible "hostility" to California law.[586] But there is nothing hostile about a

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[585] If the States wish to accord each other equivalent immunity, the doctrine of comity is not the only avenue to do so. Most directly, they can arrange by agreement to provide a specified measure of immunity, on a reciprocal basis, as States are free to do so. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742 (2001) (upholding agreement regarding boundaries). That approach would have the added benefit of assuring legislative and executive involvement within the two States.

[586] It is not clear just what California law the FTB is talking about. Nothing in California law caps damages awarded against the FTB at a specific amount. California does have a statute giving the FTB total immunity for certain actions (in effect, a cap of zero), *see* Cal. Govt. Code § 860.2, but this Court rejected the FTB's attempt to claim the shield of that statute for its intentional torts, and the U.S. Supreme Court

decision by a forum State to apply its own law, provided that it has the requisite legislative jurisdiction over the parties. The Supreme Court has set forth the basic rule that "[t]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[587] And, in the earlier appeal of this case, the Court already found that "[t]he State of Nevada is undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, injured one of its citizens within its borders." 538 U.S. at 494. In electing to apply Nevada law, therefore, this Court would be doing no more than it is constitutionally entitled to do.

Moreover, even if legislative jurisdiction alone were not enough to justify a State's choice of its own law, the FTB's argument would still fail. For it is absolutely clear that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."[588] Put another way, nothing in the Full Faith and Credit Clause mandates a presumption that, when two States have overlapping legislative jurisdiction, the forum State must defer to the law of the other State, even if that course of action would be adverse to its own interests. As Chief Justice Stone once observed, a contrary rule "would lead to the absurd result that, whenever the conflict [between the laws of two States] arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."[589]

Here, as we have discussed,[590] it would be harmful to Nevada's sovereign interests to apply the Nevada damages cap to out-of-state officials. Thus, even if this Court were somehow to treat

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affirmed. In effect, therefore, the FTB is really arguing that Nevada should apply *its* law capping damages to California as well as to Nevada. That is not comity – comity is when the forum state applies a sister state's own laws to the sister state – instead of applying the forum state's law. Here, California wants the same protection Nevada gives itself.

[587] *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998), quoting *Pacific Employers Ins. Co. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *see also Sun Oil v. Wortman*, 486 U.S. 717, 722 (1988) (same).

[588] *Hall*, 440 U.S. at 422.

[589] *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

[590] *See* discussion, *supra*, at 146-154.

that cap as part of California law, *but see* footnote 586 *supra*, it would not be a hostile act for Nevada to decline to apply it.

b. Law of the Case.

The FTB also contends that the applicability of the Nevada damage limits has been settled by the prior decision of this Court and is now law of the case. But that assertion rests on both a misunderstanding of the law of the case doctrine and a misreading of the prior history of the case.

The law of the case standard is a demanding one. As this Court recently pointed out, "[u]nder the law of the case doctrine, when an appellate court decides a rule of law, that decision governs the same issue in subsequent proceedings. . . . The doctrine *only applies to issues previously determined*, not to matters left open by the appellate court."[591] It is not enough, therefore, that a prior decision may have addressed related, but different, questions, or that an issue could have been addressed at that earlier time. Rather, "[a]bsent the necessary implication that an issue was presented, considered, and deliberately decided, it does not become law of the case and therefore does not bind the lower court on remand."[592]

The FTB cannot come close to meeting this test. With respect to the specific legal question at issue here – that is, whether California officials are entitled to partial immunity, measured by the Nevada damage caps – it is utterly clear that the FTB did not present the issue, that this Court did not consider it, and that this Court did not decide it. This lack of attention is hardly surprising, of course, because, in the earlier appeal, the FTB was claiming that this Court had to apply California's *total* immunity statute. Having chosen to press that legal issue, the FTB can hardly argue now that the Court really decided some other issue not before it.

The FTB's argument would be equally off-base, even if the "law" at issue is thought to be the more general law of comity. With respect to the intentional tort claims that were the basis of the judgment below, this Court's prior decision said only that comity did not require their dismissal,

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[591] *Wheeler Springs Plaza,* LLC *v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2008) (emphasis added).

[592] *Sherman Gardens Co. v. Longley*, 87 Nev. 558, 565, 491 P.2d 48, 53 (1971). *See also Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 667, 918 P.2d 314, 317 (1996) ("[a] principle or rule of law becomes the law of the case only if it is necessary to the appellate court's decision.")

without addressing in any way whether comity might somehow justify a limitation on damages. As for a binding requirement of "equal immunity": while it is true that the Court did refer to the immunity of Nevada officials in deciding how to deal with the various claims against the FTB, it is equally true that the Court never made any legal determination that equal immunity would be mandatory in all circumstances, even if such immunity would be adverse to Nevada's sovereign interests. Rather, it simply made a broad determination about each category of claims, deciding only whether allowance or dismissal of the claims as a whole would be consistent with Nevada's state policy. That is precisely the kind of balancing that the Court now must undertake with respect to the distinct issue of whether to apply Nevada's damage caps to the FTB, and it remains an open question that has not been previously "presented, considered, and deliberately decided" by this Court.[593]

There is likewise nothing in the prior United States Supreme Court opinion that would lock this Court into any particular view of how to apply the doctrine of comity to claims of partial immunity. Most of the opinion was devoted, not to comity at all, but to the FTB's argument that the Full Faith and Credit Clause required Nevada to honor California's statutory immunity. The only reference to comity came at the end, when the Court merely observed that it was "not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State,"[594] pointing out that "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis."[595]

Plainly enough, the Court was not, just by noting what this Court had already done, ordering Nevada to give California equal immunity in the future, or even suggesting that it would be "hostile" for the State not to do so. Nor would it have made any sense for the Court to create such a fixed rule: because the granting of comity is entirely voluntary,[596] a State must always be able to

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[593] *Sherman Gardens Co.*, 87 Nev. at 565, 491 P.2d at 53.

[594] 538 U.S. at 499.

[595] *Id.*

[596] *See* discussions, *supra,* at 146-149.

take into account the potential harm to its citizens that would result from extending comity in any particular situation. It is thus entirely reasonable for a forum State to recognize that, while equal treatment between States may sometimes be called for, that kind of treatment may, at other times, be a serious disservice to its own public policy. The Supreme Court did not say otherwise in its opinion.

c. Judicial Estoppel.

Finally, the FTB makes a judicial estoppel argument, saying that Hyatt cannot now argue against equal immunity for the FTB because he previously said that it was required. But, to establish the necessary grounds for estoppel, the FTB would have to show an argument by Hyatt to the effect that an enforceable rule of comity obligated States to give the same immunity to other States as they do to themselves, regardless of whether it was in their interests to do so. In fact, Hyatt repeatedly argued that no such obligation exists. There is thus no basis for judicial estoppel.

The record is unequivocal on this point. Although Hyatt pointed out that this Court had first looked to Nevada's own immunity in deciding what immunity initially to accord the FTB, he did not say – and the FTB conspicuously does not cite any evidence of him saying – that Nevada was required to do so. To the contrary, before the United States Supreme Court, Hyatt's counsel stated no less than five times that any such decision was entirely up to the Nevada courts in the exercise of their discretion and was not in any way a matter of federal obligation, constitutional or otherwise.[597] In short, Hyatt argued again and again just what he is arguing now: that it is entirely up to the Nevada courts to decide how much, if any, immunity to give to the FTB as a matter of comity. The FTB's estoppel argument, therefore, is baseless.

G. Punitive damages were properly allowed.

Punitive damages play an important role in sanctioning egregiously wrongful conduct and

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[597] *See* 6 AA 1458 ("I don't think that there is a federally enforceable law of state comity"); 6 AA 1469] ("comity is . . . not federal [sic] enforceable"); 6 AA 1475 ("there's no federally enforceable state law of comity"); 6 AA 1476 ("Q. Is – is the question of comity one that has a federal component so that this Court should weigh in on when it has to be exercised? A. I don't believe so. It's state versus state, Justice O'Connor"); 6 AA 1476 ("there is a jurisprudence of this Court with respect to federal and state relations which does depend on comity, and that is, of course, federally enforceable. I don't believe that there is a concomitant enforceable doctrine . . . state to state")

in assuring that it is not repeated. As this Court has observed, "[p]unitive damages provide a means by which the community, usually through a jury, can express community outrage or distaste for the misconduct of an oppressive, fraudulent or malicious defendant and by which others may be deterred and warned that such conduct will not be tolerated."[598] Consequently, the Nevada Legislature has expressly provided for awards of punitive damages in especially serious cases. Pursuant to NRS 42.005, a jury may choose to award punitive damages whenever the plaintiff has proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, whether express or implied.

The FTB argues however, that it must be given immunity from punitive damage awards because Nevada state agencies (though not foreign State agencies) have been granted such immunity by statute.[599] As we have previously discussed, however, the FTB does not stand in the same position as Nevada state agencies.[600] The only mechanism available to Nevada for deterring and punishing rogue out-of-state agencies – when they have engaged in bad-faith conduct and committed intentional torts that injure Nevada residents – is through damages awards, both compensatory and punitive. By contrast, Nevada need not impose damages on its own agencies in this fashion, because Nevada agencies are subject to, and controlled by, the Nevada executive and legislative branches.[601] Here, the jury determined, based on proper instructions from the District

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[598] *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987). *See also Countrywide Home Loans, supra*, 192 P.3d at 252; *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006); *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 45, 846 P.2d 303, 305 (1993).

[599] *See* NRS 41.035(1).

[600] *See* discussion, *supra*, at 149-158.

[601] The *Amicus Curiae* brief of the Multistate Tax Commission argues on page 22, citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), that punitive damages are not allowed because the FTB's conduct was legal under California law. Also, the State of Utah's a*micus* argues that Nevada cannot apply its tort law "to lawful activities taken by FTB pursuant to California law and engaged in within the State of California." Utah et al. Amicus Br. at 8. But nothing in *Gore* bars Nevada from applying its law to the tortious conduct at issue here. In *Gore*, the Supreme Court simply noted that "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred *and that had no impact on Alabama or its residents*," 517 U.S. at 572-73 (emphasis added), further noting that "Alabama [may not] impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." *Id.* at 573. Here, the jury did not attempt to punish or deter FTB activities having no effect beyond California's borders: rather, it imposed a sanction solely for conduct having a direct (and fully intended) impact on a Nevada resident and sought to deter a repetition of such conduct against Nevada residents in the future, both of

Court, that the extraordinary deliberate misbehavior of the FTB warranted punitive damages.

The FTB also argues that it is exempt from punitive damages awards because "the common law does not permit punitive damages to be assessed against a government agency or entity, unless statutory authorization exists."[602] But this argument is faulty for a number of reasons. To begin with, "statutory authorization" *does* exist for the award in this case. NRS 42.005 authorizes punitive damage awards against any "defendant" in specified actions, without making an exception for government defendants. And while NRS 41.035 provides that Nevada state agencies are not liable for punitive damage awards, that statutory provision does not apply to agencies of foreign States. Indeed, the exemption for Nevada state defendants in NRS 41.035 would be unnecessary if the provisions of NRS 42.005 permitted punitive damages only against individual defendants.

The various immunity statutes from other States are likewise beside the point.[603] None of the cited statutes expressly exempts officials of *foreign* States from punitive damage awards. Rather, they explicitly, or by logical implication, provide immunity only to officials of the *home* State, just as the Nevada statutes do.[604] That distinction between domestic and foreign state officials, of course, is fully in keeping with the fundamental principle that a State has full sovereign powers within its own borders, but does not carry attributes of sovereignty into another State.[605]

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which it was fully entitled to do under the principles established in *Gore*. In addition, *Gore* was addressing a state's power or supervision over another state when "the welfare and health of its own citizens may be affected when they travel to that State." *Id.*, at 572. In this case, it was the FTB's tortious conduct that took place in, or that was directed into, Nevada. This case has nothing to do with Hyatt traveling to California. Moreover, it is irrelevant that the FTB's conduct is purportedly "legal" in California. In point of fact, the FTB conduct is not so much legal but rather the FTB has immunity in California to engage in bad faith acts and commit intentional torts. The key distinction is that in California, citizens can seek the aid of the legislative and executive branches to reign in a rogue agency. Punitive damage awards are the only measure of control Nevada has to address and seek change in out of state agencies that engage in bad faith conduct directed into Nevada against a Nevada resident.

[602] FTB Opening Brief, at 109.

[603] *See* FTB Opening Brief, at 111 n. 84 (citing statutes).

[604] *See, e.g.*, Ala. Code § 6-11-26; Mont. Code Ann. § 2-9-105; N.J. Stat. Ann. § 59:9-2(c); Texas Code Ann. § 101.024.

[605] *See* discussion, *supra*, at 149-158.

1. The federal common law cited by the FTB does not govern this case nor address Nevada's public policy interests in assessing punitive damages in this case.

To support its claim for immunity from punitive damages, the FTB relies heavily on *City of Newport v. Fact Concerts, Inc.*,[606] a case involving a claim under Section 1983 of the federal civil rights law.[607] But that case is of little help to the FTB. First of all, the decision in *City of Newport* turned solely on a question of congressional intent: that is, whether Section 1983 is properly interpreted to authorize punitive damages against a municipality. In holding that Congress did not intend that outcome, the Court had no reason to consider – and did not consider – whether a State, applying its own state law, could allow punitive damages for bad-faith, oppressive, fraudulent, or malicious conduct directed at one of its citizens by a sister State.

The FTB also ignores an important aspect of *City of Newport*: that the Court, while overturning the punitive damages awarded under *federal* law, did not disturb a related award of punitive damages under *state* law. As the Court made clear, the plaintiff in that case had "sought compensatory and punitive damages against the city and its officials under 42 U.S.C. § 1983 and under two pendant state-law counts . . . ," and "[t]he jury assessed 75% of the punitive damages upon the § 1983 claim and 25% upon the state-law claim."[608] The Court expressly declared that it was "not address[ing] the propriety of the punitive damages awarded against [the City] under Rhode Island law."[609] Thus, the decision in *City of Newport* does nothing to discredit the essential understanding that state courts may award punitive damages against government agencies and officials, provided that they are authorized by state law.[610]

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[606] 453 U.S. 247 (1981).

[607] *See* 42 U.S.C. § 1983.

[608] 453 U.S. at 252-53 n.6.

[609] *Id.*

[610] The *Amicus Curiae* brief of the Multistate Tax Commission argues on page 19 that Nevada law requires allegations that a particular employee acted in a manner supporting an award of punitive damages and that the employer must have knowledge of the employee's unfitness to sustain an award of punitive damages. First, the Multistate Tax Commission cites to law not applicable here. This is not a vicarious liability case. This is a direct liability case in which the FTB's actions as a whole, as engaged in by multiple employees and supervisors, was found to warrant punitive damages. Secondly, even if the Multistate Tax Commission's view of the law is applied, there was substantial evidence that the FTB was well aware of the

The FTB asserts that the decision in *City of Newport* stands for the twin propositions that punitive damages are an ineffective means of deterring government employees from engaging in misconduct and taxpayers should not have to pay for punishment intended for the misbehaving government agency. But, in the end, these issues are questions of policy that, under our federal system, each State is free to answer for itself. No principle of federal law restricts the State of Nevada from deciding that punitive damages are a necessary deterrent to extreme misconduct by out-of-state tax officials, especially considering the lack of available alternatives. Furthermore, it is notable the decision in *City of Newport* involved misconduct by a municipality, a governmental entity that is subject to the State and its legislative and executive branches, and thus can be reigned in by its sovereign without the additional sanction of punitive damages. That is not the case when one State commits torts in a sister State or intentionally directs tortious activity into that State.

2. Other states do not limit damages against out of state agencies.

As discussed above, the *Faulkner* case and the *Bowden* case stand for the proposition that states do not limit damages imposed against a sister state as that is the only manner in which a state may regulate and control the conduct of a sister state.[611] The same principle applies to punitive damages.

3. Federal law provides for an award of punitive damages under the circumstances of this case.

Finally, we note that the very conduct in this case would be the basis for an award of punitive damages under federal law. Under Section 7431(c)(1)(B)(ii) of the United States Code,

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misconduct of the most significant perpetrator of the bad faith acts at issue in the case. By way of example, Candace Les testified that she complained to FTB supervisors about lead auditor Cox's treatment of Hyatt — an "obsession" according to Les — and that no adequate investigation was conducted of this complaint. (RT: April 23, 167:6-17; April 24, 134:1-12) Also, documentary evidence established that Cox's supervisor, Paul Lou, praised her one-sided audit and directed her to emphasize the "California ties" (93 AA 23122), and thereby disregarding any evidence contrary to the predetermined conclusion expected by the FTB. Further, high ranking members of FTB management received the Embry memo questioning whether there "enough substantiation" to assess Hyatt on a residency theory *within weeks* of the FTB nonetheless assessing Hyatt millions dollars in taxes and penalties on that very same residency theory. (54 AA 13315-13319; 84 RA 020865-020904) Large, record setting proposed assessments were not issued without significant layers of review within the FTB. Even this sample of evidence from trial established that the FTB was on notice of the very conduct for which the jury awarded punitive damages.

[611] *See Faulkner*, 627 So.2d at 366; *Bowden*, 2009 WL at *3-*4.

the Internal Revenue Service may be liable for punitive damages when it acts willfully or with gross negligence in disclosing taxpayer information.[612] In other words, the same repugnant conduct engaged in by the FTB, if it were engaged in by the IRS, would expose the IRS to punitive damages. Given that fact, it is hardly unreasonable for Nevada to allow punitive damages to be assessed against a foreign tax agency under Nevada's own punitive damages statute.

H. The jury's award of punitive damages was not excessive and should not be reduced.

The FTB's argument that the jury's award of punitive damages should be reduced because it was excessive is a request for the Court to substitute its judgment for that of the jury. There is no basis for the Court to do so. The FTB cites to the three guideposts specified by the United States Supreme Court in *State Farm Mutual Automobile Insur. Co. v. Campbell*[613] for determining whether a jury's award of punitive damages was constitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damage award to the actual harm inflicted on the plaintiff; and (3) how the punitive damages award compares to other civil or criminal penalties.[614] This Court adopted the same test in *Bongiovi v. Sullivan*,[615] thereby replacing a similar but not identical test to conform Nevada law to federal law.[616] Applying those standards, the jury's verdict should be upheld.

1. Reprehensibility.

The reprehensibility of the defendant's conduct is the "most important indicium of the reasonableness" of a punitive damages award.[617] In evaluating this factor, courts are to consider, among other things, whether the conduct involved repeated (i.e., ongoing) actions or an isolated

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[612] *See* IRS Code § 7431(c)(1)(B)(ii); *Ward v. United States*, 973 F. Supp. 996, 1002 (D. Colo. 1997); *Malis v. United States*, 87-1 USTC § 9212 (C.D. Cal. 1986); *see, e.g., Mallas v. United States*, 993 F.2d 1111, 1126 (4th Cir. 1993) (allowing award of punitive damages against IRS even if taxpayer's actual damages were zero).

[613] 538 U.S. 408 (2003).

[614] *Id.*, at 409-11 (*citing BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

[615] 122 Nev. 556, 138 P.3d 433 (2006).

[616] *Id.*, at 451-52.

[617] *Gore*, 517 U.S. at 575.

incident and whether the harm resulted from "intentional malice, trickery, or deceit, or mere accident."[618]

The reprehensibility of the FTB's conduct — explained in detail in the Statement of Facts section above — shows that a strong penalty is warranted. Moreover, it is notable that, having engaged in extraordinarily offensive behavior, the FTB nonetheless has repeatedly refused to accept that its actions were wrong and should not be repeated. To the contrary, the FTB continues to insist that its behavior was not so bad ("[a]t worst, FTB's conduct might be characterized as a zealous effort to collect taxes")[619] and that it did not lead to any "verifiable damage to Hyatt."[620] That is not at all what the jury found, however, and the evidence overwhelmingly supports the jury's verdict.

a. The offending conduct lasted over a decade.

First of all, the misconduct engaged in by the FTB was not just a one-time incident. Rather, the FTB engaged in a long-running, deceitful bad faith audit and protest process that it deliberately refused to end so that Hyatt could pursue an appeal with due process rights, which he sought in order to clear his name. During this time, the FTB sought to take advantage of Hyatt's acknowledged sensitivities to privacy and confidentiality by bombarding persons with any remote connection to Hyatt with his private information, hoping, even offering, to induce settlement. Then, for almost a decade, its *Litigation Roster* disseminated the false representation that Hyatt had been adjudged a tax cheat, and even asserted that he committed tax fraud, when in fact the FTB itself had made no final determination on these issues.

Hyatt lived with this ordeal for over a decade, in fact for 15 years if the audit period is included. As the evidence of multiple witnesses demonstrated, Hyatt suffered over a decade of emotional distress that increased seemingly exponentially over that time. He was called a fraud and has had to live with that embarrassment while fighting to clear his name – a fight that the FTB would not let him pursue for over a decade by its withholding of a final action. The FTB destroyed Hyatt's creative and scientific determination when he had been at the peak of his profession. It

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[618] *State Farm* 538 U.S. at 409.

[619] FTB Opening Brief, at 113; *see also Id.* ("[i]n sum, FTB conducted an audit, nothing more").

[620] FTB Opening Brief, at 112.

irreparably harmed his personal relations with friends and adversely affected relations with family members. His physical well-being substantially deteriorated from the constant stress of being under the FTB's thumb. He saw the proposed assessment growing to more than $50 million, increasing at a rate of more than $8,000 per day, plus the 50% interest penalties for refusing the FTB's so-called amnesty offer, when in fact the alleged original taxes assessed were *only* $7 million (including the taxes assessed on income earned after Hyatt moved to Nevada, by even the FTB's own reckoning).[621]

b. The offending conduct was deceitful bad faith.

Further, the FTB's conduct was intentionally malicious and deceitful bad faith conduct by government actors. FTB's lead auditor said she was going to "get" Hyatt and called him "a Jew Bastard."[622] She told Hyatt's bitter ex-wife, just prior to writing the Determination Letter, that he "was convicted."[623] The evidence also established that the FTB's lead reviewer of the audit disagreed with the FTB's residency case against Hyatt, even stating *in writing* that she did not know how the FTB could maintain a case against Hyatt for the entirety of 1991 or at all for 1992.[624] Other FTB internal documents established that the FTB's reviewers and supervisors were well aware of the weakness of the FTB's tax assessment against Hyatt on a residency theory and openly pursued other bases to tax Hyatt's wealth, though they could not find any.[625] While the weakness of the FTB's case was being documented in an internal memo, the lead auditor was simultaneously preparing, and then sending to Hyatt, a letter asserting not only that taxes were owed, but that there was "clear and convincing" evidence so a fraud penalty would also be assessed.[626]

The FTB argues that, if California (i.e., the California Board of Equalization and then possibly the California judicial system) ultimately finds that Hyatt owes taxes, then the FTB's

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[621] RT: May 12, 59:7-60:15, 95:15-109:13; May 19, 22:17-32:1; June 18, 25:9-28:4, 45:3-48:4, 74:10-75:6; 54 AA 13326-13329, 13404-13406.

[622] RT: April 23, 165:12-17.

[623] RT: May 20, 140:14-17.

[624] 54 AA 13325.

[625] 84 RA 020842-020847, 020949-020953.

[626] 84 RA 020865-020904; 54 AA 13315-13319.

actions were not taken in bad faith.[627] In other words, the FTB concludes that if, after a legitimate, unbiased, review with due process rights is conducted by the California Board of Equalization, it is determined that Hyatt owes some taxes, that conclusion justifies the FTB's bad faith fraudulent and malicious actions during the audits and protests. Nothing could be further from the truth. What the jury found was that the FTB had engaged in 15 years of fraudulent bad faith government conduct and unnecessarily invaded Hyatt's privacy in order to exploit his sensitivities, privacy and security.

Most telling and most significant to the need to punish the FTB with ample punitive damages is the reaction of FTB supervisors and high level managers when confronted with the actions that the FTB took in its pursuit of a claim against Hyatt. They unhesitatingly told the jury that they were proud of, not embarrassed by, the FTB's work on the Hyatt audits and protests, and that they would not change a thing, thereby showing no remorse or intent to reform. Steve Illia, the head of the Residency Program during the time of the Hyatt audits testified he was "quite proud of the [residency] program" and not embarrassed to defend the auditors, supervisors, and reviewers.[628] The head of the reviewers, Ms. Bauche, also said she was not embarrassed by her role in the Hyatt audits or the FTB's recommendations.[629] Ford, the lead reviewer, was not embarrassed by her role or the audit recommendations, but in fact was "more emphatic" at trial about the audit recommendations she ultimately made in 1996 and 1997.[630]

Cox, the FTB's lead auditor in the audit, was also proud of her work. When asked if she made mistakes or would have done anything different, she attempted to avoid answering the questions, but was then impeached with her deposition testimony in which she said she did not make any mistakes and would not do anything differently.[631] Numerous other FTB witnesses

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[627] *Id.*

[628] RT: June 23, 25:13-26:7.

[629] RT: July 7, 39:9-12.

[630] RT: July 7, 166:3-9.

[631] RT: May 27, 59:10-61:19.

denied they intended to harm Hyatt and denied they were part of a conspiracy,[632] suggesting that they too did not believe that the FTB treatment of Hyatt was wrongful and in need of reform. The jury disagreed, clearly finding that the FTB needed to be punished for its conduct.

The jury determined that the FTB waged an eleven-plus year campaign to delay the protest and not allow Hyatt to pursue an administrative appeal of the FTB's assessments — this long delay coming after Hyatt refused to settle the matter early in the protest. It is more than a reasonable inference that the jury concluded that the FTB attempted to extort a settlement and – when that failed – ratcheted up the pressure by simply not allowing the protest to end for over 11 years. This by itself is reprehensible conduct which would support the award of substantial punitive damages. The first guidepost is therefore easily met.

2. Ratio to compensatory damages.

The FTB also attacks the amount of punitive damages as disproportionate to the harm suffered by Hyatt. Of course, if one compares the amount of punitive damages to the amount of compensatory damages awarded by the jury, the less than 2 to 1 ratio (250 million to $138 million) is significantly less than the 3 to 1 ratio allowed under Nevada law.[633] The fact that the jury returned a punitive damage award well within the limits of Nevada law strongly favors upholding the award. When a state legislature sets statutory limits on a punitive damages award, and a properly instructed jury returns an award within the statutory limits, the award is not excessive under either state or federal law.

Citing to the decision in *Bongiovi*, however, the FTB makes a strange argument that the punitive damages award should not be compared to the compensatory damages award because the latter does not reflect "actual harm inflicted on the plaintiff."[634] According to the FTB, the loss of privacy and emotional distress suffered by Hyatt do not rise to the level of "actual harm,"[635] even

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[632] RT: June 20, 144:12-145:4; June 24, 103:24-105:1; July 10, 171:25-172:18; July 14, 101:7-18; July 15, 154:20-155:23.

[633] NRS 42.005(1).

[634] FTB Opening Brief, 113, *quoting Bongiovi*, 122 Nev. at 582 (internal quotation marks omitted).

[635] FTB Opening Brief, at 114.

though the jury awarded significant compensatory damages for just those injuries. But *Bongiovi* itself makes clear that this argument is far-fetched. There, this Court, in analyzing the punitive damages award, specifically compared the punitive award to the compensatory award (*not* to some other invented indicia of "actual harm"),[636] despite the fact that the defendant in *Bongiovi* had characterized the injury to the slandered plaintiff as "little more than wounded feelings and embarrassment."[637] Thus, just as in *Bongiovi*, the compensatory damages award in this case provides the proper measure of "actual harm."

So long as the award falls within Nevada's statutory 3 to 1 ratio, there is no sound basis for the Court to replace the jury's judgment on what amount of punitive damages is necessary to punish the defendant tortfeasor. Here, the jury heard and evaluated testimony regarding the economic size and strength of the defendant, the state of California. It heard that California has $35 billion in liquid assets and a net worth of $47 billion, that it has a budget of $144 billion, and that it is the eighth largest economy in the world. The FTB itself, as an agency of the State of California, generates $52 billion a year in revenue from personal income taxes (equal to $143 million a day).[638] Given those figures and the nature of the FTB's actions against Hyatt, the jury reasonably concluded that it was proper to award $250 million in punitive damages to punish the FTB for its conduct and to get the FTB to take notice and reform its ways.

In addition, the ratio is more than acceptable based on recent United States Supreme Court precedents. In addressing the ratio, the FTB fails to cite and discuss the most recent ruling on this issue from the United States Supreme Court, *Exxon Shipping Co. v. Baker*.[639] The Court commented that although a punitive damages ratio of 1 to 1 ratio is typically appropriate, a larger ratio can also be supported,[640] and emphasized that the conduct at issue in *Exxon Shipping* was at

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[636] 122 Nev. at 583.

[637] 122 Nev. at 577.

[638] RT: August 11, 85:15-98:20.

[639] 128 S. Ct. 2605 (2008).

[640] 128 S.Ct. at 2626.

most reckless, not deliberate and malicious.[641] Furthermore, *Exxon Shipping* focused not on the federal due process clause but upon the requirements of maritime law or federal common law with respect to punitive damages. Thus, as the Court explained, it "was acting . . . in the position of a common law court of last review."[642] In that capacity, the Court's decision to set the 1:1 ratio as a standard in "such maritime cases"[643] was essentially a policy decision similar to the Nevada Legislature's decision to set a ratio of 3:1 by statute,[644] and not a bright line constitutional limit on punitive damages.

The Court in *Exxon Shipping* further qualified the constitutional parameters for punitive awards by noting that, "[r]egardless of culpability . . . heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it)."[645] Here, there is no question that the FTB thought that it would never be caught. It had complete immunity in California for its actions and tried to import that immunity to Nevada.

In addition, the FTB also withheld some of the most significant documents demonstrating that it knew it had no tax case against Hyatt, but nonetheless assessed him massive taxes and penalties.[646] At the same time that Cox's supervisor was encouraging her in the summer of 1995 to analyze the facts of the Hyatt case in a manner that allowed the FTB to assess Hyatt, Cox participated in a meeting and received a follow-up memo clearly acknowledging the FTB had no residency case against Hyatt.[647] The FTB never thought that anyone would see the memo stating that it had no residency or sourcing case against Hyatt, or the notes of lead reviewer Carol Ford questioning the tax case that the FTB had against Hyatt,[648] both of which were produced only after

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[641] 128 S. Ct. at 2631-32.

[642] 128 S.Ct. at 2629.

[643] 128 S.Ct. at 2633.

[644] *See* NRS 42.005(1).

[645] 128 S.Ct. at 2605.

[646] *See* discussion, *supra*, at 26-31.

[647] 93 AA 23122; 54 AA 13316.

[648] 54 AA 13325.

an order of this Court.

3. Comparison to other penalties.

The third factor the FTB attempts to rely on is civil or criminal penalties imposed for comparable conduct. To support its argument on that factor, the FTB purports to review published opinions by the Nevada Supreme Court and claims that there has never been an approved punitive damage award as large as the award in this case. But the cases cited do not involve comparable conduct. None of the cases demonstrates repeated intentional misconduct by a sovereign State against a citizen of another State, where a strong punitive damages award is needed to sanction and prevent serious ongoing abuse of government power. In this rare situation, Nevada is able to exercise its sovereign jurisdiction over the targeted behavior and thus can address a wrong that the FTB never thought it would have to confront.

The jury has spoken in this case. There is no basis for the Court to replace the jury's judgment with its own. The jury's award of punitive damages should not be altered, amended, or reduced.

I. Prejudgment interest was properly allowed.

The applicable statute sets forth a simple method for calculating prejudgment interest on a judgment – interest runs from the time of service of the summons and complaint until the judgment is satisfied.[649] The statute says nothing about calculating interest from the time the damages were actually sustained. The statute has been applied by the Court in cases involving personal injuries. The award of damages for emotional distress, breach of privacy and attorney's fees incurred because of a fraud – all being premised on tort rather than contract – should be governed by the statute.

The FTB argues that the jury's verdict included future damages. The FTB cites a construction defect case, *Shuette v. Beazer Homes Holdings Corp.*,[650] which held that "[p]rejudgment interest may not be awarded on an entire verdict 'when it is impossible to determine

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[649] NRS 17.130(2).

[650] 121 Nev. 837, 865, 124 P.3d 530, 549 (2005) (citation omitted).

what part of the verdict represented past damages.'"

No future damages were sought or awarded in this case. Rather, the damages sought and awarded were incurred before and after the filing of the complaint, but the damages had all been incurred as of the time the case was presented to the jury. Damages that predate the judgment are past damages, and damages that post-date the judgment are future damages.

The FTB erroneously argues that Hyatt sought future damages, citing statements by Hyatt's counsel during closing. One example the FTB gives relates to Hyatt's claim for emotional distress arguing there is no "cure or a pill" to his damage. But Hyatt's testimony and his counsel's arguments linked the severity of the emotional distress to the length of time the FTB failed and refused to decide the protests.[651] The FTB decided the protests on November 1, 2007, four-and-a-half months before the trial commenced.

The FTB also quotes an argument referencing Hyatt's "heart and soul" and then references his emotional distress from losing control of his private information. But again, Hyatt's request regarding emotional distress damages was specifically tied to the FTB's long-time refusal to decide the protests. No damages were requested beyond that. Any assertion by the FTB to the contrary is belied by the trial record. Hyatt neither sought nor argued for emotional distress damages for any future period.

Lastly, the FTB references Hyatt's argument that his information is on the "World Wide Web" and that it never can be returned whole. But this reference to invasion of privacy damages is different from emotional distress. The damage occurs when the disclosure(s) take place. It is not a future damage. Hyatt was not seeking, and was not awarded, any damages for future violations of his privacy. Indeed, the dates of the invasions of privacy asserted by Hyatt all occurred before the trial and verdict in this case.[652] These were past, not future, damages.

It was in this same context that the Nevada Supreme Court declared in *Shuette* that all the damages were considered past damages, even the costs of future repairs, because the construction

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[651] RT: May 12, 81-82, 95-96; July 23, 104:6-13; 167:7-17.

[652] 83 AA 20694 – 89 AA 22050; 93 AA 23104-23124; *see also* evidence discussed, *supra*, at 37-40 and cited in fns. 524 and 525, *supra*, at 141.

defect damages were incurred when the faulty construction occurred. The same is true for Hyatt's invasion of privacy damages.

This line of demarcation is expressly recognized by this Court in *Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line.*[653] There, the Court discussed past damages that predated service of the complaint, past damages that predated the judgment, and future damages that would post-date the judgment.

This case is analogous to *Bongiovi v. Sullivan,*[654] a defamation case where the Nevada Supreme Court declared that "when there is nothing in the record to suggest that future damages were included in the award, prejudgment interest on the verdict is allowed. 'The jury is presumed to have based its verdict solely on the evidence presented,' and when there is no reference to future damages in evidence, 'it is logical to conclude that the jury did not base its verdict on future damages.'"[655]

Contrary to the FTB's argument, therefore, its so-called "*Hazelwood*" exception is inapplicable to the judgment in this case.[656] There is no "reference to future damages in evidence" upon which the jury could have based its verdict. Thus, the entire compensatory award is for past damages and should draw interest "from the time of service of the summons and complaint until satisfied.[657]

Then the FTB argues in footnote 88, based on *Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line,*[658] that Hyatt is not entitled to prejudgment interest because some of Hyatt's damages were incurred after service of the complaint, and there is no breakdown in the verdict of which damages were incurred based on the various tortious acts of the FTB. *Las Vegas-Tonopah-Reno* considered interest on damages that post-dated the complaint, but predated the judgment, and held

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[653] 106 Nev. 283, 792 P.2d 386 (1990).

[654] 122 Nev. 556, 138 P.3d 433 (2006).

[655] 138 P.3d at 449-450 (citations omitted).

[656] *Hazelwood v. Harrah's,* 109 Nev. 1005, 1011, 862 P.2d 1189 (1993).

[657] *Bongiovi,* 138 P.3d at 449.

[658] 106 Nev. 283, 792 P.2d 386 (1990).

that specific damages incurred after the filing of the complaint accrued prejudgment interest only from the date the damages were actually incurred, not from the date of service of the complaint. Nevertheless, the FTB's reliance on *Las Vegas-Tonopah-Reno* is misplaced.

Las Vegas-Tonopah-Reno involved claims of intentional interference with a prospective business relationship. The damages suffered by the plaintiff were for lost revenues. Prejudgment interest was awarded back to the date of service of the complaint, even though most of the damages from the interference occurred after service of the complaint. The damage was the specific business the plaintiff lost from specific contracts that were essentially stolen from plaintiff by defendant's misconduct. Thus, the amounts were specific and liquid, and could be proven from invoices. The damages were not the less specific, unliquidated type damages involved in cases awarding damages for pain and suffering or for emotional distress. Such damages cannot be proven by reference to invoices and documents, and are not determinable prior to the entry of a jury verdict. One cannot prove emotional distress or invasion of privacy damages on a month by month basis, even if one can prove the dates of specific events. That is why the statute relates prejudgment interest back to the date of the complaint in cases involving tort damages where calculating an exact date is impossible.

The damage to Hyatt began when the fraudulent conduct occurred and when his privacy was invaded, and continued uninterrupted until the FTB's belated decision on the Protest. Events that happened during the time the matter was pending, from beginning of the audit until verdict, contributed to and increased Hyatt's emotional distress and loss of privacy, but these acts resulted in unliquidated damages that are an inseparable part of the whole, all of which dates back to and before service of the complaint. The FTB even stepped up its tortious actions after it received the complaint (e.g., posting Hyatt's private information on its web site). That is why it is fair and equitable to impose prejudgment interest on the entire compensatory amount of the verdict back to service of the complaint, in accordance with the statute.

The Court has held that damages awarded by a jury to compensate a plaintiff for his or her medical expenses and pain and suffering incurred to the date of the verdict are past damages, and

the entire amount is subject to prejudgment interest.[659] The plaintiffs in *Eaton* were a married couple traveling with their infant daughter on Interstate 80, when their vehicle struck a patch of black ice. The Nevada Highway Patrol had been made aware of the black ice earlier that evening when two other cars slid off the road in the same area. The trooper who reported the two other accidents failed to warn oncoming traffic of the hazard by placing cones or flares alongside the road. The State of Nevada was held liable for plaintiffs' injuries which included the wrongful death of their daughter.

The trial court awarded Mrs. Eaton prejudgment interest on the amount of past medical bills alone rather than on the entire personal injury award, which included medical expenses and past pain and suffering (up to the date of the judgment). The Court found the trial court to be in error and held that the entire amount was subject to prejudgment interest.[660]

Recently, the Court ruled that the interest rate to be applied in calculating prejudgment interest is the rate in effect at the time the judgment was entered, disapproving the method used by lower courts of computing prejudgment interest based on the interest rate from year-to-year prior to the entry of the judgment, which was the common practice. *See Lee v. Ball.*[661] The Court went on to find that the District Court erred in calculating the period prejudgment interest accrued because NRS 17.130(2) explicitly provides that the judgment draws interest from the time of service of the summons and complaint until satisfied.[662]

The issue was prejudgment interest for pain and suffering from an automobile accident. The prejudgment award of pain and suffering presumably included pain and suffering to the date of the judgment, much of which occurred after the date of the filing of the complaint. Still, prejudgment interest was awarded and affirmed back to the filing of the complaint. If the Court had desired to adopt a different method of calculating interest on past damages in tort cases, an

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[659] *State v. Eaton,* 101 Nev. 705, 710 P.2d 1370 (1985) (overruled on other grounds by *State ex rel. DOT v. Hill,* 114 Nev. 810, 963 P.2d 480 (1998); *see also, Grotts v. Zahner,* 115 Nev. 339, 341, 989 P.2d 415, 416 (1999).

[660] *Id.* at 711.

[661] 121 Nev. 391, 116 P.3d 64 (2005).

[662] *Id.* at 395.

opportune time would have been in deciding *Lee v. Ball*. The Court did not do so. *Lee* is more analogous to this case than is *Las Vegas-Tonopah-Reno*.

Similarly, in *Bongiovi v. Sullivan*,[663] prejudgment interest based on a claim of defamation that related back to the filing of the complaint was affirmed on appeal, even though the damage clearly continued after service of the complaint. Although *Bongiovi* can be distinguished from Hyatt's case on any number of superficial levels, damages for defamation and for pain and suffering are more analogous to emotional distress and invasion of privacy damages than are damages for interference with a contract. Hyatt is entitled to prejudgment interest back to the filing of the complaint on all of the damages, even though the harm continued after the complaint was filed.

In awarding prejudgment interest, it would be proper for the District Court to employ the same rationale this Court employed in *Albios v. Horizon Communities*.[664] There, the Court opined that an award of prejudgment interest on an entire verdict is proper, because "the award represent[ed] only past damages[] . . . because the damages occurred when the homes were built, regardless of when the homeowners actually made or will make necessary repairs."[665] Although *Albios* was a construction defect case, it is distinguishable from a business lost profits case and is similar to a tort case in that the damages occur from the defendant's initial act *(i.e*, building a home or causing the tort-based damage) regardless of when the plaintiff actually pays for or suffers the damages caused by the act. Like the plaintiffs in *Albios*, Hyatt's damages began at the time of the fraudulent audit and continued until the belated conclusion of the protest. Indeed, the delay in the protest increased the damages on a daily basis, as did all of the other fraudulent acts of the FTB, but still the judgment amount is a single award representing all of the damages that cannot be severed and attributed to individual wrongful acts with individual, provable impact. There are no specific times to which specific damages may be tied; therefore, the statute applies to run prejudgment interest on the entire award from the date of the filing of the complaint.

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[663] 122 Nev. 556, 138 P.3d 433 (2006).

[664] 122 Nev. 409, 132 P.3d 1022 (2006).

[665] *Id.* at 1035.

Finally, there should be no question that Hyatt is entitled to prejudgment interest on the attorney fees awarded as special damages because the date each payment was made is known and interest was calculated in Hyatt's proposed judgment based on those dates. That calculation is properly reflected in the District Court's judgment.[666]

VI. CONCLUSION.

The FTB attempted to characterize this appeal as based on issues of law. But it cannot escape the factual findings of the jury. The FTB's asserted view of the facts, that it was conducting a routine audit, are not the facts upon which its appeal must be adjudicated. The FTB conducted a bad faith audit. It proceeded during the audit, through three auditors, with the singular intent to find a way, any way, to tax Hyatt. As outrageous as that might be for a government agency that is charged with impartiality and equal treatment, the FTB's conduct was much worse. Its lead auditor was openly anti-Semitic and became obsessed with getting Hyatt. The FTB was alerted to Cox's behavior towards Hyatt by a senior auditor, but failed to adequately investigate these claims. It is a reasonable inference that the FTB simply did not want to investigate these claims. Indeed, the FTB ignored and swept under the proverbial rug documentary evidence that it had no real case against Hyatt, but it proceeded to assess him anyway and attempted to use its authority to issue penalties to bargain for a settlement, just as its manuals teach. The FTB had too much to gain to not assess Hyatt to the highest amount possible. By doing so, it met its "numbers" and then some. Each proposed assessment issued against Hyatt was the largest assessment in the Residency Program the respective years they were issued. The dollar signs that popped into the first auditor's head when he read about Hyatt's wealth came to fruition. There was never a question that Hyatt would be assessed a significant tax once the first auditor read the article about Hyatt. It was just a matter of what theory and what amount would be assessed. This was outrageous bad faith conduct by a government agency.

But the facts are even worse for the FTB. It knew of and took advantage of Hyatt's particular need for privacy and confidentiality. It used Hyatt's sensitivities against him, even

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[666] 90 AA 22364-22365.

explicitly suggesting he settle the matter like other wealthy or famous individuals who do not want their private information to be subjected to an even more in-depth investigation and did not want their private information made public. But when Hyatt stood up to the FTB and would not settle, the FTB took him through more than a decade of delay and stonewalling so that he could not appeal its determinations in an actual administrative appeal before an independent board. This conduct by the FTB was outrageous and utterly unacceptable conduct by a government agency, starting with the predetermined bad faith audit focused from the beginning on "how much money" Hyatt made, continuing with the unprecedented bombardment of his personal information and the very fact that he was under audit to virtually anyone and everyone with even tenuous connections to Hyatt, and then refusing to conclude its investigation and relinquish control of the process to an independent administrative tribunal where Hyatt would have due process rights.

These are the facts upon which the FTB's appeal must be evaluated. Under these facts, the FTB is not entitled to discretionary function immunity. Bad faith acts and intentional torts by government actors are not accorded immunity under Nevada law. That was the law in 2002 when this Court first reviewed this case, and it is still the law now.

Each claim is supported by substantial evidence. And, the FTB's outrageous conduct supports the damages awarded against it. The outrageousness, along with the severity and duration, of the ordeal the FTB put Hyatt through is truly unprecedented. The emotional distress damages awarded Hyatt are fair recompense for destroying the life of a then-55-year-old man in the prime of his life with extraordinary accomplishments. The damages for Hyatt's loss of privacy compensate him for something he will never have again and valued in a way dollars cannot address. Hyatt was a low key, very private person. Privacy meant everything to him, no doubt more to him than most people. The FTB took that from him. Additionally, the special damages awarded for the professional fees incurred in the audits and protests compensate him for going through what were wasted procedures. While the tax issue will be decided in California, Hyatt had to expend this sum in defending the bad faith audits and bad faith delay in the protests.

The damages cap asserted by the FTB has no application here. The FTB misstates the

Court's prior ruling and the concept of comity in general. Further, punitive damages were properly awarded for all the reasons set forth above. In sum, punitive damages are the only means Nevada has to control a rogue out of state agency. Unlike a Nevada agency, a Nevada citizen cannot seek redress with the Nevada legislature or executive branch. Prejudgment interest was also appropriately awarded as described above.

Hyatt cannot here review and summarize every issued raised by the FTB. Further, to the extent the FTB has, or believes it has, raised an issue in a footnote or sentence somewhere in its brief that Hyatt did not address, Hyatt does not concede any issue raised. Many of the FTB's issues are simply not material and not a basis to reverse or alter the verdicts and judgment.

Hyatt therefore respectively requests that the Court deny the FTB's appeal in its entirety.

OPENING BRIEF ON CROSS APPEAL

I. STATEMENT OF ISSUE.

Did the District Court err in granting summary judgment against Hyatt on his claim for economic damages stemming from the FTB intentional torts on grounds that Hyatt presented only circumstantial evidence of causation?

II. SUMMARY OF ARGUMENT.

Hyatt cross-appeals from the District Court's pretrial dismissal of his claim for recovery of economic damages stemming from the intentional bad faith tortious conduct of the FTB. Hyatt sought these economic damages in the District Court proceeding, and continues to seek them, independent and separate from the damages Hyatt was allowed to present to the jury during the trial in the District Court, i.e., emotional distress damages, loss of privacy damages, and attorneys' fees as special damages.

The legal basis on which the District Court entered its order was contrary to established and unambiguous legal precedent in Nevada. The District Court held that Hyatt cannot rely on circumstantial evidence, but must present direct evidence to establish his economic damages. The law in Nevada is to the contrary. Circumstantial evidence by itself is sufficient to sustain a jury's verdict awarding economic damages, and in particular circumstantial evidence of causation along with expert testimony often provides the sole evidentiary support for an award of economic damages.

A summary of the pertinent facts necessary to this cross-appeal, as Hyatt presented in the District Court and which were required to be presumed as true, are as follows:

(1) The FTB's invasions of Hyatt's privacy and breaches of confidentiality as found by the jury; (2) these invasions of privacy and breaches of confidentiality include disclosures made by the FTB to at least Hyatt's two earliest and most significant sublicensees in Japan, where his exclusive sublicensor, Philips Electronics, had developed a successful Licensing Program for Hyatt's patented technology; (3) the Licensing Program in Japan came to an abrupt stop after the FTB's unlawful

disclosures in Japan; (4) Hyatt has at this time no testimony of potential customers who will testify that they refused to do business with him, to support his theory of causation relative to the downfall; (5) Hyatt has, and presented to the District Court, substantial circumstantial evidence to support his causation theory; (6) Hyatt also has extensive expert testimony to support his causation theory; and (7) the District Court excluded causation and expert testimony of causation solely because of the lack of direct testimony.[667]

III. STATEMENT OF THE CASE.

On January 23, 2006, the District Court granted the FTB's motion for partial summary judgment, ruling that in the absence of direct evidence, Hyatt's theory of causation could not support a jury's verdict awarding damages relative to the Licensing Program in Japan:

> The Court's view of it is this.
>
> That the plaintiff has no real evidence that the letters sent by defendant caused any economic damage. The plaintiff has circumstantial evidence, since the business went downhill after the letters were sent, this must have been the reason. And plaintiff seeks to prove this by bringing in experts on Japanese culture to offer their opinion that the Japanese would've shared this information. Plaintiff counsel argues that this is a reasonable inference to make, that it may very well be a reasonable inference to make, I don't know.
>
> However, these particular experts, it's the Court's understanding have no actual knowledge of anything that occurred. It seems to me that while it is true that plaintiff's counsel can argue circumstantial evidence *that plaintiffs ought to have some witness or some evidence with direct knowledge of the economic damages.*
>
> So I'm inclined to grant the motion for partial summary judgment as it relates to economic damages.[668]

Further, the District Court explained that it would have ruled to the contrary and in Hyatt's favor, except for the *Wood v. Safeway*[669] decision from this Court in October of 2005:

> I will say that had this motion been brought to the Court before October of 2005 when the Wood v. Safeway case came out, I doubt that the result would've been as it is today.

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[667] At no time did the District Court suggest or rule that Hyatt's circumstantial and expert testimony was being excluded on any basis other than the District Court's stated opinion that direct evidence was required. 12 AA 02904-02905 (court requires actual knowledge to support causation theory).

[668] 12 AA 02904-02905 (emphasis added).

[669] 121 Nev. 724, 121 P.3d 1026 (2005).

> But my view of the Wood v. Safeway case is that it essentially shifts the burden to the plaintiff in this particular case.[670]

Yet, this Court explained in *Wood v. Safeway* that the decision does not represent any significant change in summary judgment procedure or analysis.[671] This Court merely clarified the summary judgment standard as established in prior decisions, rejecting cases with inconsistent language suggesting that summary judgment is precluded if there is the slightest doubt as to any material fact.

As the Court is aware, the bad faith intentional tort claims in this action were tried to a jury during 2008. The jury found in favor of Hyatt on all claims, including three invasion of privacy claims and a breach of confidentiality claim. The jury awarded Hyatt compensatory damages consisting of $85 million for emotional distress; $52 million for invasion of privacy, and $1,085,281.56 in special damages consisting of attorneys fees incurred in defending the FTB's bad faith audit.[672] But the jury was not presented and did not consider Hyatt's economic damages stemming from the destruction of the previously well-established patent licensing program in Japan.

IV. STATEMENT OF FACTS.

A. Hyatt's invasion of privacy and breach of confidentiality claims included improper disclosures by the FTB to Hyatt's key sublicensees in Japan.

As presented at trial and found by the jury, Hyatt's invasion of privacy claims and breach of confidentially claim encompassed a decade long pattern of misconduct by the FTB in which Hyatt's confidential information was freely disclosed with no concern for Hyatt's privacy or the promises of confidentially made by the FTB. Hyatt will not repeat here the totality of the FTB's bad faith intentionally tortious conduct, which is addressed in detail in the Statement of Facts section in Hyatt's response to the FTB's brief.

In this case, the FTB announced in its first contact letter with Hyatt that he could expect

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[670] 12 AA 02906.

[671] 121 P.3d at 1030-31.

[672] 90 AA 22363.

confidential treatment of all of his personal information.[673] Subsequently, the FTB auditors explicitly promised Hyatt confidential treatment both orally and in writing.[674] The FTB's own internal policies, notices, regulations, handbooks, guidelines—all of which were ignored by the FTB in this case—also promise the right to privacy.[675] Hyatt was particularly concerned about the privacy and confidentiality of his sensitive information and the FTB made specific promises to Hyatt to satisfy his concerns.

More specifically, after assurances of strict confidentiality, Hyatt reluctantly agreed to disclose to the FTB the agreements with his Japanese patent licensees, Fujitsu and Matsushita, and information about his membership in the Licensing Executives Society.[676] Hyatt specifically committed in writing to his Japanese licensees that the agreements would remain confidential. [677]

The FTB nonetheless directly contacted two of Hyatt's key sublicensees in Japan, Fujitsu and Matsushita, after failing to first request the information from Hyatt as the FTB is required to do before seeking information from third parties. The FTB did not even notify Hyatt of these communications until 18 months later, after the trail was too cold to attempt to correct the damage. Further, the FTB was in litigation with an American affiliate of Fujitsu and was periodically auditing both companies.[678]

As presented at trial, the FTB had no need and should not have made contact with or disclosures to Fujitsu and Matsushita in Japan.[679] Hyatt knew that his Japanese sublicensees were very sensitive to and fearful of the FTB.[680] He produced his confidential licensing documents to the FTB in reliance on the FTB's promises of confidentiality, which promises were violated when

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[673] 82 RA 020471-020475.

[674] 3 RA 000585-000593.

[675] 82 RA 020471-020475; 55 AA 13705; 56 AA 13913-13929, 13939-13940; 93 AA 23181.

[676] 81 RA 020194-020207, 020234-020248; 93 RA 023004.

[677] RT: May 8, 52:9-53:9, 78:17-80:4; May 16, 104:7-107:16.

[678] 8 AA 01925-01927.

[679] 84 RA 020788-020793.

[680] 9 AA 02032.

the FTB provided the Japanese sublicensees with confidential licensing documents, copies of which could only have been obtained from Hyatt.[681]

The letters sent to Fujitsu and Matsushita gave the impression that Hyatt was under investigation by the FTB and that Hyatt had disclosed confidential licensing documents, in defiance of the Japanese companies' desire that the information remain private.[682] The sublicense agreements with Fujitsu and Matsushita expressly stated, "HYATT and his agent ... shall keep strictly in confidence the identity of COMPANY as a licensee" and required that various other information be kept confidential.[683] Moreover, the FTB directed its letters to the President of the Company and a Director of another, as opposed to the finance or accounting department that would have been able to provide the financial information sought – that Hyatt could and would have provided if asked by the FTB.[684]

The FTB had attached confidential licensing information to each of its two letters to the Japanese companies that violated both the spirit and intent of the confidentiality clause in the two sublicense agreements.[685] The FTB's letter to Fujitsu attached the signature page of the confidential license agreement.[686] The FTB's letter to Matsushita attached a confidential private letter from an executive of Matsushita to Hyatt.[687] There is no dispute that the Japanese companies received and reacted to the FTB's communications.[688] Both Fujitsu and Matsushita responded to the FTB's inquiry in writing.[689] This is direct, documentary evidence.

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[681] 84 RA 020788-020793.

[682] 9 AA 02030-02031.

[683] 81 RA 020203-020204, 020245.

[684] 84 RA 020788, 020791.

[685] 84 RA 020788-020793.

[686] *Id.*

[687] *Id*

[688] Indeed, the Japanese companies needed government approval to take a license from Philips on Hyatt's patents. (10 AA 02436, 02275-02281). Given the Japanese government regulation of the sublicensing agreements entered into by these Japanese companies, these companies would no doubt take notice of and react to an inquiry from an agency of a foreign government concerning these same agreements.

[689] 84 RA 020790, 020793.

Until the FTB's disclosures about Hyatt in Japan in April of 1995, the licensing program had been successful in sublicensing Hyatt's patents in the three and one half years predating the FTB's disclosures in Japan (the "Licensing Program").[690]

Philips' success in Japan, in the early 1990s was no coincidence. In the early 1990s, preceding the FTB's tortious invasions of Hyatt's privacy and fraudulent breaches of its promises of confidentiality through disclosures to two key Japanese sublicensees, Hyatt and his patents had become a *cause-celebre* throughout the Japanese electronics industry, a hundred-billion dollar per year industry. As Philips proceeded to sublicense Hyatt's patents to some of the largest Japanese electronics firms (e.g., Hitachi, Sony, Toshiba, NEC, and Matsushita), Hyatt became even more well-known, he was called a "legendary inventor" and a "computer legend and folk hero." He was compared to Thomas A. Edison and to Alexander Graham Bell.[691]

As discussed below, once the FTB made this disclosure in Japan, Philips' licensing successes immediately and permanently and completely stopped.

B. Hyatt incurred economic damages in Japan resulting from the FTB's disclosures.

The effect of the disclosures by the FTB in Japan in breach of its commitment to Hyatt was significant. Since the time of the FTB's unlawful disclosures, the Licensing Program obtained no new sublicensees at all, and Hyatt's revenue from new sublicensees dropped to zero immediately thereafter.[692]

Specifically, in July 1991, Hyatt signed an Agreement with a major multi-national Dutch company, N.V. Philips, through its U.S. subsidiary, U.S. Philips, ("Philips") for Patent Portfolio of 23 of Hyatt's patents.[693] This Agreement included the obligation for Philips to sublicense the Patent Portfolio for the mutual benefit of Philips and Hyatt, who were to share equally in the net proceeds

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[690] 9 AA 02021-02022, 02075-02077.

[691] 10 AA 02428-02430, 02433.

[692] 10 AA 02391, 02403.

[693] 9 AA 02021; 81 RA 020138-020178.

(the "Licensing Program").[694] Philips took this obligation on as a "fiduciary responsibility." Philips then obtained over $350 million in royalties by sublicensing major Japanese companies in the early 1990's:[695]

Something obviously happened *after March of 1995* that caused the Japanese market to close tightly against the Licensing Program. Again, the FTB's disclosures about Hyatt in Japan—in violation of the FTB's professed commitments to keep such information confidential—occurred in *April of 1995*. This was a classical cause and effect issue that should have been presented to the jury.

V. ARGUMENT.

A. Standard of Review.

This Court's appellate review of a summary judgment order is de novo.[696] Summary judgment is appropriate only when a case presents no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law.[697]

But the District Court did not apply a summary judgment standard regarding the existence of a triable fact at all. Instead, the District Court focused on and addressed whether the FTB was entitled to judgment as a matter of law. Most specifically, the transcript reveals the judge erroneously believed a finding of a material fact would have to be based on direct evidence, rather than circumstantial evidence. The District Court did not find the expert evidence was somehow incompetent or did not meet the requisite standard of professional probability. The District Court did not find the fact in issue—causation—was not material or was not in dispute.[698]

The District Court rested its decision on only one basis: The District Court stated that the circumstantial evidence—no matter how solid or convincing—could never be sufficient to create a

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[694] *Id.*

[695] 9 AA 02021-02022, 02075-02077.

[696] *Yeager v. Harrah's Club, Inc.* 111 Nev. 830, 833, 897 P.2d 1093-1094 (1995).

[697] NRCP 56(c).

[698] At no time did the District Court suggest or rule that Hyatt's circumstantial and expert testimony was being excluded on any basis other than the District Court's stated opinion that direct evidence was required. 12 AA 02904-02905.

triable issue unless it was supported by direct evidence (which the judge seemed to say required that the proffered experts have actual knowledge of Hyatt's damages). In the absence of direct evidence of causation, the District Court ruled that the FTB was entitled to judgment as a matter of law.[699] In other words, the decision focuses on the type of evidence required to reach the jury, not on the materiality of the facts in dispute.

Thus, the only legal issue in this appeal is whether, as a matter of Nevada law, circumstantial evidence alone could *ever* be sufficient to support a jury award finding causation of damages.

B. Contrary to the District Court's ruling, causation may be proved by circumstantial and expert evidence.

Eighth Judicial District Court Standard Jury Instruction 2.00 contradicts the District Court's order. It states:

> There are two kinds of evidence; direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

Although the Standard Jury Instruction does not carry the weight of law, Hyatt submits that the form instruction is an accurate statement of the law in Nevada. The District Court ignored the circumstantial evidence in this case, and the expert testimony, and determined that Hyatt could not present his evidence of economic damages to the jury because he had no direct evidence of causation linking the FTB's actions and the destruction of the Licensing Program. Again, the entire ruling of the District Court on this issue was quoted above.[700]

In *Frantz v. Johnson*,[701] a case analogous to this case, this Court directly held that causation of damages may be proven by circumstantial evidence *alone*, in the complete absence of direct evidence. *Frantz* involved claims of trade secret theft and other intentional torts. There was no

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[699] 12 AA 02904-02905.

[700] *See* quotation, *supra*, at 184.

[701] 116 Nev. 455, 467-68, 999 P.2d 351, 359 (2000).

direct evidence of respondent's damages because "not one lost customer testified that it ceased doing business with JBM because of appellants' conduct."[702] Like this case, but for different reasons, respondent in *Frantz* was not in a position to prove by direct evidence that it had lost the business of customers, because the lost customers were doing business with the competitor and would not come forward with such testimony.

In rejecting the claim that causation of economic damages cannot be proved on circumstantial evidence alone, this Court stated: "We disagree that such direct evidence is necessary and conclude that there was sufficient circumstantial evidence that appellants misappropriated trade secrets. Causation is a question for the finder of fact that will not be overturned unless clearly erroneous. Causation may be inferred from the circumstantial evidence presented at trial."[703] This statement was supported by a footnote where this Court elaborated:

> In so concluding, we recognize that there is legal support holding to the contrary that requires direct evidence of causation, such as testimony of clients lost, to establish causation in employee disloyalty cases. *See McCallister Co. v. Kastella*, 170 Ariz. 455, 825 P.2d 980, 984 (Ct.App.1992; *Bancroft-Whitney Co. v. Glen*, 64 Cal.2d 327, 49 Cal.Rptr. 825, 411 P.2d 921 (1966. However, we explicitly disapprove of such a requirement based on our belief that an existing business is entitled to compensation in instances where indirect circumstantial evidence shows that its competitors harmed it through unfair and illegal business tactics.[704]

Notably, almost all aspects of plaintiffs' case in *Frantz* were proved by circumstantial evidence only, and this Court expressly found that evidence to be sufficient to support the verdict.

Although the instant case does not involve a situation where a competitor has harmed Hyatt through unfair and illegal business tactics, this case is certainly analogous to *Frantz.* Here, the FTB, in order to gain an advantage in litigation against Hyatt, to apply pressure to Hyatt regarding his sensitivities his privacy and the Licensing Program, and to coerce a settlement of dubious tax claims, engaged in unfair and illegal tactics intended to hurt Hyatt, and which had the end effect of completely destroying the Licensing Program. Yet, the FTB shielded itself from liability for its wrongdoing based on the slender reed that — despite the undeniable circumstance that the business

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[702] *Id.* at 467, 999 P.2d at 359.

[703] *Frantz v. Johnson*, 116 Nev. 455, 467-68, 999 P.2d 351, 359 (2000) (numerous citations omitted).

[704] *Id.*, n. 7.

died immediately after the date of the FTB's illegal action and the expert testimony to a reasonable degree of professional probability that the FTB's action was the direct cause of that demise — no one can be compelled to come from Japan and testify against a powerful, potential adversary, the FTB, particularly since the FTB was continuing to audit these large Japanese companies. There is simply no basis in law for the District Court's denigration of circumstantial and expert evidence.

Similarly, in *Nevada Contract Services, Inc. v. Squirrel Companies, Inc.*,[705] in a products liability suit, a plaintiff was allowed to show through circumstantial evidence alone a defective liquor dispensing system it had purchased was the cause of its economic damages. After noting that economic damages caused by a product's malfunction can be recovered, this Court ruled:

> "Circumstantial evidence may be resorted to . . . if there can be drawn therefrom a rational inference that [a defect in the defendant's product] was the source of the trouble. There must be created in the minds of the jurors something more, of course, than a possibility, suspicion or surmise, but the requirements of the law are satisfied if the existence of this fact is made the more probable hypothesis, when considered with reference to the possibility of other hypotheses."[706]

Similarly, in this case, Hyatt is allowed to use circumstantial evidence, which supports the rational inference that the FTB's outrageous disclosure of confidential information was the source of the damage. Indeed, the evidence is clear that immediately after the disclosure, Hyatt's revenue from new licenses dropped to zero overnight, and this circumstance certainly admits of the rational inference of cause and effect. Further, when buttressed by the expert testimony regarding the business practices and culture of Japanese companies, this circumstantial evidence cannot be described as "a possibility, suspicion or surmise."

C. "Causation" in the context of intentional tort claims is different from the standard applicable generally for negligence claims.

The issue of causation may, and typically is, proven in intentional tort cases through circumstantial evidence presented to the jury at trial. Rarely does the tortfeasor explicitly acknowledge his or her intention to defraud, harass, invade the privacy, etc. of the plaintiff. In this

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[705] 119 Nev. 157, 68 P.3d 896 (2003).

[706] *Nevada Contract Services, Inc. v. Squirrel Companies, Inc.*, 119 Nev. 157, 161, 68 P.3d 896, 899 (2003) (quoting *Hershenson v. Lake Champlain Motors, Inc.*, 139 Vt. 219, 424 A.2d 1075, 1078 (1981) (quoting *Patton v. Ballam*, 115 Vt. 308, 58 A.2d 817, 821 (1948)).

regard, the Nevada Supreme Court squarely held in *Frantz v. Johnson* that:

> Causation is a question for the finder of fact that will not be overturned unless clearly erroneous . . . . Causation may be inferred from the circumstantial evidence presented at trial.[707]

In negligence cases, the proximate cause limitations on the damages recoverable by the plaintiff are generally limited to the "foreseeable consequences" of the negligence.[708] But "proximate cause" in intentional torts cases, particularly as here where bad faith and fraud are established, is given a broader scope allowing a broader recovery to fully compensate the victim of the intentional misconduct.

The Alabama Supreme Court set forth an extensive analysis of this issue in *Shades Ridge Holding Co., Inc. v. Cobbs, Allen & Hall Mortg. Co., Inc.*[709]

> [I]n cases of intentional or aggravated acts there is an extended liability and the rules of proximate causation are more liberally applied than would be justified in negligence cases. This is especially true in cases of fraud where proximate cause is often articulated as a requirement of reasonable reliance where but for the misrepresentation or concealment it is likely the plaintiff would not have acted in the transaction in question. In those instances where the defendant is found to have acted intentionally it is proper that a more remote causation result in liability than would be true in negligence cases. The policy to be followed is that liability should fall on the wrongdoer rather than to permit the victim to go uncompensated.[710]
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> . . .
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> In the context of fraud or other intentional torts the cases mention proximate cause as a necessary element for liability rather casually but provide little or no guidance regarding standards for determining causation. Often, courts do not even use the word "proximate" in connection with causation.[711]
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> . . .
>
> This trend is dictated by the policy that liability even though potentially tremendous should be imposed on the wrongdoer rather than the victim be uncompensated. Hence, even very remote causation may be found where the defendant acted intentionally.[712]

Other jurisdictions are in accord. The Fifth Circuit explained:

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[707] *Frantz v. Johnson*, 116 Nev. 455, 468 (2000) (per curiam, citations omitted).

[708] *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98 (1988).

[709] 390 So. 2d 601 (Ala. 1980).

[710] *Id.* at 607.

[711] *Id.* at 609.

[712] *Id.*

> [T]he courts have generally held that where the acts of a defendant constitute an intentional tort or reckless misconduct, as distinguished from mere negligence, the aggravated nature of his action is a matter which should be taken into account in determining whether there is a sufficient relationship between the wrong and plaintiff's harm to render the actor liable. Specifically, the factors to be taken into account are the tortfeasor's intention to commit a wrongful act, the degree of his moral wrong in so acting, and the seriousness of the harm intended.[713]

Indeed, the Eleventh Circuit confirmed the universal application of the distinction between negligence claims and intentional tort claims relative to causation:

> [T]his relaxation does not appear peculiar to Alabama law; the usual common law rule seems to be that the strictures of proximate cause are applied more loosely in intentional tort cases.[714]

This standard must be applied here where Hyatt asserted only intentional torts against the FTB and where the jury and the court found the FTB to be guilty of all tort claims asserted, including bad faith and fraud.

D. Expert testimony is appropriate and not uncommon in establishing causation.

Under NRS 50.275 expert testimony must be based on underlying factual evidence, and Hyatt's expert testimony was based on facts.[715] As explained more fully below, Hyatt's experts have set forth the facts upon which their opinions are based. Their experiences with Japanese companies and the Japanese government are facts. The FTB's sending of the letters to the Japanese companies are undisputed facts. The FTB's litigating against Japanese companies is an undisputed fact. The FTB's continuous auditing of Japanese companies is an undisputed fact. The manner in

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[713] *Johnson v. Greer*, 477 F.2d 101, 106-07 (5th Cir. 1973), as quoted in *Shades Ridge,* 390 So. 2d at 609-10 (alteration in original); *see also Seidel v. Greenberg*, 108 N.J. Super. 248, 261-262, 260 A. 2d 863, 871 (1969) ("A different matter is presented where intentional acts are involved and it is clear that the rules of causation are more liberally applied to hold a defendant responsible for the consequences of his acts. It is well settled that where the acts of a defendant constitute an intentional tort or reckless misconduct, as distinguished from mere negligence, the aggravated nature of his acts is a matter to be taken into account in determining whether there is a sufficient causal relation to plaintiff's harm to make the actor liable therefore."), as quoted in *Shades Ridge,* 390 So. 2d at 610 (emphasis added); *Mayer v. Town of Hampton*, 497 A.2d 1206, 1209 (N.H. 1985) ("The law of torts recognizes that a defendant who intentionally causes harm has greater culpability than one who negligently does so.").

[714] *See UFCW v. Philip Morris, Inc.*, 223 F.3d 1271, 1274 (11th Cir 2000) (*quoting* Prosser & Keeton on the Law of Torts § 8, at 37 n. 27 (5th ed.1984).

[715] 7 AA 01593.

which Japanese companies and the Japanese government operate are facts, or at least disputed facts which must be presumed in Hyatt's favor in opposing summary judgment. Hyatt's concern for the privacy and confidentiality of his licensing information and the FTB's many promises to protect the privacy and confidentiality of these documents are established facts. The Licensing Program went from the highest point to absolute zero, immediately after the FTB sent out the letters to the Japanese companies. These constitute compelling facts relative to causation that should be tried to a jury. The FTB's desire to "get" Hyatt, as the lead auditor said, are established facts. Reasonable inferences can and are drawn from these facts, establishing the causation link required in intentional tort cases.

That is precisely the analysis used and accepted in *Jones v. United States,*[716] a case in which a federal court in Nebraska entered a significant judgment against the IRS for damage to the taxpayers' business stemming from improper disclosure of the fact that the taxpayers were under investigation by the taxing authority. The court in *Jones* explained the causation evidence as follows:

> In response to the government's "*Daubert*-like" causation objection to this testimony, the court found that: "Before-and-after economic analysis, using the rule[-out] hypothesis, is customarily employed in economic fields to endeavor to establish causation." (Tr. 240:16-19) Therefore, the court found that the approach used by Chapin was generally sound.[717]

This Court has also recognized the use of experts in proving causation. In *Yamaha Motor Co., U.S.A. v. Arnoult,*[718] this Court upheld a jury verdict for the plaintiff upon finding the plaintiff's "warning" expert established the proximate cause of the plaintiff's injury.[719]

The concept of using expert testimony to prove causation was recently, and most succinctly, described by the Second Circuit:

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[716] 9 F. Supp.2d 1119 (D. Neb. 1998).

[717] *Jones v. United States*, 9 F.Supp.2d 1119, 1130 (D.Nev. 1998).

[718] 114 Nev. 233, 955 P.2d 661 (1998).

[719] *Id.* at 243-44; *See Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1482 (1998); *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 102 P.3d 52, 64 (2004) (*en banc*; footnote omitted; emphasis added); and *Prabhu v. Levine*, 112 Nev. 1538, 1544, 930 P.2d 103 (1996), relative to causation.

> Where, however, the nexus between the injury and the alleged cause would not be obvious to the lay juror, "expert evidence is often required to establish the causal connection between the accident and some item of physical or mental injury."[720]

Expert testimony is therefore entirely appropriate in this case where the cause of Hyatt's economic damages involves an understanding of Japanese business culture and the role of the Japanese government relative to Japanese businesses.

VI. CONCLUSION.

Hyatt presented evidence in the District Court in opposition to the FTB motion that included proof of the following factors, which is strong evidence of causation: (1) the nature of the FTB's intentional, wrongful activity; (2) the geographical proximity between the FTB actions in Japan and licensing in Japan; (3) the instantaneous proximity in time between the FTB's intrusive letters and the destruction of the Licensing Program in Japan; (4) the manner in which the Japanese business community disseminates and reacts to adverse news; (5) the delicacy of license negotiations in Japan which are influenced by clouds on integrity; (6) the long period of time that the Licensing Program in Japan had previously been immensely successful in operation; (7) all new revenues went to zero immediately after the FTB's conduct; and (8) the lack of any evidence in the moving papers of some other cause, other than the conduct of the FTB, for the destruction of the Licensing Program.

The effect of the FTB's disclosures about Hyatt in Japan *in April 1995* was, and is, a disputed material fact. Hyatt presented to the District Court, and would have presented at trial, expert testimony confirming *to a reasonable degree of professional certainty* (as described in each expert affidavit) that the information the FTB improperly disclosed about Hyatt in Japan would have been widely disseminated in Japan and would have negatively affected the sublicensing of the Hyatt patents to Japanese companies. Hyatt's proffered evidence of the cause of the economic

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[720] *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 46 (2d Cir. 2004), *cert. denied*, 546 U.S. 822 (2005) (*quoting Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987)); *see also McKinney v. Keumper*, 2005 WL 2046003 (D.S.D. 2005) ("A causal connection between an event and an injury may be inferred in cases in which a visible injury or a sudden onset of an injury occurs. However, when the injury is a "sophisticated" one . . . proof of causation is not within the realm of lay understanding and must be established through expert testimony." (citations omitted)).

damages in Japan more than meets the applicable standard for causation used for intentional tort claims.

Based on the evidence presented, the issue of the proximate cause of the damage to the Licensing Program in Japan was a question of fact for a jury. Genuine issues of material fact precluded granting partial summary judgment in favor of the FTB. The District Court erred in ruling otherwise.

The District Court's March 14, 2006 order should be reversed, and this case should be remanded to the District Court for a limited trial on the issue of whether the FTB's already proven bad faith intentional tortious conduct caused Hyatt to suffer economic damages in the form of the destruction of the patent Licensing Program in Japan. The evidence presented should be limited to the events relating to the disclosures in Japan by the FTB, the outrageous acts perpetrated on Hyatt by the FTB as found by the first jury, the findings of fraud, breach of privacy, and breach of confidentiality by the first jury, and expert testimony concerning the likely consequences of those events.

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Hyatt therefore respectfully requests that the Court reverse the District Court's order of March 14, 2006 and remand the matter to the District Court for limited proceedings as described above.

DATED: January 5, 2010

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

PETER C. BERNHARD, Nevada Bar No. 734
KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO
8345 W. Sunset Road, Suite 250
Las Vegas, NV 89113
Telephone: (702) 792-7000
Facsimile: (702) 796-7181

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

Attorneys for Respondent/Cross-Appellant Gilbert P. Hyatt

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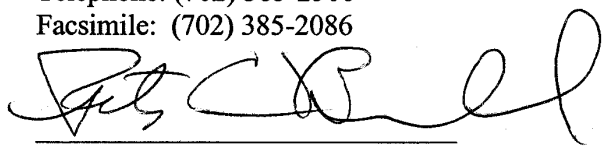
CERTIFICATE OF COMPLIANCE

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

DATED: January 5, 2010.

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



PETER C. BERNHARD, Nevada Bar No. 734
KAEMPFER CROWELL RENSHAW
GRONAUER & FIORENTINO
8345 West Sunset Road, Suite 250
Las Vegas, NV 89113
Telephone: (702) 792-7000
Facsimile: (702) 796-7181

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

Attorneys for Respondent/Cross-Appellant Gilbert P. Hyatt

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of KAEMPFER CROWELL RENSHAW GRONAUER& FIORENTINO and that on this 5th day of January, 2010, I caused the above and foregoing document entitled **RESPONDENT'S ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF** to be served by the method(s) indicated below:

_____ via U.S. mail, postage prepaid;

__X__ via Federal Express;

_____ via hand-delivery;

_____ via Facsimile;

upon the following person(s):

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

Attorneys for Appellant
Franchise Tax Board of the State of California

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

Attorneys for Appellant
Franchise Tax Board of the State of California

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

Attorneys for Appellant
Franchise Tax Board of the State of California

C. Wayne Howle, Solicitor General, State of Nevada
Local Counsel
100 North Carson Street
Carson City, NV 89701

Clark L. Snelson
Utah Assistant Attorney General
160 East 300 South 5th Floor
Salt Lake City, Utah 84114

Bruce J. Fort, Counsel
Multistate Tax Commission
444 N. Capitol Street, N.W.
Suite 425
Washington, D.C. 20001-8699

An employee of KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO

EXHIBIT 68

ORIGINAL

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

Supreme Court Case No. 53264

APPELLANT'S REPLY BRIEF AND

CROSS-RESPONDENT'S ANSWERING BRIEF

*****

APPEAL FROM JUDGMENT – EIGHTH JUDICAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

Robert L. Eisenberg (NSBN 0950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
Telephone: (775) 786-6868
Facsimile: (775) 786-9716
rle@lge.net

Pat Lundvall (NSBN 3761)
Megan Starich (NSBN 11284)
McDONALD CARANO WILSON LLP
100 W. Liberty Street, 10th Floor
Reno, Nevada 89505
Telephone: (775) 788-2000
Facsimile: (775) 788-2020
lundvall@mcdonaldcarano.com

Attorneys for Appellant/Cross-Respondent

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McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

Cases

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

McDONALD·CARANO·WILSON
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

Statutes

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

EXHIBIT 68

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

I. INTRODUCTION

Hyatt's view of this appeal is simple. He characterizes FTB's conduct as "bad faith" no less than 218 times in his brief. He contends that the "jury was repeatedly instructed that it was to evaluate FTB's conduct during its audits, and specifically whether, among other things, the FTB conducted the audits in bad faith to support a predetermined conclusion that Hyatt owed taxes." RAB 7:11-14 (Hyatt's brief does not include any citation to the record for this proposition). He further contends that the jury made express findings of bad faith against FTB after receiving that repeated instruction. See, e.g. RAB 1, 7, 9 (this contention from Hyatt is not supported by citation to the record either). He then argues that the jury's findings of bad faith were supported by substantial evidence (RAB 7, 9, 35), and therefore the liability components of the judgment must be upheld. RAB 52-53.

In truth, the jury made *no* finding of bad faith, and they were *never* instructed to determine if "the FTB conducted the audits in bad faith to support a predetermined conclusion that Hyatt owed taxes," as falsely claimed by Hyatt. The verdict forms contain no finding of bad faith. 54 AA 13308-09. The jury instructions describing the essential elements of Hyatt's claims reveal that bad faith was not among those elements (53 AA 13218-50; 54 AA 251-87), therefore, no inference of bad faith can even be drawn from the verdict. Moreover, Hyatt conceded during trial that "bad faith is not an element of any of the causes of action." 51 AA 12502 (79); 12507 (99) (100); 12511 (110-111). His position was crystal clear: "We have the burden of proof to prove the elements of our causes of action, and *bad faith is not one of the elements of our causes of action.*" (emphasis added). 51 AA 12508 (105). Hyatt conceded that he was not pursuing a bad faith claim (50 AA 12500 (70)) and he repeatedly objected to any instruction concerning bad faith, i.e. "We don't believe that separate bad faith instructions should be given at all." 51 AA 12501 (77). Against the record facts, Hyatt's bad faith emphasis in his opposition brief is egregiously misleading.

Other aspects of Hyatt's brief are equally troubling and much of the length necessitated by this reply stems from Hyatt's misleading factual contentions, misleading

recitation of procedural history and misleading legal arguments. A particularly shocking example concerns Hyatt's representations concerning jury instruction 24. In response to FTB's argument that the jury was invited to second-guess FTB's residency and tax conclusions, Hyatt denied that claim arguing that the jury was given instruction 24 which advised:

> [Y]ou are not permitted to make any determinations related to the propriety of the tax assessments issued by FTB against Hyatt, including, but not limited to, the correctness or incorrectness of the amount of taxes assessed, or the determinations of FTB to assess Mr. Hyatt's penalties, or interest on those tax assessments.

RAB 76:10-20. However, Hyatt fails to advise that the day after that instruction was given he objected to that very language, the district court withdrew that very language telling the jury it was given in error, and then she corrected that instruction with the following:

> There is nothing in corrected instruction 24 that would prevent you during your deliberations from considering the inappropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions. There is nothing in corrected instruction 24 that would prevent Malcolm Jumelet [Hyatt's expert witness] from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.

53 AA 13013 (28-29); 13053 (20) – 13054 (22). Simply put, Hyatt's advocacy has compounded the difficulty of determining this appeal.

There are three basic questions that this court must resolve to address the liability component of the judgment. First, was any FTB conduct not immune under the new test for discretionary function immunity? If none, this court need go no further, and dismissal is mandated. Second, did Judge Walsh comply with jurisdictional limits placed on this case by prior courts? If no, then dismissal is mandated on this independent ground under the court's 2002 decision. Third, using only non-immune conduct, were any of Hyatt's common law claims legally viable? If no, dismissal is again required. Hyatt has not answered any of these three basic questions to his favor.

As to Hyatt's arguments supporting the jury's shocking damage awards, Hyatt urges

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

this court to expand permissible damages far beyond those allowed in any other case. Faced with the fact that he offered no evidence of invasion of privacy damages, Hyatt argues that $52 million is a just award for his "visceral" loss of privacy. See RAB 132. Forced to acknowledge the discovery sanction which limited his compensable emotional distress to garden variety, Hyatt argues severe emotional distress can be "presumed," $85 million represents a fair sum for his general discomfort, and the other causes of his emotional distress were irrelevant simply because he said so. RAB 134-137. Refusing to acknowledge multiple limitations against imposition of punitive damages against government agencies, Hyatt also argues it is fair to impose upon the citizens of California punitive damages in the amount of $250 million. RAB 167-174. These are but a few of Hyatt's outlandish claims.

II. FACTUAL RESPONSE

A. Preface

FTB was obliged to file an opening brief which included "a statement of facts relevant to the issues submitted for review with appropriate references to the record." NRAP 28(a)(6). FTB complied, stating facts without characterization or inference and supporting each fact with a reference to the appendix. NRAP 28(e).[1] In response, Hyatt contends, without citing any Nevada rule or case, that FTB must accept all factual findings as drawn or described by Hyatt -- but not by the jury -- and that "FTB has now waived its right to challenge these factual findings." RAB 54:6-7. Hyatt's contention is unsupported by Nevada law.

[1]While Hyatt accuses FTB of not complying with NRAP 28(e) (RAB 4:6-9), he fails to offer instances of which FTB's factual assertions were either not supported by citation to the appendix, or that the appendix cite does not support the assertion. See RAB 4:6-9 To be submitted for the court's use is an electronic version of FTB's Opening Brief and this Reply Brief/Cross-Appeal Answering Brief which contains embedded links or hyperlinks to both the appendix citations and legal citations made therein. Once an electronic brief is opened a reader need only click on the link to have the reference to the appendix citation appear on screen or the cited legal authority appear on screen. A review of FTB's briefs, either manually or through this expedited process, reveals that FTB fully complied with NRAP 28(e). The same cannot be said for Hyatt's brief.

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

As the prevailing party Hyatt is entitled to all favorable or reasonable inferences when conflicting evidence exists on a material issue. Yamaha Motor Co., U.S.A. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998). However, it is up to the court, not the prevailing party, to determine whether an inference is reasonable. See Hurn v. Woods, 183 Cal.Rptr. 495, 497 (Cal. Ct. App. 1982). "Since an inference may not be illogically or unreasonably drawn, nor can an inference be based on mere possibility or flow from suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork," decisions concerning permissible inferences are questions of law for the appellate court. Kidron v. Movie Acquisition Corp., 47 Cal.Rptr.2d 752, 757 (Cal. Ct. App. 1995).

This court has repeatedly determined, as a matter of law, whether a particular inference *can* reasonably be drawn from the evidence. See, e.g., Bower v. Harrah's Laughlin, Inc. 125 Nev. ___, 215 P.3d 709, 725 (2009) (de novo determination of whether reasonable inferences could be drawn); J.J. Indus., LLC v. Bennett, 119 Nev. 269, 276, 71 P.3d 1264, 1268 (2003) (determining de novo that evidence did not support reasonable inference); Snyder v. Viani, 112 Nev. 568, 576, 916 P.2d 170, 175 (1996) (finding as matter of law that evidence did not support inference); Martin v. Sears, Roebuck & Co., 111 Nev. 923, 930, 899 P.2d 551, 556 (1995) (finding as a matter of law that no reasonable inference of age discrimination could be drawn from evidence); Horvath v. Burt, 98 Nev. 186, 187, 643 P.2d 1229, 1230-31 (1982) (de novo review of whether evidence supported reasonable inference).

If Hyatt disagreed with FTB's statement of facts, he was obligated to cite record facts, not simply offer suggested inferences or conclusions he believes can be drawn from the evidence. Offering the record facts would have permitted the court the opportunity to determine whether his inferences were reasonable or not. By failing to identify the evidence underlying Hyatt's stated inferences, he deprives the court of the foundation for his inferences and conclusions, and instead impermissively asks the court to accept his interpretation at face value.

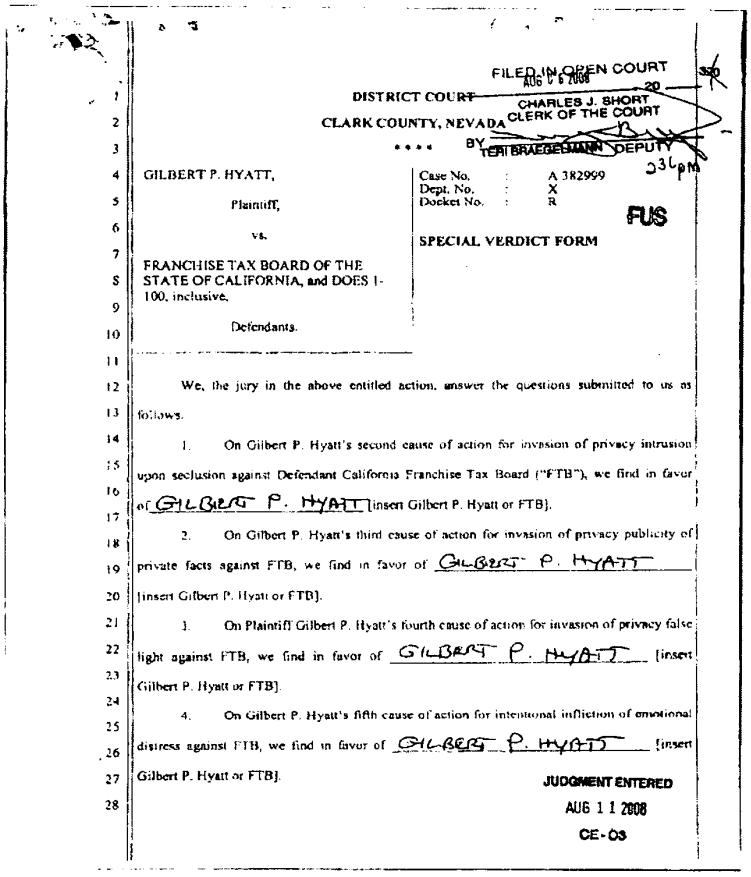
FTB found it impossible to address all of Hyatt's misrepresentations and still present

McDONALD·CARANO·WILSON
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

a brief manageable in length. FTB does, however, address key factual points and does so principally in the context of the legal discussion to which they pertain. A few issues, however, are addressed immediately below.[2]

B. The Jury's Verdict and The Material Issues Related to that Verdict

Because Hyatt materially misrepresented the jury's verdict, it is set out in full.



FILED IN OPEN COURT
AUG 06 2008
CHARLES J. SHORT
CLERK OF THE COURT
BY TERI BRAEGELMANN DEPUTY

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

FUS

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].

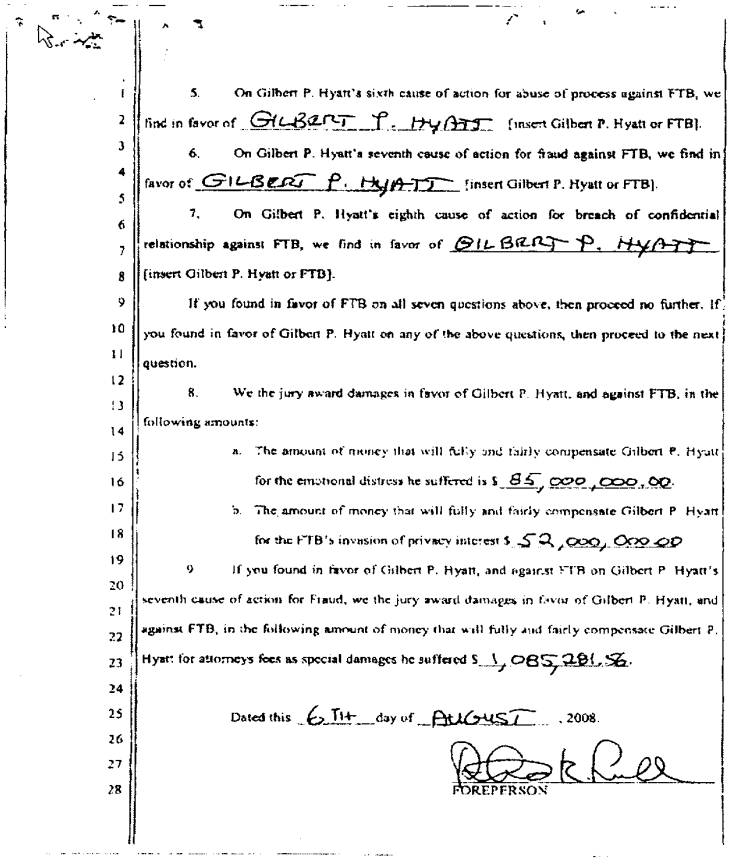
3. On Plaintiff Gilbert P. Hyatt's fourth cause of action for invasion of privacy false light against FTB, we find in favor of GILBERT P. HYATT [insert Gilbert P. Hyatt or FTB].

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].

JUDGMENT ENTERED
AUG 11 2008
CE-03

[2]In addition, Hyatt was obligated to comply with NRAP 28(e), supporting each claimed factual assertion with a record cite, but he failed to do so, further complicating this court's task. A great portion of Hyatt's answering brief lacks citation to the record, and his method of identifying record citations in a single footnote (see RAB 10:23-26, footnote 12) was a mere ruse.

McDONALD·CARANO·WILSON
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020



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

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

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

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

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

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

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

9 If you found in favor of Gilbert P. Hyatt, and against FTB on Gilbert P. Hyatt's seventh cause of action for Fraud, we the jury award damages in favor of Gilbert P. Hyatt, and against FTB, in the following amount of money that will fully and fairly compensate Gilbert P. Hyatt for attorneys fees as special damages he suffered $ 1,085,281.56.

Dated this 6TH day of AUGUST, 2008.

FOREPERSON

54 AA 13308-09.[3] The jury instructions describing the essential elements of those claims are found at 53 AA 13218-50, 54 AA 13251-87.

A general verdict "is to be construed as responsive to any and all material issues in the case." Alex Novack & Sons v. Hoppin, 77 Nev. 33, 42, 359 P.2d 390, 395 (1961). A material issue is one that relates to the essential elements of a claim. Wallace v. State, 77

[3]Although titled a "special verdict," it is apparent the verdict was a general verdict, which is a finding by the jury of the issue or issues referred to them and is, either wholly or in part, for the plaintiff or for the defendant. Fritz v. Wright, 907 A.2d 1083, 1091 (Pa. 2006). A special verdict is one in which the jury finds all material facts, leaving the ultimate decision on those facts to the court. Id. In Nevada, litigants may also use a "general verdict form with interrogatories" where there are multiple theories of liability. See Skender v. Brunsonbuilt Const. & Dev. Co., LLC, 122 Nev. 1430, 1439, 148 P.3d 710, 717 (2006). The verdict form in this case was nothing more than a general verdict with interrogatories, since it merely asked the jury a series of questions seeking the jury's conclusions regarding liability , i.e., which party prevailed on each claim FTB or Hyatt. See 54 AA 13308-09.

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

Nev. 123, 126, 359 P.2d 749, 750 (1961); Owens v. Treder, 873 F.2d 604, 609-10 (2d Cir. 1989) (in civil rights case where plaintiff alleged that he was beaten into confessing involuntarily, jury's general verdict convicting him of robbery and felony murder in criminal case did not preclude him from litigating the voluntariness of his confession in civil case).

Assuming the jury in this case applied the evidence to the essential elements of each claim upon which it was instructed, and its verdict was not a product of passion or prejudice, it can be said the jury arrived at its verdict by addressing only those essential elements. Notably, the presence or absence of "bad faith" was *not* an element of *any* claim on which the jury was instructed (53 AA 13218-50; 54 AA 13251-87), nor was bad faith one of Hyatt's asserted claims for relief. See 14 AA 3257-3300; 50 AA 12500 (70).

Hyatt expressly conceded during trial that bad faith was not an element of any of his claims. 51 AA 12502 (79); 12507 (99-100); 12511 (110-108). His counsel further stated that an instruction regarding the plaintiff's burden of proof on bad faith would confuse the jury because "bad faith is not an element of any of the causes of action." 51 AA 12507 (99-100); 51 AA 12510 (108). He specifically stated that "the problem is it becomes this confusion about whether or not [bad faith is] an element of a cause of action, and it's not. It's not an element of a cause of action." 51 AA 12510 (111). Hyatt also conceded that he was not pursuing a bad faith claim (50 AA 12500 (70)) and he repeatedly objected to any instruction concerning bad faith, i.e. "We don't believe that separate bad faith instructions should be given at all." 50 AA 12501 (79)-502 (99), 12507 (99-100), 12511 (110-111). Because bad faith was not a material issue, and the jury made no such finding, the court cannot simply assume that the jury found that FTB acted in bad faith[4]

Where, as here, a finding of bad faith was not necessary for the jury to reach its verdict, it is inappropriate to read the jury's general verdict as including a finding that FTB

[4]This also applies to many other findings Hyatt claims the jury made, but in truth they did not. See RAB 9:15-21; 9:22-10:2; 35:11-12; 54:2-7.

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE: 775-788-2000 • FAX: 775-788-2020

acted in bad faith. See, Hedges v. Rawley, 419 N.E.2d 224, 228 (Ind. Ct. App. 1981) ("[a]bsent a specific finding of bad faith, it is inappropriate to infer such a finding."); see also, Melendez v. Illinois Bell Tel. Co., 79 F.3d 661, 670 (7th Cir. 1996) (court declined to infer from a jury's general verdict that a particular finding had been made, where such a finding was not necessary based on the elements of the claim).

Simply put, Hyatt cannot ask this court to accept that the jury found something that they did not, and then contend that a substantial evidence standard of review applies.

C. The Relationship Between Sheila Cox, Candace Les and FTB

Hyatt repeatedly argues that FTB's misconduct toward him was evidenced by alleged anti-Semitic comments made by FTB employees. RAB 15-16, 169. A former FTB employee, Candace Les, was the only witness who attributed such comments, and to only one employee, Sheila Cox. See 33 AA 8178 (163-65) (Les' testimony regarding Cox's alleged remark); 41 AA 10151 (128-129) (Cox denied making remarks); 46 AA 11390 (138), 11461 (78) (Cox's co-workers testify they never heard her make such remarks). Les claimed Cox made these statements to her off duty, away from the workplace. 47 ARA 11792. Les and Cox had been co-workers and best friends at FTB, but they became estranged after Cox received a competitive promotion in 1996 to a position also sought by Les.[5] 41 AA 10145 (102), 43 AA 10512 (109) – 10513 (110). While Les testified that she complained to FTB about Cox's alleged anti-Semitic comments, (33 AA 8179 (167)) none of Les' written complaints support such a contention. 39 ARA 9635-41; 9646-50. The district court foreclosed the jury from seeing those written complaints but allowed Les' oral testimony about the contents of those complaints. 33 AA 08142 (18). And contrary to Hyatt's representation (RAB 29-30), none of Les' complaints contained any complaint about Cox' handling or involvement in Hyatt's audits. 39 ARA 9635-41, 9646-50.[6]

[5]At RAB 17:13-16, Hyatt alleges Cox was "rewarded" with a promotion for her work on Hyatt's audit. In truth, Cox received her promotion after competitive exam. 43 AA 10512 (109).

[6]The charge against Cox arose during discovery in the litigation, with FTB immediately

Continued . . .

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The comments attributed to Cox were not corroborated by any other witnesses during the entire four-month trial. See, e.g., 34 AA 11994 (140), 46 AA 11390 (138), 47 AA 11737 (189). Cox vehemently denied making any anti-Semitic comments. 41 AA 10151 (128-29). Cox also testified that Les had been a close friend of hers and she could not imagine offending her then-friend, Les, who actively and openly practiced the Jewish faith, with anti-Semitic remarks. 40 AA 9922 (219).

In 1998 FTB terminated Les for misconduct, which included taking gifts from a taxpayer being audited by the FTB. 39 ARA 9651-52, 9660; 39 ARA 9672-79. Prior to her dismissal, Les alleged that Cox was responsible for the misconduct investigation of Les. 39 ARA 9644-45.[7] Shortly after her termination from FTB, Les began meeting with Hyatt and his attorneys. Les met with one Hyatt attorney approximately 70 times, for over 500 hours. 48 AA 11786 (36). Les also had personal meetings and approximately 20 phone calls with Hyatt himself. 48 AA 11787 (39). Les believed she would be paid by Hyatt for her so-called consulting services. 48 AA 11788 (44-45). It was during these meetings with Hyatt and his attorneys that Les claimed she heard Cox make anti-Semitic comments and so testified in the early portion of her deposition. 33 AA 8178 (163-65). And then Les had a falling out with Hyatt over whether she would be paid for her consulting services. 48 AA 11788 (45) - 11789 (48). After that falling out, Les learned that Hyatt and his attorneys were using her anti-Semitic allegations in motion papers filed in the Nevada litigation. 34 AA 8256 (135-136). At her continued deposition a few months later, Les asked to make a statement on the record, testifying that Hyatt's motions had misrepresented Les' comments regarding Cox and she backtracked on her anti-Semitic allegations against Cox. Id. Les did not testify live at trial; her testimony was presented via deposition. 33 AA 8178 (162).

Hyatt did not present any evidence that such comments were made by any other FTB

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conducting a thorough investigation, including interviews of more than a dozen of Cox's co-workers and supervisors; all of these people reported that they never heard Cox use such language and that such language would be completely out of character for Cox. See, e.g., 47 AA 11737 (189); 48 AA 11994 (140-41).

[7]Les' complaint against Cox was found to be baseless. 39 ARA 9643-45.

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employees at any level. Yet in his brief Hyatt goes so far as to state that FTB employees generally "demonstrated hostility toward Hyatt because of his religion." RAB 57:6-8. In truth, Cox was a low-level auditor at FTB, with no authority to make final decisions concerning Hyatt's audit results, and the only person accused of anti-Semitic remarks. 42 AA 10303 (126)-(127). Cox's audit recommendations were subject to four separate levels of review before they became audit conclusions, and then those audit conclusions were subject to multiple layers of review at the protest level. 41 AA 10217 (128)-(129). A total of forty two (42) employees had varying involvement with Hyatt's audits and protests. 19 AA 4746. Hyatt introduced no evidence to suggest that any of these many FTB employees harbored animosity, or acted upon such animosity because of his religious faith. In fact, no evidence presented by Hyatt contradicted FTB's evidence that Cox's work was reviewed by numerous other auditors and supervisors, and that the ultimate decisions to impose taxes and penalties for the 1991 and 1992 tax years were made by FTB supervisors, not by Cox. 37 AA 9091 (131, 133), 37 AA 9165 (70). Therefore, Hyatt's suggested inference that all FTB employees involved in his audits/protest "openly demonstrated hostility toward Hyatt because of his religion," is patently unreasonable.

D. Evidence Relied Upon by FTB's Auditors in Reaching Their Initial Audit Determinations

Hyatt forcefully contends that FTB's audit recommendations were based "primarily" or "exclusively" on three affidavits[8] from members of Hyatt's family. RAB 125. Hyatt's contentions are not true. FTB based its audit recommendations on a plethora of evidence, primarily gathered from multiple third-party sources. See 66 AA 16388-427; 62 AA 15423-

[8]Internally at FTB, statements given under oath by witnesses, and witnessed by an FTB auditor, are referred to as "affidavits," even though auditors are not notaries. 42 AA 10453 (81) – 454 (82). Such statements in this case were prepared and signed after the witness had shown identification to the auditor. 42 AA 10453 (81)-454 (82). This was standard practice at FTB, and not something specific or particular to the Hyatt audit. 42 AA 10453 (81) – 454 (82). Also, pursuant to policy, in an effort to protect third-party witnesses, FTB does not release the names or identities of such witnesses until completion of its audit activities. 42 AA 10311 (160-61).

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87; 72 AA 17862-95.

• On his 1991 state tax return, Hyatt represented, under penalty of perjury, that he moved to Nevada October 1, 1991. 62 AA 15348. After auditing Hyatt, FTB concluded that he remained a California resident until April 3, 1992. 62 AA 15423-87. Thus, the disputed period between Hyatt and FTB ran from October 1, 1991, to April 3, 1992.

• After researching California's nine-month presumption,[9] Hyatt changed his move date to September 26 (63 AA 15622-23), and again to September 26, 1991 (67 AA 16501).

• Hyatt represented to FTB that he sold his California home to his long-time friend and companion, Grace Jeng, on October 1, 1991, and never returned to that home again. 66 AA 16440. Even though requested, Hyatt could not produce any evidence of the down payment allegedly paid by Ms. Jeng, monthly payments from Ms. Jeng until May 1992, notice to his mortgage holder, escrow or closing documents, purchase/sale agreements, or notice to the Orange County Assessor or Recorders Offices regarding a change in ownership. 66 AA 16287; 34 AA 8397. From the Orange County Assessor, FTB learned that Hyatt continued to pay the property taxes on his California home into 1992. 63 AA 15706. From the utility companies, FTB learned that Hyatt continued to pay the utilities on that home into 1992. 63 AA 15736-38. Documents from the Orange County Recorder revealed no recorded deed dated October 1, 1991 was filed, and, in fact, no transfer deed

[9]Under California law, taxpayers are presumed to have lived in California for the full year if they lived in California for any aggregate of nine months. Cal. Rev. & Tax. Code § 17016. If, as reported on his 1991 tax return, Hyatt met the legal presumption for a full-year residency by living nine months in California, then all of Hyatt's income reported on his 1991 tax return was taxable to California. Id. While Hyatt suggests that determining where he lived between September 26 and October 20, 1991 was unimportant since he earned no significant income during that time (RAB 81-82), Hyatt is wrong since he had to offer an explanation of his whereabouts to overcome the 9-month presumption. Since Hyatt offered no explanation at all of his whereabouts from September 26 to October 20, 1991, the 9-month presumption applied, and his credibility concerning his move date was deeply impugned.

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PO BOX 2670 • RENO, NEVADA 89505-2670
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was recorded until June 1993.[10] 64 AA 15868.

• Hyatt claimed he leased an apartment at Wagon Trails, a low-income (HUD) apartment complex, beginning October 20, 1991. 66 AA 16450. But Hyatt offered no explanation of his living arrangements, or where he kept his belongings, between September 26 and October 20, 1991. Hyatt was repeatedly asked by FTB where he lived during that timeframe, but was silent in response. 66 AA 16396, 16455-56; 67 AA 16638, 16728-29.

• From the Wagon Trails apartment manager, FTB learned that Grace Jeng, not Hyatt, actually made the lease arrangements at Wagon Trails. 66 AA 16393. The written lease was faxed to Hyatt at his California home on October 9, 1991 (63 AA 15647); Hyatt signed it and faxed it back from that home on October 13, 1991. 63 AA 15643-47. From a review of Hyatt's rental file, FTB learned that he claimed he had a California employer; he listed Grace Jeng residing elsewhere than the house he allegedly sold to her; it was Grace Jeng, not Hyatt, that signed the move-out notification; and he paid rent with checks which were mailed from California. 64 AA 15991-92.

• Hyatt offered no evidence that he ever moved into the Wagon Trails apartment, i.e. no groceries, gasoline, meals, prescriptions, linens, furniture, etc. were purchased from Nevada. Instead, from his credit card statements FTB learned he was paying for meals, filling prescriptions, purchasing airline tickets (which were later confirmed from and to LAX) and making many purchases in California. 72 AA 17767; 67 AA 16566, 16575; 72 AA 17813; 66 AA 16458.

• Under one lease agreement given to FTB, Hyatt was obligated to make rent payments beginning October 20, 1991 (63 AA 15647), but Hyatt offered no evidence of a payment for October 1991, and no utility or phone payments were made during that time. According to the Wagon Trail's apartment manager, Hyatt was never at the apartment. 64

[10]Contrary to Hyatt's brief (RAB 80 n. 301), from the notary logs FTB acquired during the protest period, FTB learned that Hyatt had backdated the deed he ultimately recorded in June 1993. 34 ARA 8452, 8478-79.

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AA 15991-92. Adjacent tenants were interviewed, and they did not see Hyatt at Wagon Trails either. Id.

• From a review of his checks, FTB learned that Hyatt was working with a number of professionals, i.e. accountants, attorneys, investment advisors, and business people between October 1991 and April 1992. 62 AA 15442-43; 67 AA 16510-11. From a review of correspondence, FTB learned their letters, as directed, were sent to Hyatt's California address. 64 AA 15756, 15762; 63 AA 15742-44; 64 AA 15820. Hyatt held numerous meetings or appointments with them in California. 62 AA 15442. Bank statements, credit card statements and other important correspondence were also being sent to his California home. 71 AA 17523; 63 AA 15742; 64 AA 15820; 72 AA 17790, 17793, 17814, 17824, 17771; 70 AA 17461, 17466.

• From his physicians and dentists, FTB learned that from September 1991 to April 1992, Hyatt took all his appointments in California. 64 AA 15987; 62 AA 15443.

• From the California DMV, FTB learned that Hyatt had a vehicle registered to him through March 18, 1993, and from the Nevada DMV, FTB learned that no vehicle was registered to Hyatt until March of 1992. 66 AA 16389; 72 AA 17878.

• From his credit card statements, FTB learned of only a few dates when he was in Nevada, i.e. to attend Comdex and open a bank account on October 25, 1991 (70 AA 17415; 67 AA 16518), and on November 27, 1991, to obtain a driver license and register to vote through Nevada's motor/voter laws (63 AA 15617, 15671). From California's registrar of voters, FTB learned there was no record of Hyatt ever voting, or even registering to vote in California. 63 AA 15695. On the few days in Nevada, Hyatt immediately returned to California where he incurred meal charges (72 AA 17792) and on one day after he signed an agreement with Sharp Corporation giving his California address and agreeing to apply California's law to any dispute (46 ARA 11329, 11337). From his credit card statements, FTB learned that during the times in Nevada, Hyatt incurred rental car charges. 72 AA 17818, 17772. From the Clark County Registrar of Voters, FTB learned that Hyatt once registered as living at 5441 Sandpiper Lane, the address of his accountant, at which Hyatt

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admittedly never resided. 62 AA 15427. A review of the checks drawn on the Nevada bank account revealed they were largely cashed by individuals or businesses located in California. 62 AA 15454-56.

- From documents received from Hyatt, FTB learned that on October 24, 1991, Hyatt signed an agreement with Fujitsu using his California address and agreeing to apply California law (64 AA 15756, 15762) and Fujitsu then began sending him letters at his California address (64 AA 15820). From Fujitsu, FTB learned that $15 million was wire-transferred to Hyatt to a bank in California on October 31, 1991. 66 AA 16276; 67 AA 16639.

- From documents received from Hyatt, FTB learned that on November 4, 1991, Hyatt signed an agreement with Matsushita using his California address and agreeing to apply California law (63 AA 15743, 15750) and Matsushita then began sending him letters at his California address (63 AA 15742). During that same time, he issued a press release. from California. 69 AA 17022. A news article was written thereafter in which Hyatt is described as being from California. 69 AA 17023. From Matsushita, FTB learned that $25 million was wire-transferred to Hyatt at a bank in California on November 15, 1991.[11] 63 AA 15742-47; 66 AA 16392.

- From information obtained from his bank, FTB learned that in December 1991, Hyatt made multiple visits to his safety deposit box located in California. 65 AA 16014. Notably, he did not change the contact address on those boxes until July 21, 1992, and he continued to make bank deposits in California during the seven-month disputed period. 65 AA 16014; 66 AA 16401.

- From the U.S. Postal Service, FTB learned that Hyatt maintained two California-based post office boxes, which were renewed April 16, 1992, and he added Jeng's name on February 2, 1992. 62 AA 15444.

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[11]Hyatt complains that FTB contacted Fujitsu notwithstanding the fact they had a confidentiality agreement which contained an exception for sharing information with government agencies. 64 AA 15753.

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- From credit card and travel documents, FTB learned that in January 1992, Hyatt travelled on business in and out of LAX, (62 AA 15485) right before making a deposit into a California bank. 70 AA 17395. Hyatt also had multiple doctor appointments in California throughout January and February 1992, before being hospitalized in California for an extended period; this information was learned directly from the doctors and the hospital. 62 AA 15443; 65 AA 16010.

- From a review of newspaper articles, FTB learned that once Hyatt was released from the hospital in February 1992, he issued press releases from California. 69 AA 17022.

- From his credit card statements, FTB learned that in March 1992, Hyatt incurred many charges in California after returning to LAX from a vacation in Colorado. 67 AA 16586; 72 AA 17772, 17797.

- From documents obtained from Clark County Business License Department, FTB learned that even though Hyatt claimed to be conducting business in Nevada, he did not apply for a business license until late 1992. 67 AA 16557; 78 AA 19426. During the disputed period, Hyatt offered no evidence of meetings, photocopier use or services, fax or telephone use, etc., and of all the business contacts he gave to FTB for verification, none of them were able to support his claim of Nevada residency. 62 AA 15429-33. From interviews and a review of checks drawn on his California bank account, FTB learned that across that same period, Hyatt was paying for California secretarial services (66 AA 16458), photocopier services, and employing a handyman to make repairs and modifications to his California home for business uses (69 AA 17017; 65 AA 16149). From an interview with the handyman, FTB learned that Hyatt was physically in the California home during those repairs/modifications. Id

- From the Clark County Recorder's office, FTB learned that on April 3, 1992, Hyatt purchased a home in Las Vegas. 62 AA 15426. The auditor noted evidence of "nesting" or moving into that home beginning then, 42 AA 10287 (62-63) (sundry household purchases from Sam's Club); 70 AA 17354, 17355 (2 beds purchased). FTB, therefore, determined that April 3, 1992, was a reasonable change in residency date for Hyatt. 72 AA 17862-95.

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- Notably, the evidence from the 1991/1992 timeframe that would have conclusively shown Hyatt's whereabouts -- his telephone records -- were never produced by Hyatt. 34 AA 8416 (103); 44 AA 10771 (183). He claimed he had destroyed them. Id.

A further review of FTB's comprehensive reports reveals that the three affidavits played a minor role in audit's recommendations.[12] See 66 AA 16388-427, 62 AA 15423-87; 72 AA 17862-95.

On appeal, Hyatt claims that FTB never assessed fraud penalties in residency cases, but he was singled out for adverse treatment. RAB 25:2-6. Hyatt is wrong. In fact, Hyatt's case is remarkably similar to Appeal of Robert F. and Helen R. Adickes, 90-SBE-012, (1990), a case in which fraud penalties in a residency case were upheld by the State Board of Equalization, just a short time before Hyatt's audit began. As to the FTB's fraud analysis, Hyatt materially misrepresents the foundation for its conclusions. Compare RAB 25-26 with 62 AA 15462-87.

FTB opened an audit for the 1992 tax year based upon the determination that Hyatt remained a California resident until April 3, 1992. 48 AA 11922 (181)-1192 (182). The 1992 audit was significantly abbreviated since most of the evidence had been gathered during the 1991 audit.[13] 72 AA 17963-70; 72 AA 17862-95. The only thing lacking was discovery of the amount of income earned by Hyatt in 1992 and when it was earned. 72 AA 17977. FTB requested that information from Hyatt. Id. Like it did for the 1991 audit, FTB sent Hyatt a detailed notice, and invited Hyatt to rebut FTB's tentative findings. 73 AA

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[12]Beth Hyatt, Hyatt's daughter, printed on her affidavit "except that I cannot be sued or have recourse taken for my statement." 68 AA 16912. At trial she testified she placed that language there to prevent someone from suing her for telling the truth and to keep the information confidential. 46 AA 11493 (209).

[13]Hyatt is critical of the fact that FTB used the same evidence gathered during its investigation of tax year 1991, for its audit of tax year 1992. RAB 30-31. Hyatt's criticism is unfounded. At the core of FTB's audit is a seven month disputed period of time that overlaps two calendar years, i.e. September, 1991 to April, 1992. 41 AA 10219 (135)-(137), 10233 (192); 62 AA 15477-78, 87. Under California authority applicable to FTB, since there were virtually no facts that were relevant to one calendar year, but not the other, FTB was well within its rights to use the 1991 audit facts for its 1992 audit. 41 AA 10219 (134).

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18015-31. And once again, after ample opportunity for Hyatt to refute FTB's recommendation, FTB weighed and analyzed all available evidence to finalize its audit recommendations for tax year 1992. 73 AA 18092-97. And once again, an internal report was prepared outlining audit's factual findings and legal authorities supporting audit's recommendations. 72 AA 17862-95. As before, those findings were based on far more than three affidavits from Hyatt's family members. Id. Recall also that FTB collected tens of thousands of documents more from Hyatt and third-parties during the protest, which FTB believed confirmed, and further established, the correctness of its initial audit recommendations. 49 AA 12155 (159)-(160).

E. FTB Policies and Practices, and FTB's Compliance Therewith

Response to Hyatt's misleading presentations about FTB's compliance with its standard policies and practices during Hyatt's audit is made largely in the specific sections relevant to that compliance. A few noteworthy corrections immediately follow.

A common theme runs through Hyatt's statement of facts. He contends that FTB should have asked him first for the information needed to conduct its audit, and only failing receipt of the requested information from him, was FTB permitted to ask third-parties. See, e.g. RAB 37:11-15. Hyatt even contends that during his audits, which were conducted from 1993 to 1995, "the California Information Practices Act stated that the FTB should seek information needed for the audit 'to the greatest extent practicable directly from the individual[,]" and that FTB "violated this policy with impunity, knowing of Hyatt's heightened and extreme sensitivity for privacy and confidentiality." RAB 37:13-19. This is a misrepresentation. At the time FTB audited Hyatt (1993-1995), FTB was permitted to contact and request that third-parties provide any relevant information without first notifying the taxpayer.[14] See Cal. Rev. & Tax Code §§ 19254, 26423 (1993).

Hyatt claims "FTB audited Hyatt upon learning how much money he made." RAB

[14]In determining the appropriateness of FTB's conduct, the court must look to the statutes that were in effect at the time his audit was proceeding. See Runion v. State, 116 Nev. 1041, 1049, 13 P.3d 52 (2000) (court improperly used prior version of statute rather than statute in effect at the time of the offense).

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PO BOX 2670 • RENO, NEVADA 89505-2670
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14:8. To the contrary, FTB initial auditor, Marc Shayer, testified "[Hyatt's] wealth had nothing to do with opening the audit...The audit was opened up because of the way the tax return was prepared." 45 AA 11219 (152). Shayer "was more interested in making sure that [Hyatt] reported his income correctly to California." 45 AA 11225 (177); 45 AA 11231 (200). For the specific reasons described at AOB 5:1-9, FTB opened Hyatt's audit (9 month presumption, sourcing issues, no moving expenses claimed in 1991).

Hyatt claims the third auditor "intentionally avoided formally documenting exculpatory statements from neighbors, who point blank told her that Hyatt moved to Nevada during the very timeframe Hyatt claimed." RAB 18:13-16. In truth, Hyatt learned of all the neighbor interviews and what they told FTB because, pursuant to policy, they all were memorialized in the audit file. 68 AA 16796-800, 16804-05, 16984-85. FTB went to Hyatt's neighborhoods in both California and Nevada, interviewing available neighbors. 68 AA 16796-800; 16804-05; 16984-85. Generally, FTB learned, as Hyatt has described himself, that he was a recluse and he did not interact much with his neighbors, and therefore the information they supplied varied greatly. 62 AA 15438; 68 AA 16796-800, 16804-05, 16984-85. For example: information mentioned at RAB 18:16-18, from the neighbor who suggested Hyatt had moved six months after receiving his patent, did not make sense since he received the patent in 1990 and she had him moving in 1990. 68 AA 16804. Other neighbors, in contrast, were less helpful to Hyatt, some placing him at his California home as late as 1994. 68 AA 16804-05. Because of the varying information from the neighbors, FTB did not place great weight on their information, and instead FTB looked to more objective evidence informing their conclusions. 62 AA 15438 (briefly noting statements from neighbors); 62 AA 15438-46 (examining other criteria such as home ownership, bank accounts, safe deposit boxes, use of professionals, etc.).

Hyatt criticizes FTB for not trying to interview him during the audit. RAB 20:3-5. It is FTB practice that once the taxpayer under audit, retains a representative, they only communicate with the representative. 40 AA 9882 (61)-9883 (62). In Hyatt's circumstance,

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PO BOX 2670 • RENO, NEVADA 89505-2670
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he retained both an attorney and an accountant. 40 AA 9883 (62). If Hyatt's representatives wanted Hyatt to be interviewed, that choice was theirs. 40 AA 9883 (62).

Hyatt suggests FTB "mislead" his representatives. RAB 22-23. However, FTB auditors are trained to collect all information and to present their questions or conclusions through tentative determination letters. 41 AA 10142 (90-91).

Hyatt suggests FTB ignored evidence from "real estate agents, escrow officers, insurance agents, a home inspector, a security provider." RAB 20:7-9. To the contrary, FTB gathered and analyzed information from them concluding it supported a move date in April 1992 when he purchased the Tara house, not in September 1991. 72 AA 17894.

Hyatt next complains about the "Embry memo." RAB 26-28. Leave it to Hyatt to find fault in something favorable to him. FTB taxes its residents under multiple legal theories, and individuals employed by FTB develop expertise in these different theories. 89 AA 22142. Those with an expertise in "sourcing" met and evaluated the preliminary information they had received from Hyatt, concluding that theory did not apply in early June 1995. 89 AA 22138-41. The specific purpose of their meeting was to evaluate sourcing as a theory, not a physical residency theory. Id. They resolved the sourcing issue in Hyatt's favor at that time. Id. Thereafter, FTB gathered a significant amount of physical residency evidence (72 AA 17867-87), weighed and evaluated that evidence (72 AA 17887-95), informed Hyatt of their preliminary conclusions, (73 AA 18078-82) and then gave Hyatt an opportunity to respond and rebut those preliminary conclusions (72 AA 17901-04). When his rebuttal offered additional evidence which was actually supportive of a move date in April 1992, FTB's auditor closed her file and transferred it to Sacramento for review by her supervisors and reviewers. 72 AA 17909, 17969.

Hyatt claims its auditors were trained to use fraud penalties as bargaining chips for settlement. RAB 26:1-12. In truth, FTB forbids its auditors or protest hearing officers from attempting to settle cases. 33 AA 8172 (138). FTB has a Settlement Bureau that handles settlement opportunities. FTB Notice 92-3, 92-8, 97-3, 98-11, 99-7, 2000-06, 2001-03, 2003-2, 2006-2. The process is only invoked when a taxpayer requests it. Id.

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As to Hyatt's CBR discussion and Kurt Sjoberg's testimony (RAB 32-35), at trial Sjoberg made clear that his criticism of FTB only extended to its legislative use of CBR. 33 AA 8172 (138). Moreover, Sjoberg testified that he conducted audits of FTB between 1993 and 1997, the years of Hyatt's proceedings. 33 AA 8060 (69). When auditing FTB, Sjoberg indicated that he reviewed tax assessments and audits conducted by FTB. 33 AA 8060 (69) – 8061 (73). Sjoberg specifically testified that he saw "**no instances**" in which "**auditors artificially inflated assessments, fabricated assessments, made bogus or phony assessments**." 33 AA 8161 (95-96) (emphasis added).

Hyatt also complains about FTB's lead residency reviewer, Carol Ford. RAB 28-29. There was testimony at trial that it was Ms. Ford's style to review an auditor's file in the style of "the Devil's advocate." 48 AA 11889 (47-48). She would then take her observations and review them with her supervisors.[15] 48 AA 11889 (47). She applied that same style to Hyatt's audit. 48 AA 11893 (63) – 11894 (67). After conferring with her supervisor, both agreed to issue Hyatt's Notices of Proposed Assessments. 48 AA 11893 (64-65), 11918 (165). In fact, contrary to Hyatt's suggestion, Ms. Ford (the lead reviewer) believed that the auditors had reached the right conclusions, and it was Ms. Ford that instructed that the 1992 audit should open because they had concluded Hyatt did not sever his California residency until April 1992, when he purchased the house in Las Vegas and evidence demonstrated he began moving in. 41 AA 10146 (106); 48 AA 11922 (181)-11923 (182).

Hyatt contends that the "jury determined that the FTB unsuccessfully sought to extort a settlement from Hyatt" (RAB 9:22-73), and suggests that finding was based upon Hyatt's representatives believing they had been "threatened" by Anna Jovanovich (RAB:40-41). In truth, even Hyatt's lead expert admitted he found no evidence of extortion. 44 AA 10846 (130). As to the conversation between Hyatt's representative (Eugene Cowan) and Ms. Jovanovich, Mr. Cowan testified that he did not construe this conversation, in which he

[15]It is standard FTB policy that reviewers' notes are not released to taxpayers since they are reflective of FTB's deliberative process. 48 AA 11891 (57)-11892 (58); 11921 (174-175).

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asked many questions about FTB's process since this was his first audit, as a threat. 35 AA 8581 (155). Moreover, if Hyatt had invoked FTB's Settlement Program, any settlement reached would have been a matter of public record requiring disclosure of Hyatt's name, total amount in dispute, amount of settlement, explanation why settlement was in best interest of State of California, and an opinion from California Attorney General as to reasonableness of settlement. Cal. Rev. & Tax Code § 19442.

These are but a few of Hyatt's mischaracterizations. The balance of those relevant to this appeal were discussed in the opening brief and discussed in the appropriate legal sections herein.

F. Hyatt's Abuse of the Nevada Protective Order and How That Contributed to the Amount of Time it Took to Finalize the Protest

In response to FTB's presentation concerning the reasons for the length of time needed to resolve Hyatt's protest, Hyatt claims that "what the FTB actually attempted to do, and what the District Court would not allow, was to misrepresent the terms of the protective order to the jury by seeking to present and argue its tortured interpretation of the protective order to the jury." RAB 48:7-9. In truth, Hyatt's own legal expert who testified at trial agreed with FTB's interpretation of the Nevada Protective Order ("NPO"). 36 AA 8899 (97). After the expert agreed with FTB, Hyatt began his re-direct by arguing with his own expert. 36 AA 8899 (96-97). Thereafter, a dispute ensued, and rather than resolve the parties' differing interpretations, the district court refused to resolve the dispute and instead forbade either party from mentioning the NPO again. 36 AA 8899 (96)-8901 (102).

At trial, FTB did not try to "blame the District Court for issuing the protective order in this case," as falsely claimed by Hyatt. RAB 48:3-4. Instead, FTB primarily blamed Hyatt's brazen abuse of the NPO. AOB 23-25. Recall that Hyatt sought and received the NPO which prevented the Protest Hearing Officer ("PHO"), without Hyatt's consent, from obtaining or viewing any documents Hyatt designated as off-limits or confidential in the litigation. 94 AA 23166-77. After the NPO was entered, Hyatt designated nearly every piece of discovery in the litigation as confidential. 50 AA 12315 (146-47). At the same

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time, Hyatt continued to produce certain information in response to the PHO's multiple requests for information – but he produced different information than what FTB uncovered in the Nevada litigation! To comply with the NPO, yet ensure that both sides of FTB (the litigation attorneys and the PHOs) were getting the same information from Hyatt, FTB put in place an internal, one-way system of communication. 76 AA 18880-83. Dunn, FTB's in-house counsel working with FTB's trial counsel, was tasked with reviewing the responses provided by Hyatt in the Protest Proceedings and comparing them to Hyatt's litigation responses. 50 AA 12369 (14-16). If they were deficient, Dunn was merely permitted to say that they were deficient, but not describe how or why they were deficient, without violating the NPO. Id. For example: In June of 2000, Hyatt provided two boxes of documents to the PHO in response to a request made six months earlier. 54 AA 13443-543. Dunn reviewed Hyatt's documents and discovered that they were grossly incomplete, based upon the information that Hyatt had previously disclosed in the Nevada litigation. 50 AA 12380 (58) – 12381 (62). To comply with the NPO, Dunn could only tell the PHO that Hyatt's responses were inadequate, but not how or why. 50 AA 12369 (14-16). This drill happened numerous times and consumed significant time. 50 AA 12307 (116) – 50 AA 12311 (132). However, given the district court's multiple orders, FTB was prohibited from giving the jury examples of how Hyatt failed to disclose to the PHO the same thing FTB learned in the litigation. 27 AA 6509-10 (order granting motion to exclude after acquired evidence).

What resulted were two different versions of Hyatt's residency: One version based upon evidence uncovered in the Nevada litigation and another version based upon selective information revealed by Hyatt to the PHO. But because of the NPO, the FTB litigation attorneys could not share the information they had gathered with the PHO, or even advise her how to request such information through the use of administrative subpoenas to third parties because of the limitation imposed by the NPO. 50 AA 12369 (14-16). FTB suspected Hyatt had two purposes for this brazen strategy: First to trap FTB into violating the NPO, and second to mislead the PHO. FTB finally established a way to get information from the litigation attorneys to the PHO. FTB issued an administrative subpoena to Hyatt

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directly to force his hand. 77 AA 18892-93; 19025-28; 76 AA 18894-97. Via administrative subpoena to Hyatt, FTB requested that Hyatt share all discovery gathered to date from the litigation with the PHO. 76 AA 18894-97. Of course, Hyatt resisted FTB's California administrative subpoena first at the district court level and then on appeal, and it took years for the California courts to sort out FTB's entitlement to sharing the same information that had been accumulated between the litigation attorneys and the PHO. State Franchise Tax Bd. v. Hyatt, C043627, 2003 WL 23100266 (Cal. Ct. App. Dec. 31, 2003) (unpublished opinion). Notably, even after the decision from the California appellate court allowing FTB's litigation attorneys to share Hyatt's information with the PHO, Hyatt resisted twice more FTB's updated administrative subpoenas, further delaying resolution of his protests.[16] 77 AA 19028-47; 50 AA 12398 (130-132). These activities were the primary reason for the delay in resolving Hyatt's protests. There were others, as outlined below.

For example: Hyatt argues that there was a 14-month delay in issuing the notice of proposed assessment ("NPA") for the 1992 tax year. RAB 35. He incorrectly asserts that the audit was "closed" on June 17, 1996. (RAB 47) Rather, on or about June 18, 1996, FTB's auditor, Sheila Cox, recommended closure of the audit for the 1992 tax year.[17] 37 AA

[16]Hyatt claims he "promptly" responded to FTB's second and third administrative subpoenas. RAB 50:12. He promptly responded "no." 77 AA 19028.

[17]At the conclusion of FTB's audit for 1991, just prior to Hyatt receiving his NPA for the 1991 tax year, Hyatt (through his tax attorney Eugene Cowan) asked FTB to delay processing the protest until the ongoing 1992 audit could be consolidated with the 1991 protest. 44 ARA 10785. Combining audit years is a common request where the same audit issues cross over two or more calendar years under audit, especially in residency cases. 46 AA 11313 (145) – 11314 (147). At about this same time, mid-1996, unbeknownst to FTB, Hyatt began consulting with his Riorden & McKenzie litigation attorney Donald Kula. Months later, before the 1992 NPA was issued, Hyatt's tax attorney Eugene Cowan contacted FTB's protest hearing officer and said that Hyatt had changed his mind, he now wanted the 1991 protest worked as soon as possible. 44 ARA 10784. FTB's protest hearing officer carefully memorialized this request and many other conversations with Cowan, taking time to carefully explain the protest process, the time it would require, and her intention to begin work on the file just as soon as workloads would permit. 44 ARA 10776-10785. While this dialogue between Cowan and FTB's protest hearing officer was ongoing, Hyatt received the 1992 NPA and filed a timely protest on October 10, 1997. 54 AA 13404-

Continued . . .

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9164(67-68); 72 AA 17967. After review by her supervisor in Los Angeles, the case was sent to FTB's Central Office in Sacramento on June 21, 1996 for final review. 72 AA 17967. Upon review by audit division supervisors, the case was reassigned to a Sacramento auditor, Jeff McKenney, to determine whether the fraud penalty should be applied to the 1992 tax year. 73 AA 18194. The reassignment was made in August 1996 because Cox (just assigned to FTB special investigations) was no longer available to work on the audit. 41 AA 10154 (140). After reviewing the audit file and conducting further research, Mr. McKenney determined that the fraud penalty was warranted on the 1992 tax year. 73 AA 18199. On November 25, 1996, he submitted that recommendation for supervisorial review. 72 AA 17968. On December 12, 1996, after approval, the case was forwarded to FTB's Technical Review Section for further review. 72 AA 17968. At this point Hyatt had not been notified about the pending fraud penalty. See 72 AA 17901-04. As was FTB practice, the case was returned to audit to inform Hyatt of the findings in support of the penalty. 72 AA 17968. Cox had returned to audit by early 1997. Id. 72 AA 17969. Because Cox was the

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
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07. Then, just 86 days later, on January 6, 1998, Hyatt sued FTB in Nevada. 1 AA 1-16. Hyatt's innovative Nevada lawsuit, among other things, asked the Nevada court to apply California tax law and find that Hyatt was a nonresident of California for income tax purposes. 14 AA 3257-300.

On March 17, 1998, unknown to FTB at the time, Hyatt's strategy in the protest was set forth in a fax communication authored by Hyatt's tax lawyer in California, Eugene Cowan. 31 ARA 7697. Cowan's memo was sent to Hyatt, Mark Hutchison and Thomas Steffen, Hyatt's lead Nevada counsel. Cowan states that Hyatt and his team, as a deliberate strategy, should consider making FTB work harder to obtain information from Hyatt:

> "Attached is a copy of the subpoena duces tecum to be issued to Cal Fed bank by the FTB regarding the taxpayer's 1991 and 1992 Cal Fed bank account information. We have until Friday to file a motion to quash if we so desire. **While there are no "pure" tax reasons to quash the motion, there may be tactical reasons to do so (such as making the FTB work for its requests for [sic] now on or taking this opportunity to file the motion in the Nevada courts or otherwise).**"

Id. (emphasis added). For Hyatt and his attorneys to contend that they did not contribute the length of the protest is astounding, in light of this fax. Bear in mind that during that time, Hyatt had not paid any amount of the proposed tax, interest or penalty. 45 AA 11153 (81). In fact, to date, Hyatt had not paid any such sums.

most logical choice to complete the audit she was reassigned the case on April 4, 1997. 48 AA 11899 (87-88). On April 10, 1997, Cox wrote a letter to Hyatt's representative explaining the determination to impose the fraud penalty on the 1992 tax year and gave him 30 days to respond. 72 AA 17901-04. Hyatt failed to respond within the 30-day period. 72 AA 17909; 73 AA 18099-18101. On May 12, 1997, Cox sent a follow up letter to Hyatt's representative explaining that the case was closed and was being sent to Sacramento for issuance of the 1992 Notice of Proposed Assessment. 72 AA 17909. In that letter, Cox explained that if Hyatt disagreed with the NPA, he must now send a written response to FTB's Central Office in Sacramento. 72 AA 17909. Cox forwarded the audit file to her supervisor for review on May 12, 1997. 72 AA 17969. Once approved by her supervisor, the case was sent to Sacramento for final review. 72 AA 17969. In a letter dated July 17, 1997, (approximately three months after FTB's April 10, 1997 letter offering Hyatt a chance to rebut) Hyatt's representative disputed the imposition of the fraud penalty. 73 AA 18099-18101. By this time the case was in Sacramento proceeding through its final review. 72 AA 17969. The Sacramento reviewer determined that the fraud penalty issue should be resolved at protest. 43 AA 10686 (164). The finalization of the audit for the 1992 tax year was approved by management on August 12, 1997. 72 AA 17969. After the clerical process of finalizing the assessment was complete, FTB issued the NPA for the 1992 tax year on August 12, 1997. 50 AA 12367 (8-9).

Next, Hyatt argues that FTB "intentionally placed a hold" on his protest for both tax years that lasted six and seven years for the 1992 and 1991 tax years, respectively. RAB 45-46. The "hold" that Hyatt refers to is, in fact, a short deferral in processing the protest, directed by FTB management and was caused by Hyatt's actions. 50 AA 12323 (180-181). Hyatt implies that the hold lasted for six and seven years and implies that FTB made a determination to not work on the protest for those periods. That argument is directly contradicted by FTB's records which clearly show that FTB employees spent vast amounts of time on Hyatt's protest throughout the time period. 76 AA 18920-19011. Thus, Hyatt's claimed "hold" for six and seven years is false.

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Hyatt argues that he was informed at his protest hearing, held on September 27, 2000 and October 4, 2000 that a protest determination would be made within six months. RAB 45-46. Hyatt refers to an entry in FTB's computerized event log made by George McLaughlin dated April 3, 2000. 76 AA 18939. Mr. McLaughlin's comment that he expected the protest to be closed by March 31, 2001, (76 AA 18939) was based on the premise that FTB would have obtained sufficient information to make a determination by that date. At the time he made this comment, McLaughlin did not foresee the impending significant deferral period caused by Hyatt's use of the NPO to keep information from the protest hearing officer (information actually requested by FTB auditors years earlier), the decisions of the Nevada court to stay that order, Hyatt's direct refusal to produce information, and Hyatt's resistance to and litigation of FTB subpoenas. 49 AA 12236 (116)-(117).

Hyatt also refers to a computerized event log entry from FTB's protest hearing officer, Cody Cinnamon, to her supervisor, George McLaughlin, dated February 20, 2002 (76 AA 18980), which indicates Hyatt's representative called Ms. Cinnamon and inquired as to the status of the case. 76 AA 18980. Ms. Cinnamon replied that she was instructed not to work on the case due to pending Nevada litigation. 76 AA 18980. What Hyatt does not mention here is that by this date he had placed a significant amount of highly relevant information under the NPO, thus preventing its consideration by FTB's protest hearing officer. 76 AA 18966, 18969. This information related to the issues of residency, income timing, business situs and fraud, among other things. 76 AA 18966, 18969. This court had subsequently issued an order (3 AA 00655-56) staying the litigation. Following advice of its attorney in the Nevada litigation, FTB complied with the stay and awaited this court's decision before acting to acquire the information for the PHO. 76 AA 18982. When the stay was lifted (April 2002), FTB immediately invoked the provision contained in the NPO and requested that Hyatt produce the information voluntarily. 77 AA 19025-28. He refused. 49 AA 12073 (110-111).

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Finally, for the 1992 tax year, Hyatt implies that FTB chose to ignore an allegedly blatant $24,000,000 income error made in calculating the tax on the 1992 NPA. RAB 30-31. Hyatt's argument appears to be that his alleged error is indisputable. Not only is Hyatt incorrect, the genesis of this issue is illustrative of Hyatt's consistent failure to cooperate during the entire audit and protest process. In calculating the amount of tax owed by Hyatt for 1992, FTB's auditor, reviewing supervisor and Sacramento reviewers, relied on documentation that shows Hyatt receiving a large amount of income in January 1992. 72 AA 17862-95. Long after the 1992 NPA amounts were proposed and sent to Hyatt by FTB auditors, FTB received correspondence from Hyatt objecting to the calculation, contending that the large number was made up of smaller amounts of income received periodically during the 1992 tax year. 64 AA 13405-06. In support, Hyatt provided some documentation that shows various 1992 deposits into his personal accounts. Id. However, because the documentation was factually and legally insufficient to prove earned income, it was rejected, and Hyatt failed to follow up with any actual proof of the receipt and timing of his 1992 income. 85 RA 021126-28. In other words, the alleged $24,000,000 "error" Hyatt claims was bad faith continues to be part of the tax dispute in this matter.

As before, FTB remains perplexed how these issues arriving from discovery in this case and orders from this court were to be resolved by the jury without guidance or direction from the district court, who refused to give any.

III. LEGAL ARGUMENT

A. Standard Of Review

Hyatt argues that this is a "substantial evidence" appeal. RAB 51-53. Hyatt is wrong. Except as to certain discreet elements of certain causes of action, FTB is not making sufficiency-of-evidence contentions. Rather, FTB's opening brief consistently argues that Hyatt's various claims failed as a matter of law, even accepting Hyatt's evidence as true.

Hyatt also argues that FTB's statement of facts is deficient and therefore FTB waived any challenge to the sufficiency of the evidence. RAB 53-54. Citing only one case from another jurisdiction, Hyatt argues that an appellant who does not "fairly summarize" all of

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE: 775-788-2000 • FAX: 775-788-2020

the facts in an appeal waives any challenge to the sufficiency of the evidence. RAB 53. This court has never adopted such a doctrine. Moreover, the case on which Hyatt relies, Foreman & Clark Corp. v. Fallon, 479 P.2d 362 (Cal. 1971), held that an appellant cannot merely recite its own evidence, ignoring contrary evidence in the record. Id. at 366. In the present case, FTB's opening brief did not merely rely on its own evidence, ignoring Hyatt's evidence. FTB frequently cited to Hyatt's witnesses and exhibits, even citing to testimony by Hyatt himself and his experts.[18]

B. Nevada's Recent Jurisprudence Examining Discretionary Function Immunity Applies To FTB And This Case

FTB's opening brief explained that, as a matter of comity, Nevada's new test for discretionary function immunity, the Berkovitz-Gaubert test, applied to FTB's actions at issue in this case (AOB 34-55) because (1) the actions at issue are discretionary; and (2) the actions were based upon considerations of social, economic, and political policy. Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720 (2007). FTB also asserted that under this new test, allegations of bad faith and/or intentional misconduct no longer preclude the application of immunity to disputed governmental conduct. AOB 52-55. Finally, FTB asserted that even if bad faith or intentional misconduct exceptions to Berkovitz-Gaubert would be recognized by this court, at trial, Hyatt only presented acts of negligence from which no inference of bad faith or intentional misconduct is permitted, and the jury did not find bad faith. AOB 55-57.

Hyatt's answering brief does not dispute that Nevada's new test for discretionary function immunity applies to FTB's sovereign immunity statute as a matter of comity.[19]

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[18]The trial in this case lasted four months, with dozens of witnesses and thousands of pages of exhibits. No appellate rule or case required FTB to summarize the testimony of every witness or to describe every exhibit. See NRAP 28(j) (briefs must be free of irrelevant and immaterial matters).

[19]Hyatt's brief does not contest that the "law of the case" requires the application of comity to FTB's sovereign immunity statute to the extent the immunity contained in that provision aligns with Nevada's new test for discretionary function immunity. Instead, Hyatt claims that the "'law of the case' is entirely consistent with the current state of the law" in Nevada. RAB 54.

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PO BOX 2670 • RENO, NEVADA 89505-2670
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Instead, Hyatt argues that the application of this new test makes no difference to the scope of the immunities that must be extended to FTB pursuant to this court's 2002 decision. See RAB 54-69. According to Hyatt, this court's recent jurisprudence "reaffirmed, not changed or contradicted" this court's previous determination that FTB did not have immunity from "discretionary acts taken in bad faith, or for intentional torts." RAB 54-55. Hyatt is wrong.

1. Standard of Review Regarding Discretionary Function Immunity

Hyatt contends that FTB is wrong by asserting that the immunity issues in this appeal should be reviewed *de novo* and instead claims they present mixed questions of law and fact. RAB 52. Yet Hyatt identifies no question of fact requiring resolution regarding FTB's claimed immunity.

In Ransdell v. Clark County, 124 Nev.____, 192 P.3d 756 (2008) and Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720 (2007), this court did indicate issues of sovereign immunity can involve mixed questions of law and fact. Nevertheless, this court applied *de novo* review to questions involving Nevada's immunity law, including questions regarding the scope of immunity statutes and whether exceptions were available. Ransdell, 192 P.3d at 761; Martinez, 123 Nev. at 438. In each case this court applied *de novo* review on the question of whether the government agency's conduct satisfied the two-prong Berkovitz-Gaubert test. Ransdell, 192 P.3d at 762-64 (court decided whether County's actions involved "an element of judgment or choice," and whether the actions were based on considerations of social, economic and political policy); Martinez, 123 Nev. at 447-48 (court determined Berkovitz-Gaubert immunity issue as matter of law).

Here, FTB is not asking this court to overturn factual determinations made by the jury or to evaluate the sufficiency of evidence regarding immunity. In fact, the jury made no such findings and the district judge refused to evaluate this issue. Rather, FTB is arguing that immunity under the Berkovitz-Gaubert test applies as a matter of law, even accepting Hyatt's evidence as true. Therefore, *de novo* review should apply.

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PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

2. The *Berkovitz-Gaubert* Test Adopted in *Martinez* Does Not Apply Solely To Negligence Claims As Argued by Hyatt

Hyatt's first argument contends that the Berkovitz-Gaubert test does not apply to intentional torts, but only applies to negligence claims. RAB 55-56; 60. Hyatt cites to the court's decision in Martinez v. Maruszczak to support this contention. See id. Hyatt's argument is entirely rebutted by subsequent Nevada case law, relying upon Martinez, which applied the Berkovitz-Gaubert test to intentional tort claims.

In Ransdell v. Clark County, this court applied the Berkovitz-Gaubert test to actions taken by government agents that the plaintiff alleged constituted intentional tort claims. 192 P.3d at 756. Clark County inspectors abated Ransdell's property, seizing various items from the property which the inspectors determined were a nuisance. Id. In response to Clark County's abatement activities, Ransdell filed a civil complaint alleging several causes of action, including intentional tort claims, such as: (1) trespass to land; (2) trespass to chattels; and (3) conversion. Id. at 760. In resolving the appeal, this court applied the Berkovitz-Gaubert test to the conduct of the Clark County inspectors. Id. at 761-762. This court did not distinguish between Ransdell's intentional tort or negligence based claims. Id. at 762-764. Rather, the court applied the test to all of the complained of government conduct, irrespective of causes of action pled, to determine if the acts were protected by discretionary function immunity. Id. Ultimately, the court determined that Clark County was entitled to complete discretionary function immunity – **for all claims, including the intentional tort causes of action**. Id. at 764.

In City of Boulder City v. Boulder Excavation, the court applied Berkovitz-Gaubert to the City's conduct, despite the fact that all of the plaintiff's claims were based upon "alleged intentional, arbitrary, and capricious conduct." 124 Nev. ___, 191 P.3d 1175, 1180 (2008). Specifically, the plaintiff pled the claim of "intentional interference with contractual relationship" against the government agency. Id. At trial, the district court found the plaintiff's favor on the intentional tort claim. Id. at 1178. This court, however, applied the Berkovitz-Gaubert test to the actions taken by the City and concluded that it was entitled to discretionary function immunity because the acts at issue were discretionary and

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based upon policy determinations. Id. at 1181-82. Here again, the labels (intentional tort vs. negligence) placed on the City's conduct by the plaintiff were not determinative of whether the new test applied. See also, Reynolds v. United States, 549 F.3d 1108, 1112 (7th Cir. 2008) (label of "bad faith" has no bearing on the analysis required pursuant to Berkovitz-Gaubert test).

Pursuant to the Berkovitz-Gaubert test, government actions are entitled to discretionary function immunity when the requisite two elements are satisfied. Ransdell, 192 P.3d at 762. The reviewing court does not consider the names or labels placed on the government's conduct by the parties. See Ransdell, 192 P.3d at 764. The court reviews each action taken by the government, objectively, to determine whether or not the conduct is entitled to immunity. See Terbush v. United States, 516 F.3d 1125, 1129 (9th Cir. 2008). In other words, it is the nature of the conduct that is at issue, not the names of the claims or the characterizations drawn by the plaintiff in describing the conduct. Reynolds, 549 F.3d at 1112.

This rule makes sense from a public policy perspective. If the names or "labels" placed on the government's actions by plaintiffs were determinative of whether the conduct would be entitled to immunity, plaintiffs would always be able to sidestep the application of discretionary function immunity by merely pleading their claims as intentional torts. This would entirely defeat the purpose of discretionary function immunity and likely eviscerate any instance in which immunity would be applicable. If the creativity of a plaintiff's counsel in pleading intentional torts were all that is sufficient to sidestep these basic principles, "immunity doctrines cannot function." Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1136 (10th Cir. 1999). Under Hyatt's view, immunity would never apply if an intentional tort were pled in a complaint. In fact, this is exactly what happened in this litigation. By merely pleading intentional torts, Hyatt was able to avoid dismissal of this case at the early stages of this litigation – in spite of the fact that when the conduct Hyatt complains of is examined, it is apparent that all conduct entailed discretionary acts taken by FTB. See pages 39-43, below. This litigation has proceeded for over twelve years. See 1 AA

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1-16. During this time period, the parties have expended millions of dollars litigating this case, hundreds of depositions were taken, thousands of documents were exchanged, mountains of motions were filed, multiple writs have been filed, and extremely excessive damages were awarded against FTB. See AOB 26, n. 22. In addition, countless hours of employee time were spent addressing the issues presented in this litigation. In other words, all of the dangers the Berkovitz-Gaubert test protects against have come to pass.

3. There Is Not A Bad Faith Or Intentional Torts Exception To Discretionary Function Immunity As Argued by Hyatt

FTB's opening brief explained in detail that mere allegations of government bad faith are insufficient to avoid application of the Berkovitz-Gaubert test. AOB 52-55. In order to avoid dismissal of his claims on this basis, Hyatt argues that the court's adoption of the Berkovitz-Gaubert test did not alter or change the fact that bad faith conduct is not entitled to discretionary function immunity. RAB 55-58. Hyatt is, once again, mistaken.

a. *Falline* And Its Progeny Were Overruled With The Adoption Of The *Berkovitz-Gaubert* Test in *Martinez*

Hyatt's primary basis for claiming that a bad faith exception survived the adoption of the new test is his reliance upon Falline v. GNLV Corp., 107 Nev. 1004, 823 P.2d 888 (1991), the case that adopted the so-called "bad faith exception" in Nevada.[20] RAB 56-57. Hyatt claims that Falline was neither distinguished nor overruled by Martinez. Id.

As a starting point, contrary to Hyatt's arguments, the adoption of the Berkowitz-Gaubert test entirely changed the existing law in Nevada related to discretionary function immunity. In Martinez, this court expressly overruled and abandoned **all** of the previous tests applied under Nevada law for the application of discretionary function immunity pursuant to NRS 41.032(2), because those tests lead to inconsistent results. 168 P.3d at 727-29. As a result, each and every case that relied upon, or applied, these old tests are no longer good law. Id. at 726 n. 28.

[20]Falline created a distinction between an abuse of discretion which is entitled to immunity (NRS 41.032) and bad faith conduct – a distinction that was unsupported by any legal authority and was discussed largely in a footnote. 107 Nev. at 1009 n.3.

McDONALD·CARANO·WILSON LLP
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PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775 788-2000 • FAX 775 788-2020

Although Martinez did not specifically reference Falline, the court did expressly overrule the "operational-versus-planning test" that was relied upon and referenced in Falline in adopting the bad faith exception. See Martinez, 168 P.3d at 727. On this basis alone, it appears that Falline, as it relates to the so-called bad faith exception, has now been overruled. Even if Falline was not expressly overruled by Martinez, its holding that "discretionary acts taken in bad faith" are outside the scope of Nevada's discretionary function immunity is called into serious question and, at a minimum, implicitly overruled. The new Nevada jurisprudence in this area has made it abundantly clear that courts are **not** to consider the "**subjective intent**" of the particular government actor – a point entirely ignored by Hyatt's brief. Martinez, 168 P.3d at 728; Butler ex rel. Biller v. Bayer, 123 Nev. 450, 168 P.3d 1055, 1066 (2007). The only question is whether **objectively** the conduct at issue is susceptible to a policy analysis and thus satisfies the two elements of the new test. Id.; Franklin, 180 F.3d at 1135; Rogers v. United States, 187 F.Supp.2d 626, 631 (N.D. Miss. 2001).

A review of Falline reveals that the analysis of whether an act was conducted in bad faith depends entirely upon the subjective intent of the individual government agent. Falline defines bad faith as "the absence of a reasonable basis for denying benefits . . . and the defendant's **knowledge** or **reckless disregard** of the lack of a reasonable basis for denying the claim." Falline, 107 Nev. at 1009 (emphasis added). The opinion further explains that bad faith is "an implemented **attitude** that completely transcends the circumference of authority . . .". Id. at 1009 n.3 (emphasis added). As an illustration, the Falline court provides an example of bad faith as occurring when "an administrator decides to delay or deny a claimant's benefits because of a **personal dislike** for the claimant." Id. (emphasis added).

It is apparent that pursuant to Falline and its progeny, bad faith is determined entirely by looking to the subjective intent or attitudes of the government agent, which is now expressly prohibited. Martinez, 168 P.3d at 728; Butler, 168 P.3d at 1067. Therefore, contrary to Hyatt's assertions, Falline's bad faith exception to discretionary function

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

immunity did not survive the adoption of the Berkovitz-Gaubert test.

b. Post-*Martinez* Cases Do Not Change This Result

Hyatt argues that subsequent Nevada cases cite to Falline, thus showing the bad faith exception to discretionary function immunity survived the adoption of the Berkovitz-Gaubert test. RAB 57-60. However, none of these decisions were required to pass on the issue of whether the bad faith exception survived the adoption of the new discretionary function immunity test. Moreover, the references to the bad faith exception in these cases are found in dicta.

Hyatt claims that this court's decision in City of Boulder City v. Boulder Excavation, Inc. supports the conclusion that bad faith remains an exception to discretionary function immunity. RAB 56-57. This opinion did cite to Falline and referenced the bad faith exception. Boulder City, 191 P.3d at 1182. But the reference to Falline was made in passing in dicta and is not the holding of the case. See id. "A statement in a case is dictum when it is unnecessary to a determination of the questions involved." Argentina Consol. Min. Co. v. Jolly Urga Wirth Woodbury & Standish, 125 Nev. ___, 216 P.3d 779, 785 (2009) (internal citations and quotations omitted). Dicta is not controlling authority. Id. More importantly, however, in Boulder City, this court was not asked to consider the question of whether the bad faith exception survived the adoption of Berkovitz-Gaubert. Boulder City, 191 P.3d at 1182. Rather, the parties and the court merely assumed that Falline was still good law, without actually analyzing the impact of the adoption of Berkovitz-Gaubert test. See id.

Hyatt's citation to ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 173 P.3d 734 (2007) also does not support his conclusion. In ASAP, this court was required to determine whether a government agency was entitled to immunity pursuant to NRS 414.110, a specific statute that relates expressly to governmental immunities in the context of emergency response activities. Id. at 742-43. This statute expressly exempts willful misconduct, gross negligence, and other acts from immunity. Id. In ASAP, the district court never analyzed or considered the application of discretionary function immunity to the city's conduct. Rather, the court remanded this issue to the district court – without any further discussion. Id. at

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
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745-46. Although the court noted that the city could be vicariously liable for the "willful misconduct of its employees," the court did not consider whether the bad faith exception survived the adoption of the Berkovitz-Gaubert test. Id. Therefore, ASAP, like Boulder City, does not support Hyatt's conclusion that the bad faith exception survived the adoption of the new test since these courts were never asked to consider, nor did they consider, this issue.[21]

c. Hyatt's Reliance On Out-of-State Authorities Is Misplaced Since None Utilize the *Berkovitz-Gaubert* Test

In an effort to convince the court that bad faith remains an exception to discretionary function immunity, Hyatt cites to cases from other jurisdictions. See RAB 60-61. These cases, however, apply to specific state laws of certain individual states – none of which apply the Berkovitz-Gaubert test to their state's version of discretionary function immunity. In fact, none of these decisions reference, or analyze the Berkovitz-Gaubert test. See Matter of Sheffield, 465 So. 2d 350 (Ala. 1984) (no reference to the Berkovitz-Gaubert test); McCray v. City of Dothan, 169 F.Supp. 2d 1260 (M.D. Ala. 2001) (same); Hawkins v. Holloway, 316 F.3d 777 (8th Cir. 2003) (same – applying Missouri law); Catalina v. Crawford, 483 N.E.2d 486 (Ohio Ct. App. 1984) (applying Ohio law before adoption of Berkovitz-Gaubert test by federal courts); Tobias v. Phelps, 375 N.W.2d 365 (Mich. Ct. App. 1985) (same – applying Michigan law).[22]

In addition, Hyatt's brief fails to mention that several of these cases were decided **before** the United States Supreme Court even adopted the Berkovitz-Gaubert test in 1988

[21]Hyatt's citation and reliance upon Jordon v. State ex. rel. DMV & Pub. Safety, 121 Nev. 44, 110 P.3d 30 (2005) [RAB 59] has no bearing on this case or this issue. Jordon was decided over two years before this court decided Martinez and therein adopted the Berkovitz-Gaubert test; Jordon applied the prior tests for discretionary function immunity which have since been abandoned. Similarly, Hyatt's reliance on Davis v. City of Las Vegas, 478 F.3d 1048 (9th Cir. 2007) [RAB 56-57] is unavailing. Davis, like Jordon, was decided before Martinez and before this court adopted the Berkovitz-Gaubert Test.

[22]Hyatt also cites to The Libertatia Assoc., Inc. v. U.S., 46 Fed. Cl. 702 (2000). RAB 60. This case has absolutely nothing to do with the application of discretionary function immunity or governmental torts assessed under the Federal Torts Claim Act. Rather, the case involves a contract action between the United States government and a private company and whether the government terminated the contract in "bad faith." Id.

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
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and 1991. See Tobias, 375 N.W.2d at 365; Catalina, 483 N.E.2d at 486. Thus, the fact that these jurisdictions recognize, or more accurately recognized, a bad faith exception to discretionary function immunity prior to the adoption of Berkovitz-Gaubert has absolutely no bearing on whether such an exception applies in jurisdictions, like Nevada, that have since adopted the Berkovitz-Gaubert test.

Hyatt also fails to cite any case applying the Berkovitz-Gaubert test recognizing a bad faith exception. FTB has conducted an extensive search and has been unable to locate any such case. Thus, the case law from other jurisdictions does not support Hyatt's argument that bad faith remains an exception to discretionary function immunity under the Berkovitz-Gaubert test.

FTB's opening brief cited cases applying the Berkovitz-Gaubert test expressly rejecting a bad faith exception in Federal Tort Claims Act suits.[23] AOB 52-55. Hyatt's brief attempts to distinguish these cases by incorrectly stating that "the plaintiff[s] [in these cases were] suing for recovery of damages stemming from a discretionary decision of the government, typically a regulatory action." RAB 67. Hyatt's characterization of these cases is completely inaccurate. All of these cases, like the case at bar, were lawsuits alleging intentional or bad faith torts against the government seeking money damages. See Franklin, 180 F.3d at 1124; Rogers, 187 F.Supp.2d at 626; Matter of TPI Int'l Airways, Inc., 141 B.R. 512 (Bankr. S.D. Ga. 1992); Bolen v. Dengel, CIV.A. 00-783, 2004 WL 2984330 (E.D. La. Dec. 16, 2004). None of these cases were based upon administrative challenges to governmental decision making. Id.

For example, in Franklin, the plaintiffs brought civil tort claims based upon the government's alleged improper acts as the conservator of a business. 180 F.3d at 1127. Like Hyatt, the plaintiffs claimed that the acts constituted bad faith or intentional misconduct and were therefore not immune. Id. In Rogers., a case highly analogous to this case, the

[23]Federal jurisprudence is useful in analyzing Nevada immunity claims. Butler, 123 Nev. at 466 n.50.

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
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plaintiffs filed tort claims against the government for damages they allegedly sustained from improper government "field audits" that plaintiffs alleged were "targeted" in order to "make an example" out of them and to "allay political pressure." 187 F. Supp. 2d at 629. Likewise, in TPI International, the plaintiffs in a bankruptcy adversary proceeding alleged a tort claim of "intentional misrepresentation" or "fraud" as well as other intentional tort claims against a government agency. 141 B.R. at 514-15. All plaintiffs, like Hyatt, attempted to avoid the application of discretionary function immunity by alleging the government engaged in bad faith or intentional misconduct. Franklin, 180 F.3d at 1125; Rogers, 187 F. Supp. 2d at 629; TPI, 141 B.R. at 514-15. Yet, all of courts properly rejected the plaintiffs' attempts to avoid application of immunity based upon allegations of bad faith or intentional misconduct. Franklin, 180 F.3d at 1140; Rogers, 187 F. Supp. 2d at 631-33; TPI, 141 B.R. at 519-20. The courts held that the subjective intent of the government agent was irrelevant, and reviewed the conduct of the government entities only through the prism of the Berkovitz-Gaubert test to determine whether, objectively, the government was entitled to immunity. Franklin, 180 F.3d at 1140; Rogers, 187 F.Supp.2d at 630-31; TPI, 141 B.R. at 519-20.

d. Government Conduct Remains Subject to Scrutiny

FTB is not contending that the lack of a bad faith exception means that government agents can engage in any type of egregious conduct and still be entitled to immunity. That is not FTB's position, nor does it conform to the application of Berkovitz-Gaubert. For example, if a government agent engaged in torture (i.e. thumb screws) to obtain information from a citizen, this would not fall within the confines of the discretionary function immunity. This is so because such activities would violate clear legal mandates – such as constitutional protections – that expressly prohibit such actions. See Franklin Sav. Corp. v. United States, 180 F.3d 1124 (10th Cir. 1999) (discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action for the agent to follow); Limone v. U.S., 497 F.Supp.2d 143, 203-4 (D. Mass. 2007) (no discretion to violate constitutional provisions).

It is important to underscore that Hyatt offered no evidence that FTB violated clear,

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PO BOX 2670 • RENO, NEVADA 89505-2670
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legal mandates or policies, and there were NO allegations in this case that FTB suborned perjury, used any type of physical violence to coerce testimony, fabricated evidence, engaged in torture or any other type of egregious conduct that would be clearly unlawful and unconstitutional. At worst, Hyatt claims FTB conducted an investigation which it was lawfully authorized to do but did so incorrectly – i.e., it gathered the wrong evidence, it analyzed the evidence wrong, it was "biased" in favor of FTB in its determinations, it improperly utilized cost-benefit ratios to determine its budgets, it published a "Litigation Roster," FTB spoke to Hyatt's relatives that did not like him, it went "after wealthy taxpayers," etc. See, e.g., RAB 18-35, 41-42, 54-69. As previously explained, these types of "bad faith" allegations are exactly the types of claims that cannot be reviewed under the discretionary function immunity test. Reviewing these claims necessarily requires this court to decide whether FTB, the government agency with the expertise in tax audit investigations, did its job "correctly" by the standards decided by the Nevada district court, or, in this case, the lay Nevada jury with no expertise in California tax law, audit procedures, or the like. This is exactly the type of judicial second-guessing into the subjective intent of government agents that the Berkovitz-Gaubert test is intended to prohibit. See Franklin Sav. Corp. v. United States, 180 F.3d 1124 (10th Cir. 1999).

4. There Was No Bad Faith Finding In This Case And It Is Impermissible to Infer Such a Finding

Hyatt's unfounded claim that the jury made a finding of "bad faith" permeates every aspect of his answering brief. See, e.g., RAB 4 ("The jury determined that the FTB abused its enormous power in bad faith...."); RAB 14 ("The jury heard and accepted substantial evidence of...bad faith conduct by the FTB"). Yet, as mentioned above, the jury made no finding of bad faith. Bad faith was neither a claim, nor an element of any claim, presented to the jury. Any such claim by Hyatt is wholly without merit. See pages 5-8.

The following claims were presented to the jury: (1) intrusion upon seclusion; (2) publicity of private facts; (3) false light; (4) abuse of process; (5) intentional infliction of emotional distress; (6) fraud; and (7) breach of confidential relationships. 14 AA 3257-3300. The jury instructions reveal that none of these claims contained an essential element

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
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of bad faith. See 53 AA 13218-50; 54 AA 13251-87. The jury verdict form did not seek or request the jury to make any factual findings regarding bad faith. See 54 AA 13308-09. The verdict form merely asked the jury to determine whether Hyatt or FTB prevailed on each claim in a conclusory fashion. Id. "Bad faith" was not pleaded separately as an independent cause of action. 14 AA 3257-3300. Hyatt's counsel admitted that they had not pled as a separate claim bad faith. 50 AA 12500 (70). Hyatt's counsel also admitted that "bad faith" was "not an element of any of the cases of action." See 51 AA 12509 (108). Contrary to Hyatt's claims, there was no specific "finding" of bad faith made in this case, nor is there any inference that can be drawn from the jury's verdict and, therefore, even if bad faith remains an exception to discretionary function immunity, no such finding was made in this case.

5. Based Upon The Application Of Discretionary Function Immunity, Each Of Hyatt's Claims, As Tried To The Jury, Must Be Dismissed

Finally, Hyatt argues that, even if the two-part Berkovitz-Gaubert test were applied to FTB's conduct, it is not entitled to discretionary function immunity. See RAB 61-64. Hyatt's arguments on these points are flawed.

a. Part One of *Berkovitz-Gaubert*: All Of FTB's Alleged Improper Conduct Was Discretionary

The opening brief explained that all of FTB's actions were discretionary acts entitled to immunity. AOB 40-49. In fact, this point was made through Hyatt's own examinations at trial. See AOB 40-41. Hyatt now, however, contends that FTB's investigative conduct was not discretionary, "it ha[d] no discretion to conduct the investigation in an unfair and partial manner or to unlawfully disclose confidential information given to it during the investigation." RAB 61-62.

An act is discretionary if it involves "an element of judgment or choice." Martinez, 168 P.3d at 728; Butler, 168 P.3d at 1066. On the other hand, as Hyatt points out, an act is not discretionary if it involves the mandatory compliance with a specific statute, regulation, or policy. Berkovitz by Berkovitz v. United States, 486 U.S. 531, 536 (1988). Hyatt contends that none of FTB's conduct was discretionary because FTB was required to: (1)

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE: 775-788-2000 • FAX 775-788-2020

treat him fairly and impartially; and (2) maintain the confidentiality of his personal information. RAB 61-62.

In order for an act or decision to be non-discretionary pursuant to the Berkovitz-Gaubert test, the statute or policy must direct a mandatory and specific course of conduct for the government actor. Terbush v. United States, 516 F.3d 1125, 1129 (9th Cir. 2008). The cases cited by Hyatt's brief clarify this requirement. For example, in Bolt v. United States, the Ninth Circuit determined that removal of snow and ice from a parking lot was not discretionary because a written policy mandated specific times when snow and ice were to be removed. 509 F.3d 1028, 1032 (9th Cir. 2007).

Hyatt cites no statute, regulation or FTB policy that imposed a specific course of conduct on how FTB was to be fair and impartial. RAB 61. Rather, Hyatt merely cites to other pages of his own brief. See RAB 61 n. 241 (referring reader to various other sections of the brief). When these other sections are reviewed, however, Hyatt still has not identified any specific statute, policy, regulation or directive that FTB allegedly failed to follow or that mandated a specific course of conduct for FTB.

If the statute, regulation or policy does not mandate a specific course of conduct, the agency retains discretion to make its own decisions on how to fulfill the agency's policy. See Ransdell, 192 P.3d at 762-63 (Nevada statutes did not specify how Clark County inspectors reached conclusion that area constituted a "dangerous condition"). In order for a governmental policy to be deemed non-discretionary, the policy must be a specific and mandatory directive. Id. Here, the aspirational goal to treat taxpayers fairly and impartially was not such a specific and mandatory directive. See Kelly v. United States, 241 F.3d 755, 760 (9th Cir. 2001). Rather, it was nothing more than a "gratuitous and unsolicited statement[s] of policy or of intention," which was neither an enforceable promise nor a specific and mandatory directive of policy to FTB's employees. See Bogley's Estate v. United States, 514 F.2d 1027, 1032-33 (Ct. Cl. Apr. 16, 1975); cf. Minehan v. United States, 75 Fed. Cl. 249, 260-262 (2007) (no actionable promise where IRS's mission to "provide America's taxpayers top quality service by helping them understand and meet their

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
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tax responsibilities and by applying the tax law with integrity and fairness to all;" deemed policy aspirational only).

Here, any internal goal to treat taxpayers fairly and impartially was no different from the similar goal in the IRS's mission statement in Minehan. This broad goal did not specify any particular course of conduct for FTB's employees. A general regulation or policy does not remove discretion from governmental agencies "unless it specifically prescribes a course of conduct." Kelly, 241 F.3d at 761. For example, in Blackburn v. United States, the Ninth Circuit rejected assertions that general policy goals regarding warning signs removed discretion from government employees, because this general policy did not specify **how** the government agency was supposed to meet these goals or how or when to warn the public. 100 F.3d 1426, 1431 (9th Cir. 1996). See also, Tippett v. United States, 108 F.3d 1194 (10th Cir. 1997) (park safety policy that protecting human life takes precedence over all other considerations in national park did not remove discretion to determine how to implement this policy.)

Here, there was no specific policy or regulation that dictated the way FTB employees must conduct audits in order to satisfy the aspirational goal of fairness and impartiality. There was no specific requirement directing how FTB should gather evidence, when FTB could send third-party demands, what evidence FTB could consider, or how FTB should analyze the evidence. See AOB 38-40. A goal to be fair and impartial cannot be deemed a mandatory directive because it would be impossible to determine whether the goal was fulfilled. Fairness and impartiality, like beauty, differ dependent upon the eye of the beholder, and are therefore, entirely subjective concepts. Under Berkovitz-Gaubert, there must be some objective means to determine whether the directive was fulfilled. See Bolt, 509 F.3d at 1032. Whether a government employee acted fairly or impartially is simply too subjective to be amendable to specific quantifications. See Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588 (1992) (vague promises that a phone system would be good for a particular business deemed only "commentary sales talk" and mere "puffery," not an enforceable promise that could be quantified).

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE: 775-788-2000 • FAX 775-788-2020

Hyatt next argues that FTB did not have discretion to disclose his identity information, based upon California and federal laws. RAB 61-62. Hyatt then cites to pages 35-36 of his own brief, but again he does not identify what statute, policy, or regulation prohibited these actions. There is, in fact, no statute, regulation, or policy that prohibited FTB from sending necessary disclosures of Hyatt's identity information when making third-party requests for information. Specifically, the California Information Practices Act ("IPA") did not prohibit FTB from disclosing Hyatt's identity information in order to ensure that the information it received from third parties was specific to Hyatt.

> No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains **unless the information is disclosed, as follows**:
>
> (p) 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**.

Cal. Civ. Code § 1798.24(p) (emphasis added). The IPA did not prohibit FTB from making necessary disclosures of Hyatt's identity information to third parties because each disclosure was made to obtain information that was necessary for FTB's investigation of Hyatt's failure to comply with state tax laws.[24]

FTB's own internal policies and training manuals also refute Hyatt's argument. FTB policy allowed FTB to make disclosures of identity information in order to obtain relevant information related to an audit. See 48 AA 11902 (99)–(100); 47 AA 11738 (191)–(192); 42 AA 10307 (142)–(144) (FTB could reveal personal information if necessary to collect or assess personal income tax.) FTB's Security and Disclosures Manual specifically indicates that personal information including social security numbers, can be disclosed if the disclosure was authorized by law. See 60 AA 14976; 61 AA 15034. Contrary to Hyatt's repeated contention that FTB made massive and illegal disclosures of his identity information, a review of FTB's communications reveals that FTB employees narrowly and

[24]In addition, no federal laws prohibited FTB from disclosing Hyatt's personal information when conducting its audit investigation. The Federal Privacy Act has absolutely no application to FTB's audit conduct. See 5 U.S.C. § 552a.

specifically tailored each communication to obtain only information which would reasonably be expected to be in the possession of the specific recipient – consistent with the IPA and FTB's manuals and policies. Therefore, FTB did not violate any statute, regulation, or internal policy by making these limited disclosures, therefore, this conduct remains "discretionary" within the Berkovitz-Gaubert test.

For example, FTB sent a letter to the Nevada DMV. 62 AA 15615-16. This letter provided necessary identifying information such as Hyatt's name, social security number, date of birth, and post office box address – all of which was already in the possession of the DMV. Id. The letter sent to the Clark County Assessor only sought information regarding Hyatt's Nevada house – 7335 Tara Avenue. 63 AA 15724. This letter asked for information regarding who the present owner was, who the previous owner was, and the date the property was transferred. Id. Likewise, the letters sent to the power companies Southwest Gas Corp. (65 AA 16099-100; 16154-55) and Southern California Edison (63 AA 15731-32)) asked only for information related to the power bills at Hyatt's California and Nevada houses. This was the identical case with letters sent to water companies, cable companies, trash collectors and all other third-parties. See 63 AA 15733-35; 65 AA 16095-96; 16233-243; 65 AA 16097-98; 16143-146. Despite Hyatt's unsubstantiated assertion that FTB made massive illegal disclosures of his confidential information, see, e.g., RAB 9, 57, 58, there is no statute, regulation or policy that prohibited FTB or its employees from making these necessary disclosures for the purpose of facilitating the audit. Rather, such disclosures were left to the discretion, judgment and choice of the auditor.[25]

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[25]Hyatt does claim that FTB attempted to extort a settlement from him because it sent him, along with thousands and thousands of other taxpayers, a form notifying him of the California Legislature's decision to offer a tax amnesty program. FTB **did not** create the Tax Amnesty legislation, did not decide who was eligible for the program, or what the penalties would be for eligible taxpayers who failed to participate. See 89 AA 22051-67. Thus, Hyatt's claim (which is unsupported by any record citation) that FTB "imposed" an amnesty penalty of "nearly $10 million" on Hyatt is blatantly false. See RAB 67. It remains unclear how FTB attempted to "extort" a settlement from Hyatt by sending him a form related to this program mandated by California's Legislature. Imagine if FTB had not sent

Continued . . .

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PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

b. Part Two Of *Berkovitz-Gaubert*: All Of FTB's Actions Were Based Upon Policy Determinations

FTB's opening brief established that each of FTB's discretionary acts was taken to further the economic policy of imposing personal income tax on all California residents. AOB 50-49-52. In response, Hyatt argues that the second element of the Berkovitz-Gaubert test cannot be satisfied because "not every purportedly discretionary act of FTB . . . is automatically in furtherance of a plausible policy objective." RAB 62. Hyatt makes no attempt to explain what actions were not based upon economic objectives. Rather, Hyatt merely claims actions taken by FTB in bad faith or "outside the circumference of the authority granted to FTB are not protected by any form of immunity" and "fall outside the ambit of a plausible policy objective." Id. These arguments fail for several reasons.

Hyatt misstates this second element of the Berkovitz-Gaubert test, which requires the court to determine if the judgment is the kind that the discretionary function exception was designed to shield i.e., actions based on considerations of social, economic, or political policy. Butler, 168 P.3d at 1066. As explained in FTB's opening brief, see AOB 50-52, the focus of the second element is not on the government employee's "subjective intent in exercising the discretion conferred . . . but on the nature of the actions taken and on whether they are susceptible to a policy analysis." Id. Hyatt's brief entirely ignores this key aspect of the policy element.

Hyatt also fails to rebut the presumption that FTB's conduct was based upon economic policy considerations because it was charged with administrating and enforcing California's tax laws. See AOB 50-51. "If a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves considerations of the same policies which led to the promulgation of the regulations." United States v. Gaubert, 499 U.S. 315, 323 (1991). It is

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Hyatt the Tax Amnesty Form: He would surely be arguing that FTB treated him different from other taxpayers, he was deprived of an opportunity for amnesty, and this would have been evidence of FTB's alleged bad faith or nefarious conduct.

the policy of California to collect personal income tax from its residents. See AOB 50-51. FTB enforces this policy. A legitimate purpose of Hyatt's audit was to determine the correctness of his tax returns, i.e., whether his alleged date of California non-residence – October 1, 1991 – was correct. See, e.g., 46 AA 11300 (91)-(92) (describing purpose of residency audit). Based on the unrebutted presumption, all of FTB's actions – as claimed by Hyatt and tried to the jury – were in furtherance of the economic policies of tax collection. Gaubert, 499 U.S. at 323.

Hyatt cites a few cases suggesting they support his claim that bad faith overcomes any policy basis for FTB's conduct. See RAB 62-64. However, these cases do not support Hyatt's argument. First, Hyatt cites Coulthurst v. United States, 214 F.3d 106 (2d Cir. 2000). There is no reference in Coulthrust to bad faith or intentional misconduct on the part of the government employees. Next, Hyatt relies upon Limone v. U.S., 497 F.Supp.2d 143 (D.Mass. 2007). The Limone court determined that the government agents' conduct in framing innocent men and suborning perjury were not discretionary acts. Id. at 203-204. The government's conduct at issue was prohibited by the U.S. Constitution and other specific and direct legal requirements placed on law enforcement agents. Id. As these acts were not discretionary in the first instance, the court did not reach the second Berkovitz-Gaubert element.

In sum, Hyatt failed to establish that the Berkovitz-Gaubert test is not satisfied in this case. He has failed to establish that any of FTB's conduct was "non-discretionary" or that FTB violated any express constitutional provision, statute, regulation or directive when it: (1) gathered evidence; (2) analyzed evidence; (3) conducted its administrative protests; or (4) engaged in other organizational conduct. Hyatt has also failed to rebut the fact that all of FTB's discretionary conduct was taken for an important economic policy purpose -- i.e., to administer California's tax laws. Consequently, discretionary function immunity applies to all of FTB's conduct. As such, the judgment must be reversed and Hyatt's entire case must be dismissed. With the dismissal of this case on these grounds, this court need not consider any other issues or go any further with its review.

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

C. Contrary To Hyatt's Arguments, District Judge Walsh Allowed Trial To Exceed The Jurisdictional Scope Of This Case

FTB's opening brief explained that even if this court's April 4, 2002 order was left entirely undisturbed by this court's recent case law related to discretionary function immunity, Hyatt's case, as tried to the jury, must still be dismissed because all of FTB's conduct at issue was nothing more than alleged negligence. See AOB 55-57. As a result, the trial exceeded the jurisdictional scope placed by the court's 2002 order which expressly dismissed Hyatt's negligence claim pursuant to discretionary function immunity. On this alternative basis, this entire case must be dismissed. In an effort to avoid this result, Hyatt asserts that evidence of negligence was admissible at trial; the negligence evidence constituted substantial evidence to support his intentional tort claims; and the inclusion of this evidence conformed to the prior rulings of this court. RAB 69-75.

FTB is not asserting that the district court made an evidentiary error by admitting the negligence evidence at trial. See AOB 55-57. To the contrary, FTB's argument is simply that evidence of mere negligence cannot be sufficient as a matter of law to support liability for intentional tort claims and the only evidence of alleged wrongdoing by FTB was mere negligence, as admitted by Hyatt's own expert. Id. Thus, even if this court assumes that all of the negligence evidence presented by Hyatt was true, this evidence alone cannot establish FTB's liability for intentional misconduct, as a matter of law.

1. Hyatt's Arguments Illustrate That All Of FTB's Conduct At Issue Was Nothing More Than Mere Negligence, Which Was Immune Under the Court's 2002 Decision

Hyatt's brief does not cite to any record evidence that supports his contention that FTB engaged in intentional conduct. RAB 70-71. Although Hyatt claims FTB "labels" the trial evidence as negligence, it is really Hyatt who is using his own labels to assert that evidence of negligence alone can be transmuted into intentional conduct based upon the quantity of the so-called negligence. Id. at 70-72.

For example, Hyatt claims (without a record citation) that FTB engaged in intentional conduct because FTB discounted evidence in favor of Hyatt's residency claim. Id. at 70. The conduct Hyatt complains of was FTB not doing its job properly, according to

McDONALD·CARANO·WILSON
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

Hyatt. See AOB 55-57. Hyatt's argument in response to FTB's Rule 50(a) motion summarized the evidence Hyatt claimed equated to intentional misconduct. See 45 AA 11190 (35) – 11203 (86). When each act described by Hyatt's counsel is analyzed, one concludes it is nothing more than mere negligence – i.e., FTB improperly gathered evidence, improperly weighed evidence, and improperly engaged in organizational conduct and the like. See 45 AA 11190(35) – 11203 (86) (Hyatt's counsel arguing in opposition to FTB's Rule 50(a) motion that Hyatt presented no evidence of intent to defraud). Hyatt's primary expert witness testified that what FTB and its employees did wrong was not adhere to "reasonable professional standards" while conducting the audit. See 44 AA 10754 (114)-10778 (212); 10814(3)-34 (84); 10938 (144)-45 (170) (Jumelet's direct examination). Failing to adhere to "reasonable professional standards" is a negligence standard.

Hyatt then argues that cumulative acts of negligence can be submitted to the jury as evidence of intentional wrongdoing. RAB 71-72. The truth is that cumulative acts of negligence, and nothing more, *cannot* support a finding of liability for an *intentional* tort. AOB 57. Hyatt's brief appears to acknowledge this point when he admits that case law holds that "**repeated acts of negligence are insufficient in themselves to prove intentional conduct . . . .**" RAB 71 (emphasis added). Yet Hyatt goes on to argue, in the same sentence, that "multiple acts of negligence can be evidence of deliberate or intentional acts." Id. Hyatt's brief does not cite any legal authority to support the proposition that evidence of negligence only can support a liability finding against a party for an intentional tort, especially in the absence of any evidence actually proving intentional misconduct. See RAB at 69-72.

FTB specifically moved to dismiss Hyatt's case in its motions for judgment as a matter of law on this very basis -- all of Hyatt's evidence proved nothing more than negligence and was therefore outside the jurisdictional limitations of this case. 45 AA 11181(2)-192(35). Although Hyatt's counsel did not present any evidence that FTB engaged in intentional misconduct, (see 45 AA 11192(35)-11203(86)), the court denied FTB's motion during trial and post-trial (45 AA 11206(101)-207(102)), adopting instead

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

Hyatt's theory that intentional misconduct could be "inferred" from multiple negligent acts.[26]

On this basis alone, Hyatt's case, as tried to the jury, clearly exceeded the jurisdictional scope of this court's 2002 order which dismissed Hyatt's negligence-based claims as immune. Once again, on this basis alone this case requires dismissal and the court need go no further with its review.

D. No Matter What Labels Hyatt May Use, Hyatt's Entire Case Tried To The Jury Concerned Whether FTB's Residency, Tax, And Fraud Assessments Conclusions Were Correct

In addition to allowing Hyatt's negligence-based claims to be presented to the jury, the trial judge also exceeded jurisdictional boundaries that prohibited the jury from deciding the propriety of FTB's administrative determinations. See AOB 58-67. FTB's opening brief explained that the manner in which Hyatt was allowed to present this case – which was nothing more than a collateral attack upon FTB's underlying administrative conclusions – impermissibly exceeded the scope of the jurisdictional limitations created by Judge Saitta's 1999 order dismissing Hyatt's declaratory relief claim. Id.

Although Hyatt does not dispute that the propriety of FTB's administrative decisions were squarely outside of the jurisdictional scope of this case, Hyatt asserts that the jury was never asked to decide the tax and residency issues. RAB 75-80. In fact, Hyatt expressly concedes "[t]he law of the case prohibited Hyatt from trying the residency issue and tax case." RAB 5:2-4. Against this concession, Hyatt goes on to claim the jury was not asked to act as a reviewing court for FTB's administrative determinations. Id. Hyatt then claims that

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[26]The district court's failure to properly review these additional issues was error, and does not insulate the jury's verdict that exceeded the jurisdictional scope of this case. See Dictor v. Creative Management Services, LLC, 126 Nev. ___, 223 P.3d 332 (2010) (court's ruling in first appeal, allowing case to proceed on one ground, did not preclude summary judgment on other grounds after first remand). Thus, like Dictor, the mere fact that this court allowed Hyatt's intentional tort claims as alleged in his complaint to proceed in 2002, does not mean that the district court properly refused to dismiss these claims in 2008 based upon alternate theories, and given the district court's obligation to ensure that this court's 2002 order was properly adhered to throughout this litigation.

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE: 775-788-2000 • FAX 775-788-2020

because the jury was not asked to decide the residency case, the district court did not err in excluding extensive evidence that rebutted Hyatt's claims that FTB improperly determined his residency or improperly assessed taxes or fraud penalties. RAB 79-80. Hyatt's arguments are contradicted by the evidence, his own brief and contradictory jury instructions provided to the jury.

1. In Order To Rule In Hyatt's Favor, The Jury Was Necessarily Required To Determine That FTB Improperly Reached The Wrong Result In Its Administrative Conclusions

The evidence Hyatt presented at trial related almost exclusively to his general claim that FTB improperly determined he remained a resident of California until April 1992 and then improperly imposed fraud penalties against him. For example: A key finding to FTB's fraud determination was that Hyatt did not cooperate during the audits, which is an indicia of fraud under California law. See 66 AA 16425-27. The only topic Edwin Antolin testified to was his opinion that Hyatt did cooperate with FTB. 36 AA 8787 (9); see also, 36 AA 8786 (2)-8821 (143); 8910 (140)-8919 (176) (Antolin's entire direct examination). Hyatt also presented the testimony of Paul Schervish, a professor at Boston College, who testified that "wealth holders," like Hyatt, do not necessarily live opulent lifestyles. 43 AA 10658 (53) – 10659 (54); see 43 AA 10654(35)-62(63) (Schervish's entire direct examination). This evidence was intended to negate FTB's determination that Hyatt engaged in implausible behavior -- another indicia of fraud under California law. Id. Hyatt's primary expert, Malcolm Jumelet, was permitted to testify that FTB improperly weighed and analyzed the evidence it gathered when reaching its residency and fraud penalty conclusions. 44 AA 10943 (165); see also, 44 AA 10754(114) – 78 (212), 10814(3)-34(84), 10938(144)-45(170) (Jumelet's direct examination). Nearly every witness Hyatt presented critiqued the administrative conclusions reached by FTB. See, e.g., Eugene Cowan (35 AA 8542, 8558-61, 8570-71, 8576-78, 8629); Candace Les (33 AA 8228-29); Michael Kern (34 AA 8346-52, 8353-540); Gilbert Hyatt (37 AA 9005-21, 9079-87, 9094-105, 9150-59, 9163-65, 9172). Although Hyatt claims that this evidence was admitted to prove FTB's "fraud claim," there is no question that in order for the jury to agree that FTB failed to act

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

fairly and impartially during the audit, the jury necessarily had to determine that FTB reached the wrong administrative conclusions. Finally, recall that during Hyatt's closing argument he described California's Legislature enacting tax laws, with FTB enforcing those laws, and the Las Vegas jury being empowered to act as a "check and balance" on the exercise of those California powers. 52 AA 12837 (90). As such, Hyatt's contention that the jury was not asked to review the propriety of FTB's administrative decisions is wrong. See AOB 55-67.

Hyatt's brief is replete with statements that he is, and has always been, challenging FTB's ultimate conclusions related to his residency and the tax and fraud penalty assessments. For example, Hyatt's brief repeatedly states that he was challenging the "one-sided" and "predetermined" audit conclusions finding that he was a resident of California until April 1992 and assessing him taxes and fraud penalties. See, e.g., RAB 7, 18, 20, 22, 24, 40, 64, 77, n. 292, 166 n.610, 181. There is no way to prove that the audit itself was "one-sided" or "predetermined" without explicitly or, at a minimum, implicitly concluding that FTB's ultimate residency and tax assessment conclusions were wrong. Hyatt's brief repeatedly indicates that FTB "trumped up a tax case". See, e.g., RAB 62, 73, 80 n.301, 90. Once again, in order to accept that FTB "trumped up a tax case" against Hyatt, the jury was required to accept that FTB had no basis to determine that he was resident of California until April 1992 – i.e., its residency and subsequent tax assessments were wrong. Since the jury was permitted -- even encouraged to do so -- FTB at minimum should have been permitted to put all evidence before the jurors and they should have been instructed on California law applicable to tax determinations.

The jury simply could not have accepted that Hyatt was a tax cheat who did not move to Nevada when he claimed he did, but at the same time conclude that FTB treated him unfairly and impartially when it concluded he only pretended to move to Nevada in 1991 and subsequently assessed him taxes and fraud penalties. To accept Hyatt's fraud theory, the jury necessarily had to determine that FTB's administrative determinations were wrong. As a result, Hyatt's attempts to claim that the jury was not asked to review the

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

priority of the tax and residency determinations is rebutted by the evidence and Hyatt's own arguments on appeal.[27]

2. The District Court's Corrective Jury Instruction 24 Informed The Jury That It Was Permitted To Determine The Correctness Of FTB's Administrative Conclusions And Hyatt Argued They Reached the Wrong Conclusion

As noted in the introduction, Hyatt materially misstates what happened at trial concerning jury instruction 24, and he ignores any discussion of **corrected** jury instruction 24. Compare 53 AA 13013 (28-29); 13053 (20)-13054 (22) with RAB 75-80.

Corrected instruction 24, which was given over FTB's vehement objection, entirely negated any jurisdictional limits that may have been placed on the jury on this issue. Id.

> There is nothing in corrected instruction 24 that would prevent you during your deliberations from considering the inappropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions. There is nothing in corrected instruction 24 that would prevent Malcolm Jumelet [Hyatt's expert witness] from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.

53 AA 13054 (22). It could not be more plain from this instruction that Judge Walsh permitted – actually *invited* – the jury to evaluate "the appropriateness or correctness" of FTB's conclusions regarding residency, tax assessments and Hyatt's fraud, despite Judge Saitta's earlier order to the contrary. Id. The instruction also improperly highlighted testimony by Hyatt's expert regarding the "appropriateness or correctness" of FTB's residency determinations and conclusion. Hyatt's counsel used this instruction to argue that FTB came to the wrong conclusions when it evaluated the evidence gathered during the audit and the protest. 52 AA 12827 (51). Regardless of any other instructions that were given to the jury, corrected instruction 24 told the jury to evaluate the appropriateness or correctness of FTB's administrative conclusions. There can be no serious debate that the

[27]Hyatt's brief claims that his counsel did not argue to the jury that the protest hearing officer simply rubberstamped the audit recommendations. RAB 79. The record reveals otherwise. 52 AA 12834 (80-81).

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE: 775-788-2000 • FAX 775-788-2020

jury was impermissibly allowed to act as a reviewing court regarding FTB's administrative conclusions.

As explained in FTB's opening brief, this violated Judge Saitta's unchallenged 1999 order, which was predicated upon the fact that FTB's administrative determinations were not within the subject matter jurisdiction of the district court. See AOB 59-60. The administrative tax proceedings between Hyatt and FTB remain ongoing in California. Therefore, allowing the jury to review FTB's administrative decisions was a blatant violation of the exhaustion-of-remedies doctrine. Id.; Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 170 P.3d 989, 993-95 (2007) (describing purpose of exhaustion of administrative remedies); Mesgate Homeowners' Ass'n v. City of Fernley, 124 Nev. ___, 194 P.3d 1248 (2008).

In addition, as various courts that apply Berkovitz-Gaubert have concluded, "when the sole complaint is addressed, as here, **to the quality of the investigation as judged by its outcome,** the discretionary function immunity should ... and does apply. Congress [and the State of Nevada] did not intend to provide for **judicial review** of the quality of investigative efforts." Pooler v. United States, 787 F.2d 868, 871 (3d Cir. 1986) (emphasis added); see also, Flax v. United States, 847 F.Supp. 1183, 1189-90 (D.N.J. 1994).

3. To Compound Her Error, The District Court Permitted Only A One-Sided Presentation Of The Facts Underlying FTB's Administrative Conclusions

Hyatt's brief claims that FTB "wants it both" ways on this issue. RAB 80. Hyatt claims that FTB alleges that, although the propriety and correctness of FTB's residency and tax assessment determinations should not have been tried to the jury, FTB still wants this court to determine FTB's residency evidence should have been admitted at trial. See RAB 80. Hyatt is confused. Simply put, it is FTB's contention that its administrative determinations were outside the jurisdictional scope of this case. AOB 63. Nevertheless, if this court finds that Hyatt was properly permitted to open the door at trial and to attack the appropriateness and correctness of FTB's administrative determinations, then it was prejudicial error for the district court to exclude the substantial evidence that **supported**

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

FTB's administrative conclusions and applicable California legal principles guiding FTB's auditors. See AOB 63-67.

Hyatt's brief argues that the district court's exclusion of evidence was proper because the evidence only related to Hyatt's residency determinations. RAB 79-80. However, as already noted, once Hyatt was allowed to present his residency evidence to the jury and offer his experts' opinions addressing the propriety of FTB's administrative conclusions, FTB had the right to rebut his theories with its evidence refuting Hyatt's contentions. For example, Hyatt (over FTB's objection) presented expert and lay witnesses testimony that he cooperated during the audits, to rebut FTB's fraud determination. See, e.g., 34 AA 8333 (108); 8338 (128), 8349 (173); 35 AA 8509 (185)-(186); 36 AA 8787 (9). Yet FTB was precluded from presenting evidence that Hyatt **did not** cooperate during the audit. See AOB 64. For example, the district court prevented FTB from introducing evidence of Hyatt's IRS audit and the fact that they experienced similar lack of cooperation. 33 AA 8047 (14)-8049 (22). In addition, evidence related to where Hyatt maintained his residence in Nevada between September 1991 and November 1991 was relevant to rebut Hyatt's testimony that he became a resident of Nevada in September 1991. AOB 63-67. The district court improperly excluded evidence of Hyatt's ridiculous Continental Hotel story (AOB 65-66), evidence related to Hyatt's travel arrangements out of LAX not McCarran during the disputed timeframe, evidence of Hyatt's back-dated deed on his California home, and an entire host of additional evidence. See AOB 63-67. Suffice it to say, it is **Hyatt** who cannot have it both ways in this regard. Equally important, if Hyatt was properly permitted to challenge the propriety or the correctness of FTB's administrative conclusions, then evidence of the legal principles guiding FTB's determinations should have been admitted, but Judge Walsh declared them inadmissible. 24 AA 5794.

In sum, the district court incorrectly permitted the jury to review the factual bases for FTB's conclusions, to second-guess FTB's analysis for reaching those conclusions, and to substitute its own judgment for FTB's determinations, but with a one-sided version of the evidence and no legal guideposts. This eviscerated the jurisdictional boundaries that were

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

placed on this litigation from the inception.

This case must be dismissed in its entirety based upon the district court's failure to adhere to the jurisdictional limitations in this case. All of the evidence Hyatt presented at trial was based exclusively upon alleged negligence by FTB and related to FTB's administrative conclusions. Even under this court's previous standard for discretionary function immunity, and without considering the Berkovitz-Gaubert test, FTB could not be held liable for its negligence or its administrative conclusions. With such a ruling, the court need not consider any of FTB's additional arguments and contentions.

E. Common Law Claims

1. Hyatt Misrepresents The Scope Of This Court's 2002 Decision Concerning His Common Law Claims And The Standard of Review

Hyatt's brief consistently misinterprets this court's April 4, 2002 order. He argues that the order upheld the denial of summary judgment on his common law claims "based on genuine issues as to material facts." RAB 83, lines 16-17. He argues that the order effectively determined the question of "whether there was sufficient evidence to create a material issue of fact for each claim asserted." RAB 83, lines 21-22. He also argues that the factual and legal legitimacy of each common law cause of action was reviewed and given the stamp of approval by this court in 2002, falsely suggesting that this court's April 2002 order was based on a review of evidence rather than a review of the allegations in Hyatt's complaint. RAB 95, lines 11-12; RAB 86, lines 10-11; RAB 74, lines 3-4.

Hyatt made similar arguments in the district court, contending that this court's April 2002 order resolved the validity of common law causes of action, thereby precluding FTB's various motions attacking these causes of action. See AOB 68-69. Judge Walsh agreed. 22 AA 5491. Because Hyatt's argument in the district court and in this court mischaracterized the nature, scope and impact of the April 4, 2002 order, FTB will set the record straight.

a. The Petition and This Court's June 13, 2001 Order; Rehearing Proceedings

After the district court denied a motion for summary judgment that was based on multiple grounds, including lack of jurisdiction, FTB filed a petition for a writ. This court

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

issued a dispositional order on June 13, 2001, noting that FTB's petition presented a jurisdictional issue based upon comity. 5 AA 1063. Although the court noted the existence of this comity issue, the court did not decide that issue because the court perceived another independent basis for dismissal of Hyatt's claims, i.e., the absence of probative evidence on each claim. 5 AA 1065. In doing so, the court expressly recognized that its decision to grant the petition was based "on grounds other than those alleged in the petition." 5 AA 1063.

Hyatt petitioned for rehearing. He pointed out that "the Court decided the Writ Petition on issues not raised, briefed or argued" in the writ petition, and that FTB's writ petition did not challenge the sufficiency of evidence regarding the summary judgment rulings. 5 AA 1072. He argued: "First, the Court's order violates Hyatt's due process rights by denying Hyatt his day in court without even a hearing before this Court on an issue never raised in the FTB's writ petition." 5 AA 1081. Next he argued that this court did not follow the correct standard of review in evaluating evidence on the summary judgment motion. Id. Finally, he argued that summary judgment was premature because discovery was not yet complete. Id. As part of the rehearing process, Hyatt moved for permission to file extra pages; he argued that this court's June 13, 2001 order was "based upon grounds that were neither raised in the Writ Petition nor addressed by Hyatt." 5 AA 1089, 1103.

b. The April 4, 2002 Decision

Hyatt's petition for rehearing convinced this court that the June 13, 2001 order was wrong, and on April 4, 2002, the court granted rehearing and vacated the order. 5 AA 1183-1193. The court did not identify which of Hyatt's grounds was the basis for granting rehearing. The court merely recited the factual background and concluded:

> On June 13, 2001, we granted the petition in Docket No. 36390 on the basis that Hyatt did not produce sufficient facts to establish the existence of a genuine dispute justifying the denial of the summary judgment motion. . . . Hyatt petitioned for rehearing in Docket No. 36390 on July 5, 2001, and in response to our July 13, 2001 order, Franchise Tax Board answered on August 7, 2001. Having considered the parties' documents and the entire record before us, we grant Hyatt's petition for rehearing, vacate our June 13, 2001 order and issue this Order in its place.

5 AA 1184. The court then decided the writ petition on the ground actually raised in the

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

petition, i.e., the jurisdictional ground based on comity. 5 AA 1184-90.

In summary, this court's June 13, 2001 order granted a writ based on a review of the evidence on Hyatt's common law claims; Hyatt petitioned for rehearing on the ground that the issue of insufficient evidence had not been raised in the writ petition; and this court granted rehearing, vacated the June 13, 2001 order, and decided the case based on the ground raised in the petition (comity). Although Hyatt's petition for rehearing asserted the alternative ground that his evidence was sufficient to survive summary judgment, it is obvious that this was not the ground on which rehearing was granted. There was not a single word in the April 4, 2002 order indicating that the court was determining the sufficiency of Hyatt's evidence on his common law claims, that the court was evaluating whether Hyatt satisfied all mandatory elements of each cause of action, or that the court was deciding the propriety of FTB's legal defenses to those claims. In fact, the April 4, 2002, order vacated the June 13, 2001, order, and the new order was completely silent on the sufficiency of evidence on Hyatt's common law claims. If the April 4, 2002 order was intended as this court's evaluation of evidence on Hyatt's common law claims, surely this court would have included an analysis of the evidence, just as the court had previously done in the June 13, 2001 order. 5 AA 1066-68. Even as to Hyatt's intentional tort theories, which this court allowed to survive the comity challenge, the court's analysis in the April 4, 2002 order was not based on a review of Hyatt's evidence. Rather, the court's analysis was based solely on allegations in Hyatt's complaint. 5 AA 1190 ("Hyatt's complaint alleges" bad faith and intentional torts).

Accordingly, Hyatt is wrong in his assertions that the April 4, 2002 order was based on this court's evaluation of the sufficiency of evidence and the viability of his common law causes of action.

c. The Legal Effect of the April 4, 2002 Decision

The April 4, 2002 order dealt with one issue -- comity. The order did not approve the common law claims, disapprove FTB's defenses, or otherwise preclude subsequent review of the claims. Because the order did not deal with these other issues, the order simply had

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE: 775-788-2000 • FAX 775-788-2020

no impact on these issues when the case was remanded for further district court proceedings. The law of the case doctrine, which precludes re-litigation of an issue after an appellate court's ruling in the same case, only applies if the appellate court actually addressed and decided the issue explicitly or by necessary implication. Dictor v. Creative Mgmt. Services, LLC, 126 Nev. __, 223 P.3d 332, 334 (2010). Here, the April 4, 2002 order did not explicitly decide any issue other than comity (and other jurisdictional issues mentioned only summarily, such as full faith and credit, 5 AA 1188). Also, there is certainly no "necessary implication" that the court evaluated Hyatt's evidence or FTB's defenses on each of the common law claims, or that the court precluded subsequent legal challenges to the claims.

Here, FTB's motions for summary judgment after the 2002 remand were based on legal contentions and evidence different from those previously raised in FTB's motion for summary judgment that led to the April 4, 2002 order. Compare 2 AA 464-500; 3 AA 501 12 with 14 AA 3440-58; 14 AA 3462-75; 15 AA 3504-63; 15 AA 3581-49; 17 AA 4021-48; 17 AA 4049-83. Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486 (1997) (trial court can reconsider denial of summary judgment if different evidence is introduced or first decision was clearly erroneous); Bartmettler v. Reno Air, Inc., 114 Nev. 441, 446, 956 P.2d 1382 (1998) (trial court can reconsider summary judgment denial at any time, particularly if case has been more fully developed). Contrary to Hyatt's contention, the mere fact that this court allowed Hyatt's intentional tort claims to proceed in 2002 does not automatically mean that the district court properly refused to dismiss these claims later. Nor does the April 4, 2002 order preclude FTB from raising, or this court from considering, appellate legal attacks on Hyatt's common law claims.

2. The Applicable Standard of Review

Hyatt observes that many of FTB's legal arguments on appeal were raised in motions for summary judgment. Hyatt states that FTB "suggests that Judge Walsh erred in denying the FTB's numerous summary judgment motions because Hyatt failed to establish facts supporting one or more elements of each claim." RAB 82:10-12. Hyatt then contends

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
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that appellate courts should not "step back in time" to review pretrial summary judgment denials, and "it makes no sense whatsoever" to reverse a judgment on a jury verdict due to an erroneous pretrial denial of summary judgment. RAB 82-83.

Hyatt ignores the fact that all of FTB's motions for summary judgment were based on *legal* grounds establishing that the various causes of action were barred as a matter of law. We contended that even if Hyatt's evidence was accepted, there were legal impediments to his recovery on each cause of action. Contrary to Hyatt's assertion that appellate review of a pretrial denial of summary judgment "makes no sense whatsoever" in this context, this court has itself reviewed the propriety of pretrial summary judgment denials that were followed by trials and verdicts, particularly when the summary judgment motions were based on purely legal grounds. See, e.g. Mainor v. Nault, 120 Nev. 750, 762-65, 101 P.3d 308, 316-18 (2004) (summary judgment denied, followed by jury trial; verdict for plaintiff; summary judgment denial reviewed de novo on appeal from judgment; judgment for plaintiff reversed); Univ. of Nevada, Reno v. Stacey, 116 Nev. 428, 430-31, 435, 997 P.2d 812 (2000) (appeal from judgment on jury verdict; sole issue on appeal was whether district court erred by denying defendant's pretrial motion for summary judgment; judgment on jury verdict reversed because district court erred in denying the motion for summary judgment).

FTB's arguments for reversal do not rely solely on the district court's errors in denying the numerous motions for summary judgment. These motions illustrate just one of many contexts in which FTB made and preserved its legal arguments in the district court – in pretrial motions for summary judgment; in motions for judgment as a matter of law after Hyatt's case in chief; in motions for judgment as a matter of law at the close of evidence; and in post-trial motions.

Finally, contrary to Hyatt's claims, the proper standard of review related to these claims is *de novo*. As indicated in the opening brief, FTB contends that each of Hyatt's claims failed as a matter of law. AOB 68-96. With limited exception, as to each such claim FTB presented purely legal arguments defeating the claim. AOB 70-93. Almost all of FTB's

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE: 775-788-2000 • FAX 775-788-2020

attacks on Hyatt's causes of action involved purely legal challenges, not challenges based upon sufficiency of evidence. As to all of these legal challenges, *de novo* review is appropriate. E.g. Morris v. Bank of Am. Nevada, 110 Nev. 1274, 1276-78, 886 P.2d 454 (1994) (court made independent *de novo* determination of whether defendant's alleged statements could constitute fraud or bad faith).

3. Hyatt's Fraud Claim Fails As A Matter Of Law

Hyatt's fraud claim was predicated upon two alleged promises: (1) to treat Hyatt "fairly and impartially"; and (2) to keep certain information confidential. 14 AA 03286-93; 45 AA 11200 (76). FTB's opening brief explained that Hyatt's fraud claim failed, as a matter of law. AOB 70-78. FTB established that the district court erred when it failed to dismiss the fraud claim prior to submission to the jury. Hyatt's answering brief has not responded to or rebutted these arguments. Rather, Hyatt attempts to sidestep FTB's arguments.

a. Hyatt's Contention That The Elements Of Common Law Fraud Are Less Exacting When A Government Agency Is Accused Is Unsupported In The Law And Without Merit

Hyatt asserts that some lesser standard applies to his fraud claim because FTB is a government agency. RAB 86-88. Hyatt claims that every government investigation carries with it an implicit promise of fairness and impartiality, and that this implied promise is sufficient to support a fraud claim. Id. Hyatt argues that "[e]very citizen would understand" that a government agency always impliedly promises to be fair and impartial when conducting an investigation. Id. Based on this position, Hyatt argues that a plaintiff should be able to base an actionable fraud claim against a government agency on such a vague, ambiguous implied promise simply because the defendant is a government agency. Id. Hyatt cites no Nevada case law to support his contention. Indeed, the weight of authority points to the opposite conclusion. While this court has never explicitly held that ordinary tort elements apply in actions against government agencies or officials, it has confirmed such a result in a litany of cases. See, e.g., Clark County School Dist. v. Virtual Educ. Software, ___Nev.___, 213 P.3d 496, 503-4 (2009) (applying ordinary common law elements of

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PO BOX 2670 • RENO, NEVADA 89505-2670
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business disparagement against school district); Butler, 168 P.3d at 1067 (applying ordinary elements of negligence to determine liability against state); State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 148, 42 P.3d 233, 239 (2002) (applying ordinary common law elements of defamation and privilege against state); Posadas v. City of Reno, 109 Nev. 448, 851 P.2d 438 (1993) (applying ordinary common law elements of defamation, intentional infliction of emotional distress and abuse of process to suit against city government).

Other courts agree. See Hess v. United States, 361 U.S. 314, 319 n. 7, (1960) (under the Federal Tort Claims Act, the law of the state where the action accrued shall govern "in the same manner and to the same extent as a private individual under like circumstances"). Maryland Environmental Trust v. Gaynor, 803 A.2d 512, 517 (Md. 2002) (court squarely rejected the plaintiffs' argument that some higher duty was owed to the landowners by a governmental agency in the context of a fraud claim); Reata Const. Corp. v. City of Dallas, 197 S.W.3d 371 (Tex. 2006) (once the city waives its sovereign immunity, it "must participate in the litigation process as an ordinary litigant"); Madajski v. Bay County Dep't of Public Works, 297 N.W.2d 642 (Mich. Ct. App. 1980) (applying ordinary elements of nuisance claim to suit against county road commission).

Hyatt relies heavily on SEC v. ESM Gov't Sec., Inc., 645 F.2d 310 (5th Cir. 1981), a case that addresses vastly different legal principles and public policies from those at issue here. See RAB 88. Unlike this case, SEC involved an application by the SEC to a federal court to enforce an administrative subpoena. SEC did not involve a civil cause of action for an intentional tort. Rather, the standards discussed in SEC apply only where the government forces a private citizen to provide access to materials that would not otherwise be constitutionally permissible, and then attempts to use those materials to support criminal or administrative charges. This is far different from the present case, where a private citizen sued a government agency, alleging that the agency represented that he would be treated courteously, and then allegedly failed to do so.

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PO BOX 2670 • RENO, NEVADA 89505-2670
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This court should reject Hyatt's assertion that there should be some *per se* rule that a promise of fairness and impartiality can be implied in every government investigation, and that such a promise can form the basis for a fraud claim. Regardless of Hyatt's speculation as to what "[e]very citizen would understand," and regardless of whether the claim involves allegations of the government's bad faith, when the government is a defendant in a common law tort claim, the plaintiff must still prove the same common law elements of that tort .

b. Implied Promises Are Legally Insufficient To Support A Fraud Claim

FTB's opening brief established that implied promises to treat a person fairly and impartially are not actionable representations for purposes of fraud. AOB 70-73. FTB's opening brief also established that alleged promises of confidentiality to Hyatt were also not actionable because FTB never made an express promise to maintain the confidentiality of Hyatt's name, address or social security number. AOB 73-76. Hyatt's brief contends that FTB did not raise these issues in the district court. RAB 84. Hyatt is wrong. 45 AA 11186 (20-21); 45 AA 11187 (22). Hyatt's brief also concludes, without a citation to the record or legal authority, that "[t]here was nothing implied or uncertain about FTB's representations in this case." RAB 86. Once again, he is wrong.

i. FTB Did Not Explicitly Or Implicitly Promise Hyatt It Would Treat Him Fairly And Impartially

Hyatt's brief contains an internal inconsistency. At one point he acknowledges he is relying upon an implied promise (RAB 14:2-4), and at another he contends he is relying upon express promise (RAB:89). As discussed in detail in the FTB's opening brief, the **ONLY** evidence Hyatt presented at trial to establish that FTB "promised" him that it would treat him fairly and impartially during the audit, was a copy of a standardized, widely distributed privacy notice that indicated "what you [the taxpayer] should expect from the Franchise Tax Board" during the course of the audit. See 1 SAA 00001-5. This notice indicated that a taxpayer can expect "courteous treatment by the FTB employees." See id. At trial, Hyatt argued from that promise of courtesy there was implied a promise of fairness and impartiality. ABB 70-71. Hyatt's brief does not identify any evidence that supports his

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contention that FTB **explicitly** promised him it would treat him fairly and impartially during the audit. See RAB 89-90. In fact, at RAB 14:2-4, Hyatt acknowledges he was relying upon an implied promise: "the initial privacy notice states that FTB will treat the taxpayer with courtesy, and this was intended to convey to Hyatt that the FTB would conduct a fair and unbiased audit." Such an inference or implied promise is insufficient as a matter of law to support the jury's verdict for fraud, which must be proven by clear and convincing evidence. Bulbman, 108 Nev.at 110-111. Evidence that FTB sent Hyatt a form notification that indicated that it would treat Hyatt with courtesy is not clear and convincing evidence to support Hyatt's claim that FTB promised – either implicitly or explicitly – to treat him fairly and impartially during the audit.

To support his new argument that FTB made an express promise of fairness and impartiality, Hyatt relies on the testimony of Marc Shayer, who was the first auditor assigned to Hyatt's case, and who sent the privacy notice described above. RAB 89. However, Shayer's testimony does not support Hyatt's contention. See id. Rather, Shayer merely testified that the statements to treat Hyatt with courtesy, as contained in the privacy notice, were generally things that auditors "were supposed to do when performing an audit." See 45 AA 11221 (159:6-11). Shayer never testified that he expressly promised or intended to promise that FTB would treat Hyatt fairly and impartially by sending out its privacy notice. Id. Shayer's testimony reveals that these statements were little more than aspirational goals – as contained in FTB's Mission Statement – that FTB employees were supposed to strive to achieve. Id.[28] As explained in FTB's opening brief, it is well-settled that aspirational goals found in standardized and widely distributed handbooks, manuals, or policy statements are insufficiently vague to form the factual predicate for a fraud claim. See AOB 73.

[28]The meaning of courteousness and impartiality are matters upon which individual judgments can be expected to differ, and are therefore improper statements on which to base a fraud claim. See Restatement (Second) of Torts §538A (1977).

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Hyatt's brief claims there was additional evidence to support this promise. RAB 89-90. For example, Hyatt claims that "FTB holds itself out to taxpayers in its Privacy Notice, Mission Statement, Strategic Plan, manuals, and in communications with the public to be fair and impartial and that 'FTB's internal Audit Standards require that auditors act with objectivity and in a fair and unbiased manner.'" RAB 13. Hyatt's brief fails to point to any evidence that Hyatt actually saw or received any of these publications at the beginning of the audit. Hyatt's brief fails to establish or explain how any of these statements in these various publications are evidence that any FTB employee **expressly promised Hyatt** to treat him fairly and impartially. Hyatt also claims that "[e]very FTB audit witness at trial testified he or she must act in a fair and impartial manner." RAB at 14; see also, 90. But here again, **none of these witnesses testified they promised Hyatt, spoke to Hyatt, or otherwise communicated to Hyatt or his representatives** – either implicitly or explicitly – that they would treat Hyatt fairly and impartially during the audit.

ii. FTB Did Not Promise Hyatt To Keep His Name, Address, Social Security Number Or The Fact He Was Under Audit Confidential

Here again, FTB's brief established that Hyatt's fraud claim also fails, to the extent it is predicated upon FTB's alleged promises to maintain the confidentiality of his name, address and social security, because FTB never promised it would keep this information confidential. AOB 73-75. In response, Hyatt attempts to broaden the nature of the confidentiality promise by referencing various documents wherein FTB and Hyatt did discuss the confidentiality of certain information. RAB 91. However, these documents do not establish that FTB **specifically promised** Hyatt it would maintain his name, address and social security number confidential.

As previously explained by FTB, the representations of confidentiality were made in the context of the parties' discussions of a very narrow group of Hyatt's business documents and patent-related information. See AOB 74. Hyatt attempts to tie disclosures regarding his name, address and social security number to the promises made with respect to his business documents. See RAB 91. Because there were no broad promises of confidentiality

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PO BOX 2670 • RENO, NEVADA 89505-2670
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concerning his name, address and social security number, and because FTB did not violate the promises of confidentiality with respect to Hyatt's business documents, there was no fraud.

c. There Was No Fraudulent Intent, Nor Could Such Be Legally Inferred

As discussed at length in the FTB's opening brief, Hyatt presented absolutely **no evidence** at trial that FTB had the requisite intent; i.e. that it knew its statements were false **at the time they were made** and deliberately intended to induce Hyatt to act or refrain from acting. AOB 76-77. Where a plaintiff bases his claim for fraud on a statement of future intentions, the plaintiff must provide evidence that, at the time the statement was made, the defendant never intended to honor or act on his statement; evidence that the promisor failed to fulfill a promise is insufficient, by itself, to show that the promisor had the requisite fraudulent intent. Tallman v. First Nat. Bank of Nev., 66 Nev. 248, 261, 208 P.2d 302, 308 (1949). Fraudulent intent may not be inferred from a subsequent failure to perform a promise. Id.; Bulbman, 108 Nev. at 112.

Throughout his answering brief, Hyatt attempts to avoid the absence of fraudulent intent by making conclusory statements that FTB acted in bad faith. See RAB 91-92. He goes so far as to suggest that the intent element of fraud can be established by simply accepting his factual and legal conclusion that the FTB acted in bad faith. See RAB 91-92. Notably, Hyatt offers no authority to support this claimed legal principle. Id.

Hyatt's argument to support the intent element of his fraud claim is based entirely on FTB's alleged **subsequent** failure to perform on its alleged promises of fairness and confidentiality. See, e.g., RAB 15-37 (detailing evidence of so-called "bad faith" based upon conduct of third FTB auditor to work on Hyatt's case over a year and a half after the audit was initiated and alleged promises were made). Hyatt baldly asserts, without citing to anything in the record, that the FTB "conducted a goal-oriented audit" and later assessed a fraud penalty against Hyatt "to better bargain for and position the case to settle." See RAB

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91.[29] With these broad and unsupported statements, Hyatt attempts to equate fraudulent intent with various events that occurred well after the alleged promises of fairness and impartiality in 1993. To the extent Hyatt's "bad faith" term of art refers to his allegations that Anna Javonovich threatened him to force a settlement in 1995, see RAB 40-41, Hyatt has not shown how or why this allegation bears any relationship to Marc Shayer's alleged promises in 1993. To the extent Hyatt is referring to his characterizations of FTB's amnesty program, see RAB 51, Hyatt has not shown how or why this program originated in 2004 relates to Marc Shayer's alleged promises in 1993. Finally, to the extent that Hyatt is referring to his allegations that Shelia Cox made an anti-Semitic remark in 1995, see RAB 15-16, or a boast to Hyatt's ex-wife in 1995, see RAB 15-16, or a boast to Hyatt's ex-wife in 1995, see RAB 92:3-4, he has not shown how or why this allegation bears any relationship, temporal or otherwise, to Marc Shayer's alleged promises made in 1993.

Even accepting Hyatt's allegations and gross mischaracterizations as true, all of FTB's alleged bad faith actions took place well after the alleged promises of future conduct made in 1993. Because Hyatt has failed to present anything other than FTB's alleged subsequent failure to perform on its promises, as a matter of law, he cannot establish the requisite intent element of his fraud claim.

d. There Was No Justifiable Reliance

To establish justifiable or reasonable reliance, this court requires the following:

> The false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and **when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it or for other reasons, his loss is not attributed to the defendant.**

Lubbe v. Barba, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975) (emphasis added). Lack of justifiable reliance bars recovery in an action for fraud. Pac. Maxon, Inc. v. Wilson, 96 Nev. 867, 870, 619 P.2d 816, 818 (1980). Where the defendant's alleged misrepresentations could not have been material to the plaintiff's decision to act, no justifiable reliance exists.

[29]The court should also note that Hyatt does not contest that the events he says prove fraudulent intent all occurred after 1993. RAB 91-92.

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See Clark Sanitation, Inc. v. Sun Valley Disposal Co., 87 Nev. 338, 342, 487 P.2d 337, 339 (1971). Here, contrary to Hyatt's assertions, he could not and did not justifiably rely to his detriment on any of FTB's alleged promises.

Regardless of any representations or promises FTB made, Hyatt was required by law to comply with the audit. Indeed, the very same letter in which he claims FTB made the promises (FTB will treat you with courtesy and will comply with California's Information Practices Act and Federal Privacy Act) which induced him to cooperate contains the following language:

> It is ***mandatory*** to furnish all information requested when you are required to file a return or statement. If you do not file a return, or do not provide the information we ask for, or provide fraudulent information, the law says you may be charged with penalties and interest and, in certain cases, you may be subject to criminal prosecution. We also may disallow claimed exemptions, exclusions, credits, deductions or adjustments. This could make the tax higher or delay or reduce any refund.

See 1 SAA 00003 (emphasis added). Hyatt's contention that his only reason for cooperating with the audit was based on his belief that the FTB would treat him courteously and keep his information private (RAB 92:13-16) is disingenuous because he knew his failure to cooperate would result in severe financial or criminal penalties. See id.

In addition, Hyatt contends that his reliance is proven by the alleged special damages (professional fees he incurred during the audit) he sustained. RAB 92-93. For the reasons discussed above, he would have incurred those sums anyway.

4. Hyatt's Invasion of Privacy Claims Fail As A Matter Of Law

Hyatt's brief erroneously contends that FTB's various invasion of privacy arguments must be rejected because there was substantial evidence presented to the jury to support these claims. RAB 97; 104-107. Hyatt misses the point. This is not a substantial evidence issue. Rather, FTB contends that **none** of Hyatt's invasion of privacy claims should have been submitted to the jury because these claims should have been dismissed as a matter of law. AOB 78-79.

a. FTB's Disclosures Of Hyatt's Identity Information Was Made Strictly In The Context Of FTB's Investigation

Throughout his brief, Hyatt claims that FTB made "massive disclosures of his

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personal information." See, e.g., RAB 37, 95, 102, 107, 124. Hyatt claims that these "mass disseminations" were "unprecedented" disclosures of his personal information – i.e., his name, social security number, address ("the Tara address"),[30] credit card information, and "other personal information."[31] Id. at 37-38, 133, 181:8.

i. Credit Card Number

In truth, there was only 1 disclosure of Hyatt's credit card number and that was to a third-party who already possessed the number.

NAME OF RECIPIENT	RECORD CITES
Federal Express	66 AA 16279-80

In reviewing Hyatt's credit card statements, FTB discovered that Hyatt used his card for payment to Federal Express, 42 AA 10384 (115)-(117), and FTB requested information about origination and drop-off of his packages. 66 AA 16279-80. FTB provided Hyatt's credit card number, which Hyatt himself had already given to Federal Express to pay for these shipments. Id.

ii. Tara Address

In truth, only 11 letters referenced Hyatt's Tara address.

NAME OF RECIPIENT	RECORD CITES
Allstate Sand and Gravel	65 AA 16174
CG Eggers	64 AA 15997-98
Clark County Recorder	64 AA 15879
Clark County Treasurer	63 AA 15717
Harold Pryor	64 AA 15995-96

[30]Hyatt's challenged disclosure of his address was limited to his Las Vegas Home on Tara Avenue. See 14 AA 03281. Thus, when FTB refers to the disclosures of Hyatt's address, it is referring only to FTB's disclosure of the Tara address.

[31]Hyatt does not identify what "other personal information" FTB allegedly disclosed other than the information listed. FTB cannot and will not attempt to address this new unsubstantiated category of "other personal information" in this reply brief.

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KB Plumbing	64 AA 15999
Las Vegas Sun	66 AA 16382-83
LV Valley Water Dist.	65 AA 16095-96
Orange County Treasurer/Tax Collector	63 AA 15697
Silver State Disposal	65 AA 16097-98
Southwest Gas Co.	65 AA 16099-100

Every recipient was already in possession of his address. Over half were sent to government agencies or public utilities, already in possession of the information. (Clark County Recorder) 64 AA 15879; (Clark County Treasurer) 63 AA 15717; (Las Vegas Valley Water District) 65 AA 16095-96; (Orange County Treasurer/Tax Collector) 63 AA 15697; (Silver State Disposal) 65 AA 16097-98; (Southwest Gas Company) 65 AA 16099-100.

Of the 5 remaining contacts: two were sent to Hyatt's neighbors – each of whom lived on the same street as Hyatt and were clearly aware of the Tara address, (CG Eggers) 64 AA 15997-98; (Harold Pryor) 64 AA 15995-96; two were sent to companies that had performed work and/or services at the Tara address, and obviously had the address, (Allstate Land and Gravel) 65 AA 16174; (KB Plumbing) 64 AA 15999; and one was sent to the subscription department of the newspaper to determine whether the newspaper was being delivered to Hyatt's home, 66 AA 16382-83.[32]

Of the third-party disclosures that used Hyatt's Tara address, only 6 referenced Hyatt's name somewhere on the correspondence in conjunction with the address. In other words, although FTB may have disclosed the Tara address, FTB did not connect Hyatt's name to that address in such way that it would reveal Hyatt lived there. (Allstate Sand and Gravel) 65 AA 16174; (Clark County Assessor) 63 AA 15723; (Las Vegas Sun) 66 AA

[32]An individual "must expect the more or less casual observation of his neighbors and the passing public as to what he is and does and thus there is no liability for publicizing that he has returned home from a visit, or gone camping in the woods, or given a party at his house for his friends." Johnson v. Sawyer, 47 F.3d 716, 733 (5th Cir. 1995) citing Restatement (Second) of Torts, § 652 D, comment b.

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16382-83; (Las Vegas Valley Water District) 65 AA 16095-96; (Silver State Disposal) 65 AA 16097-98; (Southwest Gas Company) 65 AA 16099-100.

Thus, FTB's so-called "massive disclosures" of Hyatt's Tara address were in reality 11 third-party contacts, over half of which did not reference Hyatt's name, and all of which were sent to individuals or entities that already had the Tara address in their possession at the time of the disclosure.

iii. Social Security Number

Hyatt also claims that FTB made "massive disclosures" of his social security number to third parties. RAB 37-38, 133, 188. In this instance, 43 of the contacts contained Hyatt's social security number which was used as an identifier, common at the time, to ensure that they were requesting and receiving information about the right Gilbert Hyatt.

NAME OF RECIPIENT	AA CITES
Association of Computing Machinery	64 AA 15900-01
Bizmart	64 AA 15941-42
Block, Plant & Eiser	65 AA 16127-28
City Water Service -- La Palma	63 AA 15734-35
Clark County Assessor	63 AA 15723
Clark County Department Election	63 AA 15668
Clark County Department Elections	65 AA 16109
Commerce Bank	64 AA 15971-972
Congregation Ner Tamid	65 AA 16080-81
Copley Colony	65 AA 16023-24
Dale Fiola	65 AA 16123-24
Great Expectations	64 AA 15906-09
Greg Roth	65 AA 16139-40
Institute Electrical & Electronic Engineers	64 AA 15902-03
Las Vegas Sun	65 AA 16093-94
Las Vegas Sun	66 AA 16382-83
Las Vegas Valley Water District	65 AA 16095-96
Lesley Anne Andrus	65 AA 16141-42
Licensing Executives Society	64 AA 15898-99
Loeb and Loeb	65 AA 16121-22
Nevada Development Authority	64 AA 15910-11
Nevada DMV	63 AA 15615
Orange County Register	66 AA 16386-87

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Orange County Times	66 AA 16384-85
Orange County Treasurer/Tax Collector	63 AA 15701-02
Orange County Treasurer/Tax Collector	63 AA 15697
Orange County Voter Registration	63 AA 15694
Personal Computer Users Group	64 AA 15912-13
Post Office Cerritos	63 AA 15673
Roger McCaffrey	65 AA 16125-26
Sam's Club	64 AA 15943-44
Sam's Club	64 AA 15973-74
Silver State Disposal	65 AA 16097-98
Southern California Edison	63 AA 15731-32
Southwest Co. Club	65 AA 16024-26
Southwest Gas Co.	65 AA 16099-100
Sports Authority	64 AA 15904-05
Sports Authority	64 AA 15939-40
Temple Beth Am	64 AA 15896-97
Temple Beth Am	64 AA 15945-46
US Postmaster -- CA	65 AA 16078
US Postmaster -- CA	65 AA 16077
Wagon Trails Apartment Complex	64 AA 15990-94

In fact there were two Gilbert Hyatts that resided in Las Vegas at the time of FTB's audits. 39 AA 09716 (75)-(76).

At trial, it was undisputed that one's social security number was the most commonly and regularly used identifier in the mid-1990's. See 39 AA 09726 (117) – 27 (119), 9728 (125-26) (testimony of Hyatt's privacy expert, Daniel Solove); 48 AA 11801 (96-97), 11802 (99), 11817 (160) - 11818 (164) (testimony of FTB's privacy expert, Deidre Mulligan). For example, during that timeframe, social security numbers were used as driver's license numbers in Nevada. 1996 Nev. Op. Att'y Gen. No. 26 (Sept. 13, 1996); NRS 483.345 (1996).[33] Colleges and universities in Nevada used social security numbers as

[33]At trial, several examples were discussed concerning the use of a driver's license as identification. E.g. Before ATM's, when one paid for groceries with a check, the cashier would ask to see the payor's driver's license and note the social security number on the

Continued . . .

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student identification numbers. 48 AA 11800 (90). Social security numbers were required on voter registration forms--like Hyatt's--which are public documents. 77 AA 19098 – 19102. Hyatt, himself, freely disclosed his social security number to many government agencies, individuals and business without requesting confidentiality. 47 AA 11626 (75) – 11628 (85); 77 AA 19100 – 02; 78 AA 19429. Hyatt also placed his social security number into the public record in numerous litigations ongoing at the time of FTB's audit. 78 AA 19346-48; 19369-78, 19393, 19405, 19425.

iv. Hyatt's Name Only

To begin, Hyatt offers no argument or case law explaining how disclosure of simply his name invaded his privacy. Moreover, can one imagine conducting any government investigation without ever disclosing the identity of these individual under investigation?

The letters that Hyatt complains of were sent to Hyatt's own professionals, business contacts or government agencies.[34] Many of the entities and individuals were provided by Hyatt as his own Nevada contacts.[35] Others were either friends or knew of Hyatt.[36] Both Chris Woodward and Jerry Hicks had interviewed Hyatt for newspaper articles. 66 AA 16281-2. All of these individuals clearly knew Hyatt's name when they received FTB's

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check. 30 AA 7437 (192)-(193); 48 AA 11800 (90); 11801 (94)-(95). Grades at colleges and universities were publicly posted using social security numbers. Id.

[34](Association of Colo-Rectal Surgery) 65 AA 16022; (Dr. Edgar Hamer) 64 AA 15957; (Dr. Gerald Isenberg) 64 AA 15967; (Dr. Steven Hall) 64 AA 15968; (Dr. William Peloquin) 64 AA 15969; (Las Alamitos Imaging) 64 AA 15965-66; (University Medical Center) 64 AA 15970; (Association of Colo-Rectal Surgery) 65 AA 16022; (Clark County School District) 65 AA 16108; (Dr. Edgar Hamer) 64 AA 15957; (Dr. Eric Shapiro) 64 AA 15958; (Dr. Gerald Isenberg) 64 AA 15967; (Dr. Melvin Shapiro) 64 AA 15959; (Dr. Nathan Shapiro) 64 AA 15960; (Dr. Norman Shapiro) 64 AA 15961; (Dr. Richard Shapiro) 64 AA 15962; (Dr. Shapiro) 64 AA 15964; (Fujitsu) 65 AA 16187-88; (Gov. Robert Miller) 65 AA 16191; (Helene Schlindwein) 65 AA 16169-173; (LA Times, Chris Woodyard) 66 AA 16282; (LA Times, Jerry Hicks) 66 AA 16281; (Las Alamitos Imaging) 64 AA 15965-66; (Linda Wetsch) 66 AA 16362-65; (Matsushita) 65 AA 16189-90; (Sen. Richard Bryan) 65 AA 16192; (University Medical Center) 64 AA 15970.

[35](Clark County School District) 65 AA 16108; (Gov. Robert Miller) 65 AA 16191; (Sen. Richard Bryan) 65 AA 16192.

[36]38 AA 9339 (159) (Helene Schlindwien).

correspondence.

v. Purpose Of The Third-Party Contacts

In addition to creating an impression of "massive" disclosures, Hyatt's brief also attempts to create the impression that FTB had no legitimate business purpose for sending the correspondence. See generally RAB 37-40. This, too, is false.

As explained in FTB's opening brief, each of its third-party contacts was sent for the purpose of investigating Hyatt's claim that he severed his California residency, which also included verifying information that Hyatt had provided FTB to support this claim[37]. See AOB 6-16. The undisputed testimony at trial established unequivocally that all of these documents were sent for the purpose of conducting a legitimate residency audit of Hyatt and for no other purpose. 42 AA 10313 (167)-10320 (196); 10363 (32)-10394 (156). This same undisputed evidence, explained in detail in FTB's brief, reveals that each third-party contact was individually tailored to each recipient in order to receive only the specific information believed to be in the possession of that entity or person. Id.; see AOB 9-12.

With each of these documents FTB was attempting to determine, objectively, the state in which Hyatt maintained the closest connections – such as where he maintained his bank accounts; where he belonged to professional groups and organizations; where he saw a doctor or dentist; where he got his daily newspaper; where he was registered to vote; where he owned property; where he purchased groceries, filled prescriptions, got his hair cut;

[37]California law defines a "resident" as an individual who is in California for other than a temporary or transitory purpose or who is domiciled in California but who is outside the state for a temporary or transitory purpose. Cal Rev. & Tax. Code § 17014(a). This is determined by examining the objective facts surrounding the taxpayer's residency – not the taxpayer's subjective intent. In the Matter of the Appeal of Constance L. Maples, 2009 WL 532503 at *5 (Cal. St. Bd. Eq. Jan. 21, 2009). Where an individual has significant contacts with more than one state, the state in which the individual maintains the closest connections during the taxable year is deemed to be the state of residence. Id. To determine which state has the closest connections, FTB must consider objective factors and connections that a taxpayer may have with a specific state – such as the location of the taxpayer's real property, telephone records, the number of days the taxpayer spent in California versus the number of days spent in other states during the disputed time period, and other like information. Maples, 2009 WL 532503 at *4-5.

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where he maintained utilities; etc. 42 AA 10313 (167)-10320 (196); 10363 (32)-10394 (156). FTB did not just send out third-party correspondence randomly. Rather, it sent requests to those government agencies, public utilities, companies, individuals, and neighbors, which either knew, or should have known, information related to Hyatt's connections in either California or Nevada during the disputed time period. See id.

b. Nevada Does Not Recognize A Common Law Claim For Breach of Information Privacy; Such Claims Have Been Created By Legislatures or Congress

As previously argued in FTB's opening brief, Nevada does not recognize a cause of action for breach of informational privacy. See AOB 79-81. Nevada has made clear that it will not create a new common law claim when a statutory remedy already exists. [38]See, e.g. Sands Regent v. Valgardson, 105 Nev. 436, 440, 777 P.2d 898 (1989). Hyatt's primary response is that this issue was addressed by this court's 2002 order. RAB 95-96. As already indicated at pages 54-57, this court's 2002 order did not address this issue.

In this case, Hyatt relied principally upon alleged violations of California's Information Privacy Act and the Federal Privacy Act in support of his invasion of privacy claims. 52 AA 12824 (39)-(40); 12896 (37)-12897 (41). Both those statutes have comprehensive remedies for violations thereof. Cal. Civ. Code § 1798 et. seq.; 5 U.S.C. § 522a et. seq. Under Nevada law, Hyatt cannot create a new common law claim, instead of invoking those available statutory remedies. Hyatt baldly claims that the cases cited by FTB on this issue have no application to this case. See RAB 96. To the contrary, and on this issue FTB's point is best described by the court in Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1995), a case with remarkably similar facts:

> Even apart from the foregoing, there is no showing that Texas would create a common law cause of action for violation of section 6103(a)(1), inasmuch as section 7217 provided for a comprehensive private cause of action for any such violation. While Texas generally recognizes the doctrine of negligence *per se*, no Texas decision has been found applying the doctrine

[38]Nevada's Legislature did not recognize any protection for information privacy until 2005. See NRS 239B.030; NRS 239B.040.

> to create a common law cause of action for a statutory violation *where* there is a comprehensive and express statutory private cause of action for the statutory violation. Moreover, in this instance both the statute violated and the statute creating the cause of action for that violation are federal. We can think of no reason for a Texas court to create a common law cause of action for the statutory violation in such a circumstance. We have long followed the principle that we will not create "innovative theories of recovery or defense" under local law, but will rather merely apply it "as it currently exists." As there is currently no Texas law creating a common law cause of action for a statutory violation for which violation there is an express and comprehensive statutory cause of action, we will not undertake to ourselves create such a Texas common law cause of action.

Id. at 729 (citations and footnotes omitted).

c. There Was No Objective Expectation Of Privacy In The Information Disclosed By FTB As Part Of Its Audit

Hyatt's brief seems to ignore the requirement that he must have a reasonable expectation of privacy in the challenged disclosures. Hyatt has confused this requirement throughout this litigation – as he does now on appeal. Hyatt suggests it was appropriate for his invasion of privacy claims to be submitted to the jury merely because he had a "subjective expectation of privacy" in his name, home address and social security number. RAB 104-105. To this end, Hyatt claims that there is no relevance to whether he was a "public figure";[39] whether he hired a publicist and sought out and received substantial publicity; or whether the claimed "confidential" information was already a matter of public record when it was disclosed. See generally RAB 105-106. These arguments, however, are legally incorrect.

With an invasion of privacy claim there are two required expectations: (1) subjective expectation of privacy, and (2) this expectation must be objectively reasonable under the circumstances of the case. People for the Ethical Treatment of Animals v. Berosini, 111

[39]FTB is asserting that given Hyatt's public persona, the substantial publicity he personally generated for himself during the time the audit was being conducted (including conducting dozens of press interviews in his California home and having news organizations photograph his Tara address), Hyatt's objective expectation of privacy in his personal information was seriously, if not completely, diminished under the circumstances.

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Nev. 615, 632-33, 895 P.2d 1269 (1995); see also, Peters v. Vinatieri, 9 P.3d 909, 914-15 (Wash. Ct. App. 2000).

Whether an objective expectation of privacy exists in a particular context is a question of law for the court to decide. See, e.g., PETA v. Berosini, 111 Nev. at 633 n.20; Greywolf v. Carroll, 151 P.3d 1234, 1246 (Alaska 2007); Peters, 9 P.3d at 914-15. The issue here is not whether there was substantial evidence for the jury to determine that an objective expectation of privacy existed in this information, but whether the court should have permitted these claims to proceed to the jury in the first instance.

When objectively evaluating the scope of a privacy interest, the court must consider the circumstances surrounding the alleged invasion of privacy. PETA v. Berosini, 111 Nev. at 634; Ortiz v. Los Angeles Police Relief Ass'n, 120 Cal. Rptr. 2d 670, 679-80 (Cal. Ct. App. 2002) ("reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms...."). Community norms are determined by evaluating the customs of the time and place, the occupation of the plaintiff and the habits of his neighbors and fellow citizens. Restatement (Second) Torts § 652D, cmt. c. (1965). The customs, practices, and physical settings surrounding particular activities has effected whether a reasonable expectation of privacy may be present under certain circumstances. See, e.g., Whalen v. Roe, 429 U.S. 589, 602 (1977) (reporting of drug prescriptions to government was supported by established law and "not meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care"); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 114 (3d Cir. 1987) (no invasion of privacy in requirement that applicants for promotion to special police unit disclose medical and financial information in part because of applicant awareness that such disclosure "has historically been required by those in similar positions").

Whether Hyatt had a protectable, objective expectation of privacy in his name, address, or social security number, must be determined in light of the facts and circumstances that surround this case as well as the customs and norms in Nevada between

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1993 to 1995 – the period of time when FTB allegedly invaded his privacy. Runion v. State, 116 Nev. 1041, 1049, 13 P.3d 52 (2000). This requires the court to consider: the context of the disclosures, the nature and extent of the disclosures, Hyatt's own publicity, Hyatt's own disclosures of information, and the like. See PETA, 111 Nev. at 633 n.20; Ortiz, 98 Cal. App. 4th at 1304-05. When these factors are considered objectively, there is no question that Hyatt did not have an objectively reasonable expectation of privacy in the information disclosed.

The undisputed evidence revealed that all of the challenged disclosures of Hyatt's identity information were made during the course of a lawful audit investigation regarding Hyatt's residency. 42 AA 10313 (167)-10320 (196); 10363 (32)-10394 (156). As explained in FTB's brief, an expectation of privacy is diminished when someone is under investigation. AOB 84. Hyatt claims that the cases relied upon by FTB for this proposition do not apply to this case "because the government initiated the investigation of its own purposes." RAB 105-106. It is unclear what Hyatt means with argument. There is, however, no distinguishing these cases. Hyatt, like the plaintiffs in the cases relied upon by FTB, made a claim to a third-party about a fact pertaining to him. For example, in each of these cases, the plaintiffs made claims to their insurance companies or employers that they were entitled to worker's compensation or filed personal injury claims. See, for example, Schlatter v. Eighth Judicial Dist. Court In & For Clark County, 93 Nev. 189, 561 P.2d 1342 (1977); McLain v. Boise Cascade Corp., 533 P.2d 343, 346 (Or. 1975); Forster v. Manchester, 189 A.2d 147, 150 (Pa. 1963). In this case, Hyatt claimed to FTB that he was no longer a resident of California as of October 1, 1991 – shortly before he received 40 millions of dollar in taxable income. 63 AA 15528-29. FTB, like the investigating agencies in the above cases, investigated the accuracy of Hyatt's claim. 63 AA 15605. The context of these disclosures – during a lawful investigation – diminished, if not eliminated, Hyatt's expectation of privacy in this information.

Second, the nature and extent of the disclosures during the investigation further undermines any objectively reasonable expectation of privacy in this information. As

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explained above, virtually all of the challenged disclosures were made to businesses, government entities, Hyatt's own professionals, or entities and persons that Hyatt identified as possessing knowledge about his residency. See pages 66-68 above. Obviously, disclosures of information to someone that already has the information cannot be an invasion of privacy. Moreover, the vast majority of the disclosures were made to businesses or government entities. Id. As explained in FTB's opening brief, there is no expectation of privacy in business records. Couch v. United States, 409 U.S. 322, 335-36 (1973); United States v. Miller, 425 U.S. 435 (1976). In addition, it is a well accepted point that the disclosure of one's home address and name is not an invasion of privacy. See McNutt v. New Mexico State Tribune Co., 538 P.2d 804, 808 (N.M. Ct. App. 1975) (publication of names and addresses of police officers and wives was not an invasion of privacy); see also, 62A Am. Jur.2d Privacy § 172.

Third, contrary to Hyatt's claim that he is a private person who has actively sought privacy in his life, Hyatt enjoyed widespread publicity throughout the time FTB was allegedly disclosing his identity information – in particular his name. In fact, Hyatt was the subject of hundreds of newspaper and magazine articles. 40 ARA 9977–10002; 41 ARA 10188; 44 ARA 10751; 89 AA 22070-137. And, it was Hyatt who engaged the publicist that generated this very publicity. 48 AA 11986 (107)-11989 (121). Hyatt offered no argument in response to FTB's claim of prejudicial error by Judge Walsh's refusal to admit the massive publicity surrounding Hyatt. See RAB 97. If, as Hyatt contends, it was an issue for the jury concerning the reasonableness of his privacy expectation, then surely the jury was entitled to review all the relevant evidence. 48 AA 11984 (99)-1192 (133). By engaging in this type of publicity, Hyatt regularly and personally disclosed his name and significant information about his personal life to the public at large – without any concern for his personal privacy. Moreover, Hyatt was freely disclosing his social security number, Tara address and other information to various vendors and others without seeking any promises of confidentiality – at the exact same time that FTB was using the same identity information to ensure it was getting information about the correct Gilbert Hyatt. 38 ARA 9430 – 39

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ARA 9559; 79 AA 19732 – 80 AA 19753. These disclosures by Hyatt were made to such entities as piano delivery men, Sam's Club, Sears, a Toyota dealership, Allstate Sand and Gravel, State Farm, an air conditioning company, an appliance repair company, construction companies and others. Id.

Fourth, Hyatt's name, social security number and address were a matter of public record during the same period that FTB allegedly disclosed this information. See pages 79-80 below. Therefore, Hyatt's own actions and behaviors reveal that there could hardly be an objective expectation of privacy in his name, Tara address, and social security number between 1993 and 1995 when FTB used his identity information.

Finally, the undisputed evidence at trial revealed that in Nevada between 1993 and 1995 this identity information was routinely and widely disclosed.[40] See 1996 Nev. Op. Att'y Gen. No. 26 (Sept. 13, 1996); NRS 483.345 (1996); 48 AA 11801 (94-97); 47 AA 11614 (27), 11623 (64). The customs and practices in Nevada between 1993 and 1995 reveal that Hyatt's name, address and social security number were not considered highly confidential information at that time. See Johnson v. Sawyer, 47 F.3d at 736 n. 40.

Taking all of these facts and issues into consideration, Hyatt had no objective expectation of privacy in his identity information during FTB's audit investigation. The disclosures were made during a lawful investigation; they were narrowly tailored to third parties that were expected to have information related to Hyatt's residency; the disclosures were made to entities and individuals that either had, or were likely to have, the information disclosed; Hyatt received significant publicity, based upon his own efforts, during the time of the audit; Hyatt regularly disclosed this same information during the timeframe; the information disclosed was already a matter of public record; and the customs and actions in Nevada during the relevant timeframe did not support a finding of privacy in this

[40]The court cannot review FTB's conduct under today's standards. Rather, the court must consider the customs and practices related to the disclosure of this information between 1993 and 1995 – when the disclosures were actually made. See, Ortiz, 98 Cal. App. 4th at 1304-05; Restatement (Second) Torts § 652D, cmt. c. (1965).

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information.[41] Based upon all of these facts, the district court erred when it did not determine, as a matter of law, that there was no objective expectation of privacy in the matters disclosed.

d. Since All Information Disclosed Was A Public Record, Hyatt's Claims Were Precluded By The Public Records Defense

Hyatt's brief did not provide any legal or evidentiary basis to overcome the fact that the identity information disclosed by FTB was a matter of public record at the time it was disclosed during the audit. In fact, Hyatt does not dispute that his name, address and social security number (the claimed "personal" or identity information alleged to have been impermissively disclosed by FTB) were a matter of public record at the time of the disclosures. See RAB 97-103. Contrary to Hyatt's advocacy, the question here is whether liability under an invasion of privacy theory can be imposed for the disclosure of identity information, including social security numbers, when that information is already found in public records.

This court, the United States Supreme Court and the Restatement of Torts have answered this question by unequivocally holding that information contained in public records, including old public records, cannot form the basis for liability for common law invasion of privacy claims. Montesano v. Donrey Media Group, 99 Nev. 644, 649, 668 P.2d 1081 (1983); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); Restatement (Second) of Torts 652D cmt. b (1977). In fact, comment b of the restatement specifically notes that, "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public . . . [including] facts about the plaintiff's life that are matters of public record, such as the date of his birth, the facts of his marriage, . . . or the

[41]Under each of the invasion of privacy torts, the plaintiff must establish that the alleged invasion of privacy would be highly offensive to a reasonable person. PETA, 111 Nev. at 634. The factors that are applied to determine whether conduct is highly offensive are analogous to the factors that are used to determine whether the expectation of privacy is objectively reasonable. Id.; See also, Taus v. Loftus, 151 P.3d 1185, 1222, (Cal. 2007) (considering same factors to conclude that both reasonable expectation of privacy and highly offensive intrusion existed).

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pleadings that he has filed in a lawsuit."

Hyatt attempts to sidestep this clear, binding authority by arguing that Montesano and Cox are not controlling and are distinguishable from this case. Hyatt argues that Montesano does not apply because the public records at issue in that case are different from the public records at issue here since the information disclosed was "never private" and never "intended to be private." RAB 101. Montesano makes no such distinction. Montesano, 99 Nev. at 649. Rather, Montesano, like Cox before it, held that disclosing information that is already available to the public or is a matter of public record cannot provide the basis for common law invasion of privacy claims in Nevada. Id. Hyatt also argues that information contained in "isolated and stale" public records is not subject to the public records defense or the holding of Montesano. RAB 97, 98. Montesano expressly rejected Hyatt's argument. This court held that information relating to an arrest of the plaintiff which occurred in 1955, when plaintiff was a minor, and which was contained in a public record could not form the basis of an invasion of privacy claim following the republication of this information 24 years later in 1979. Montesanto, 99 Nev. at 649. As this court stated, courts have "universally recognized" that "materials properly contained in a court's official records are public facts." Id. Thus, regardless of Hyatt's attempts to distinguish Montesano, Nevada law is clear – information that is a matter of public record cannot form the basis for an invasion of privacy claim in this State. Id. [42]

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[42]Several cases cited by Hyatt have no application to the question of whether disclosure of information such as a person's name, address, or social security number, that is already a matter of public record, can ever provide the basis for a common law invasion of privacy claim. For example, some citations only address the issue of whether lists of certain people, which include this type of information, should be disclosed under Freedom of Information Act requests. Heights Cmty. Cong. v. Veterans Admin., 732 F.2d 526 (6th Cir. 1984). Other cases cited by Hyatt address liability for federal constitutional violations – not under common law claims in Nevada. See, Sheets v. Salt Lake County, 45 F.3d 1383 (10th Cir. 1995) (constitutional claims). Others address core privacy interests related to procreation and medical records. Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. Ct. App. 1994) (disclosure of HIV status); Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488 (Mo. Ct. App. 1990 (right to privacy in procreation). Incidentally, neither of these cases involved the disclosure of information that was already contained in the public record. In other instances, Hyatt's citations highlight the public nature of the very facts Hyatt claims are contained in obscure and stale public records. For example, Greidinger v. Davis, 988 F.2d

Continued . . .

Also, Hyatt's contention is also factually inaccurate. Contrary to Hyatt's arguments, his name, social security number and Tara address were disclosed in various public records that were created or given publicity during the exact same time frame that FTB used this information. Hyatt's social security number appeared in public documents related to Hyatt's divorce proceedings. 80 AA 19811-38; 82 AA 20308-83, 20564; 83 AA 20599-693. These re-opened proceedings were ongoing in the early 1990s when FTB began its audit, and were the subject of newspaper articles during this timeframe. 83 AA 20565-78; 43 ARA 10623-10632. Hyatt's name and social security number were listed in Hyatt's voter's registration forms, which were filled out and filed in Nevada in 1991 and 1995, respectively. 77 AA 19087-118. Hyatt's social security number was voluntarily disclosed on his business license form that was filed in 1992. 78 AA 19429; 78 AA 19426-28. In 1993 and 1994, Hyatt paid the property taxes on the Tara address, which created a public record of Hyatt's connection to the Tara address. 47 AA 11626(76) – 628(85).

Finally, Hyatt argues that Montesano and Cox Broadcasting are limited to media defendants. RAB 101. However, nothing in those decisions creates such a limitation. And other courts have expressly rejected Hyatt's contention, noting that Cox Broadcasting was not limited to media publications and nor was it the rationale of that opinion. Johnson v. Sawyer, 47 F.3d at 732 n. 33. FTB is not asserting a First Amendment defense. Rather, FTB is asserting that, as a matter of Nevada law, Hyatt's claims for invasion of privacy were precluded because all of the information disclosed was a matter of public record at the time of the disclosure. Therefore, the district court erred, as a matter of law, when it failed to dismiss Hyatt's invasion of privacy claims pretrial based upon the clear application of the public records defense. Montesano, 99 Nev. at 649.

1344 (4th Cir. 1993), which is not premised on invasion of privacy claims, highlights the public nature of voter registration forms. Recall, Hyatt's name and social security were listed on Hyatt's voter registrations, which, as noted by Greidinger, are public documents. Thus, Hyatt's out-of-state authority does not advance his argument that this court should ignore controlling Nevada authority related to this issue.

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PO BOX 2670 • RENO, NEVADA 89505-2670
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e. There Was No Evidence Presented to Support The False Light Claim

As explained in FTB's opening brief, in order to prevail on his false light claim, Hyatt was required to prove that FTB's statements were false. AOB 85-86. In order to establish the falsity, Hyatt was required to establish that FTB made at least an implicit false statement of objective fact. Restatement (Second) of Torts § 652E(b) (1977) (referencing the "falsity of the publicized matter"); Flowers v. Carville, 310 F.3d 1118, 1132 (9th Cir. 2002) (applying Nevada law).[43] As the restatement clarifies, "it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true." Restatement (Second) Torts § 652E cmt. a (1977). The very name of the tort "false light" indicates that the matter publicized must be false before it becomes actionable.

Hyatt claims that he presented substantial evidence to support this element. RAB 106-107. Hyatt does not dispute that he presented no evidence that any third-party who received FTB's demands construed them as implying Hyatt was a tax cheat, but he claims that the jury could simply draw the inferences from the evidence that FTB portrayed Hyatt as a "tax cheat for 10 years." RAB 106-107. Hyatt presented absolutely no evidence – not one witness, not one document –establishing that any person or entity either construed FTB's communications as implying he was a tax cheat or believed Hyatt was a tax cheat after receiving one of FTB's third-party contacts or reviewing FTB's Litigation Roster.

The undisputed evidence reveals that FTB made no false statements of fact or inferences related to Hyatt during the audit investigations or at any time thereafter. Clearly FTB's third-party correspondence did not state or infer that Hyatt was a tax cheat. See, e.g.,

[43]Hyatt claims FTB published false statements that implied he was a "tax cheat." RAB 107. In order for the jury to determine that FTB had made the "false" statement that Hyatt was a "tax cheat," the jury was necessarily required to determine the propriety of the underlying tax and fraud penalty assessments. Yet Hyatt alleges they were repeatedly told they could not do so and were not asked to do. RAB 75-79. Now Hyatt takes a contrary view admitting that in order for Hyatt to prove that FTB's implied statement was false, he was necessarily required to prove that he was **not** a tax cheat – which required the jury to review and determine whether the tax and fraud assessments were correct.

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PO BOX 2670 • RENO, NEVADA 89505-2670
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63 AA 15723; 65 AA 16099-100; 64 AA 15910-11. Rather, this correspondence, at most, inferred that Hyatt was under investigation. See id. This was undeniably true.

As to the Litigation Roster, FTB made no false statement of fact or inference related to Hyatt. FTB merely listed this litigation, a general description of the dispute between the parties, and the amount in controversy. 83 AA 20694-22050. Hyatt contends that FTB created a false inference that Hyatt was a tax cheat because the amount of the tax assessments and fraud penalties were listed on the Litigation Roster. RAB 107. This inference is illogical and unreasonable. All of the cases on the Litigation Roster were cases in which the taxpayers and FTB were currently litigating (i.e., disputing) tax assessments made by FTB. 83 AA 20694-22050. The only reasonable inference that could be drawn from the Litigation Roster and the listing of the tax assessments was that Hyatt disputed these amounts and he was litigating these conclusions with FTB. 54 AA 13626-29; 54 AA 13398-403. Therefore, the inference was not false. No matter how this issue is reviewed, it is plain that FTB never published any false statement or inference related to Hyatt either during the audits or with the publication of the Litigation Rosters. This is fatal to Hyatt's false light claim.

f. FTB's Litigation Rosters Were Privileged

i. Litigation Privilege

Hyatt contends that the litigation privilege applies only to communications between counsel in the course of judicial proceedings, and he argues that, because the Litigation Rosters allegedly did not "function as a necessary or useful step in the litigation process," they are not protected by the litigation privilege. See RAB 108. Hyatt's attempt to narrow the scope of the litigation privilege is clearly contrary to Nevada law as recently articulated by this court in Clark County Sch. Dist. v. Virtual Educ. Software Inc., 126 Nev.___, 213 P.3d 496, 502 (2009).[44] The "scope of the absolute [litigation] privilege is broad," and "a

[44]Hyatt does not cite to Virtual in the section in his answering brief that discusses the litigation privilege, even though that opinion was published nearly five months before Hyatt

Continued . . .

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court determining whether the privilege applies should resolve any doubt in favor of a broad application." Virtual, 213 P.3d at 502 (citing Fink v. Oshins, 118 Nev. 428, 432, 49 P.3d 640, 643 (2002)). This court held that the litigation privilege applies even to communications made by a party even before any litigation has commenced. Id.

Here, the Litigation Rosters were published by FTB in response to the litigation filed against FTB, during the course of the litigation, by a party to the litigation, FTB. See 50 AA 12297 (76-77). As noted in FTB's opening brief, communications are "related to" the litigation where they have "some bearing on the subject matter of the proceeding." See AOB 87. Hyatt attempts to narrow the scope of the privilege by citing inapplicable case law from other jurisdictions. See RAB 108. He then formulates his own test, stating that the communications at issue must be "a necessary or useful step in the litigation process." See id. As this court recognized in Virtual, however, the litigation privilege is broad, and it extends even to letters written by parties outside the course of any judicial proceeding. See Virtual, 213 P.3d at 503. Indeed, so long as communication is "connected with, or relevant or material to, the cause in hand or subject of inquiry," the communication is absolutely privileged, and "no action will lie therefore, however false or malicious [it] may in fact be." See Sahara Gaming Corp. v. Culinary Workers Union Local 226, 115 Nev. 212, 218, 984 P.2d 164, 168 (1999) (citations omitted). Here, the Litigation Rosters were simply summaries of the lawsuit Hyatt filed against the FTB in Nevada—much like judicial dockets-- and as such, they bear a direct relationship not only to the subject matter of this proceeding, but to the actual proceeding itself. See 83 AA 20694- 89 AA 22050 (Complete Copies Of All Litigation Rosters).

ii. Fair Report Privilege

Hyatt contends that the fair report privilege only protects "[q]uoting from a court file," and that the Litigation Rosters are not protected because they somehow implied that Hyatt was a tax cheat or that he was guilty of tax fraud. RAB 109. From that, Hyatt argues

filed his answering brief, see RAB 108, and even though Hyatt was well aware of Virtual. RAB 52 n. 206.

McDONALD·CARANO·WILSON LLP
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FTB's inclusion of the amount of the tax assessments on the Litigation Roster, between April 1998 to March 2000 (when the amount of the tax assessments was placed in the case file by Hyatt himself), was not a "fair report" of the litigation because this information was not related to the litigation at that time. See RAB 108-109. Hyatt's arguments are factually inaccurate, and he attempts to narrow the scope of the fair report privilege in a manner that is inconsistent with Nevada law.

Contrary to Hyatt's assertions, against the allegation of his complaint, the amount of the tax assessments *was* at issue from the onset of this litigation. Hyatt filed his Complaint in 1998, which included his First Cause of Action for "Declaratory Relief." 1 AA 1-16. Hyatt sought a determination that he terminated his California residency on September 26, 1991. Id. As such, Hyatt challenged FTB's determination regarding his residency, and he sought to invalidate the tax assessments and penalties. See id. Although his claim was dismissed in April 1998, Hyatt re-pled this claim in his First Amended Complaint, filed in June 1998, 1 AA 114-43, as well as his Second Amended Complaint filed in April 2006, expressly stating he was doing so to preserve the issue for appeal. 14 AA 3257-3300. Therefore, Hyatt's contention that his tax assessments were not at issue in this litigation is simply not supported by his own pleadings. Moreover, by placing the propriety of the tax assessments at issue, Hyatt waived any right to confidentiality or privacy in the information contained on the Litigation Roster. Schlatter, 93 Nev. at 192 (when a litigant places an issue before the court he cannot claim privilege surrounding that issue).

Hyatt does not contend that the amounts of proposed assessments listed on the Litigation Roster were inaccurate. It is, therefore, unclear how the inclusion of these specific figures, which are undisputedly accurate, makes the Litigation Roster an "unfair" report. Contrary to Hyatt's brief (RAB 109, n. 402), the record in this case reveals that these amounts were placed in the court file in March 2000, by Hyatt, when his own attorney, Eugene Cowan, submitted an affidavit in support of one of Hyatt's own filings. See 3 RA 593, 595. This occurred long before this case was appealed to the United States Supreme

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Court. In addition, the Litigation Roster was not published on FTB's website until 2000. See 50 AA 12296(70)-12297(74).

Nevada law does not require the information reported to be specifically included in a court file at all in order for this privilege to apply. Wynn v. Smith, 117 Nev. 6, 14, 16 P.3d 424 (2001); Lubin v. Kunin, 117 Nev. 107, 17 P.3d 422 (2001). In fact, contrary to Hyatt's arguments, Nevada law does not even require 100 percent accuracy in order for this privilege to apply. Id. Rather, the report need only be a "fair abridgment of the occurrence reported" or an otherwise "fair and accurate" report. Id. at 14 (citing Restatement (Second) Torts § 611 (1965)). Even if more accurate information is included in the report than is present in the court file, it is baffling for Hyatt to claim that such a report is "inaccurate" and not subject to this privilege.

Here, the Litigation Rosters presented a fair and accurate report of the judicial proceeding in Nevada initiated by Hyatt. 85 AA 21178-79. The rosters accurately noted the existence of the litigation, the issues involved, and the amount in controversy between the parties, i.e., the amounts of Hyatt's tax assessments. Id. Hyatt speculates from these simple statements that the general public would somehow understand these statements to imply that he was a tax cheat or that he "had been found guilty of fraud." See RAB 109. As before, Hyatt offered no evidence in support of his speculation. Hyatt's speculation is therefore baseless and cannot defeat the fair report privilege.

g. Without the Litigation Rosters, There Was No Evidence of the Required Element of Publicity for the Invasion of Privacy Claims

In arguing that the invasion of privacy claims were supported by substantial evidence, Hyatt relies heavily on the Litigation Rosters. E.g., RAB 106 (publication of Litigation Roster allowed inference that Hyatt was portrayed in false light to third parties); 107 (FTB "falsely broadcasted on its internet website that Hyatt wad committed tax fraud") Without the Litigation Rosters he has no other evidence satisfying the essential element of "publicity," for purposes of his invasion of privacy claims.

Publicity, which is a required element for Hyatt's claims alleging false light and publication of private facts, requires that "the matter is made public, by communicating it to

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PO BOX 2670 • RENO, NEVADA 89505-2670
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the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of *public knowledge*." Restatement (Second) of Torts § 652D cmt. a (1977) (emphasis added). The publicity standard is far greater than the publication requirement associated with defamation, which requires simply that the matter be communicated to a third person. See id. Rather, to establish publicity under Hyatt's two claims, the information or statement must actually be disseminated to the public at large or to a large number of persons so as to make the statement either widely known to the public or likely to become known. Id.; see, e.g., Virgil v. Time, Inc., 527 F.2d 1122, 1126 (9th Cir. 1975) (indicating that the difference between "publication" and "publicity" is not the means of communication, but rather the difference is to whom the communication reaches); Marleau v. Truck Ins. Exch., 37 P.3d 148, 154 (Or. 2001); Fernandez-Wells v. Beauvais, 983 P.2d 1006, 1008 (N.M. 1999). Without the Litigation Roster, Hyatt cannot establish the necessary element of publicity because none of FTB's other alleged disclosures of identity information and the so-called false statements were publicized to the *public at large* or to so many persons that the matter of FTB's audit would be considered *public knowledge*.

h. The Breach Of Confidential Relationship Claim Failed As A Matter Of Law

Hyatt confuses the issue by arguing two separate torts (one recognized in Nevada and one not) should be melded together to form a new tort that Hyatt has termed "breach of confidentiality." See RAB 111. Specifically, Hyatt cites authority from a limited number of jurisdictions that recognize the tort of "breach of confidentiality," and argues that the alleged disclosure of confidential information by a government agency fits within Perry v. Jordan. RAB 111-112. The torts of breach of confidentiality and breach of confidential relationship are entirely separate theories. Nevada law has never recognized a tort for "breach of confidentiality."

The tort recognized in Nevada, breach of confidential relationship, requires the plaintiff to prove that "a confidential or fiduciary relationship" exists between the parties. Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). While this relationship does not necessarily equate to a fiduciary relationship, it "exists when one party gains the

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
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confidence of the other and purports to act or advise with the other's interests in mind." Id. at 947. "When such a special relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party."[45] Id.

Hyatt suggests that a confidential or special relationship existed between him and FTB. RAB 111-114. As noted in FTB's opening brief (AOB 90), an actionable special relationship cannot exist as a matter of law between a government agency and a private citizen, especially where the government agency is conducting an investigation of that citizen. Other jurisdictions unanimously have reached this conclusion. See, for example, Johnson v. Sawyer, 760 F. Supp. 1216, 1233 (S.D. Tex. 1991), issue upheld on appeal, 47 F.3d 716 (5th Cir. 1995). Maryland Envtl. Trust v. Gaynor, 803 A.2d 512, 517 (Md. 2002).

Indeed, "a taxpayer knows that the relationship between the taxpayer and the IRS is inherently an adversarial one." United States v. Mitchell, 763 F. Supp. 1262, 1267 (D. Vt. 1991) rev'd on other grounds in 966 F.2d 92 (2nd Cir. 1992). As a result of this adversarial relationship, "the taxpayer is well aware that in dealing with the IRS and its agents, he or she is well-advised to have the assistance of an accountant or a tax lawyer." Id. FTB is aware of no case holding that a "special relationship" exists between a citizen and a governmental taxing agency in the context of the tort of breach of confidential relationship as articulated in Perry v. Jordan, or even under the breach of confidentiality tort recognized by a few jurisdictions. Hyatt's brief, likewise, cites to no such case. Because no special

[45]Hyatt argues that a jury instruction on Perry was offered by FTB, and "FTB therefore cannot allege the [district] Court erred in instructing the jury." RAB 110. FTB always contended that there were legal obstacles barring Hyatt's "breach of confidentiality" claim. E.g. 13 AA 3073-77 (opposing amended to complaint); 14 AA 3461 (motion for summary judgment). When the district court allowed the claim to go to the jury, FTB wanted to make sure the instruction on the claim was accurate. FTB therefore offered an instruction correctly setting forth the Perry requirements; and the judge gave the instruction. 51 AA 12560-62; 52 AA 12751. FTB's contention on appeal, however, is not that the district court gave an erroneously phrased instruction. Our contention is the same as it has always been, i.e., that the claim should have never gone to the jury because the claim did not fit within the Perry framework or any other recognized Nevada theory. AOB 88-90.

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PO BOX 2670 • RENO, NEVADA 89505-2670
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relationship exists between a citizen and a government taxing agency, particularly where a taxing authority has commenced an adversarial audit investigation against that citizen, Hyatt's claim for breach of confidential relationship fails as a matter of law.

5. Hyatt's Abuse of Process Claim Fails As A Matter of Law

Hyatt had to prove two essential elements for his abuse of process claim: (1) an ulterior purpose by the defendants other than resolving a legal dispute; and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding. LaMantia v. Redisi, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002). Hyatt argues that his claim is based solely on FTB's alleged "improper and illegal use of administrative subpoenas." RAB 115.

a. The Demand Letters Were Neither Improper Nor Illegal

FTB filed a motion in limine seeking a ruling that:

(1) FTB was statutorily authorized to conduct investigations inside Nevada;
(2) It was not illegal or improper for FTB to conduct its investigations in Nevada;
(3) There is no Nevada law that prohibits FTB from conducting its investigations in Nevada;
(4) FTB was authorized to issue "Demands to Furnish Information";
(5) These "Demands to Furnish Information" were not subpoenas and were not unlawful; and
(6) FTB was not required by Nevada law to obtain permission from any Nevada state court or agency prior to sending its "Demands to Furnish Information" into Nevada.

19 AA 4556-79 (emphasis added). The district court granted FTB's motion. 27 AA 6533-34. There should not have been, therefore, any issue at trial as to whether the Demand Letters were subpoenas or unlawful. Nevertheless, over FTB's objection, Hyatt continued to argue at trial that the Demand Letters were unlawful or inappropriate. 45 AA 11199 (73) (Hyatt's counsel stating that the FTB was "not entitled to... demand that information from any non-California resident or entity"). Before this court, Hyatt continues to argue that the Demand Letters were subpoenas, illegal and improper. RAB 115-118. Hyatt's arguments are both contrary to the law of the case, and fundamentally inaccurate.

FTB has statutory authority to conduct investigations and to "require by demand" information relevant to the investigation. Cal. Rev. & Tax Code § 19504(a). At the time FTB audited Hyatt, FTB was permitted to contact third parties without first notifying the

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taxpayer. See Cal. Rev. & Tax Code §§ 19254; 26423 (1993).[46] All California state agencies, including FTB, have the power to conduct investigations outside of California. See Cal. Rev. & Tax. Code § 19504(d); see also, Cal. Gov't Code §§ 11185(d); 11187(c); 11189. Thus, FTB was within its statutory authority when it sent Demand Letters to Nevada residents seeking information relevant to its tax audit investigation of Hyatt.

b. FTB Did Not Issue Administrative Subpoenas During Its Audits

There is no basis for Hyatt's characterization of the Demand Letters as administrative subpoenas.[47] The Demand Letters were merely investigative tools accompanied by cover letters that stated they sought the "cooperation" of the recipient. See, e.g., 64 AA 15898-905. Administrative subpoenas typically are issued by an agency which is seeking information from an individual or entity which the agency regulates to confirm compliance with its regulations. See In re Subpoenas Duces Tecum Nos. A99-0001, A99-0002, A99-0003 and A99-0004, 51 F. Supp. 2d 726 (W.D. Va. 1999). A subpoena is a "writ commanding a person to appear before a court or tribunal, subject to a penalty for failing to comply." Black's Law Dictionary 1440 (7th ed. 1999).

There is a significant distinction between a subpoena and an FTB Demand Letter. Here, the FTB issued form letters, accompanied by demands seeking information. E.g. 64 AA 15898-99. The Demand Letters were not subpoenas and had none of the legal affects of such a tool.[48] Id. The word "subpoena" was not used anywhere in any of the Demand Letters. Id. Additionally, there was no indication by the language of these demands that the

[46]In determining the scope of FTB's investigative authority during Hyatt's residency audit, the court must look to the statutes that were in effect at the time his audit was proceeding. See Runion v. State, 116 Nev. at 1049 (court improperly used prior version of statute rather than statute in effect at the time of the offense).

[47]The only process Hyatt alleged was abused was FTB's Demand Letters. 14 AA 3262 -63.

[48]Hyatt's argument that the FTB called the Demands Letters "pocket subpoenas" is misleading. There was testimony that one person, a witness for Hyatt who previously worked at FTB, called these documents "pocket subpoenas." 44 AA 10777 (209); 44 AA 10815 (6). No other person who worked at FTB testified that the Demand Letters were called pocket subpoenas. And no one receiving the letters considered them as subpoenas. Nevertheless, whatever nickname was or was not given to the documents by one individual does not change their legal effect.

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recipient would be the subject of any repercussions or penalties for failing to respond. Id. And contrary to Hyatt's argument, no one receiving the Demand Letters construed them as subpoenas. E.g., 47 AA 11623 (64). The Demand Letters, in short, are not subpoenas at all.

c. An Abuse of Process Claim Cannot be Based on the Mere Issuance of a Subpoena

As explained in the opening brief, the tort of abuse of process requires *judicial* or *legal* process. AOB 90-91. Hyatt cites no precedent to the contrary. Instead, Hyatt cites to irrelevant case law in which courts found an abuse of process by a government agency that fraudulently issued administrative subpoenas and clearly invoked the judicial process by attempted enforcement of the same. RAB 115-16. These cases make clear that the mere *issuance* of an administrative subpoena cannot form the basis for an abuse of process claim. Only when those subpoenas are *enforced* by a court can a claim for abuse of process arise. The actions complained of by Hyatt—the mailing of Demand Letters by FTB—simply cannot, as a matter of law, be construed as invoking the judicial process.

Even if FTB had issued administrative subpoenas, which it did not, administrative subpoenas were not self-enforcing and therefore cannot be considered final until the issuing agency has sought and obtained *judicial enforcement*. See Shea v. Office of Thrift Supervision, 934 F.2d 41, 45 (3d Cir. 1991); see also, Stryker Corp. v. U.S. Dept. of Justice, CIV.A. 08-4111 (WJM), 2009 WL 424323 at *3 (D.N.J. Feb. 18, 2009). The Supreme Court has refused to consider pre-enforcement disputes arising out of agency subpoenas on the grounds that such claims are not yet ripe. See Reisman v. Caplin, 375 U.S. 440, 450 (1964) (declining to grant equitable relief to the recipient of an administrative summons that had not been judicially enforced).

An abuse of process claim arises only when an agency has turned to judicial enforcement of an administrative subpoena, because the purpose of the tort is to preserve the integrity of the court, the tort requires misuse of a *judicial process*. ComputerXpress Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 644 (Cal. Ct. App. 2001). Abuse of process "refers to an abuse of judicial process, and **it is not until the government files an enforcement action that it has begun to use the court's process**." Stryker Corp., 2009 WL 424323 at *4

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(emphasis added); see also, Tuck Beckstoffer Wines LLC v. Ultimate Distributors, Inc., 682 F. Supp. 2d 1003 (N.D. Cal. 2010) (the mere issuance of subpoenas is not considered to be an abuse of process); SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 316-17 (5th Cir. 1981) (only when a government agency invokes the power of a court to enforce a misbegotten administrative subpoena can there can be an abuse of process). "Without having used the judicial process, [FTB] could not have abused it." See Stryker Corp., 2009 WL 424323 at *4.

Nevada is in accord with these jurisdictions. Abuse of process requires abuse of "legal process." LaMantia v. Redisi, 118 Nev. at 30. This court has characterized the requirement as hinging on misuse of "regularly issued process." Nevada Credit Rating Bureau, Inc. v. Williams, 88 Nev. 601, 606, 503 P.2d 9 (1972) (filing lawsuit in court and obtaining court-issued attachment); LaMantia, 118 Nev. at 30 (civil lawsuit filed in court); Posadas v. City of Reno, 109 Nev. 448, 851 P.2d 438 (1993) (criminal complaint filed in court); Kovacs v. Acosta, 106 Nev. 57, 787 P.2d 368 (1990) (partition suit filed in court); Bull v. McCuskey, 96 Nev. 706, 615 P.2d 957 (1980) (filing lawsuit in court and obtaining court-issued summons), overruled in part on other grounds in Ace Truck v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987).

d. "Official Looking" Papers Are Not Enough For Abuse Of Process

Hyatt argues that his claim "is, and always has been, based on the FTB's improper use of administrative subpoenas." RAB 115. But after asserting that he is relying solely on "administrative subpoenas," Hyatt is then faced with the reality that FTB's demands were not actually administrative subpoenas. To deal with this reality, he is forced to argue that FTB's demands for information "appeared" to be subpoenas. RAB 116, lines 9-10 (demands "appeared" to be legal summons or subpoenas).

There is no basis for Hyatt's argument that a non-judicial paper can somehow be transmuted into forbidden judicial process, merely because the non-judicial paper might be "official looking." RAB 116, line 9. Hyatt cites no authority supporting such a contention. On the other hand, FTB's opening brief cited and discussed Liles v. Am. Corrective

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Counseling Services, Inc., 131 F. Supp. 2d 1114, 1117-18 (S.D. Iowa 2001) (AOB 91-92), where a private collection company processed claims from merchants who received unpaid checks. The company sent a notice to the plaintiff stating that it was an "Official Notice." It contained a seal with a "scales of justice" emblem; it falsely implied that it was from the county attorney's office; and it falsely implied that a criminal complaint had been generated and was being processed. There was nothing to indicate that the official looking notice was issued by a court, and in fact, the notice was not issued as part of any court case. The plaintiff sued the collection company for abuse of process. The court dismissed the claim, holding that the essential element of judicial process failed as a matter of law because the notice, despite its official appearance, did not actually result from any court process. "Without the involvement of a court, the threat of criminal prosecution is insufficient to constitute 'legal process' as required by this tort." Id. at 1117-18.

Hyatt's brief fails to cite, distinguish or even recognize the existence of Liles. And he cites no legal authority contrary to Liles or supporting his theory that a paper that was never issued in a judicial proceeding can constitute "legal process" merely because the paper is official looking. Hyatt's theory, if accepted by this court, would create an entirely new tort: "abuse of official-looking process."

Hyatt's brief states that there is "ample case law" supporting his position (RAB 115, line 6), but he primarily relies on only one case, United States v. Powell, 379 U.S. 48 (1964). RAB 115, lines 7-18. Hyatt proffers Powell as an abuse of process case involving administrative subpoenas, arguing that Powell would allow an abuse of process claim based on "the specter of enforcement" by a court, or the "threat of enforcement" of administrative subpoenas. Id. Powell says no such thing. The question before the United States Supreme Court was the standard the IRS had to meet to obtain judicial enforcement of a summons in a fraud investigation. Powell, 379 U.S. at 50-51. Powell was not an abuse of process tort case. The Court said nothing even remotely suggesting that an abuse of process claim could rely on an administrative summons for which no judicial enforcement was ever sought. Nor did the Court say a word about the "specter of enforcement" or the "threat of enforcement"

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PO BOX 2670 • RENO, NEVADA 89505-2670
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in the context of an abuse of process claim (or in any other context, for that matter).[49]

Finally, FTB's opening brief established that none of the few Nevada recipients of demands for information perceived them as legal instruments, or that any recipient felt coerced or intimidated by a demand. AOB 92. Hyatt's only response is that "the jury did not accept that assertion," and that "the jury found" the demands to be illegal and unenforceable. RAB 118, lines 3-4. Once again, Hyatt relies on his perceived "specter of court enforcement" as a substitute for actual evidence of the effect of the demands for information. RAB 118, lines 7-10. The undeniable fact is that no Nevada recipient of a demand for information testified the paper was perceived as legal process, judicial process, coercive process, or anything other than a routine inquiry. See AA citations at AOB 92, lines 13-20. Moreover, the jury did not make the findings on which Hyatt relies.

Accordingly, Hyatt's abuse of process claim failed as a matter of law and should never have been submitted to the jury.

6. Hyatt's Intentional Infliction Of Emotional Distress Claim Fails As A Matter Of Law

Hyatt's claim for intentional infliction of emotional distress ("IIED") failed as a matter of law because: (1) as a discovery sanction, Hyatt was limited to "garden variety" emotional distress, precluding him from establishing IIED as a matter of law; (2) Hyatt's evidence did not establish that his emotional distress was sufficiently severe to support this claim; and (3) Hyatt had no physical manifestation or objectively verifiable evidence of severe emotional distress. AOB 93-96. Hyatt's responses are meritless.

a. The District Court's Sanction Limiting Hyatt To Garden Variety Emotional Distress Precluded Hyatt From Recovery For His IIED Claim

Hyatt argues that the district court's order limiting him to recovery for garden variety

[49]Hyatt cites three other cases at RAB 116, n. 427. None of those cases dealt with the abuse of process tort; none of the cases dealt with the judicial process prerequisite for the tort; and certainly none of the cases dealt with whether an administrative paper (such as a letter or a demand for information) can be characterized as legal process, for purposes of abuse of process tort liability, merely because the paper is official looking.

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emotional distress did not affect his ability to recover on his IIED claim. RAB 122-24. There is no dispute that the district court limited Hyatt to only garden variety emotional distress. 15 AA 3547. It is also undisputed that this sanction was imposed against Hyatt after he unilaterally refused to provide his medical records during discovery.[50] 15 AA 3544-47. By limiting Hyatt's evidence to only garden variety emotional distress, the district court effectively precluded Hyatt from being able to establish the necessary and essential element of his IIED claim – i.e., that he suffered "severe or extreme emotional distress." Therefore, the district court erred by failing to dismiss this claim.

A plaintiff claiming IIED must show that he or she "actually suffered **severe** or **extreme** emotional distress." Nelson v. City of Las Vegas, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983) (emphasis added); see Miller v. Jones, 114 Nev. 1291, 1300, 970 P.2d 571 (1998). Garden variety emotional distress is distress that is not severe. See Ruhlmann v. Ulster County Dept. of Soc. Services, 194 F.R.D. 445, 449 (N.D.N.Y. 2000).

Other jurisdictions routinely hold that when a plaintiff asserts a claim for IIED but refuses to provide access to medical records, sanctions are appropriate,[51] including

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[50]Many of the medical records sought overlapped in time with the disputed timeframe in which Hyatt's residency was questioned. In addition to likely providing alternative causes of emotional distress, they may also have revealed representations from Hyatt concerning his address. Hyatt has never produced these records, even in redacted form.

[51]Hyatt argues that his alleged physical symptoms (e.g., sick to his stomach, sleeplessness, tightness in his chest) were sufficient to satisfy legal requirements for emotional distress recovery, despite his failure to seek treatment for these alleged ailments. RAB 125-28. Where emotional distress damages are not secondary to physical injuries, either a physical impact must have occurred, or there must be proof of serious emotional distress "causing physical injury or illness." Betsinger v. D.R. Horton, Inc., 126 Nev. ___, ___ P.3d ___ (Adv. Opn. 17, May 27, 2010) (quoting Bartmettler, 114 Nev. at 448). "We have previously required a plaintiff to demonstrate that he or she has suffered some physical manifestations of emotional distress in order to support an award of emotional [distress] damages." Id. Insomnia and general physical or emotional discomfort are insufficient to satisfy the physical impact requirement. Chowdhry v. NLVH, Inc., 109 Nev. 478, 483, 851 P.2d 459 (1993). Even contemplating suicide and seeking additional psychotherapy do not satisfy the requirement. Bartmettler, 114 Nev. at 443, 448. This court recognizes the need to impose safeguards against the "illusory recoveries" sought in Chowdhry and Bartmettler.

Continued . . .

dismissal. See, e.g., Ford v. Zalco Realty, Inc., CIV.A 1:08-CV-1318, 2010 WL 378521 at *6 (E.D. Va. Feb. 1, 2010) (plaintiff failed to supply requested documentation to support claim for emotional distress; court granted motion to strike emotional distress claim); Coffin v. Bridges, 72 F.3d 126 (4th Cir. 1995) (affirming dismissal of complaint because plaintiff refused to provide mental health care records); In re Consol. RNC Cases, 127, 2009 WL 130178 at *12 (S.D.N.Y. Jan. 8, 2009) (emotional distress claims dismissed where plaintiffs refused discovery of medical records); Zabin v. Picciotto, 896 N.E.2d 937 (Mass. App. Ct. 2008) (dismissal of claim for emotional distress for refusal to comply with order requiring release of medical records); Ellis v. SmithKline Beecham Corp., C07-5302RJB, 2008 WL 3166385 (W.D. Wash. Aug. 5, 2008) (plaintiff refused to provide medical records during discovery; summary judgment granted on claim for IIED); Lindstrom v. Hunt Enterprises, Inc., B189275, 2007 WL 4127191 (Cal. Ct. App. Nov. 21, 2007) (granting motion to dismiss or strike claims for emotional distress as sanction for failing to comply with order requiring release of medical records).[52]

Hyatt attempts to avoid the district court's sanction, claiming that the phrase "garden variety," does not actually mean "garden variety" as the term has been defined by numerous courts throughout the country, (RAB 122-24), even though the discovery commissioner expressly stated that Hyatt was limited to recovery of garden variety emotional distress "as many courts have referred to it." 15 AA 3547. Garden variety emotional distress claims are defined as "ordinary and commonplace" or "simple or usual." Jessamy v. Ehren, 153 F.

Betsinger, 126 Nev. at __ (quoting Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000)). One safeguard is the additional requirement of objectively verifiable indicia of severe emotional distress, such as seeking medical care. Miller, 114 Nev. at 1294. Here, Hyatt failed to seek treatment; his general complaints were not objectively verified; he experienced no physical impact or physical manifestation; and he presented no medical testimony that his alleged physical symptoms were caused by FTB's audit activities. Thus, he failed to establish recoverable emotional distress damages.

[52]This issue often arises in the context of discovery orders, which are generally not published as a matter of course. Therefore, these orders are generally contained in unpublished decisions.

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
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Supp. 2d 398, 401 (S.D.N.Y. 2001). Such claims do not require medical attention and are based on generalized allegations of insult, hurt feelings, and lingering resentment. Javeed v. Covenant Med. Ctr., Inc., 218 F.R.D. 178, 178-79 (N.D. Iowa 2001) (finding that claims including loss of self-respect, loss of self-esteem, medical anguish, grief, anxiety, dread, sorrow, and despondency are not garden variety emotional distress).

In contrast, seeking extensive damages and claiming severe injury pursuant to a claim for IIED "elevates a case **above** that of a garden variety emotional distress case." See Beightler v. Suntrust Banks, Inc., 2:07-CV-02532-DV, 2008 WL 1984508 at *3 (W.D. Tenn. Apr. 30, 2008) (emphasis added); see also, Pacheco v. Rogers & Breece, Inc., 579 S.E.2d 505, 507-08 (N.C. App. 2003) (plaintiff does not have a remedy for IIED where he only establishes garden variety anxiety or concern); E.E.O.C. v. California Psychiatric Transitions, 258 F.R.D. 391 (E.D. Cal. 2009) (garden variety emotional distress claim does not involve a separate claim of IIED). Koch v. Cox, 489 F.3d 384, 390 (D.C. Cir. 2007) (distinguishing garden variety emotional distress from "any specific psychiatric injury or disorder, or unusually severe distress"); Mugavero v. Arms Acres, Inc., 680 F. Supp. 2d 544, 578 (S.D.N.Y. 2010) (severe emotional distress claims "differ from the garden variety claims in that they are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony and evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other, corroborating witnesses"). Contrary to Hyatt's contentions, garden variety emotional distress is not a term of art without meaning, and it certainly was intended to have significance in this case.

By limiting Hyatt to solely garden variety distress, the discovery commissioner recognized the fundamental unfairness of allowing Hyatt to make a claim for severe emotional distress, but concurrently allowing him to shield vital medical records from FTB. 15 AA 3553-58; See also, E.E.O.C. v. California Psychiatric Transitions, 258 F.R.D. At 400 (E.D. Cal. 2009) (noting the fundamental unfairness of allowing a plaintiff to make a claim for emotional distress but shielding discovery of information related to that claim); Combe v. Cinemark USA, Inc, 1:08-CV-142 TS, 2009 WL 3584883 at *2 (D. Utah Oct. 26, 2009)

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

("Medical records are also relevant to the preparation of defendant's defenses against the emotional distress claims because the records may reveal another sources of stress unrelated to defendant which may have affected a plaintiff's emotional distress"); Wooten v. Certainteed Corp., 08-2508-CM, 2009 WL 2407715 at *1 (D. Kan. Aug. 4, 2009) (medical records are relevant to defenses against emotional distress claims because records "may reveal stressors unrelated to Defendant that may have affected Plaintiff's emotional well being.").

If the court were to construe the sanction order as Hyatt claims, it would render the penalty meaningless and instead reward Hyatt for hiding his records from FTB. Garden variety distress is not severe distress, and cannot as a matter of law establish the severity element necessary for a claim of IIED.

b. Hyatt Asks This Court To Presume Severe Emotional Distress

Hyatt argues that severe emotional distress can be presumed under Nevada law. RAB 119-122. Nevada has never presumed the existence of severe distress, and Hyatt cites no Nevada cases in support of this unfounded proposition. RAB 119-121. Emotional distress is not presumed, even in cases involving intentional torts. See Betsinger v. D.R. Horton, Inc., 126 Nev. ___, ___ P.3d ___ (Adv. Opn. 17, May 27, 2010) (fraud and deceptive trade practices). A plaintiff must present affirmative and objective evidence of severe emotional distress to succeed on a claim for IIED. See, e.g., Miller, 114 Nev. at 1300 (a plaintiff must present "objectively verifiable indicia of the severity of his emotional distress"); Jordan v. State ex rel. Dep't. of Motor Vehicles & Pub. Safety, 121 Nev. 44, 110 P.3d 30 (2005) (plaintiff failed to state a claim for IIED where he did not allege that he suffered any severe emotional distress), overruled on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, ___ Nev. ___, 181 P.3d 670 (2008).

Other courts have held that emotional distress may not be presumed and is not established simply by evidence of defendant's extreme or outrageous conduct. See, e.g., Doe v. Kaiser, CIVA 6:06-CV-1045DEP, 2007 WL 2027824 at *5 (N.D.N.Y. July 9, 2007) ("It should be noted that damages for emotional distress may not be presumed, and are not

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
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established simply by evidence of a defendant's egregious conduct"); Tanzini v. Marine Midland Bank, 978 F. Supp. 70, 78 (N.D.N.Y. 1997) (damages for emotional distress may not be presumed because of the nature of the defendant's actions alone); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1215 (6th Cir. 1996) ("damages for mental and emotional distress will not be presumed, and must be proved by competent evidence").

Without his so-called presumption, Hyatt's evidence did not overcome Nevada's high burden to show that he "actually suffered **severe** or **extreme** emotional distress." Nelson v. City of Las Vegas, 99 Nev. at 555 (emphasis added). General emotional or physical discomfort such as anger, embarrassment, humiliation, or other similar symptoms, such as migraines and stress, are insufficient to establish severe emotional distress. Miller, 114 Nev. at 1300; Watson v. Las Vegas Valley Water Dist., 378 F. Supp. 2d 1269, 1279 (D. Nev. 2005) aff'd, 268 F. App'x. 624 (9th Cir. 2008). Ordinary emotions do not satisfy the rigorous "severe emotional distress" requirement needed to make a showing of IIED. See, e.g., Nelson, 99 Nev. at 548. Severe emotional distress is such that no reasonable person could be expected to endure it. Alam v. Reno Hilton Corp., 819 F. Supp. 905, 911 (D. Nev. 1993) (citing Restatement (Second) of Torts, § 46, cmt. j (1995) ("It is only where [emotional distress] is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.").

Here, Hyatt claimed that he "suffered anger, anxiety, embarrassment, humiliation, and other related symptoms" due to FTB's audit. 15 AA 3521. He testified to humiliation, frustration, fear, and embarrassment 37 AA 9162 (59), 9172 (99-101), 9173 (105). Hyatt and his friends and family also testified to some related symptoms such as trouble sleeping, crying and headaches. 39 AA 9541 (23); 45 AA 11140 (26-27). General feelings of embarrassment, anger, or anxiety are not so severe that they were unendurable. See Miller, 114 Nev. at 1300. Thus, Hyatt did not meet his burden of establishing that he suffered stress so severe and of such intensity that no reasonable person could be expected to endure it.

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
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c. Nevada Law Requires Objectively Verifiable Indicia, But Hyatt Offered None

A plaintiff alleging IIED must present "objectively verifiable indicia of the severity of his emotional distress." Miller, 114 Nev. at 1294. Contrary to Hyatt's contention at RAB 127, when the plaintiff presents no objective evidence of "medical or psychiatric assistance arising from the alleging incidents," his IIED claim cannot survive. Id. (plaintiff who testified that he was depressed, but failed to seek any medical or psychiatric assistance, presented no objectively verifiable evidence); Watson, 378 F. Supp. 2d at 1279 (plaintiff failed to prove severe distress where he presented no medical or psychiatric evidence).[53]

Hyatt's own testimony that he suffered severe emotional distress is obviously not objective evidence. See, e.g., Vallinoto v. DiSandro, 688 A.2d 830, 839 (R.I. 1997) (self-serving uncorroborated statements of plaintiff were insufficient without supporting, medical evidence); Myers v. Bennett Law Offices, 238 F. Supp. 2d 1196, 1206 (D. Nev. 2002) ("[A] plaintiff must support a claim for damages based on emotional distress with something more than his or her own conclusory allegations").

Self-serving statements, corroborated only by a plaintiff's friends and family, are similarly not sufficient objective evidence of serious emotional distress. See Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099 (6th Cir. 2008) (plaintiff must provide some evidence beyond his or her own testimony or the self-serving testimony of that person's family member; rejecting plaintiff's and plaintiff's sister's affidavits as sufficient evidence of serious emotional distress). The testimony of Hyatt's friends and family was also not based upon personal knowledge of the alleged conduct by FTB, or of Hyatt's distress, but rather, was based upon what Hyatt had told those friends and family members about his dispute with FTB and the alleged effect of that dispute. 39 AA 9541 (22) – 9543 (33); 45 AA 11140 (26-27); 45 AA 11144 (45) – 11145 (47). Therefore, such testimony

[53]The only Nevada case cited by Hyatt in support of his contention that medical evidence is unnecessary to establish IIED is Bartmettler, 114 Nev. at 448, which is not applicable, as that discussion related to the separate tort of negligent infliction of emotional distress.

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

was based on Hyatt's self-serving account. Because Hyatt's perception of the source and extent of his emotional problems was entirely subjective, similarly, witness testimony that relied upon his subjective perception—in the absence of any medical records or other objective evidence—cannot meet Nevada's standard. Hay v. Shell Oil Co., 986 S.W.2d 772, 777 (Tex. App. 1999).

Hyatt cites no case for the position that the testimony of friends and family is objective verification of his emotional distress. Instead, he cites Kalantar v. Lufthansa German Airlines, suggesting that the court allowed the testimony of friends or family to support the claim. RAB 128. In that case, however, the court concluded that the plaintiff failed to offer a "sufficient evidentiary basis for him to reach a jury...on his allegations of severe emotional distress." 402 F.Supp.2d 130, 146 (D.D.C. 2005). In fact, one court interpreting Dixon held that the plaintiff's testimony—in conjunction with that of his father—could not, as a matter of law, satisfy the objectively verifiable standard. Veney v. Ojeda, 321 F. Supp. 2d 733, 748-49 (E.D. Va. 2004). Without objectively verifiable evidence of severe emotional distress, the IIED claim failed as a matter of law.

7. The District Court Erred In Her Treatment Of FTB's Statute Of Limitations Defense Both Before And During Trial

Hyatt's brief inaccurately states both the facts and the law related to the statute of limitations issues. RAB 137-144. FTB filed several motions for partial summary judgment on each of Hyatt's "non-fraud" claims,[54] based on the statute of limitations. See, e.g., 14 AA 3440; 15 AA 3581; 17 AA 4021. The district court denied these motions after concluding, at Hyatt's urging, that material issues of fact existed with respect to when the limitations period began to run. See, e.g., 15 AA 3717-22; 19 AA 4672-73 (Hyatt argues issues of fact related to discovery of cause of action is for jury to decide); 19 AA 4672-78; 4700 (court's pretrial rulings).

[54]There is no dispute that each of Hyatt's causes of action, with the exception of his fraud claim, is subject to a two-year limitations period. See NRS 11.190(4)(e).

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At trial FTB presented the exact same evidence to the jury related to the statute of limitations defense. See 66 AA 16388-427; 77 AA 19072-74, 19119-21. Inexplicably, however, the district court granted Hyatt's motion for judgment as a matter of law, dismissing FTB's statute of limitations defense, after concluding, again at Hyatt's urging, that the identical evidence did not create an issue of fact, and that the same evidence now showed as a matter of law that the limitations period had not expired. 55 AA 12489 (26).

The district court's inconsistent and diametrically opposite rulings were wrong. The opening brief presented two straightforward arguments. First, the district court erred when it accepted Hyatt's argument that material issues of fact existed, and when it denied FTB's pretrial motions for summary judgment, because the uncontroverted evidence established that the limitations period expired before Hyatt filed his claims in January 1998. AOB 96-98. Second, even if the district court did not err in denying the pretrial motions, the district court certainly erred at trial when it accepted Hyatt's changed argument that no material issues of fact existed, and that, as a matter of law, the identical evidence established that the limitations period had not expired. Id.

a. Hyatt's Legal Contentions Related To The Statute Of Limitations Are Inaccurate

Hyatt essentially claims that in order for the limitations period to be triggered, the plaintiff must: (1) be aware of every single fact related to a defendant's actions that may give rise to the plaintiff's claims; (2) know the specific causes of action that may be based upon those facts; and (3) know the full extent of the damages. See generally, RAB 138-144. Based upon these erroneous legal contentions, Hyatt claims the statute of limitations was not triggered until he received the complete audit file from FTB in September 1996. [55] Id.

[55]Hyatt makes reference to the "continuing tort doctrine." See RAB 139. Although Hyatt never attempts to analyze or tie this doctrine to the facts, FTB is compelled to explain why the "continuing tort doctrine" has no application to this case. As a starting point, FTB has been unable to locate any Nevada Supreme Court case adopting this doctrine and, for this reason alone, it does not apply. However, even if this court recognized the doctrine, the continuing tort doctrine only applies "when a tort involves a continuing wrongful conduct." Flowers v. Carville, 310 F.3d at 1126. Thus, "the doctrine applies where there is 'no single incident' that can 'fairly or realistically be identified as the cause of significant harm." Id.
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First, a cause of action accrues when the wrong occurs and the party sustains injury. Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18 (1990). An exception to this general rule is the discovery rule, where the limitations period is "tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action." Id.; see also, G & H Associates v. Ernest W. Hahn, Inc., 113 Nev. 265, 934 P.2d 229 (1997). Thus, the statute of limitations commences once a plaintiff has sufficient facts to put him on "inquiry notice" – or has constructive knowledge – of his claims. Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248 (1983). Once a plaintiff has inquiry notice, he must use due diligence to discover the facts related to the claim. Bemis v. Estate of Bemis, 114 Nev. 1021, 1025, 967 P.2d 437, 441 (1998).

The main focus of the discovery rule is on the injured party's "knowledge of or access to facts rather than on her discovery of legal theories." Massey, 99 Nev. at 727-28. Therefore, "[a]ccrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim. Nor is accrual deferred until the injured party has enough information to calculate its damages." Davel Communications, Inc. v. Qwest Corp., 460 F.3d 1075, 1092 (9th Cir. 2006) (internal quotations omitted).

Based upon the uncontroverted evidence, Hyatt knew of sufficient facts to put him on notice of his claims in spring of 1995 and no later than, August 1995 – more than two years before Hyatt filed his complaint in January 1998. Therefore, the district court erred in

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(quoting Page v. United States, 729 F. 2d 818, 821-22 (D.C. Cir. 1984). When the continuing tort doctrine is applied, the statute of limitation begins to run only from time the tortious conduct ceases – or when the last act of the continuing tort occurs. Page, 729 F.2d at 821.

Here, Hyatt has not identified what, if any, continuing wrongful conduct existed that would trigger the application of this principle of law. Moreover, each of the torts that are subject to the two-year limitations period (i.e., privacy torts, abuse of process and the like) are based upon conduct that occurred between 1993 and 1995. For example: Hyatt claims FTB's inquiries to third parties for information about him invaded his privacy (3 different ways), breached a confidential relationship, constituted an abuse of process and was intended to cause him severe emotional distress. All such inquiries and audit activities occurred between 1993 and 1995. The only "continuing acts" alleged by Hyatt relate to his fraud claim, which was expressly acknowledged as timely. Thus, there is no basis for the application of the continuing tort doctrine to the claims subject to FTB's statue of limitation defense.

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
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denying FTB's pretrial motions based upon the statute of limitations.

b. The Uncontroverted Evidence Placed Hyatt On Notice Of His Claims in 1995

Hyatt does not dispute that in the Spring of 1995 he was aware that FTB was sending demand letters to various third parties that included his name, social security number, and the fact that he was under audit. See RAB 139-40; 77 AA 19072-74, 19119-21. In addition, Hyatt does not dispute that after discovering this information he sent a fax to his tax representatives telling them that "FTB appears to be sending out demand letters to many entities to whom I wrote checks in late 1991 and 1992." 77 AA 19119. This uncontroverted evidence demonstrates that Hyatt discovered FTB's alleged invasions of his privacy, and the like, in the spring of 1995 – two years and six months before he filed his complaint. Hyatt's only argument is that these facts were insufficient to put him on notice because these letters and demands were only sent to his California "bank and his attorneys" who "had independent obligations to safeguard and not disclose his confidential information." RAB 139. In addition, Hyatt contends that he did not know that demands were being sent to Nevada entities or that information was being sent to others until he received the complete audit file. See id. at 139-140. Hyatt misstates the evidence.

Hyatt's own fax indicated that he knew, as of the Spring of 1995, that FTB was sending demand letters to "many entities" to whom he sent checks in 1991 and 1992. 77 AA 19119. Therefore, by Hyatt's own statements, he knew that these demands (which he also knew contained his social security number and other identity information) were being sent to a multitude of individuals – not just his banks and attorneys. See 77 AA 19122-50. Checks written by Hyatt in late 1991 and early 1992 included checks to Nevada entities, including: the Nevada DMV, Congregation Ner Tamid, Centel Telephone, Wagon Trails Apartments, and Nevada Power Company. See 77 AA 19166-76.

The determination of whether a plaintiff knew or should have known facts supporting a cause of action is generally a question of fact. Nevada Power Co. v. Monsanto Co., 955 F.2d 1304, 1307 (9th Cir. 1992). However, such an issue may be decided as a matter of law when "uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
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discovered" the alleged wrongdoing. Id. Moreover, Hyatt was fully aware of virtually every fact necessary to support his case by August 1995, when FTB sent him the detailed, 39-page preliminary determination letter. 66 AA 16388-427. Hyatt's brief baldly claims that this letter "did not otherwise provide sufficient information to Hyatt to put things together and figure out that his privacy was violated" and the basis for his other claims. RAB 140.

Hyatt misrepresents the facts related to information in the letter – especially when that information is coupled with Hyatt's previous undisputed knowledge of FTB's use of Demand Letters to third parties. For example, Hyatt claims that the August 1995 letter did not disclose FTB's use of Demand Letters or the fact that his address and social security number were disclosed by those demands. See RAB 140-41. However, the August 1995 letter specifically indicated that FTB sent letters to numerous individuals and entities. 66 AA 16410-12. In March 1995, Hyatt knew FTB was contacting third parties using Demand Letters and he knew that at least some of these included his social security number. 77 AA 19119-21. In addition, contrary to Hyatt's contentions, the August 1995 letter provided Hyatt sufficient information of the scope of FTB's investigation. In fact, the August 1995 letter made Hyatt aware of virtually all of FTB's third-party contacts – more than a year before he received the audit file. 66 AA 16388-427. The letter repeatedly referenced information FTB obtained from third parties – located both in Nevada and California – related to Hyatt's audit. Id. Examples from this letter include the following verbatim statements:

- "**Information was obtained** from the bank that the taxpayer did have safe deposit boxes in California." 66 AA 16389. (emphasis added).
- "**Information obtained from** the Clark County Treasurer's Office showed that a parcel of land is in name of Kern Trust." 66 AA 16394. (emphasis added).
- "The Clark County Department of Elections **informed us** that taxpayer voted once . . . ." Id. (emphasis added).
- "**information obtained** from Nevada Department of Motor Vehicles . . . ." 66 AA 16406. (emphasis added).

The letter also explained in great detail that auditor Sheila Cox made a visit to Las Vegas, in

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PO BOX 2670 • RENO, NEVADA 89505-2670
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March 1995; she visited the Wagon Trails Apartments, interviewed the property manager and reviewed his file. 66 AA 16393. The letter also explained that Cox visited Hyatt's home and spoke with his trash collector and the mailman, and spoke with the receptionist at his alleged place of business. 66 AA 16396-97. Of particular note, Hyatt was also put on notice of FTB's third-party contacts due to the letter's reference to specific information that Hyatt had not given to FTB. For example, the August 1995 letter referenced specific dates related to when Hyatt had obtained medical attention from certain physicians. 66 AA 16391. In particular, the letter referenced two dates Hyatt visited a "Dr. Shapiro," along with Dr. Shapiro's address. Id. However, Hyatt never told the auditor which Dr. Shapiro he saw or the dates services were provided. FTB could only have obtained this information by contacting the doctor directly. The letter specifically referenced the amounts and dates that wire transfers were made to Hyatt by Matsushita and Fujitsu. 66 AA 16392. During the audit, Hyatt never provided this information to FTB and, in fact, had told FTB he did not have any of this information because the wire transfers were made to his attorneys' trust account. 34 AA 08481 (72-73); 66 AA 16312-13. The letter also made clear that FTB obtained information related to Hyatt's home that could only have been obtained by disclosing his address to third parties – "Southwest Gas Corporation has provided information that Gilbert Hyatt is not the customer of record for 7335 Tara"; "The Las Vegas Valley Water District has provided information that the account for 7335 Tara was established on 4/1/92"; "Silver State Disposal Service in Las Vegas has provided information that the account at 7335 Tara was opened on 4/1/92 in the name of Michael Kern." 66 AA 16396.

In sum, it was FTB's August 1995 letter – not the audit file – that put Hyatt on notice of the extent of FTB's audit. The contents of this letter, coupled with Hyatt's previous knowledge of FTB's third-parties contacts, is undisputed and uncontroverted. This information gave notice to Hyatt that: (1) FTB contacted a variety of third parties, without his permission; (2) FTB sent Demand Letters to various entities to whom Hyatt wrote checks in 1991 and 1992; (3) these Demand Letters included Hyatt's social security number

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and the fact he was under audit; (4) FTB disclosed his address to third parties in an effort to obtain information; (5) these Demand Letters and other contacts were sent to entities in both California and Nevada, many of which had no independent obligation to maintain his privacy, and a variety of other information that Hyatt now claims he only learned through the receipt of the audit file in 1996. The district court erred by not dismissing the 2-year statute of limitation claims, or at very minimum, erred by not allowing FTB to argue the issue to the jury. If this court agrees with FTB that all non-fraud claims were barred by the statute of limitations, and that the fraud claim was insufficient as a matter of law, Hyatt's entire case must be dismissed, and this court therefore does not need to address any other issues in the appeal or the cross-appeal.

8. The District Court Erred By Effectively Creating An Irrebuttable Presumption Against FTB

The opening brief established that the district court erred by effectively creating an irrebuttable presumption related to alleged negligent spoliation of evidence. AOB 98-100. This stemmed from FTB's replacement of an antiquated email system (EMC) with a modern system in the late 1990s. FTB made an exhaustive effort to ensure that all emails were preserved and printed before the replacement occurred. 25 AA 6293-305. When EMC was removed from FTB's mainframe computer, emergency backup tapes were created; but these tapes were overwritten approximately three years later pursuant to FTB's standard policy. 25 AA 6300-01. Hyatt only requested the backup tapes after he discovered they were overwritten. 25 AA 6308.

The district court determined that FTB committed negligent spoliation regarding the tapes, and the district court instructed jurors that they could draw an inference that the tapes would have been unfavorable to FTB. 54 AA 13278. This permissible inference was based upon Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103 (2006). But the district court then made rulings far beyond anything allowed by Bass-Davis, barring FTB from offering any evidence explaining the circumstances surrounding the tapes, and preventing defense counsel from using admitted exhibits to argue that the jury should not draw the inference.

McDONALD·CARANO·WILSON LLP
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This had the effect of erroneously transmuting the permissible inference into an irrebuttable presumption against FTB.

FTB's opening brief noted that Bass-Davis itself relied on two cases holding that the inference is permissible; that the affected party can explain the circumstances; and that a jury is free to reject the inference if the jury believes the documents were destroyed accidentally or for an innocent reason. AOB 99-100. FTB also cited additional similar cases that were not relied upon in Bass-Davis, but standing for the same proposition. AOB 100. Hyatt's brief offers virtually no response. His sole effort to deal with these cases is the following: "The FTB's citations to certain other cases where a court provided other remedies for the spoliation have no application here." RAB 145. Hyatt fails to cite, or even mention any of the cases discussed in the opening brief, even the two cases on which this court relied in Bass-Davis. Hyatt completely ignores these cases because he has to – the cases are sound, applicable and show that the district court erred.

Hyatt also makes the following conclusory argument: "Under Bass-Davis and a wealth of consistent authority from other jurisdictions, once spoliation is found by the court, the court can order that the spoilating party is not allowed to reargue this issue to the jury." RAB 145, lines 8-10. Bass-Davis says no such thing, and Hyatt fails to identify a single case within the "wealth of consistent authority from other jurisdictions." Id. Instead, his only citation is to a few pages in one of his own district court papers. RAB 145, line 26, fn 538. Although his district court paper cited some cases from foreign jurisdictions dealing with other issues, none of those cases stand for the proposition asserted in his answering brief.[56] 39 RA 9744-49.

The effect of an adverse inference jury instruction can be outcome-determinative if the jury decides to draw an inference that the missing information would have been adverse to a party. In re NTL, Inc. Sec. Litig., 244 F.R.D. 179, 192 (S.D.N.Y. 2007) (an adverse

[56]Hyatt's reliance on his district court paper violates NRAP 28(e)(2), which prohibits a party from incorporating by reference or referring the supreme court to a memorandum of law submitted to the district court, for an argument on the merits of an appeal.

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
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inference instruction is a severe sanction "that often has the effect of ending litigation because it is too difficult a hurdle for the spoliator to overcome"). This is why a trial judge must use caution when considering such an instruction. See State v. Engesser, 661 N.W.2d 739, 755 (S.D. 2003) (adverse inference spoliation instruction should be applied with caution); Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 567 (S.D.N.Y. 2008) (characterizing adverse inference instruction as "severe"); Jackson v. Harvard Univ., 900 F.2d 464, 469 (1st Cir. 1990) (characterizing adverse inference as a "grave step").

The party affected by the permissive adverse inference instruction must be able to offer evidence explaining the circumstances of the lost or destroyed evidence. This does two things. First, it gives the jury a complete picture with which to evaluate the party's culpability and to determine whether the inference should be drawn or rejected. Second, the explanation may itself be relevant to the jury's decision on whether the lost or destroyed evidence was probably adverse to the affected party. Hyatt ignores these principles; he ignores applicable case law; and he cites no law supporting the district court's ruling. This court has consistently held that it will not consider conclusory arguments lacking substantive citations to relevant legal authority. See State Indus. Ins. Sys. v. Buckley, 100 Nev. 376, 382, 682 P.2d 1387 (1984) (citing Smith v. Timm, 96 Nev. 197, 606 P.2d 530 (1980), Gilbert v. Warren, 95 Nev. 296, 594 P.2d 696 (1979) and Holland Livestock Ranch v. B & C Enterprises, 92 Nev. 473, 553 P.2d 950 (1976)). In the present case, the court should reject Hyatt's conclusory arguments, which lack any citation to relevant legal authority.

F. The Compensatory Damages Were Legally Improper

Compensatory damages in this case should have been capped at $75,000 per claim. Hyatt's answering brief fails to provide any legitimate arguments against imposition of the cap. If the damages are not capped, the damages are excessive as a matter of law. A verdict is excessive when the amount indicates prejudice or passion on the part of the jury, or when the amount is so clearly beyond reason as to shock the judicial conscience. Slack v.

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Schwartz, 63 Nev. 47, 58-59, 161 P.2d 345 (1945). In such a case this court "would not hesitate to disturb the judgment." Id. at 59. See also, Hazelwood v. Harrah's, 109 Nev. 1005, 1010, 862 P.2d 1189 (1993) overruled on other grounds by Vinci v. Las Vegas Sands, Inc., 115 Nev. 243, 984 P.2d 750 (1999) (new trial can be granted where verdict is "so flagrantly improper as to indicate passion, prejudice or corruption in the jury"). In the present case the jury awarded compensatory damages of $52 million for invasion of privacy and $85 million for emotional distress. The district court granted no relief from these astronomical awards. Hyatt's answering brief fails to provide any justification for the awards. They must be set aside.

1. Standard of Review Regarding Compensatory Damages

FTB contends that the district court erred by denying FTB's request to apply comity and to limit compensatory damages to $75,000 per claim. AOB 100-02. This is a purely legal issue, which this court should review *de novo*, just as this court reviewed the comity issue *de novo* in its April 2002 order. 5 AA 1183-93. FTB also contends that there was no evidence of invasion of privacy damages. AOB 102-103. On such an issue, this court conducts its own independent review of the record; if there is no evidence of damages, an award of damages by the jury is improper and must be set aside, as a matter of law. E.g., Mainor v. Nault, 120 Nev. 750, 773-76, 101 P.3d 308 (2004). Finally, FTB contends that the emotional distress damages cannot stand because the district court erred by refusing FTB's evidence of alternative causes of emotional distress, and because the $85 million award was excessive. These contentions raise legal issues that should be reviewed *de novo*. E.g., Miller v. Schnitzer, 78 Nev. 301, 307, 371 P.2d 824 (1962) (special damages reduced by Supreme Court).

2. All Compensatory Damages Should Have Been Statutorily Capped

For the reasons articulated at pages 100-101 of the opening brief, all compensatory damages should have been capped at $75,000 per claim. This court has already ruled that FTB's complete immunity statute should be applied to the extent that the statute does not offend a comparable Nevada policy. 5 AA 1189-90. Regarding compensatory damages,

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
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California allows no recovery against FTB, but Nevada allows tort plaintiffs to recover up to $75,000 per claim against government entities. See NRS 41.035(1). Therefore, California's complete immunity statute for FTB would only offend Nevada's policy to the extent that plaintiffs are deprived of the ability to recover up to $75,000 per claim. Denial of recovery beyond that limit offends no Nevada policy. The cap should therefore apply.

a. Hyatt's Arguments Against the Application of Comity Fail

i. Hyatt's General Arguments and His "Special Immunity" Argument

Hyatt argues that comity should be rejected because unlimited compensatory damages are necessary to protect Nevada citizens from out-of-state government tortfeasors. RAB 146-50. The Nevada Legislature has established a policy of protecting Nevada citizens from government tortfeasors by waiving sovereign immunity and allowing compensatory damages, but only up to $75,000. In its 2002 decision, this court held Nevada's statute applied to FTB. 5 AA 1189-90. Thus, Hyatt's argument ignores the fact that allowing recovery against FTB up to $75,000 would give Nevada citizens protection against out-of-state government tortfeasors, to the full extent that such protection is given to Nevada citizens who make claims against Nevada government entities.

Hyatt next argues that this court "is not obligated to grant special immunity to the FTB." RAB 147. We are not demanding "special" immunity. We are merely requesting that this court fully apply its April 2002 comity ruling to the present comity issue regarding the limit on compensatory damages. And we are merely requesting this court to do what the United States Supreme Court said in its 2003 opinion, i.e., "sensitively appl[y] principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488, 499 (2003).[57]

[57]We do contend that the district court's refusal to recognize any immunity for compensatory and punitive damages violated FTB's constitutional rights under the Full Faith and Credit Clause, as explained at AOB 101, fn. 80.

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Hyatt argues that comity is a voluntary doctrine that should not be applied in this case, similar to the denial of comity in Mianecki v. Second Judicial Dist. Court, In & For Washoe County, 99 Nev. 93, 658 P.2d 422 (1983). RAB 148-49. Hyatt's argument ignores the fact that this court has already decided that issue in this very case. 5 AA 1189-90. In April 2002 this court rejected Hyatt's argument and decided that comity would be applied regarding FTB's immunity. Id. Indeed, this court ruled that application of comity was mandatory with regard to FTB's immunity, to the extent that such immunity did not offend Nevada policies; and the court issued a writ of mandamus commanding the district court to comply with its mandatory duty to apply immunity to the discretionary/negligence claims.

ii. Hyatt's Arguments Regarding Compensatory Damages Used for Deterrence and Punishment

Hyatt's next contention is that substantial compensatory damages are necessary "to sanction and deter" misconduct by government employees from other states. RAB 149, lines 10-11. Hyatt contends that the $75,000 limit on compensatory damages should not apply because Nevada needs a "means of deterring and punishing" government employees from other states. RAB 150, lines 11-12. Hyatt's argument blurs the distinction between compensatory and punitive damages. Compensatory damages are only intended to "compensate a wronged party" for damages actually suffered. Ainsworth v. Combined Ins. Co., 105 Nev. 237, 244, 774 P. 2d 1003 (1989), modified on other grounds in Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 706, 962 P. 2d 596 (1998). On the other hand, punitive damages are designed to punish and deter wrongful conduct. Id.; see also, Ace Truck & Equip. Rentals, Inc. v. Kahn, 103 Nev. 503, 506, 746 P. 2d 132 (1987) (although focus of punitive damages is on punishing and deterring culpable conduct, focus of compensatory damages is on "the injury suffered by the plaintiff"), abrogated on other grounds in Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006).

Hyatt contends that unlimited compensatory damages "provide a penalty for those [wrongful] actions and a strong dose of deterrence against repeated offenses." RAB 153, lines 8-9. Hyatt contends that deterrence is a "critical goal" of compensatory damages. Id. at lines 10-11. Hyatt's only citation for this contention is part of a sentence taken out of

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PO BOX 2670 • RENO, NEVADA 89505-2670
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context from Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986). RAB 153, fn 567. In Stachura the Supreme Court dealt with an unrelated issue regarding the measure of damages in a federal civil rights case. Despite the vague sentence in Stachura on which Hyatt relies, more recent Supreme Court pronouncements are to the contrary. In State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), the Court recognized that although compensatory and punitive damages are usually awarded at the same time by the same decision-maker, compensatory and punitive damages "serve different purposes." Id. at 416. Specifically, compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered...." Id. "By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." Id. Furthermore, in Nevada punitive damages are awarded in addition to compensatory damages, for the purpose of punishing and deterring conduct. Those punishment and deterrent purposes are "unrelated to the compensatory entitlements of the injured party." Siggelkow v. Phoenix Ins. Co., 109 Nev. 42, 45, 846 P.2d 303 (1993); Ainsworth, 105 Nev. at 244; Ace Truck, 103 Nev. at 506.

Hyatt's arguments for refusing to apply this court's April 2002 comity holding are not persuasive. Hyatt has failed to provide any legitimate argument for rejecting a result that sensitively applies principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity as a benchmark for the analysis. Franchise Tax Board, 538 U.S. at 499.

iii. Hyatt's Argument Regarding Equal Treatment

In a five-page section of the answering brief, Hyatt attempts to rebut an argument that FTB never made. The first sentence of this section in Hyatt's brief states: "The FTB argues that the doctrine of comity has been understood to require complete equality among States." RAB 154, lines 12-13. Later in this section, Hyatt states that "FTB suggests" that comity requires "equal treatment between States under all circumstances." RAB 155, lines 16-17. Hyatt cites FTB's opening brief at pages 32-33 for his characterization of FTB's argument. RAB 154 fn. 570.

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FTB is not arguing that comity requires "complete equality" among states, or that comity requires "equal treatment between States under all circumstances." Rather, FTB has consistently argued that FTB, as a California government entity, should be treated no worse than a similarly situated Nevada government entity in a Nevada court case. AOB 101, lines 12-14 (FTB should be "treated no worse than a similarly situated Nevada government entity"); 102, lines 6-7 (same); 108, lines 20-21 (same). FTB's arguments were largely based upon this court's April 2002 holding that California's complete immunity statute for FTB should be applied under the doctrine of comity, but only to the extent that the immunity statute did not contravene Nevada policies. 5 AA 1189-90. Because the statutes in both states provided immunity from claims based on discretionary acts, those claims were mandatorily dismissed. 5 AA 1189-90. Yet other claims, which would have survived against a Nevada government entity in a Nevada court based on immunity law as it existed at that time, were allowed to proceed. In this result, FTB was treated no worse than a Nevada government agency would have been treated in a Nevada court, and Hyatt was treated no better than if he sued a Nevada government entity.

If anything, it is Hyatt who argued that states should be given "equal treatment." Hyatt made this argument attempting to convince the United States Supreme Court that this court's April 2002 decision was sound. Hyatt's brief in the Supreme Court argued that states can recognize the sovereign interests of other states, "using their own sovereign interests as a benchmark." 6 AA 1360. His brief also argued that in the present case the "reference point" for FTB's liability is "the liability *of the State [of Nevada] itself.*" 6 AA 1341 (italics emphasis in original). At oral argument at the Supreme Court, when asked by Justice Stevens whether states should treat each other "the way they would want to be treated themselves," Hyatt's counsel answered affirmatively, arguing that "we want to treat the other sovereign as we do treat ourselves," and further arguing: "We are treating the other sovereign [California] the way we treat ourselves." 6 AA 1480 (emphasis added). Thus, it was Hyatt who successfully argued to the Supreme Court that this court's April 2002 order should be affirmed because this court treated the two sovereigns equally.

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Hyatt relies on a municipal bond case, Dep't of Revenue of Ky v. Davis, 553 U.S. 328 (2008). RAB 154-155, n. 571. That case involved the Commerce Clause, with nothing to do with issue of comity. Hyatt also relies on property tax law, arguing that it is permissible for states to exempt their own property from taxes, while imposing taxes on in-state property owned by another state. RAB 155. Again, the cases on which Hyatt relies have nothing to do with whether comity should be applied in a tort case in which an out-of-state government entity has been sued in a Nevada court.

Finally, Hyatt argues that Nevada v. Hall, 440 U.S. 410 (1979) compels a denial of comity here. RAB 157. Hyatt notes that the State of Nevada was held liable for unlimited damages for a traffic accident in California, even though there was a cap on damages under Nevada law. Id. Hyatt argues that "if California were involved in an identical accident in Nevada, the FTB's theory would mean that California could claim the benefit of the Nevada statutory cap, thereby limiting its own out-of-state exposure to a modest level of damages." RAB 157, lines 10-13.

Hyatt entirely misconstrues FTB's comity argument. FTB does not contend that an out-of-state government defendant should enjoy *more* protection than the forum state would enjoy in the forum state's own courts. We merely contend that an out-of-state sovereign should be treated no *worse* than the forum state would be treated in its own courts. In Nevada v. Hall, the Nevada government entity that caused the accident in California was treated no worse than a similarly situated California agency would have been treated in that state; and the injured California citizens received no greater benefit against the Nevada government entity than they would have received in a lawsuit against their own state government if the accident had been caused by a California government employee. Hall, 440 U.S. at 424.

The comity analysis applied in this court's April 2002 order is the same analysis that FTB is seeking here. California has immunity laws. We are requesting this court to recognize and apply comity to those laws, to the extent that those laws do not offend important Nevada public policies. We are not asking this court to apply Nevada's immunity

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PO BOX 2670 • RENO, NEVADA 89505-2670
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laws to any greater extent than the FTB would be entitled to immunity under California laws. Accordingly, the compensatory damages award against FTB, if allowed to stand at all, should be capped at $75,000 per claim.[58]

iv. Hyatt's Full Faith and Credit Argument

FTB's opening brief demonstrated that the Full Faith and Credit Clause places limits on the discretionary application of comity. AOB 67-68, fn 64. States cannot act with outright hostility to sister states by refusing to recognize laws that are not antagonistic to their own policies. Id.; AOB 101, fn 80. This court's April 2002 ruling survived a Full Faith and Credit Clause analysis because this court had given "healthy regard" for California's sovereign status, relying on Nevada's own sovereign immunity as a benchmark for this court's analysis.[59] Franchise Tax Board, 538 U.S. at 499.

In response, Hyatt argues that the judgment in this case, if affirmed, would not be unduly hostile to the sovereign State of California -- even if Nevada courts refuse to give any recognition to California's laws granting immunity to FTB for compensatory and punitive damages, and even if Nevada courts give no regard whatsoever to California's sovereign status or to the contours of Nevada's own sovereign immunity. RAB 147-49, 158-60. Hyatt's arguments ignore reality. Short of a military attack by one state against another, it is difficult to imagine an act more hostile than one state's courts imposing a half billion dollar judgment against another state, including $250 million in damages intended to punish the citizens of the other state, all in a case involving a solitary multimillionaire plaintiff who moved from a taxing state to a non-taxing state, and who did not like the

[58]As such, in Hyatt's hypothetical example in which a California government employee causes an accident in Nevada, if the California government agency did not have immunity or a cap on damages under California law, the agency would not be able to claim some type of Nevada statutory immunity or cap applicable to Nevada government entities. In the present case, however, FTB enjoys complete immunity under California law. We are only requesting this court to recognize FTB's immunity to the extent that it does not offend important Nevada public policies. Limiting FTB's damages to $75,000 per claim offends no such Nevada public policy.

[59]As originally noted, the continuing vitality of Nevada v. Hall, 440 U.S. 410 (1979) is extremely questionable in light of more recent Supreme Court opinions. AOB 101, fn 80.

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PO BOX 2670 • RENO, NEVADA 89505-2670
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decisions of the taxing state. This Nevada judgment, if affirmed, will fall on the shoulders of California taxpayers, even though Hyatt's compensatory damages would have been capped and punitive damages would have been barred if he had sued a Nevada government entity. It is difficult to perceive a more hostile economic act by one sovereign state against another. This is precisely what the Full Faith and Credit Clause avoids.

v. Hyatt's Law of the Case Argument

Hyatt's brief claims that this court is not obligated to treat FTB the same as it would treat a similarly situated Nevada state agency as a matter of comity. RAB 146-62. This court already determined the manner and application of comity to California's sovereign immunity statute in this case. Therefore, the application of comity to California's sovereign immunity statute in this case is the law of the case. Hyatt argues, however, that the court's comity ruling is not the law of the case with respect to the issues related to compensatory and punitive damages. See RAB 158-60. He draws a narrow construction of the law of the case doctrine, claiming that this court must re-decide and re-review the application of comity to California's sovereign immunity statute on every issue that may arise in this case that requires the application of this rule of law. See RAB 160-61.

In Nevada, "when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in the case." Dictor v. Creative Mgmt. Servs., LLC, 126 Nev. ___, 223 P.3d 332, 334 (2010); see also, Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724, 728 (2007). It is the "principle" or "rule of law" not its narrow application, that is the law of the case and must be applied to in all subsequent proceedings in this litigation. Hsu, 173 P.3d at 728.

Hyatt cites no case limiting the law of the case doctrine to only those specific factual contexts in which a particular principle or rule of law is announced in a previous appeal. To the contrary, by determining that the law of the case doctrine applies to either principles or rules of law, Nevada's legal authorities have determined the exact opposite – that the rule of law or principle determined by decision will be applied to different factual contexts that may arise in a case involving the same legal issues or principles. See Hsu, 173 P.3d at 728

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
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(describing that principle or rule of law must be applied in all subsequent proceedings).

Here, this court's 2002 decision determined two things. First, the doctrine of comity should be applied to FTB, out of deference and respect, and to promote harmonious interstate relations between Nevada and California. 5 AA 1189-1190. Second, California's complete immunity statute must be applied to the extent application of the immunities contained in that statute did not violate Nevada's policies or interests. Id. Based upon the application of this rule of law, this court determined that the district court erred in failing to: (1) apply the doctrine of comity in the manner described by the court's decision; and (2) dismiss Hyatt's negligence claim. Id. This court issued a writ of mandamus ordering the district court to apply the doctrine of comity. Id. This decision was affirmed by the United States Supreme Court. 6 AA 1486-92. As a result, the district court was required to apply comity, throughout all of the subsequent proceedings, to California's sovereign immunity statute in a manner consistent with this court's 2002 decision. Wickliffe v. Sunrise Hosp., Inc., 104 Nev. 777, 781, 766 P.2d 1322, 1325 (1988) (a trial court has no authority to deviate from the mandate issued by an appellate court).

Nothing in this court's 2002 decision limited the rule of law announced in that decision to only the specific factual context raised in the initial writ. In fact, such a limited application of the law of case doctrine makes no sense. The law of the case doctrine "is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest." Hsu, 173 P.3d at 728. If the law of the case doctrine applied in the narrow manner that Hyatt claims, every legal principle announced by the appellate court could be re-evaluated every time a new factual issue arose in the litigation that related to the particular issue. No legal issue could ever be settled because each new factual issue or scenario would require the reconsideration of the legal principles or rules of law already announced. This is exactly what the law of the case doctrine is intended to prohibit. Hsu, 173 P.3d at 728.

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PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

Moreover, this narrow interpretation would allow district courts, like the district court in this case, to avoid the law of the case doctrine at their own whims. Simply by claiming that a new factual context is at issue, the district courts would be permitted to re-evaluate and consider what legal principle or rule of law to apply – in spite of previous mandates from the court expressly announcing the principle or rule of law at issue.

Finally, Hyatt's narrow interpretation of the law of the case doctrine is not supported by Dictor, *supra*, in which this court held the law of the case doctrine applies to any issue decided by the appellate court "explicitly or by necessary implication." See also, Bernhardt v. Los Angeles County, 339 F.3d 920, 924 (9th Cir. 2003) (noting that law of the case doctrine applies to explicit as well as implicit determinations by court); Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 249 (D.C. Cir. 1987) (same).

Therefore, contrary to Hyatt's arguments, the principle and rule of law previously announced by this court's 2002 decision is the law of the case and requires that the doctrine of comity be applied to California's sovereign immunity statute in the same manner previously announced by this court. Comity must be extended to California's sovereign immunity statute, requiring that FTB be treated no worse than a similarly situated Nevada state agency.

vi. Hyatt's Judicial Estoppel Argument

The judiciary's integrity is protected by the doctrine of judicial estoppel, which prevents a party from taking inconsistent positions in litigation. Marcuse v. Del Webb Communities, Inc., 123 Nev. 278, 163 P.3d 462 (2007). The doctrine applies when (1) the same party has taken two positions; (2) the positions were taken in a judicial proceeding; (3) the party was successful in asserting the first position (i.e., the court adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake. Id. In the present case, all of these requirements are satisfied.

Although Hyatt's brief provides quotations to some of his statements to the Supreme Court (RAB 162, fn 597), he ignores the statements on which judicial estoppel is based.

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

This court's April 2002 order applied comity and treated FTB no worse than a Nevada government entity would be treated in Nevada courts. 5 AA 1189-90. This result left some claims against FTB intact. 5 AA 1190. FTB believed the entire case should have been dismissed; and when FTB challenged this court's decision in the United States Supreme Court, Hyatt's counsel argued for affirmance by attempting to show the Supreme Court that this court's decision gave appropriate constitutional respect to the sovereign State of California. 6 AA 1341, 1467. Hyatt's counsel recognized the need to convince the Supreme Court that California was being treated no worse than Nevada would be treated in its own courts. Hyatt's brief in the Supreme Court argued that states are capable of recognizing the sovereign interests of other states by "using their own sovereign interests as a benchmark." 6 AA 1360. Hyatt argued that the "reference point" for California's liability in this case is "the liability *of the State [of Nevada] itself.*" 6 AA 1341 (italics emphasis in original). Hyatt's brief relied upon case law in which forum courts looked to the scope of government immunity for their own states in determining the scope of a sister state's liability. 6 AA 1359. At oral argument, Hyatt again argued that states "look at their own immunity to see what kinds of suits could be brought against them," and states try to grant "the outside sovereign that same type of immunity." 6 AA 1467 (emphasis added). When Justice Stevens asked whether states should treat other sovereign states the way they would want to be treated themselves, Hyatt's counsel answered affirmatively, assuring the Supreme Court: "We are treating the other sovereign [California] the way we treat ourselves." 6 AA 1480.

Hyatt prevailed in the Supreme Court. Franchise Tax Bd., 538 U.S. at 499. Indeed, the Supreme Court expressly adopted Hyatt's catch-phrase "benchmark" argument, upholding this court's decision because this court "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." Franchise Tax Board, 538 U.S. at 499.

Now, of course, Hyatt pretends that he did not take this position in the Supreme Court. In truth he took his position in his written and oral arguments to the Supreme Court;

his position at that time was successful in convincing the Supreme Court to affirm this court's April 2002 ruling; his position at that time is totally inconsistent with his present position that comity should be rejected and that a California agency can be treated far worse than a Nevada agency would be treated in a Nevada court; and his position was not taken as a result of ignorance, fraud or mistake. Consequently, every factor for judicial estoppel is satisfied in this case.

3. There Was No Evidence Of Invasion Of Privacy Damages

As pointed out in the opening brief, there was absolutely no evidence that in all the years since FTB's alleged disclosures of Hyatt's name, address and social security number, he had ever been targeted for identity theft, or industrial espionage or had he ever suffered any actual damage whatsoever as a result of the disclosures. AOB 102. Despite the lack of any actual damage from the alleged invasion of privacy, the jury awarded $52 million for such damages. 54 AA 13309. Coincidentally, the amount of Hyatt's tax liability at the time was approximately $52 million. 45 AA 11134 (2)-11135 (7); 11152 (74). Hyatt concedes that the $52 million for invasion of privacy damages was "different and separate from emotional distress damages." RAB 132, lines 17-19. Hyatt argues, on the other hand, that loss of privacy damages "compensate for the visceral loss of the privacy interest that is gone forever." Id. at lines 19-20. Hyatt's legal citations for this proposition (at RAB 132, fn 498) provide no support for his position. Indeed, legal research has revealed no reported case, from any state or federal jurisdiction, allowing compensation for a "visceral loss" of anything. [60]

[60]Hyatt cites to the Restatement (Second) of Torts §652H (1977). RAB 132, fn 498. This Restatement section provides no support for recovery of privacy damages to compensate for a visceral loss. The Restatement section only allows invasion of privacy damages for (a) the harm to the plaintiff's interest in privacy resulting from the invasion [here, Hyatt showed no actual harm, no incident in which someone attempted to use the information against him, no attempt to steal his identity, and no other actual harm resulting from the alleged disclosures]; (b) mental distress [this was awarded in the other portion of the verdict ($85 million)]; and (c) special damage caused by the invasion [here, Hyatt offered no evidence of any special damages caused by the disclosures].

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

Hyatt argues that his astronomical award of invasion of privacy damages is justified because he "strives hard to maintain a private, low key, and unassuming lifestyle." RAB 134, line 1. This assertion is belied by the record, which shows that Hyatt and his retained publicist actively sought publicity for Hyatt regarding his computer chip patent. 48 AA 11984-92. Media went to his home and conducted extensive personal interviews, there were hundreds of newspaper and magazine articles published throughout the world, and Hyatt was even the subject of an episode of the nationally syndicated television show "Hard Copy." 39 AA 9726 (114); 79 AA 19732-38; 89 AA 22068-137; 28 AA 6993.

Hyatt argues that the huge invasion of privacy award can be justified because FTB allegedly "put Hyatt in front of his circle of friends, family members, business associates, and patent sub-licensees as a purported tax cheat and a fraud." RAB 134, lines 1-3. Hyatt provides no appendix citation for this statement. At trial, Hyatt was asked by *his own counsel* whether he knew of any people, businesses, associations or other entities that thought any less of him as a result of receiving notices that he was being audited. Hyatt's answer was: "No. I don't know for certain, but I'm very concerned that they would have." 37 AA 9172 (100). Thus, although he was "concerned" about possible harm from the disclosures, he had no knowledge of any such harm that may have actually occurred. Additionally, Hyatt failed to call a single witness who testified that he or she thought less of Hyatt as a result of FTB's disclosures.

Courts have not hesitated to reduce excessive compensatory damages in invasion of privacy cases. For example, in Geragos v. Borer, B208827, 2010 WL 60639 (Cal. Ct. App. Jan. 11, 2010), the defendant surreptitiously videotaped prominent attorneys and their famous client. The plaintiffs suffered distress, embarrassment, humiliation and paranoia for which they sought treatment from the invasion of their privacy; nevertheless, an award of $2.25 million for compensatory damages was reduced to $150,000. In Fotiades v. Hi-Tech Auto Collision Painting Services, Inc., E029854, 2001 WL 1239716 (Cal. Ct. App. Oct. 17, 2001), the plaintiff's supervisors at his workplace photographed the plaintiff while he was urinating in a restroom. They distributed the photograph of the plaintiff's penis to numerous

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

employees and customers. The plaintiff suffered extreme humiliation and severe emotional distress, but his award of $1 million for invasion of privacy was reduced to $350,000.

In Zinda v. Louisiana-Pac. Corp., 409 N.W.2d 436 (Wis. Ct. App. 1987) aff'd in part, rev'd in part in 440 N.W.2d 548 (Wis. 1989), an employee was terminated due to alleged inconsistencies between his work application and his medical history. The director of personnel published a notice in a company newspaper, indicating that the employee was terminated for falsification of employment forms. The plaintiff sued for invasion of privacy. His evidence showed that the newspaper reached the business where his wife worked; he was embarrassed and humiliated; he wondered if his friends thought he was a liar; and he acted like he was "shot down." Id. at 442. The jury awarded him $50,000 for invasion of privacy, but the appellate court determined that the award was excessive and unsupported by the evidence. Among other things, the court noted that he suffered no "actual damages," with no medical treatment, no counseling, and no out-of-pocket losses (like Hyatt). Id.

In Peoples Bank & Trust Co. of Mountain Home v. Globe Int'l Pub., Inc., 978 F.2d 1065 (8th Cir. 1992), the plaintiff was a 97-year-old woman who was a "local legend" in her community. The defendant published the plaintiff's photograph on the cover of a tabloid magazine, with the headline "Pregnancy forces granny to quit work at age 101." Id. at 1067. A story inside the tabloid had a second photograph of the plaintiff, with a fictitious story about a woman who quit work at age 101 because she was pregnant as a result of an extramarital affair. The plaintiff sued for various theories, including invasion of privacy. The jury returned a verdict of $650,000 in compensatory damages. Id. Despite the trial court's findings that the defendant's conduct damaged the plaintiff's "very being" and that the photographs had the effect of burying the plaintiff in mock, mire and slime, the appellate court determined that the damages were so great as to shock the judicial conscience. Id. at 1071. The court noted that although the plaintiff was angry, upset, humiliated, embarrassed, depressed and disturbed, there was no evidence of significant adverse effects on her health,

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

and no evidence of lost earnings, medical expenses and the like. Id. The case was remanded to the trial court for a "substantial" reduction of compensatory damages. Id.

It bears repeating that Hyatt's $52 million award for invasion of privacy was not based upon emotional distress he suffered due to the alleged disclosures of private information. The jury awarded emotional distress ($85 million) separately. 54 AA 13309. There was simply no evidence that Hyatt suffered any actual harm from the alleged invasion of privacy, and certainly no harm justifying the ridiculous $52 million award. Hyatt's brief fails to identify any standard of review under which this award could possibly be upheld. Nor does he cite any case from any jurisdiction approving such an astronomical award. The award has no evidentiary basis, it is shocking and unsupportable under any standard of review, and there was no rationale basis for the district court's refusal to grant relief from this ridiculous award.

4. The Emotional Distress Damages Cannot Stand

As noted above, a verdict is excessive as a matter of law when the amount is so clearly beyond reason as to shock the judicial conscience, or where the verdict indicates passion, prejudice or corruption in the jury. Slack v. Schwartz, 63 Nev. at 58-59; Hazelwood v. Harrah's, 109 Nev. at 1010. For example, in Hazelwood a retired law enforcement officer was awarded $425,000 for humiliation, disgrace, emotional distress and worry resulting from false imprisonment and defamation, after he was wrongfully arrested and falsely accused of fraud. The excessive award was reduced to $200,000, because the verdict was likely influenced by passion and prejudice. This was evidenced by the fact that the plaintiff was not physically injured in the incident, and by the fact that he was an individual facing a large corporate adversary. 109 Nev. at 1010-11. In the present case, the jury awarded $85 million for emotional distress compensatory damages, and the district court refused to grant any relief from this ludicrous award. Like the plaintiff in Hazelwood, Hyatt was not physically injured, and he was an individual facing an out-of-state government tax agency. The verdict was certainly influenced by passion and prejudice, as in Hazelwood.

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

At trial, after explaining Hyatt's claimed emotional distress evidence in excruciating detail, Hyatt's counsel asked the jury to award approximately $19 million, admitting that even this was "a big number." 52 AA 12931 (176). In his argument to the jury, counsel also expressly conceded that an award of approximately $43 million would be "absurd." Id. Yet the jury awarded more than four times the amount counsel conceded was a "big number," and nearly double the amount counsel conceded was "absurd." Hyatt argues that there is no law prohibiting a jury from awarding more money than counsel referenced in closing argument. RAB 136, lines 17-18. This may be true, but there is no rational justification for a trial judge's refusal to reduce a verdict of nearly double an amount that the plaintiff's counsel has expressly conceded, in open court on the record, is "absurd."

a. Hyatt's Limited Garden Variety Emotional Distress Imposed As A Discovery Sanction Can Not Support An $85 Million Award

Having refused to disclose any medical records during discovery, and having made the choice to limit his damages to "garden variety" emotional distress, it is astonishing that Hyatt can now contend that the $85 million award was not excessive. It is even more astonishing that the trial judge, who approved the Discovery Commissioner's decision limiting the damages to "garden variety" emotional distress, did not grant any relief from the verdict.

FTB's opening brief provided an exhaustive analysis of case law in Nevada and other jurisdictions, clearly establishing that the jury's award is entirely unprecedented in Nevada and elsewhere. AOB 104-106. Hyatt fails to provide any analysis of these numerous cases. RAB 134-36. His only argument is based upon a novel mathematical approach involving three cases. Hyatt contends that he was subjected to 11 years of pressure and misconduct from FTB. RAB 135. He then argues that in Bartgis, this court did not disturb a compensatory damage award of $275,000 for emotional distress, where the defendant's conduct lasted only about six months. RAB 135. Hyatt conveniently ignores the fact that the plaintiff in Bartgis suffered documented bladder infections, upper-respiratory infections, and a dramatic weight loss as a result of her emotional distress. If the award in

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

Bartgis for six months of infliction of emotional distress is calculated out to Hyatt's alleged eleven-year time frame, the Bartgis emotional distress award would equate to approximately $6 million.

Similarly, Hyatt argues that in Guar. Nat. Ins. Co. v. Potter, 112 Nev. 199, 912 P.2d 267 (1996), this court did not disturb a $150,000 compensatory award for emotional distress for the defendant's conduct lasting approximately 18 months. RAB 135. Once again, if the damages in Potter are calculated for an eleven-year time frame, the damages would total approximately $1.1 million.

Hyatt also relies on State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). RAB 135. Hyatt argues that the United States Supreme Court did not question a $1 million compensatory award for a year and a half of emotional distress. Id. Yet once again, if the award in Campbell is calculated for an eleven-year time frame, the total compensatory damages would be $7 million, which is approximately twelve times less than Hyatt's award.

Actually, a case cited in the Hyatt's answering brief for another proposition provides strong support for FTB's contention that the emotional distress award in the present case was excessive. In the section of his brief dealing with immunity, Hyatt cites Limone v. United States, 497 F. Supp. 2d 143 (D. Mass. 2007). RAB 63, fn. 247. That case involved two FBI agents who wanted to protect a high-priority confidential informant in a mafia investigation on the 1960s. The informant committed a murder. To protect him, the FBI agents intentionally and knowingly framed four innocent men for the murder. The innocent men were convicted. Three were sentenced to die in the electric chair, but their sentences which were later reduced to life sentences when the death penalty was vacated; the fourth was given a life sentence. Knowing that the men were innocent and had been falsely and fraudulently convicted of the murder, the FBI agents spent years after the trial successfully supporting the convictions during post-conviction proceedings. Two of the innocent men eventually died in prison after serving 17 and 27 years, respectively; the other two spent 29 and 33 years in prison, respectively, until they were freed after the FBI agents' conduct was discovered.

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775.788.2000 • FAX 775.788.2020

The innocent men and their estates and families sued on various theories, seeking damages resulting from loss of liberty and their pain, suffering and emotional distress caused by the FBI agents. The trial judge, sitting without a jury, observed the horrendous physical and emotional distress suffered by all the plaintiffs, which the judge characterized as "beyond imagining." Id. at 229. Three of the innocent men had spent years on death row before their sentences were reduced; two died in prison; the two who survived spent 29 and 33 years in prison; each of the four innocent men "literally lost a lifetime"; wives were deprived of their husbands; children were deprived of their fathers; and the innocent men and their families were devastated and destroyed. Id. at 229-50.

The judge carefully evaluated the damages necessary to provide full compensation for the unimaginable loss of liberty and destruction of lives; and the judge considered damages award amounts in other cases. Id. Taking everything into consideration, the judge awarded two of the innocent men $1 million per year for their loss of liberty and their physical and emotional damages; the other two were awarded less than $800,000 per year. Id. at 250. Wives were awarded less than $35,000 per year for their 30 years of damages. Id. And awards to children and other family members for 30 years of suffering were approximately $8,000 per year. Id. Hyatt measures his own alleged emotional suffering at 11 years, and he asks this court to find that $85 million—which equates to nearly $8 million per year—is a reasonable amount of compensation. RAB 135-36. Comparing this award to Limone, the verdict here was undeniably excessive.[61]

No amount of debating skill by Hyatt can establish that his $85 million emotional distress award was within a reasonable range for garden variety emotional distress. Even if

[61]In attempting to show that his case is worse than all others, thereby justifying $85 million in emotional distress damages, Hyatt tells this court: "Hyatt has located no case of 11 plus years of continual financial pressure and combined with and caused by outrageous bad faith governmental misconduct and the resulting severe emotional distress." RAB 135, lines 3-5. This is not true. Actually, his attorneys found just such a case, indeed, a case far worse—Limone—which involved more than 30 years of loss of liberty, loss of life, economic and personal destruction of the innocent victims of the FBI agents' outrageous misconduct, and resulting severe emotional distress. RAB 63, fn. 247. Hyatt ignores the damages awards in Limone, which were mere fractions of the jury's award in the present case.

McDONALD·CARANO·WILSON LLP
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

this court somehow discards the garden variety limitation imposed by the trial judge and the Discovery Commissioner, the award is still beyond all reason, shocking the judicial conscience and there is no logical explanation for the district court's approval of this absurd award. The award must therefore be vacated entirely, capped, or remitted to a reasonable amount.

b. The Trial Judge Erred By Prohibiting FTB From Introducing Evidence Of Alternative Causes Of Emotional Distress

Having barred FTB from obtaining Hyatt's medical records, which would have been fertile ground for information as to alternative causes of Hyatt's alleged emotional distress, the district court went much further, also barring FTB from introducing evidence of other known events that clearly could have caused emotional distress. AOB 106-108. FTB's opening brief pointed out that the district court excluded all evidence of Hyatt's involvement in a patent interference lawsuit, which stripped him of any ownership interest in his coveted patent that had earned him hundreds of millions of dollars, effectively taking away his very identity as an inventor. AOB 107. This patent decision occurred in March 1995, four years after he moved to Nevada to avoid California taxes, two years after FTB's audit was commenced, and at virtually the same time when Hyatt was dealing with the FTB's audit. See AOB 4-6. Before trial, Hyatt conceded that it was a jury question as to whether his alleged FTB-related emotional distress was actually caused by alternative events in his life. 18 AA 4457 (Hyatt's counsel states that patent dispute and FTB dispute "occurred about the same time," and that whether patent dispute caused distress was for "the jury to decide"). Yet during trial, Hyatt's counsel changed his position and convinced the judge to exclude evidence of the patent interference action. 52 AA 12759-66.

Hyatt's only response on appeal is a single sentence in his brief representing to this court that the patent litigation was "short-lived" and does not explain objectively-verified manifestations of FTB-related distress that occurred "many years after" the patent litigation. RAB 136, lines 23-26. Hyatt's representation to this court that the patent litigation was "short-lived" is false. The patent interference action was commenced in the U.S. Patent and Trademark Office in 1991. 69 AA 17098-102. The Board of Patent Appeals and

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100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020