

**FILED**

**JAN 26 2010**

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

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA,

Appellant,

v.

GILBERT P. HYATT,

Respondent

Supreme Court Case No. 53264

District Court Case No.: A382999

Notice of Appeal Filed March 4, 2009

**REPLY IN SUPPORT OF MOTION TO  
PERMIT EXPANDED BRIEFING FOR  
RESPONDENT'S ANSWERING BRIEF  
AND OPENING CROSS APPEAL BRIEF**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *S. Young*  
DEPUTY CLERK

**REPLY IN SUPPORT OF MOTION TO PERMIT EXPANDED BRIEFING FOR  
RESPONDENT'S ANSWERING BRIEF AND OPENING CROSS APPEAL BRIEF**

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Detached from Motion filed 01/11/10 and  
filed separately per order filed 01/26/10. sy

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1 Respondent-cross-appellant Gilbert P. Hyatt ("Hyatt"), by and through his attorneys of  
2 record, respectfully submits this reply in support of his motion to permit expanded briefing for  
3 Respondent's Answering Brief and Opening Cross Appeal Brief, and in response to the FTB's  
4 opposition to the motion.

5  
6 In his motion, Hyatt demonstrated the need and justification for submitting for  
7 consideration an extended length brief. In a matter this complex and with a record as substantial  
8 as is the record in this case, Hyatt suggests that the reasons set forth are sufficient to  
9 demonstrate that the relief sought is warranted, and the proposed brief is well and carefully  
10 drafted, in compliance with the rules of this Court. The FTB, nevertheless, opposes Hyatt's  
11 motion for a variety of reasons, none of which has substance.

12 Contrary to the rather juvenile response of the FTB, Hyatt's motion is not based on any  
13 belief that he is special or that he is entitled to special privileges. On the contrary, Hyatt takes  
14 his responsibilities with respect to this appeal and his candor to this Court seriously, and he and  
15 his team of attorney's have made every effort over an extended period of time to present a brief  
16 that is not redundant, but that addresses all of the issues raised and alluded to by the FTB in its  
17 shot-gun Opening Brief and in the Briefs of the Amici. Great care and effort was taken to edit  
18 and re-edit the drafts, reducing them by many pages and removing every non-essential word,  
19 while still fully addressing all of the necessary issues. This matter has been in litigation for well  
20 over a decade. It has consumed the life and energies of Hyatt. The trial in this case lasted four  
21 months, the verdicts are substantial and the issues many and complex, and the record consists of  
22 tens of thousands of documents. Full and fair briefing should be allowed.

23  
24  
25 The FTB complains, nevertheless, that Hyatt requested and received extensions of time  
26 to file the brief. The FTB states that it received only one extension of time before it submitted  
27 its 118 page brief, implying that Hyatt's motives have been dilatory. The FTB fails to  
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1 recognize, however, that its comparison of the number of extensions obtained for filing of the  
2 briefs is not fair, since it is a comparison of apples to oranges. As the appellant, the FTB was  
3 initially afforded a longer period of time to prepare its brief, making extensions less necessary.  
4 Hyatt, on the other hand, was initially afforded a very short period of time for its brief,  
5 necessitating the first request for a modification of the briefing schedule. The FTB also fails to  
6 consider that Hyatt was required to prepare a substantial Respondent's Appendix, because the  
7 FTB flat-out refused to discuss the content of the Appendix with Hyatt or his attorneys before  
8 filing Appellant's Appendix. A more apt comparison would be the total time it took each party  
9 to prepare and file its brief, not the number of extensions. In any event, this point is irrelevant  
10 and intended only to cloud the issues. Hyatt's motions for extensions were granted; thus, this  
11 Court has already ruled that the extensions were warranted.

12  
13 The FTB then complains that Hyatt did not inform this Court when it sought extensions  
14 of time that it would later seek permission to file a brief longer than the page limit already set by  
15 this Court. The FTB expressly argues that Hyatt was not candid with this Court in its motions  
16 for extensions of time, and impliedly argues that Hyatt has violated some prior Court edict  
17 regarding the length of the brief in bad faith. This argument lacks merit, and the implications  
18 are inappropriate.

19  
20 Hyatt has followed the same procedure followed by the FTB in this case and by  
21 appellate litigants in hundreds of cases of which Hyatt's appellate counsel is personally aware.  
22 The FTB first drafted its 118 page brief, although it was limited to 30 pages by Rule, and then  
23 submitted it to the Court along with a motion to file it. Hyatt first drafted his 198 page brief,  
24 although he was limited to 138 pages by Order, and then submitted it to the Court along with a  
25 motion to file it. Both parties respectfully asked the Court to file their extra-length briefs, and  
26  
27  
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1 made affirmative representations that the number of pages submitted was warranted by the  
2 complexity of the case and the issues.

3 In every case where an extra-length brief is submitted for consideration, a prior limit on  
4 the length of the brief has been exceeded; one set by rule or by court order. This Court's prior  
5 order allowing Hyatt 138 pages for his brief, which was filed before Hyatt began drafting his  
6 brief, was not a direction by the Court that Hyatt is not allowed to request additional pages if he  
7 can justify the request. It was a preliminary determination of how many pages would be  
8 allowed, just as the Rule generally sets a preliminary determination. Hyatt did not set out to  
9 disobey the order. He attempted diligently and in good faith to meet the page limit set by the  
10 Court, but found he was unable to do so, while still fairly and fully addressing the issues in this  
11 complex case. This issue now before this Court is not one of deception or non-compliance or  
12 contempt, as the FTB so wildly asserts; the issue before this Court is whether Hyatt has justified  
13 his request to file a brief 198 pages in length. The FTB's insinuations and arguments do not  
14 address this quintessential question.  
15  
16

17 The FTB complains that Hyatt's proposed brief uses a font size not in compliance with  
18 NRAP 32(a). The FTB notes correctly that the version of NRAP 32(a) that governs this appeal  
19 simply states that the font size must be "no smaller than 10 characters per inch. However, the  
20 FTB incorrectly asserts that the font size used by Hyatt "is approximately 14 or 15 characters  
21 per inch." This argument is disingenuous, at best.  
22

23 Hyatt has used a font size of 12 and style of Times New Roman. Times New Roman is a  
24 proportionally spaced typeface, as recognized by this Court's amended rule, NRAP 32(a)(5).  
25 The new rule allows a Times New Roman font size of 13, which equates to 12 (not 10)  
26 characters to the inch. If the FTB's argument were accepted, this Court's new rule would allow  
27 for a smaller, not a larger font.  
28

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1           The old rule was silent with respect to the type of typeface, but the 10 characters per  
2 inch mandated by that rule apply to a monospaced typeface, as was commonly used when the  
3 rule was adopted. The new rule allows for a monospaced typeface containing 10 ½ character's  
4 per inch, only ½ a character more than the old rule. Clearly, the old rule did not address the size  
5 of proportionally spaced typeface.

6  
7           Under the old rule, attorneys were often informed by the clerk of the Nevada Supreme  
8 Court that a font size of 11 or 12 in a proportionally spaced typeface was acceptable. Hyatt's  
9 appellate counsel has personally filed many briefs with this Court, and they have all been Times  
10 New Roman in 12 point font, just as is the presently submitted proposed brief. This font and  
11 typeface is in compliance with the version of the Rule that governs this appeal, and with the past  
12 practices of this Court.

13  
14           Interestingly, the FTB's Opening Brief appears on inspection to be in a Roman style,  
15 probably Times New Roman or a variation of that style, and it is in 12 point font, containing 14  
16 characters per inch. It is odd that the FTB would ascribe evil motive to Hyatt for producing a  
17 brief with the same font size as its own brief.

18           It is even more disingenuous for the FTB to accuse Hyatt of doing this in order to get  
19 more pages. The difference in the number of pages in a 12 point font as opposed to a 13 point  
20 font is not significant, when one is talking about 200 pages, and if Hyatt's brief were a few  
21 pages longer, Hyatt would be in the same position he is now: He would have to ask this Court  
22 for permission to file the extra-length brief. Hyatt does not imagine that this Court will resolve  
23 such an important motion based on something as inconsequential as the font size or the exact  
24 number of the pages, nor would Hyatt attempt to mislead this Court by such manipulations.  
25 Hyatt believes this Court will review the proposed brief, will see that it is well and  
26 professionally drafted and addresses the issues in this case concisely but fairly, and will  
27  
28

1 determine based on such an analysis whether Hyatt's request to file the brief is justified. If the  
2 FTB believes this Court operates in some other manner, Hyatt does not share that belief.

3         The FTB complains that the footnotes in Hyatt's proposed brief are not the same font  
4 size as the text, and suggests that Hyatt has done this to save a few more pages. The FTB even  
5 suggests that Hyatt has chosen to use footnotes for citations as a method of saving pages. The  
6 FTB is wrong.

7  
8         The footnotes are in a smaller font. They are in Times New Roman 11, and such a type  
9 face and font is appropriate under the applicable rule. Briefs with footnotes in this style have  
10 commonly been filed at the Nevada Supreme Court, and until just recently, this Court even  
11 preferred this style of citation, and used this style in its own published Opinions. Hyatt's  
12 proposed brief followed, in great part, the style from renowned expert on appellate briefing,  
13 Brian Garner. Using this style of footnotes for citations is a style issue, not a page saving issue.  
14 In fact, use of footnotes for citations of a single sentence may cost Hyatt pages. It takes more  
15 space to cite in this style than to include citation sentences in the text. Hyatt used footnotes as a  
16 matter of style preference, not to save pages, and not to attempt to mislead this Court.

17  
18         The FTB states that "the rule does not allow a party to use a smaller font size in  
19 footnotes." This language is carefully selected and is intended to mislead. FTB's counsel  
20 knows that the old rule, which governs this appeal, is silent on this issue. The new rule  
21 addresses the font to be used in footnotes, but the old rule did not, and using a slightly smaller  
22 font size for footnotes is not uncommon in appellate briefing. The old rule simply addresses the  
23 size of monospaced typeface generally, and does not mandate that text and footnote typeface  
24 must be the same. The font used in Hyatt's footnotes is not non-compliant with the old rule.

25  
26         Finally, the FTB complains that Hyatt has not properly referenced factual statements in  
27 the brief to the appendices. This is laughable in light of the comprehensive citations to the  
28

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1 record contained in Hyatt's proposed brief, and the abuses in the FTB's Opening Brief with  
2 respect to its citations to the record.<sup>1</sup>

3 In taking issue with Hyatt's citations to the record, the FTB misrepresents Hyatt's  
4 statement regarding citations from Hyatt's proposed brief. Footnote 12 on page 10 states in  
5 relevant part: "In the Statement of Facts, Hyatt places his supporting citations from the record  
6 in a single footnote after several sentences or an entire paragraph *where there are related*  
7 *subject matters* in order to avoid further lengthening the brief by inserting a footnote after each  
8 sentence." The FTB in its argument leaves out the key phrase "*where there are related subject*  
9 *matters.*" Hyatt grouped cites together that were related by subject matter, but Hyatt did not  
10 make any factual statement that is not immediately and appropriately cited to the record.  
11 Making a single footnote containing all the record cites to a related subject matter is consistent  
12 with the requirement for making a citation for every assertion in the brief. Nothing in NRAP  
13 28(e) requires a citation for every sentence in a brief. The rule requires that "[e]very assertion  
14 in briefs regarding matters in the record shall be supported by a reference to the page and  
15 volume number, if any, of appendix where the matter relied on is to be found." When an  
16 assertion is made in several sentences, and that assertion has been properly cited to the  
17 appendix, the Rule has been satisfied. Hyatt's proposed brief fully complies.

20 ///

22 ///

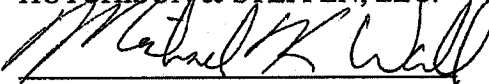
23 ///

24 \_\_\_\_\_  
25 <sup>1</sup> The FTB's brief was hardly a model for citing to the record to support each factual assertion. Not only did the  
26 FTB consistently cite its own pleadings and arguments as authority for factual statements, it entirely ignored the  
27 facts found by the jury. Also, the FTB often makes 2 or 3 assertions in one sentence, and then cites a single  
28 document as support for the entire sentence, even though the citation might not support the assertion or might only  
support one of the multiple assertions. (E.g., The FTB claims that the first FTB protest officer Anna Jovanovich  
waited to start the protest due to a request from Hyatt's tax attorney to consolidate the protests, with no evidentiary  
cite supporting the asserted fact (FTB Brief, at 20:17-20), when Jovanovich point blank admitted she was too busy  
to work on the Hyatt protest and apologized for her delay. See discussion on pages 44:5-6, 47:1-21.).

1 For the foregoing reasons, Hyatt respectfully requests that the Court grant his Motion to  
2 Permit Expanded Briefing for Respondent's Answering Brief and order that Respondent's  
3 proposed Answering Brief be filed.

4 DATED: January 8, 2010.

6 HUTCHISON & STEFFEN, LLC.

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25, I certify that I am an employee of **HUTCHISON & STEFFEN**  
3 **LLC** and that on this 8<sup>th</sup> day of January, 2010, I caused the above and foregoing document  
4 entitled **MOTION TO PERMIT EXPANDED BRIEFING FOR RESPONDENT'S**  
5 **ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF** to be served by the  
6 method(s) indicated below:  
7


- 8 \_\_\_\_\_ via U.S. mail, postage prepaid;
- 9       X       via Federal Express;
- 10 \_\_\_\_\_ via hand-delivery;
- 11 \_\_\_\_\_ via Facsimile;

12 to the attorney(s) listed below at the address indicated:

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