

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

\* \* \* \* \*

FRANCHISE TAX BOARD OF  
THE STATE OF CALIFORNIA,

Appellant,

v.

CASE NO: 53264

GILBERT P. HYATT,

**FILED**

Respondent

FEB 18 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY R. Malone  
DEPUTY CLERK

MOTION FOR STAY PENDING APPEAL WITHOUT BOND

ROBERT L. EISENBERG (NSBN 0950)  
Lemons, Grundy & Eisenberg  
6005 Plumas Street, Suite 300  
Reno, Nevada 89509  
775-786-6868

JAMES W. BRADSHAW (NSBN 1638)  
PAT LUNDVALL (NSBN 3761)  
CARLA HIGGINBOTHAM (NSBN 8495)  
McDonald Carano Wilson LLP  
2300 West Shara Avenue, Suite 1000  
Las Vegas, Nevada 89102  
702-873-4100

ATTORNEYS FOR APPELLANT

**RECEIVED**

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3 **MOTION FOR STAY PENDING APPEAL WITHOUT BOND**  
4

5 Pursuant to NRAP 8, appellant hereby moves for a stay pending the appeal of a  
6 \$490 million judgment, without a bond.<sup>1</sup>  
7

8  
9 **STATEMENT OF FACTS**

10 **A. Background and early stages of the litigation**

11 This is a tort action arising out of a tax audit of Gilbert Hyatt (Hyatt) by the Franchise  
12 Tax Board (FTB) of the State of California. In the early 1990s, Hyatt received more than  
13 \$150 million in income from transactions involving patents on computer technology. In 1991,  
14 Hyatt, who had been a long-time California resident, claimed he moved to Clark County,  
15 Nevada. He filed a 1991 California income tax return, representing under oath that he was  
16 only a "part-year" resident for 1991. He filed no 1992 California tax return. His 1991 part-  
17 year tax return claimed that he had ceased to be a resident of California -- and that he became  
18 a resident of Nevada -- shortly before he received huge income from the patent transactions.  
19 The date of his severance of his residency in California was critical in determining whether his  
20 substantial income from the patent transactions was subject to California state income tax.

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As discussed in more detail below, the parties have stipulated to a temporary stay,  
without a bond, pending this court's decision on the present motion. The stipulated stay is  
presently in effect. 2 App. 466.

1           FTB commenced an audit to determine whether Hyatt had underpaid California state  
2 income taxes. The audit focused on Hyatt's contention that he was a Nevada resident during  
3 the relevant time frame. The audit included some activities in Nevada. At the conclusion of  
4 the audit, the auditor submitted a recommendation that Hyatt was a California resident until  
5 April of 1992, and accordingly, proposed that he owed income taxes for 1991 and 1992. FTB  
6 issued notices of proposed tax assessments and proposed penalties for civil fraud. Hyatt  
7 protested the proposed assessments and penalties through FTB's administrative process.  
8 While the administrative protest was still pending, Hyatt filed a lawsuit in Clark County  
9 against FTB, seeking declaratory relief concerning his residency, and alleging that FTB  
10 committed several torts in Nevada during the audit, including negligence, invasion of privacy,  
11 false light, abuse of process, intentional infliction of emotional distress and fraud.

12           FTB challenged Hyatt's lawsuit on several grounds, including lack of evidence and  
13 lack of subject matter jurisdiction based on FTB's immunity under California law. The district  
14 court denied FTB's challenge, and FTB sought a writ of prohibition or mandamus from this  
15 court. Docket No. 35549. On April 4, 2002, this court held that the Nevada district court  
16 could exercise jurisdiction over FTB in this action; that the intentional tort claims could  
17 survive; but that the negligence claim must be dismissed due to immunity and application of  
18 comity. 1 App.1. FTB sought review by the United States Supreme Court, which affirmed  
19 this court's order in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 123 S.Ct. 1683  
20 (2003).

## 21   **B.    The trial and judgment**

22           The case went to trial on April 14, 2008. Hyatt's primary theme focused on whether  
23 FTB properly weighed and evaluated evidence it gathered about his residency, to conclude that  
24 he owed additional taxes to California and should be subjected to penalties for underpayment.  
25 After four months of trial, the jury awarded Hyatt \$85,000,000 for emotional distress damages;  
26 \$52,000,000 for invasion of privacy damages (although Hyatt presented no evidence of his  
27 damages for invasion of privacy); and \$1,085,281.56 for attorneys fees as special damages.  
28 Even though Hyatt did not request punitive damages in the first phase, in a second phase the



1 jurors were asked whether they wanted an opportunity to award punitive damages, and the jury  
2 answered in the affirmative. And in a third phase of the trial, the jury awarded \$250,000,000  
3 in punitive damages.

4 On September 8, 2008, the district court (Hon. Jessie Walsh) entered a judgment,  
5 including prejudgment interest dating back to 1998, in the total amount of \$490,421,013.81.  
6 1 App.15. FTB filed post-trial motions for judgment as a matter of law and for a new trial.  
7 1 App.47. The district court denied these motions, and FTB has filed a timely appeal. 3 App.  
8 590.

9 **C. District court proceedings on FTB's request for a stay without a bond**

10 Shortly after entry of the judgment, FTB filed a motion pursuant to NRCP 62(b), for  
11 a stay (without a bond) pending the outcome of post-trial motions. 1 App. 23. Hyatt did not  
12 oppose the motion, and the district court granted this stay on September 16, 2008. 1 App. 45.  
13 On September 30, 2008, FTB also filed a provisional motion pursuant to NRCP 62(d), for a  
14 stay pending appeal without a bond. 2 App. 238. At that time the district court had not yet  
15 ruled on FTB's post-trial motions, but FTB wanted to make sure that a stay pending appeal  
16 would be in place if the post-trial motions were denied. Hyatt opposed the stay motion, and  
17 FTB filed a reply. 2 App. 392, 426. The parties subsequently stipulated that if the district  
18 court were to deny FTB's post-trial motions, and if the district court also denied FTB's motion  
19 for a stay pending appeal without a bond, the previous stay would remain in place pending the  
20 Nevada Supreme Court's opportunity to rule on the stay issue. 2 App. 466. Specifically, the  
21 parties stipulated that if the district court denied the stay pending appeal without bond, in  
22 whole or in part, FTB would have 15 days in which to file papers in this court seeking a stay;  
23 and the district court's prior stay would remain in place until ten days after this court's ruling  
24 on the stay issue.

25 The district court held a hearing on January 29, 2009, at which the district court orally  
26 denied FTB's post-trial tolling motions. 3 App. 490. On the motion for a stay without a bond,  
27 the district court orally granted a stay but denied the request for no bond. 3 App. 559. The  
28 district court did not address FTB's comity argument (discussed below); nor did the district

1 court set a specific amount of the bond; nor did she give any guidance to the parties as to the  
2 amount of the bond that she will require if this court denies relief to FTB. On February 3  
3 and 9, 2009, the district court entered written orders on the tolling motions and on the stay  
4 motion. 3 App. 583, 585.

## 5 II

## 6 ARGUMENT

### 7 A. NRAP 8 factors

8 NRAP 8 governs any motion filed in the Nevada Supreme Court for a stay pending  
9 appeal. Subdivision (a) of the rule generally requires a party to seek a stay in the district court  
10 before seeking a stay in this court. FTB has satisfied this requirement. The district court  
11 denied FTB's request for a stay without a bond. Accordingly, relief is appropriate in this  
12 court.

13 Subdivision (c) of NRAP 8 provides a list of factors to be considered by this court in  
14 determining whether a stay pending appeal should be granted. In the district court, there was  
15 no serious dispute over the fundamental question of whether FTB is entitled to a stay pending  
16 appeal. The only serious dispute was whether FTB should be required to post a supersedeas  
17 bond. As to the question of whether FTB is entitled to a stay, the district court ruled for FTB  
18 (although the district court required a bond). Thus, the district court presumably resolved the  
19 four NRAP 8 factors in FTB's favor. Although there was no serious dispute over whether  
20 FTB is entitled to a stay, and although the district court ruled that FTB is entitled to a stay, we  
21 will briefly discuss the Rule 8 factors here.

#### 22 1. The object of the appeal will be defeated if a stay is denied.

23 The first factor in NRAP 8(c) is whether the object of the appeal will be defeated if the  
24 stay is denied. This factor really does not relate to whether a bond should be required.  
25 Instead, this factor relates to the issue of whether execution on the judgment should be stayed  
26 at all, with or without a bond. It is apparent, however, that the object of FTB's appeal will,  
27 in all likelihood, be defeated in the absence of a stay. Without a stay, Hyatt will be able to  
28 collect on the nearly half-billion dollar judgment, and there will be no restrictions on his use

1 and enjoyment of the money. If the judgment is ultimately set aside, reversed or significantly  
2 reduced, the money will have already been paid, Hyatt may have spent it or otherwise disposed  
3 of it, and obtaining a full refund from him will probably be impossible.

4 **2. FTB will suffer irreparable harm.**

5 The second factor under NRAP 8(c) is whether the appellant will suffer irreparable or  
6 serious harm if the stay is denied. In the present case, this factor essentially mirrors the first  
7 factor, i.e., whether the object of the appeal will be defeated. If execution on the judgment is  
8 not stayed, the money will be paid and FTB will be irreparably harmed. Moreover, if FTB is  
9 required to pay millions of dollars in premiums per year on the bond, during the entire time  
10 of the appeal, FTB will be further harmed, because this money will not be refundable from the  
11 bonding company. If the judgment is reversed, reimbursement from Hyatt of the millions of  
12 dollars in annual premiums on the bond will be difficult, if not nearly impossible, to obtain.

13 Additionally, bonding companies require collateral security before they will issue  
14 supersedeas bonds. 2 App. 464-65. To obtain a bond, a judgment debtor usually must provide  
15 the bonding company with collateral consisting of 100 percent of the amount of the bond.  
16 Such collateral is usually in the form of an irrevocable letter of credit from a bank or other  
17 large financial institution. *Id.* These institutions typically require the judgment debtor to have  
18 sufficient funds on deposit; the funds on deposit are not accessible during the time in which  
19 the letter of credit is in effect; and the institutions charge a significant annual fee for the letter  
20 of credit. Thus, to obtain a bond, FTB will be required to pay millions of dollars per year in  
21 premiums for the bond; FTB will need to obtain a letter of credit as collateral for the bond; the  
22 State of California will lose access to millions of dollars in funds on deposit for the letter of  
23 credit; and FTB will need to pay an annual fee for the letter of credit. *Id.*

24 **3. Hyatt will not suffer irreparable harm from a stay without a bond.**

25 The third factor under NRAP 8(c) is whether the respondent will suffer irreparable or  
26 serious injury if the stay is granted. Here, Hyatt's own evidence at the punitive damages phase  
27 established that he will suffer no irreparable harm from a stay, even if a bond is not required.  
28 Hyatt's evidence (described in more detail later in this motion) was that California has billions

1 of dollars, and Hyatt's evidence was that if the judgment is affirmed, California will have more  
2 than enough money to pay the judgment.

3 **4. Prevailing on the merits.**

4 The final factor is whether the appellant is likely to prevail on the merits in the appeal.  
5 To defeat a stay on this factor, Hyatt, as the potential respondent, must "make a strong  
6 showing that appellate relief is unattainable." *Mikohn Gaming Corp. v. McCrea*, 120 Nev.  
7 248, 89 P.2d 36 (2004). In particular, the court should deny a stay on this factor only "if the  
8 appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory  
9 purposes." *Id.*

10 In the present case, it would be impossible to include in this motion all of the potential  
11 issues that might be raised in an appeal, or to brief the potential appellate issues in this motion.  
12 Based solely on FTB's post-trial motions, however, it is abundantly clear that there are  
13 significant issues calling into question the validity of the judgment. 1 App. 47. These issues  
14 include, but are not limited to, the following:

15 (1) Whether the district court correctly applied the doctrine of comity. This is a very  
16 significant issue, which touches on several aspects of the judgment, including whether FTB  
17 should be entitled to limited immunity (i.e., a cap on damages awarded against governmental  
18 entities).

19 (2) Whether the district court erred by expanding the trial far beyond the scope  
20 contemplated by this court and by the United States Supreme Court. For example, the district  
21 court improperly allowed the jury to evaluate FTB's decision-making process and to second-  
22 guess taxation decisions.

23 (3) Whether there were factual and legal bases for the jury's awards of compensatory  
24 and punitive damages. The jury awarded Hyatt \$85,000,000 for emotional distress damages,  
25 despite the fact that he never sought or obtained professional care for emotional distress. And  
26 the jury awarded \$52,000,000 for invasion of privacy damages, despite a lack of evidence of  
27 such damages. These awards were flagrantly excessive, yet the district court refused to remit  
28 them. The district court also made the unprecedented decision to allow punitive damages

1 against a state government agency on a common law claim. Then, when the jury awarded the  
2 grossly excessive and unconstitutional amount of \$250,000,000 in punitive damages against  
3 FTB, the district court refused to grant any relief.

4 (4) Whether the district court committed multiple prejudicial errors in rulings on  
5 evidence disputes and jury instructions. FTB's post-trial motion identified dozens of errors  
6 on procedural and evidentiary matters. And there are other errors committed by the trial court  
7 that were not discussed in FTB's post-trial motion. (See 3 App. 609, issues listed in docketing  
8 statement as potential issues for appeal.)

9 Taking all of the NRAP 8(c) factors into consideration, it is obvious that the judgment  
10 must be stayed pending an appeal. As indicated above, the real question here is whether FTB  
11 should be required to post a bond. In determining this question, the court should note that a  
12 bond is not mandatory. Rather, a stay pending appeal under Rule 8 "may be conditioned upon  
13 the filing of a bond or other appropriate security in the district court." (Emphasis added.) The  
14 word "may" is permissive, not mandatory. See Tarango v. SIIS, 117 Nev. 444, 451 n. 20, 25  
15 P.3d 175 (2001)("may" is permissive).

16 **B. Nevada and California both recognize that government entities need not**  
17 **post supersedeas bonds for stays.**

18 **1. NRCP 62(e) and Cal. Civ. Proc. §995.220.**

19 Like almost all states, Nevada and California both have rules and statutes recognizing  
20 that public entity judgment debtors are not required to post supersedeas bonds or other security  
21 for stays of execution or enforcement of judgments. Nevada's provision is contained in NRCP  
22 62(e), which states:

23 (e) Stay in favor of the state or agency thereof. When an appeal is taken by the  
24 State or by any county, city or town within the State, or an officer or agency  
25 thereof and the operation or enforcement of the judgment is stayed, no bond,  
obligation, or other security shall be required from the appellant.

26 Similarly, California Code of Civil Procedure §995.220 states, in part:

27 **Bond in action of proceeding; public entities and officers not required to give**

28 Notwithstanding any other statute, if a statute provides for a bond in an  
action or proceeding, including but not limited to a bond for issuance of a . . .

1 stay of enforcement of a judgment on appeal, the following public entities and  
2 officers are not required to give the bond and shall have the same rights,  
remedies and benefits as if the bond were given:

3 (a) The State of California or the people of the state, a state agency,  
4 department, division, commission, board or other entity of the state, or a state  
officer in an official capacity or on behalf of the state.

5 These laws are based on a recognition that a public entity will have the ability to pay  
6 a judgment, and that the requirement of a bond or other security will often be disruptive to  
7 efficient functioning of a government. Courts have recognized that requiring a government  
8 entity to post an appeal bond has the dual negative effect of interfering with government's  
9 ability to perform its public functions and deterring it from appealing judgments against it.  
10 See Lampson Universal Rigging, Inc. v. Wash. Pub. Power Supply Sys., 715 P.2d 1131, 1133  
11 (Wash. 1986) (granting stay to public entity without bond).

12 Laws waiving bonds for public entities also recognize that a government should not be  
13 saddled with wasteful and unnecessary expenses and burdens involved with obtaining a bond,  
14 paying a premium for a bond, and providing the bonding company with mandatory collateral  
15 (usually 100 percent) consisting of government-owned property, thereby preventing the  
16 government from being able to use its collateral/property until the bond is exonerated. Cf. City  
17 of S. San Francisco v. Cypress Lawn Cemetery Ass'n., 14 Cal. Rptr. 2d 323, 327 (Ct. App.  
18 1992) (statute recognizing that public good is best served by excusing governments from bond  
19 requirements, and by reducing expenditure of public funds for bonds).

20 **2. The public policies of NRCP 62(e) and Cal. Civ. Proc. §995.220 are**  
21 **consistent with each other and should apply in this case, by application of the**  
22 **comity doctrine**

23 In the district court, Hyatt argued that the Nevada rule, NRCP 62(e), and the California  
24 statute, Cal. Civ. Proc. §995.220, are not applicable here. Hyatt contended that a technical  
25 reading of these laws shows that they only apply to government entities of the state in which  
26 the judgment was rendered. Hyatt argued that each state's law only establishes a no-bond  
27 policy for "domestic" agencies, and that neither state's laws apply to a "foreign" state agency.  
28 3 App. 552. Hyatt's argument should be rejected for several reasons. Since the interests of

1 both Nevada and California are identical concerning whether a state agency is obligated to post  
2 a bond to secure a stay pending appeal, the district court should have treated FTB just as it  
3 would treat a Nevada governmental agency in the same circumstance, and not require a bond  
4 from FTB to secure a stay pending appeal. This result is demanded by the doctrines of comity,  
5 law of the case, and judicial estoppel.

6 **a. Relevant history of this case**

7 **(1) Nevada Supreme Court proceedings**

8 Certain issues in this case have already been reviewed by this court and by the United  
9 States Supreme Court. One of the early issues was whether the Nevada district court was  
10 required to apply a California statute that provides full sovereign immunity to FTB. FTB  
11 argued that Hyatt's lawsuit should be dismissed for lack of subject matter jurisdiction, due to  
12 FTB's complete immunity under California law. Judge Saitta, who was the district judge  
13 presiding over the case at that time, did not grant FTB's motion to dismiss, and FTB filed a  
14 writ petition in this court. (Docket Nos. 35549 and 36390) On June 13, 2001, the court  
15 granted the petition and issued a writ of mandamus directing the district court to grant  
16 summary judgment in FTB's favor. Hyatt petitioned for rehearing. On April 4, 2002, the  
17 court granted rehearing and vacated the previous order. 1 App. 1. In the new order, the court  
18 held that parts of the Nevada district court action would survive, but that the discretionary  
19 negligence claim must be dismissed. Thus, the court issued a writ of mandamus compelling  
20 the district court to dismiss Hyatt's claims based on discretionary negligence.

21 In reaching this result, this court considered whether California's complete statutory  
22 immunity for FTB should apply in this Nevada action, pursuant to the doctrine of comity. This  
23 court recognized the important policy behind comity, namely, that the courts in one state will  
24 give effect to the laws of another state "out of deference and respect, to promote harmonious  
25 interstate relations."<sup>2</sup> 1 App. 7.

26 

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2

27 There can be no serious debate over the need to promote harmonious relations  
28 between the residents of California and Nevada. These are not merely two sister states  
within the United States; they are immediate neighbors, with a common border of (continued)

1 This court's April 4, 2002 order was premised upon the fundamental recognition that,  
2 under the doctrine of comity, a sister state's protective laws should be given effect in a lawsuit  
3 against the sister state, unless those laws contravene the forum state's own policies and  
4 interests. To determine whether comity should apply in the present case, the April 4, 2002  
5 order analyzed whether California's complete immunity statute would contravene Nevada's  
6 own policies and interests. To make this determination, the court compared the scope of  
7 immunity allowed to Nevada and California government entities under the statutes of each  
8 state. The court observed that under Nevada statutes, our government entities enjoy immunity  
9 for most discretionary acts and functions, including negligence acts. 1 App. 7. Likewise,  
10 California's statute, under which FTB has complete immunity, would necessarily include  
11 immunity for FTB's discretionary acts. Accordingly, this court ruled that Nevada and  
12 California interests were similar with respect to Hyatt's negligence claim, which this court  
13 characterized as being based on discretionary acts.

14 Although Nevada has not expressly granted its state agencies immunity  
15 for all negligent acts, California has granted the Franchise Tax Board such  
16 immunity. We conclude that affording the Franchise Tax Board statutory  
17 immunity for negligent acts does not contravene any Nevada interest in this  
18 case. An investigation is generally considered to be a discretionary function,  
19 and Nevada provides its agencies with immunity for the performance of a  
20 discretionary function even if the discretion is abused. Thus, Nevada's and  
21 California's interests are similar with respect to Hyatt's negligence claim.

22 \* \* \*

23 We conclude that the district court should have declined to exercise  
24 jurisdiction over the negligence claim as a matter of comity. Accordingly, we  
25 grant the petition in Docket No. 36390 in part; the clerk of this court shall issue  
26

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27 (continued) more than 600 miles. The residents and governments of both states cooperate  
28 and share important bi-state goals relating to natural resources, forest fire suppression, roads,  
interstate border problems, economic issues, law enforcement, and a multitude of other  
interests and concerns that are common to the millions of residents in California and Nevada.  
Likewise, there can be no serious debate over Nevada's reliance on California as an  
important source of visitors for our state's critical tourism and recreation industries. In this  
context -- where a solitary Nevada plaintiff wants a California government agency to post  
a bond of at least a half billion dollars, all to secure a personal judgment rendered in favor  
of the single plaintiff -- comity's goal of promoting harmonious interstate relations cannot  
be ignored and should be given great weight.



1 a writ of mandamus directing the district court to grant Franchise Tax Boards's  
2 motion for summary judgment as to the negligence claim.

3 1 App. 7-8 (footnotes omitted).

4 In short, application of immunity for FTB on the negligence claim -- based on  
5 California's statute providing complete immunity for FTB -- did not offend Nevada's own  
6 interests. Accordingly, this court issued a writ of mandamus and ordered the district court to  
7 dismiss Hyatt's negligence claim, pursuant to the doctrine of comity and the application of  
8 California's immunity statute. *Id.*

9 This court then turned its attention to Hyatt's claim based on intentional torts. The  
10 court noted that California's complete immunity statute for FTB encompassed such claims,  
11 but under Nevada statutes, there is no immunity for such claims. This court observed that  
12 "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad  
13 faith, or for intentional torts committed in the course and scope of employment." 1 App. 8.  
14 The court then held that Nevada's interests in protecting its citizens from intentional torts and  
15 bad faith acts committed by government employees outweighed California's interest in giving  
16 FTB complete immunity. Thus, the court allowed these claims to avoid dismissal. In effect,  
17 the court determined that FTB should be treated in the same manner as a similarly situated  
18 Nevada government agency, and a Nevada citizen should receive the same rights against a  
19 California agency as the citizen would received against a Nevada agency. Claims based on  
20 FTB's discretionary acts would be given immunity, pursuant to comity, but claims based on  
21 intentional torts would not.<sup>3</sup>

22 <sup>3</sup>

23 This court's order relied on *Mianecki v. District Court*, 99 Nev. 93, 685 P.2d 422  
24 (1983), where the State of Wisconsin was sued in a Nevada court. Wisconsin claimed  
25 complete immunity under Wisconsin law. The *Mianecki* court applied a traditional comity  
26 analysis, looking to whether the law of Wisconsin was contrary to the policies of Nevada.  
27 The court ruled that if a Nevada state employee had engaged in the same conduct as the  
28 Wisconsin employee in *Mianecki*, there would be no immunity for a Nevada state employee  
in a lawsuit in our state. As such, the court refused to provide the State of Wisconsin with  
immunity that was unavailable to the State of Nevada itself in a Nevada lawsuit. *Mianecki*,  
therefore, stands for the proposition that a sister state sued in Nevada should be treated the  
same as Nevada itself would be treated. This court should note that *Mianecki's* (continued)

(2) United States Supreme Court proceedings

FTB appealed to the United States Supreme Court, which affirmed in *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 123 S.Ct. 1683 (2003). At oral argument, one of the Justices observed that the Nevada Supreme Court essentially held: “The law we apply to tax collectors who act in this state is the same as we apply to Nevada tax collectors.” 2 App. 296-97. A short time later during oral arguments, Hyatt’s counsel argued that under the principle of comity, states tend to look at their own immunity in determining whether an outside sovereign should receive the same immunity. 2 App. 320 (an “emerging principle of comity, is they [states] have tended to look at their own immunity to see what kinds of suits could be brought against them and to try, then, to grant to the - to the outside sovereign that same type of immunity”).

Shortly thereafter, Justice Stevens inquired of Hyatt’s counsel as to whether comity asks the question: “What would I do if the tables were reversed?” 2 App. 333. He then asked whether one sovereign should “generally treat the other sovereign the way they would want to be treated themselves.” *Id.* Hyatt’s counsel responded: “That’s correct, Justice Stevens.” *Id.* In fact, Hyatt’s counsel went even further, explaining that “we want to treat the other sovereign as we do treat ourselves, not just as we want to be treated.” *Id.* Counsel for Hyatt then conceded that the position Hyatt was asserting on the comity issue was: “We [Nevada] are treating the other sovereign [California] the way we treat ourselves.” *Id.*

Hyatt’s position that the governments of California and Nevada should be treated identically in a Nevada court was not limited to his oral arguments. He took the same position in his written Respondent’s Brief in the United States Supreme Court. For example, his brief noted that “state courts are fully capable of recognizing the sovereign interests of other States, using their own sovereign interests as a benchmark.” 2 App. 387. Hyatt further recognized

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(continued) analysis of discretionary immunity, using a discretionary-operational comparison, might no longer be good law, in light of *Martinez v. Maruszczak*, 123 Nev. \_\_\_, 168 P.3d 720 (2007)(adopting new test for discretionary immunity) and *Ransdell v. Clark County*, 124 Nev. \_\_\_, 192 P.3d 756 (2008)(applying immunity to low-level employee’s action in filing nuisance abatement).

1 that the Nevada Supreme Court's "reference point was not the liability of private individuals  
2 for tortious conduct, but the liability of *the State itself*." 2 App. 368 (italics in original).  
3 Finally, Hyatt cited numerous state cases in support of the proposition that forum courts have  
4 "often done what the Nevada Supreme Court did below: looked at immunity of the forum  
5 State in determining what acts of the defendant State would be subject to suit." 2 App. 386  
6 (emphasis added).

7 Thus, in both written and oral argument before the United States Supreme Court,  
8 Hyatt's counsel expressly took the position that a California government entity being sued in  
9 Nevada should be treated the same way in a Nevada court as a Nevada government entity  
10 would be treated. This was the foundation of Hyatt's argument that the United States Supreme  
11 Court should affirm this court's order of April 4, 2002. The United States Supreme Court  
12 agreed, affirming this court's order in its entirety, and concluding that this court had  
13 "sensitively applied principles of comity with a healthy regard for California's sovereign  
14 status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark  
15 for its analysis." *Hyatt*, 538 U.S. at 499.

16 In summary, Hyatt took the position that (1) a California government entity in a Nevada  
17 lawsuit should not be given broader immunity than a Nevada government entity would receive  
18 in the same case, and (2) as a citizen of Nevada, Hyatt was entitled to the same rights and  
19 remedies (no more and no less) that he would be allowed against a Nevada entity in a Nevada  
20 court. His position prevailed, both in this court and in the United States Supreme Court.

21 **b. The doctrine of comity has been applied in other cases, and**  
22 **the doctrine applies here**

23 This court's April 2002 order in this case recognized the important policy behind  
24 comity, namely, that the courts in one state will give effect to the laws of another state "out  
25 of deference and respect, to promote harmonious interstate relations." 1 App. 7. When a  
26 government entity is sued outside of its own state, its laws will be applied in the forum state  
27 unless those laws offend or contravene the policies of the forum state. *Id.*

28

1 In 2006, the doctrine of comity and the United States Supreme Court's decision in  
2 *Hyatt* were applied by the New Mexico Supreme Court in the context of a statute of limitations  
3 dispute involving public entity immunity. In *Sam v. Sam*, 134 P.3d 761 (N.M. 2006), an  
4 Arizona state employee negligently drove over and killed his son while in New Mexico.  
5 Slightly less than three years later, the son's estate filed a suit in New Mexico against the  
6 Arizona state agency for whom the driver worked. Arizona had a one-year statute of  
7 limitations for actions against a government entity. New Mexico had a two-year statute for  
8 actions against New Mexico government entities, and a general three-year statute for claims  
9 against other non-government defendants. An intermediate court of appeals determined that  
10 Arizona's one-year government entity statute of limitations did not apply in the New Mexico  
11 case, and New Mexico's two-year statute likewise did not apply because it was only applicable  
12 to New Mexico government entities. Thus, the intermediate court of appeals held that New  
13 Mexico's general three-year statute applied, and the case could proceed.

14 The New Mexico Supreme Court reversed. The *Sam* court ruled that New Mexico's  
15 shortened two-year statute of limitations for New Mexico government entities reflected the  
16 public policy of that state, which would apply instead of Arizona's even shorter one-year  
17 statute. Nevertheless, neither state had a public policy or state interest in a limitations period  
18 longer than two years for any government entity defendants. Thus, although the *Sam* court  
19 applied New Mexico's two-year limitations, which technically only applied to New Mexico  
20 government entities, this application still resulted in dismissal of the action against the Arizona  
21 entity. *Id.* at 765-68.

22 The *Sam* court's analysis tracked important comity considerations. The *Sam* court  
23 noted that comity refers to the "spirit of cooperation" in which one state approaches the  
24 resolution of a case touching on the laws and interests of another state. *Id.* at 766. The *Sam*  
25 court relied on *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182 (1979), recognizing a strong  
26 presumption that another state's law will apply to that state unless such law violates a  
27 legitimate public policy of the forum state. *Id.* at 765-66. This presumption that comity will  
28 apply is based on the "intimate union of these states, as members of the same great political

1 family,” and the “deep and vital interests which bind them so closely together.” *Id.* The *Sam*  
2 court then looked to *Hyatt*, noting the United States Supreme Court’s holding that “not only  
3 was it appropriate for Nevada to grant California immunity, but also to only grant to California  
4 what it deemed appropriate for itself.” *Id.* at 468 (emphasis added). In other words, the *Sam*  
5 court applied New Mexico’s two-year statute of limitations to the Arizona government entity  
6 sued in a New Mexico court, because this limitations period would be applicable to one of  
7 New Mexico’s own government entities if sued in the same court.

8 As noted above, this court has recognized that comity is a principle whereby the courts  
9 of one jurisdiction give effect to the laws and judicial decisions of another state out of  
10 deference and respect and to promote harmonious interstate relationships. See *Mianecki v.*  
11 *Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983)(cited in this court’s  
12 April 4, 2002 order, at p.7, fn. 16). In determining whether to grant comity to another state’s  
13 laws, the forum state must determine whether the application of the sister state’s laws would  
14 contravene any of the policies or interests of the forum. *Id.* In cases like the present case,  
15 where one state agency has been sued in another state, a clear principle has emerged: the  
16 forum state looks to the manner in which its own state agencies would be treated under the  
17 same or similar circumstances and provides that same treatment to the sister state agency. See  
18 e.g., *Schoeberlein v. Purdue University*, 544 N.E.2d 283, 288 (Ill. 1989) (granting comity,  
19 after determining that treatment of out-of-state agency would be the same treatment given an  
20 in-state agency under the same circumstances); *Solomon v. Supreme Court of Florida*, 816  
21 A.2d 788, 789-90 (D.C. Cir. 2002) (applying comity, D.C. court treated Florida bar the same  
22 way the D.C. bar would be treated under similar circumstances); *McDonnell v. State of Illinois*,  
23 748 A.2d 1105, 1107-08 (N.J. 2000) (explaining that some courts have declined to grant  
24 comity to out-of-state law because it would require treating out-of-state agency differently than  
25 in-state agency); *Sam v. Sam, supra* (applying two-year statute of limitation that applied to  
26 New Mexico state agencies to an Arizona state agency sued in New Mexico); *Hansen v. Scott*,  
27 687 N.W.2d 247 (N.D. 2004) (applying same level of sovereign immunity accorded to a North  
28 Dakota state agency to a Texas state agency sued in North Dakota).

1 The rationale for this rule is simple. By treating the sister state agency the same as an  
2 in-state agency, no interests or policies of the forum state are undermined, but at the same  
3 time, the sister state agency is accorded heightened respect and more deference than just any  
4 other ordinary litigant. See Hansen, 687 N.W.3d at 251 (determining that application of same  
5 level of immunity to Texas agency afforded to North Dakota agency does not compromise  
6 public policy of North Dakota); Sam, 134 P.3d at 768 (same). Thus, the purpose of comity --  
7 to encourage harmonious interstate relationships and encouraging a spirit of cooperation  
8 between the states -- is satisfied. *Id.*

9 The present case is an example of this court's application of these principles. This  
10 court already expressly held that the district court had a mandatory duty to apply the principles  
11 of comity to Hyatt's negligence claims. 1 App. 7. In doing so, this court expressly engaged  
12 in a comparative analysis of governmental immunities that would extend to a Nevada state  
13 agency under the facts and circumstances of this case, in contrast to the complete immunity  
14 that would be extended to FTB under California law. *Id.* This court then concluded, applying  
15 principles of comity, that FTB could be subject to liability in Nevada only to the same extent  
16 that a similarly situated Nevada agency could be held liable. *Id.* Thus, the court concluded  
17 that the district court should have dismissed Hyatt's discretionary negligence claims on the  
18 basis of comity, because similarly situated Nevada state agencies could not be held liable for  
19 their discretionary acts. *Id.*

20 The United States Supreme Court expressly affirmed this decision in *Hyatt*. In doing  
21 so, the Supreme Court expressly held that "[t]he Nevada Supreme Court sensitively applied  
22 principles of comity with a healthy regard for California's sovereign status, relying on the  
23 contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." 538  
24 U.S. at 499 (emphasis added). Thus, the Supreme Court expressly upheld this court's  
25 application of comity, because this court correctly treated FTB the same way that it would  
26 have treated its own state agencies. In fact, the Supreme Court expressly noted that, based on  
27 this court's proper application of comity principles, this case is not "a case in which a State  
28

1 has exhibited hostility to the public acts of a sister state.” *Id.* (internal citations and quotations  
2 omitted.)

3 FTB’s interpretation of the rule relied upon by the United States Supreme Court’s  
4 decision is the same interpretation taken by other courts that have subsequently examined and  
5 relied upon that decision. For example, the North Dakota’s application of the rule expressed  
6 in *Hyatt* is identical to FTB’s interpretation. *Hansen v. Scott*, 7 N.W.2d at 250-51. There, the  
7 North Dakota Supreme Court expressly relied on *Hyatt* and held that when applying the  
8 doctrine of comity, the court was required to apply the same immunity from suit to a Texas  
9 state agency that it would apply to a North Dakota state agency sued under the same or similar  
10 circumstances. *Id.*

11 Similarly, the New Mexico Supreme Court also agreed with FTB’s interpretation, in  
12 the *Sam* opinion discussed above, where the court’s ruling, based on comity, treated the  
13 foreign state defendant that same way that the forum state would treat its own agencies under  
14 similar litigation circumstances. *Sam*, 134 P.3d at 766.

15 **c. Public policy relating to the bond requirement here.**

16 In the present case, the issue concerning whether a bond should be required is nearly  
17 identical to the issue in *Sam* and many of the other cases cited above. Here, Nevada and  
18 California have both expressed the clear and unambiguous identical public policies and  
19 interests -- that a government entity should not be required to post a bond or other security as  
20 a prerequisite to obtaining a stay of execution on a judgment against the entity. Nevada’s  
21 policy does not conflict with California’s. In the interest of fostering the relationship between  
22 Nevada and California, comity should be applied unless Nevada has a strong interest in  
23 refusing to recognize California’s statute. There is no such interest.

24 As noted earlier, *Hyatt*’s district court argument was that the Nevada rule and the  
25 California statute only apply to “domestic” government entities, and that neither state’s law  
26 should be applied to a “foreign” government entity. 3 App. 552. Contrary to *Hyatt*’s argument  
27 below, this court should not decline to apply the public policy expressed in NRCP 62(e), which  
28 is identical to the public policy in CCP §995.220, simply because that rule, on its face, only

1 waives the bond requirement for Nevada state agencies. Likewise, this court cannot ignore  
2 CCP §995.220 simply because that statute, on its face, only applies to California entities.

3 As in *Sam*, the question here is not resolved simply by looking at the technical language  
4 of the forum state's rule. Rather, the question relates to the public policy expressed in the  
5 forum state's rule, and whether the public policy in the forum state's rule would be offended  
6 by application of the foreign sovereign's law.

7 Indeed, this court itself already performed an identical analysis in its April 4, 2002  
8 order. This court evaluated whether Hyatt's claim based on negligent discretionary acts could  
9 survive against a challenge based on California's immunity statute for FTB (which, of course,  
10 would only apply to the California "domestic" agency). To determine whether California's  
11 statutory immunity for FTB should apply in this Nevada lawsuit, this court looked to the public  
12 policy expressed in NRS 41.032 -- the policy that government agencies should be immune  
13 from liability for such acts (and that Nevada residents cannot recover damages for such acts).  
14 This Nevada statute, of course, only applies to Nevada agencies (i.e., agencies that Hyatt  
15 would characterize as "domestic" agencies). Nonetheless, this court had no hesitation  
16 whatsoever in applying the statutory public policy to a California agency.

17 In applying immunity to FTB for negligent discretionary acts, this court determined that  
18 Nevada's public policy of protecting its own agencies from liability -- and prohibiting its own  
19 residents from suing for such acts -- is similar to California's public policy. As such,  
20 Nevada's public policy was not offended by application of California's immunity statute, at  
21 least with regard to Hyatt's allegations of negligence against FTB. This court, therefore,  
22 ordered Hyatt's negligence claim dismissed, despite the fact that NRS 41.032, on its face, only  
23 protects Nevada "domestic" government agencies. Accordingly, this court's own April 4,  
24 2002 order has already rejected Hyatt's idea that the public policies expressed in Nevada and  
25 California laws should only apply to so-called "domestic" government agencies, and that these  
26 policies should not apply to a foreign government agency sued in a Nevada court.

27 ////

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1       The narrow question in the present motion is whether application of California's no-  
2       bond statute for government entities would offend Nevada public policy. Similar to  
3       California's statute, NRCP 62(e) expresses the public policy that a government body should  
4       not be required to post a bond for a stay pending appeal. This is exactly the same policy  
5       expressed in C.C.P. §955.220. The mere fact that NRCP 62(e) only applies to Nevada  
6       agencies is not determinative. The public policy expressed by that rule is clearly not offended  
7       by application of California's identical law. Accordingly, the public policies expressed in  
8       NRCP 62(e) and C.C.P. §955.220 should apply to relieve FTB of the burden of posting a bond  
9       or other security as a prerequisite to obtaining a stay of execution or enforcement of the nearly  
10      half-billion dollar judgment.<sup>4</sup>

11                   **d. Other Constitutional considerations**

12       Moreover, a failure to apply comity to California's no-bond statute would violate FTB's  
13      rights under the United States Constitution. When the United States Supreme Court ruled in  
14      this case, it specifically upheld Nevada's application of comity because the Court noted that  
15      it was "not presented . . . with a case in which a State has exhibited a 'policy of hostility to the  
16      public acts' of a sister State." *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 499, 123 S.Ct.  
17      1683, 1690 (2003), citing *Carroll v. Lanza*, 349 U.S. 408, 413, 75 S.Ct. 804 (1955). If Nevada  
18      refuses to give comity to California's statute, which explicitly exempts California state  
19      agencies from having to post a bond pending appeal -- in spite of the fact that no Nevada  
20      public policy or interest would be contravened by its application -- Nevada will be adopting  
21      "a policy of hostility to the public acts of a sister State." *Id.* Such an action would undermine

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23      

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24       In the district court, the parties extensively argued the doctrine of comity regarding  
25      the motion for stay without a bond, and the parties extensively briefed the question of  
26      whether comity should be applied to CCP §955.220 and NRCP 62(e). At the hearing,  
27      however, the district court denied FTB's motion without even mentioning comity or  
28      explaining why she believes the doctrine does not apply in this context. 3 App. 559. Earlier  
in the hearing, in ruling on the post-trial tolling motions, the district court did discuss comity,  
essentially ruling that the doctrine did not apply beyond the narrow issue determined by this  
court in the April 2002 order on the mandamus action. 3 App. 490-93.

1 the notions of cooperative federalism between California and Nevada, and would be contrary  
2 to the harmonious relationship between the citizens of our two states. See Nevada v. Hall, 440  
3 U.S. 410, 429, 99 S.Ct. 1182 (1979) (Blackmun, J., dissenting).

4 In addition, such an action will likely violate the Full Faith and Credit Clause of the  
5 United States Constitution. Although the United States Supreme Court has stated that the  
6 comity doctrine is not required by the United States Constitution, the High Court has strongly  
7 intimated that this may not be the case where one state adopts a policy that is hostile to the  
8 public acts of another state. See Carroll v. Lanza, 349 U.S. at 413. Therefore, if this court  
9 decides to take a position that is hostile to the people and public acts of California, such a  
10 decision would rise to the level of a Constitutional violation of the Full Faith and Credit  
11 Clause, as eluded to in these prior cases. Cf. Carroll, 349 U.S. at 413 (comity not  
12 constitutionally mandated, but leaving open issue as to whether a constitutional violation  
13 would occur if state was openly hostile to public acts of sister state); *Franchise Tax Board*,  
14 538 U.S. at 499 (same). Thus, this court should not adopt a unilateral policy of hostility  
15 toward California and its public acts. Rather, this court should apply comity in this instance.

16 Moreover, requiring FTB to post a supersedeas bond in order to stay execution of the  
17 judgment would also violate FTB's due process rights. Applying "an inflexible requirement  
18 for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the  
19 full amount of a judgment is posted can in some circumstances be irrational, unnecessary, and  
20 self-defeating, amounting to a confiscation of the judgment debtor's property without due  
21 process of law." *Texaco, Inc., v. Pennzoil Co.*, 784 F.2d 1133, 1154 (1986) overruled on other  
22 grounds, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519 (1987). This is exactly the  
23 case here. First, if FTB is required to post a supersedeas bond and to pay the astronomical  
24 bond premiums necessary to maintain that bond, this would "amount to the confiscation" of  
25 California's property "without due process of law." *Id.* On the other hand, if FTB does not  
26 post the required bond as ordered and a stay is not entered, Hyatt will immediately be able to  
27 execute on his judgment, resulting in the arbitrary denial of FTB's appellate rights. *Id.* This  
28 is so because if Hyatt is able to execute on the judgment before the appeal is heard and

1 decided, the entire purpose of the appeal will be lost and it will be reduced to a “meaningless  
2 ritual” in violation of the due process clause. *Id.* In either scenario, FTB’s due process rights  
3 would be violated if FTB is required to post a supersedeas bond to stay execution of Hyatt’s  
4 judgment.

### 5           **3.       The law of the case doctrine**

#### 6                   **a.   The law of the case doctrine applies here**

7           An appellate court’s decision becomes “the law of the case” and must be adhered to  
8 throughout the subsequent progress of the case, both in the district court and upon any  
9 subsequent appeal. *Bd. of Gallery of History v. Datecs Corp.*, 116 Nev. 286, 288-89, 994 P.2d  
10 1149 (2000); see *Hsu v. County of Clark*, 123 Nev. \_\_\_, 173 P.3d 724 (2007)(“The doctrine of  
11 the law of the case provides that the law or ruling of a first appeal must be followed in all  
12 subsequent proceedings, both in the lower court and on any later appeal.”) This court’s ruling  
13 in an appeal is subject to the “law of the case” doctrine in later proceedings, and the doctrine  
14 cannot be avoided by more detailed and precisely focused arguments. *State v. District Court*,  
15 121 Nev. 225, 232-33, 112 P.3d 1070 (2005).

16           The law of the case doctrine is designed to ensure judicial consistency and to prevent  
17 the reconsideration, during the course of a single continuous lawsuit, of those decisions which  
18 are intended to put a particular matter to rest. *Hsu*, 123 Nev. at \_\_\_, 173 P.3d at 728. The law  
19 of the case doctrine, therefore, serves important policy considerations, including judicial  
20 consistency, finality, and the protection of the court’s integrity. *Id.*

21           The law of the case doctrine cannot be avoided by a new argument made after the  
22 previous appellate proceedings. In *Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975), the  
23 defendant’s conviction had been affirmed in a previous appeal, which resolved an issue  
24 dealing with whether his guilty plea was voluntary. In a subsequent petition for  
25 post-conviction relief, the defendant raised the issue again, fine tuning his argument. In the  
26 second appeal, the *Hall* court held that the law of the case doctrine applied. “The doctrine of  
27 the law of the case cannot be avoided by a more detailed and precisely focused argument  
28 subsequently made after reflection upon the previous proceedings.” *Id.* at 316.

1 In the present case, both this court and the United States Supreme Court have ruled on  
2 the issues of comity. This court ruled that comity should be applied to California in this case,  
3 and that California's laws should apply to the extent that those laws do not contravene  
4 Nevada's own policies and interests. The rulings of both courts establish that FTB, as a  
5 California government agency, should be treated the same (i.e., no worse than) as a similarly  
6 situated Nevada government agency. These rulings are the law of the case. As such, FTB  
7 should be entitled to the same no-bond right to stay pending appeal to which a Nevada agency  
8 would be entitled under NRCP 62(e).

9 **b. Hyatt's arguments in the district court were without merit**

10 In order to avoid FTB's request for a stay without a bond, Hyatt argued in the district  
11 court that the law of this case does not require the application of the principle of comity. In  
12 particular, Hyatt argued that the law of this case did not require the district court to treat FTB  
13 the same as a similarly situated Nevada state agency. 2 App. 398-404. To support this  
14 proposition, Hyatt made a three-fold argument. First, Hyatt claimed that neither this court nor  
15 the United States Supreme Court determined that FTB must be treated like a similarly situated  
16 Nevada agency, because the comity issue was not really the focus of these appellate decisions.  
17 2 App. 400-404. This was incorrect. The quintessential holding of each of these decisions  
18 was the fact that the district court should have applied the principle of comity, using Nevada's  
19 treatment of its own state agencies as the benchmark for this analysis.

20 Second, Hyatt claimed that the district court was not required to apply comity in this  
21 instance because this principle is not a mandatory doctrine. 2 App. 401. Hyatt, however, was  
22 wrong again. Comity is required in this case for two reasons. First, the law of the case  
23 doctrine mandates the application of comity to the issues in this litigation. In addition, judicial  
24 estoppel prevents Hyatt from claiming that FTB be treated different from the way a Nevada  
25 state agency would be treated, as discussed in more detail below.

26 And third, Hyatt argued that *Nevada v. Hall*, 440 U.S. 410 (1979), mandates that  
27 Nevada courts should not treat FTB the same as Nevada government agencies. 2 App. 399-  
28 400. In *Hall*, a Nevada state employee was in an accident in California, and he was sued by

1 California residents. The defendant requested the California court to grant limited immunity,  
2 pursuant to a Nevada statute that imposes a cap on damages awards against government  
3 employees. The California courts declined, because under California law there would have  
4 been no immunity (i.e., no cap on damages) for a similarly situated California state employee,  
5 and therefore the Nevada statute contravened California's law. The United States Supreme  
6 Court held that the California court decisions were not unconstitutional.

7 In the present case, Hyatt argued that California's position in *Hall* showed disrespect  
8 for Nevada, and therefore Nevada courts should essentially retaliate for California's refusal  
9 to allow immunity in 1979 in the *Hall* case. Hyatt argued:

10 California, through the FTB, now requests that Nevada, as a matter of comity,  
11 apply all Nevada laws and rules that Nevada has adopted to protect its own  
12 agencies, in order to protect California, even though California has refused to  
13 grant comity to Nevada. If the FTB succeeds in this argument in Nevada, then  
14 California will take advantage of Nevada rules favorable to it (such as NRCP  
15 Rule 62), where it commits intentional torts against a Nevada citizen, but it  
16 refuses to accept Nevada's favorable laws when Nevada is sued in California  
17 for mere negligence. That result is not what the Nevada Supreme Court ruled in  
18 this case, nor is it conceivable that it would so rule, given California's refusal  
19 to grant comity to Nevada with respect to Nevada's compensatory damage caps.  
20 The concept of comity is based on one state's respect of another state. One  
21 state's refusal to grant comity on a specific issue makes it virtually certain that  
22 the second state will return the disrespect and reject a subsequent request for  
23 comity on that same issue by the first state.

24 *Id.* (emphasis added).

25 Hyatt's argument was wholly without merit. If Hyatt were correct, then why did this  
26 court grant comity to FTB in 2002, and mandate the district court to dismiss Hyatt's negligence  
27 and discretionary acts claims? In fact, Hyatt's comity argument shows a fundamental  
28 misunderstanding of FTB's position and this court's prior ruling in this case. FTB's district  
court motion for a stay without a bond did not seek a blind application of Nevada law in favor  
of FTB. Rather, the motion sought application of a California statute, tempered by  
consideration of Nevada's public policies established by Nevada law. In other words, FTB  
sought application of California's statute allowing a stay pending appeal without a bond,  
because the statute, when compared with Nevada's similar law, does not offend or contravene  
Nevada's public policy.

1 This is precisely the analysis used by this court in its prior decision in this case. With  
2 regard to Hyatt's claim for recovery based on negligent acts and discretionary acts, this court  
3 determined that the California statute giving FTB immunity from lawsuits in California should  
4 apply in this Nevada lawsuit. Why? Because (1) good relationships between sister states  
5 should be fostered, and this is accomplished by application of the doctrine of comity, and (2)  
6 California's immunity statute for FTB did not contravene Nevada's statute giving immunity  
7 to Nevada government agencies for negligent and discretionary acts. Under both statutes,  
8 citizens of California and Nevada are precluded from recovering against Nevada state agencies  
9 and FTB for negligent or discretionary acts. Thus, this court determined that Nevada's public  
10 policy -- under which Nevada citizens are barred from recovering against a Nevada state  
11 agency for negligent or discretionary acts -- was not offended or contravened by application  
12 of the California immunity statute for FTB, in a Nevada lawsuit filed by a Nevada citizen  
13 against FTB. This was the only reason why this court issued a writ mandating the district  
14 court to apply comity and to dismiss the claims based on negligent and discretionary acts.

15 Hyatt contends, however, that in *Hall*, California essentially thumbed its nose at Nevada  
16 by refusing to recognize Nevada's statutory immunity. Hyatt contends that Nevada courts  
17 should now retaliate against California by refusing to apply comity in the present case. Hyatt  
18 fails to understand that the California courts in *Hall* merely applied the same fundamental  
19 concept that this court applied in its April 4, 2002 order in the present case, i.e., that a forum  
20 state can refuse to recognize another state's laws applicable to suits against the other state if  
21 the other state's laws offend or contravene the forum state's own public policies.

22 In *Hall*, the California courts observed that Nevada law provided limited immunity (a  
23 cap on damages) for government agencies, but California law provided no such immunity for  
24 its own government agencies. As such, Nevada's law contravened and offended California's  
25 broader public policy of allowing its citizens to recover full damages against California  
26 agencies. Thus, the California courts declined to give the Nevada agency more protection than  
27 California would give its own agencies. See *Nevada v. Hall*, 440 U.S. at 424 ("As the  
28 California courts have found, to require California either to surrender jurisdiction or to limit

1 respondents' recovery to the \$25,000 maximum of the Nevada statute would be obnoxious to  
2 its statutorily based policies of jurisdiction over nonresident motorists and full recovery.");  
3 *Hall v. University of Nevada*, 105 Cal. Rptr. 355, 358, 503 P.2d 1363 (Cal. 1972) ("To hold  
4 that the sister state may not be sued in California could result in granting greater immunity to  
5 the sister state than the immunity which our citizens have bestowed upon our state  
6 government. If a sister state has not abrogated sovereign immunity for tort, it is conceivable  
7 that a California citizen would be denied all recovery for an automobile accident in this state  
8 even though if the State of California had been the defendant recovery would have been  
9 permitted."); *Hall v. University of Nevada*, 141 Cal. Rptr. 439, 442 (Ct. App. 1977) ("By thus  
10 utilizing the public highways within our state to conduct its business, Nevada should fully  
11 expect to be held accountable under California's laws.").

12 Nothing in any of the decisions by the California Court of Appeal or the California  
13 Supreme Court in *Hall* even remotely suggests that California does not respect Nevada or that  
14 California would deny comity to Nevada in all cases. The California courts merely held that  
15 in the specific circumstances in that case, Nevada law offended and contravened California  
16 public policy and therefore would not be applied.

17 As noted above, in the district court Hyatt argued: "One state's refusal to grant comity  
18 on a specific issue makes it virtually certain that the second state will return the disrespect and  
19 reject a subsequent request for comity on that same issue by the first state." 2 App. 399-400  
20 (emphasis added). This assertion is factually incorrect because it assumes that California  
21 refused to grant comity/immunity in *Hall* due to disrespect for Nevada. As discussed above,  
22 there is absolutely no basis for this assumption. California courts in *Hall* merely applied well-  
23 established comity law -- determining whether Nevada's limited immunity statute conflicted  
24 with California's policy of allowing full recovery. California demonstrated no disrespect in  
25 these decisions.

26 More important, by this court's very decision in the present case, this court clearly  
27 rejected the idea that Nevada courts should retaliate against California and "return the  
28 disrespect" allegedly demonstrated by California in *Hall*. Indeed, this court did the opposite

1 of what Hyatt believes is "virtually certain." This court's April 4, 2002 order applied comity  
2 and granted immunity to California on the negligence/discretionary claims -- despite  
3 California's decision not to grant immunity to Nevada in 1979 in *Hall*. This court's 2002  
4 decision in the present case applied comity and thereby fostered the important relationship  
5 between the two states, by giving express recognition to California's immunity law, to the  
6 extent that California's law did not offend or contravene Nevada's law. Therefore, this court  
7 ordered the district court to dismiss Hyatt's claim based on negligence and discretionary acts,  
8 because California's specific immunity statute favoring FTB did not offend Nevada's public  
9 policy to that extent. If this court had wanted retaliation against California for refusing to  
10 grant immunity to Nevada years earlier in *Hall*, this court would certainly not have applied  
11 comity and ordered mandatory dismissal of Hyatt's negligence and discretionary acts claims.  
12 In the district court, Hyatt offered no explanation as to why this court would have ordered  
13 dismissal of these claims, based on comity, while at the same time wanting our judiciary to  
14 retaliate against California because of California's alleged disrespect and denial of comity  
15 years earlier in *Hall*.

16 Hyatt's district court papers also argued that the law of the case doctrine does not apply  
17 because the precise issue related to a bond pending appeal was not previously raised before  
18 this court or the United States Supreme Court. 2 App. 398-99. Obviously this precise issue  
19 was not previously raised, because the issue never arose until after the verdict and judgment.  
20 In any event, Hyatt provided no legal authority to support his narrow interpretation of the  
21 application of the law of the case doctrine. *Id.* Hyatt's opposition did not cite any case,  
22 statute, or rule establishing that the law of the case doctrine applies in such a narrow context.  
23 *Id.* Therefore, Hyatt's argument failed on this basis alone. See *Holland Livestock v. B&C*  
24 *Enterprises*, 92 Nev. 473, 553 P.2d 950 (1976)(no consideration of arguments not supported  
25 by legal authority).

26 Even if the argument is considered on the merits, however, the law of the case doctrine  
27 is not so narrow. "Law of the case" is a judicially created doctrine, the purpose of which is  
28 to prevent re-litigation of issues that have been decided. See *Gould, Inc. v. U.S.*, 67 F.3d 925,



1 930 (Fed. Cir. 1995). In Nevada, the law of the case doctrine makes an appellate court's  
2 decision on a rule of law binding in subsequent proceedings. *Wheeler Springs Plaza LLC v.*  
3 *Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) (citing *Bd. of Gallery of History v.*  
4 *Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000)). Thus, when an appeals court  
5 states a rule of law necessary to its decision, the rule is the law of the case and "must be  
6 adhered to throughout its subsequent progress both in the lower court and upon subsequent  
7 appeal." *LoBue v. State*, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976). When a different  
8 factual scenario is presented to the district court related to a legal issue that has already been  
9 determined by the appellate court, the district court is required to apply that rule of law to the  
10 new factual scenario. *Id.* That is exactly the case here, where this court already established  
11 the rule of law that comity must apply: the FTB should be treated no worse than a Nevada  
12 agency, and the FTB is entitled to the protection of California laws unless those laws are in  
13 conflict with, and contravene, Nevada's own policies established by Nevada laws.

#### 14 **4. Judicial estoppel**

##### 15 **a. The doctrine of judicial estoppel applies in this case**

16 Judicial estoppel applies when the following five criteria are met: (1) the same party  
17 has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative  
18 proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal  
19 adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and  
20 (5) the first position was not taken as a result of ignorance, fraud, or mistake. *Marcuse v. Del*  
21 *Webb Communities, Inc.*, 123 Nev. \_\_\_, 163 P.3d 462, 468-69 (2007). The central purpose of  
22 judicial estoppel is to guard the judiciary's integrity. *Id.*

23 In the present case, Hyatt contended in this court and the United States Supreme Court  
24 that FTB's request for compete immunity, under California law, should be rejected. In doing  
25 so, Hyatt took the position in both high courts that Nevada should grant immunity and comity  
26 to California only to the extent that Nevada would grant itself such rights. As noted above,  
27 during oral argument at the United States Supreme Court, Hyatt's counsel argued that under  
28 the principle of comity, states look at their own immunity in determining whether an outside

1 sovereign should receive the same immunity. Justice Stevens asked whether, if the tables were  
2 reversed, one sovereign would "generally treat the other sovereign the way they would want  
3 to be treated themselves." Hyatt's counsel immediately responded "that's correct," and counsel  
4 then elaborated upon that position, arguing that "we [Nevada] want to treat the other sovereign  
5 [California] as we do treat ourselves, . . ." 2 App. 333. Hyatt's counsel then took the position:  
6 "We [Nevada] are treating the other sovereign [California] the way we treat ourselves." *Id.*

7 Hyatt was successful, convincing both this court and the United States Supreme Court  
8 that complete immunity should be rejected for FTB, based on the understanding that California  
9 would not be treated worse than Nevada itself would be treated. Having prevailed in his  
10 position, Hyatt is now subject to judicial estoppel. All of the requirements for this doctrine  
11 are satisfied. Hyatt should be judicially estopped from changing his position and arguing now  
12 that California is not entitled to the same fundamental protections to which Nevada would be  
13 entitled if the tables were turned.

14 Both states have laws protecting government agencies from supersedeas bond  
15 requirements for stays pending appeal. On the issue of immunity, Hyatt previously took the  
16 position that both states will be -- and should be -- entitled to the same protections. Hyatt  
17 was successful, but he wants to assert a contrary position now, simply because the context is  
18 different and his prior position no longer suits his needs. He should be judicially estopped  
19 from doing so. Accordingly, the court should apply either NRCP 62(e) or C.C.P. §995.220,  
20 or both, and the court should grant a stay pending appeal without a bond.

21 **b. Hyatt's arguments in the district court were without merit**

22 In the district court, Hyatt argued that judicial estoppel does not apply to his previous  
23 statements, because his previous statements only related to "substantive liability for tortious  
24 acts." 2 App. 404 (lines 12-13). Once again, Hyatt provided no legal authority or citations to  
25 support his narrow interpretation of the judicial estoppel doctrine.

26 Additionally, Hyatt's proposed limitation of judicial estoppel was entirely incorrect. As  
27 noted above, Hyatt argued extensively, in both his written and oral submissions to the United  
28 States Supreme Court, that this court correctly applied the doctrine of comity in this case,

1 because FTB was treated the same as a similarly situated Nevada state agency. In fact, Hyatt  
2 explicitly argued that when applying the comity doctrine, the Nevada courts were required to  
3 treat FTB the same way that these courts would treat a Nevada state agency. Based on these  
4 unequivocal arguments, on which Hyatt prevailed, he is judicially estopped from now taking  
5 the opposite position before this court. *Marcuse*, 123 Nev. at \_\_\_, 163 P.3d at 468-69.

6 Judicial estoppel precludes a party from assuming a position in a legal proceeding that  
7 contradicts, or is inconsistent with, a previously asserted position on which the party prevailed.  
8 In fact, the entire purpose of this doctrine is "to prohibit the deliberate shifting of position to  
9 suit exigencies of each particular case that may arise concerning the subject matter in  
10 controversy," and to protect the integrity of the judicial system. *Sterling Builders, Inc. v.*  
11 *Fuhrman*, 80 Nev. 543, 550, 396 P.2d 850 (1964) (quoting 31 C.J.S. Estoppel § 121 at 649,  
12 650). This doctrine "looks to the connection between the litigant and the judicial system,  
13 preserving the integrity of the courts by preventing litigants from 'playing fast and loose with  
14 the courts.'" *Chaffee v. Kraft General Foods, Inc.*, 886 F.Supp. 1164, 1168-69 (D.N.J. 1995),  
15 quoting *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107 (3d Cir. 1992); *Russell v. Rolfs*, 893  
16 F.2d 1033, 1037 (9th Cir.1990). None of the five criteria for application of judicial estoppel  
17 (see *Marcuse*, 163 P.3d at 468-69) requires the context of the previous arguments to be  
18 identical to the context of the latter arguments.

19 FTB's district court motion for a stay without a bond only requested application of the  
20 doctrine of comity -- so that FTB would be treated the same as (i.e., no worse than) a  
21 similarly situated Nevada state agency. That is the same general context in which Hyatt made  
22 his arguments to the United States Supreme Court. Specifically, Hyatt argued that this court  
23 properly applied the doctrine of comity in this case, because it treated FTB the same as it  
24 would treat a Nevada state agency. It makes no difference that the specific sub-question  
25 involved in the comity analysis involved the scope of tort immunity, rather than application  
26 of no-bond laws. The overarching issue before the United States Supreme Court related to the  
27 general application of comity. Based on the doctrine of judicial estoppel, Hyatt cannot shift

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1 his position on comity to suit his exigencies, simply because the context has changed. Rather,  
2 he is judicially estopped from taking an inconsistent position now.

3 Based on application of comity, law of the case, and judicial estoppel, FTB should not  
4 be required to post a bond as a prerequisite to obtaining a stay pending appeal.

5 **C. Even if NRCP 62(e) and C.C.P. §995.220 do not apply, a bond should not**  
6 **be required here, pursuant to *Nelson v. Heer***

7 During the punitive damages phase at trial, Hyatt himself presented evidence of what  
8 he described as the State of California's net worth or net assets. FTB disputed this evidence.  
9 But for the limited purposes of dealing with the issue of whether a bond should be required  
10 for a stay pending appeal, FTB acknowledged Hyatt's evidence on this issue. Hyatt's own  
11 expert, Kurt Sjoberg, gave testimony establishing that Hyatt is entirely secure in his ability to  
12 recover from FTB if the judgment is upheld. Specifically, Sjoberg testified that the State of  
13 California is the eighth largest economic entity in the world, with total assets of \$183 billion,  
14 net assets (i.e. net worth) of \$47 billion, unrestricted cash and investments "in order to pay  
15 obligations" of \$35.3 billion, and income tax revenues of \$143 million per day on average. 2  
16 App. 265-69. Hyatt's expert witness Sjoberg further testified:

17 It is my opinion that the general financial status of the State of California  
18 is strong. We have significant assets. We have resources to draw from. And  
19 we have demonstrated the ability to weather economic down turns. They do not  
20 have long term affect upon us. There's a dip here and there but we always come  
21 out with some form of increase at the end, as those trend lines revealed.

22 2 App. 270-71 (emphasis added)

23 With this evidence in mind, there is no reason whatsoever to require FTB to obtain a  
24 supersedeas bond pending an appeal, based on *Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252  
25 (2005). *Nelson* adopted a test to be employed in considering security requirements for a stay  
26 pending appeal. Heer sued Nelson and obtained a monetary judgment in the amount of  
27 \$330,000. The district court granted a stay of the judgment pending appeal, but conditioned  
28 the stay upon the posting of a supersedeas bond. Nelson requested permission to post alternate  
security instead of a supersedeas bond, but the district court rejected her request. Nelson then

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1 filed a motion with this court, requesting that the stay be conditioned upon alternate security  
2 rather than a supersedeas bond.

3 The *Nelson* court began its analysis by observing that “[t]he purpose of security for a  
4 stay pending appeal is to protect the judgment creditor’s ability to collect the judgment if it is  
5 affirmed by preserving the status quo and preventing prejudice to the creditor arising from the  
6 stay.” *Id.* at 835. Thus, “a supersedeas bond should not be the judgment debtor’s sole remedy,  
7 especially where other appropriate, reliable alternatives exist.” *Id.* The court further stated  
8 that “the focus is properly on what security will maintain the status quo . . . not how ‘unusual’  
9 the circumstances of a given case may be.” *Id.* at 835-36.

10 Accordingly, the *Nelson* court rejected the old restrictive “unusual circumstances” test  
11 set forth in *McCulloch v. Jeakins*, 99 Nev. 122, 659 P.2d 302 (1983), and the court adopted  
12 a new five-factor test for determining when a full supersedeas bond may be waived and/or  
13 alternate security may be substituted: (1) the complexity of the collection process; (2) the  
14 amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of  
15 confidence that the district court has in the availability of funds to pay the judgment; (4)  
16 whether the defendant’s ability to pay the judgment is so plain that the cost of a bond would  
17 be a waste of money; and (5) whether the defendant is in such a precarious financial situation  
18 that the requirement to post a bond would place other creditors of the defendant in an insecure  
19 position. *Id.* at 836.

20 The issue in *Nelson* involved whether alternative security -- i.e., some form of security  
21 other than a bond, such as security in the form of real property -- should be allowed. Thus,  
22 it is somewhat unclear whether *Nelson* applies in a case where the sole issue is whether the  
23 judgment creditor should be required to post any supersedeas bond at all, and if so, the amount  
24 of the bond. Nevertheless, we will evaluate the *Nelson* factors, because even if these factors  
25 do apply here, the factors result in a conclusion that no bond should be required.

26 One point is clear from *Nelson*: NRCP 62(d) does not require a supersedeas bond in  
27 the full amount of the judgment prior to a stay being entered in every case. Additionally, by  
28

1 rejecting the "unusual circumstances" and "rare circumstances" tests in *McCulloch*, it was  
2 clearly the *Nelson* court's intent to ease restrictions previously imposed in stay/bond cases.

3 **1. Complexity of collection process**

4 The first *Nelson* factor relates to the complexity of the collection process. There is no  
5 evidence of unusual complexity in the "collection process" in the present case. Hyatt decided  
6 to file his lawsuit in Nevada. He is not entitled to greater collection rights on his judgment  
7 than he would have in any other state. Although collection of a half-billion dollar judgment  
8 would not be routine, there is no unusual complexity that justifies burdening FTB with the  
9 requirement of posting a bond.

10 More important, there is no reason to believe that if the judgment is affirmed after all  
11 appellate challenges, Hyatt will be forced to go through complex non-voluntary collection  
12 procedures to obtain his money. The court should not presume that the judgment debtor here  
13 will somehow deplete or hide its assets to avoid liability on the judgment. After all, the  
14 judgment debtor here is a state government agency of a neighboring state, not a private  
15 judgment debtor. Hyatt need not be concerned that FTB will set up off-shore bank accounts,  
16 create bogus shell corporations, or flee to another state to shield money from a judgment  
17 creditor. Hyatt will not need to auction off state bridges, execute on Cal Trans snow-removal  
18 vehicles, or otherwise proceed through the sometimes difficult and time-consuming collection  
19 efforts necessary when dealing with a private judgment debtor. As Hyatt's expert testified at  
20 trial, the State of California is the eighth largest economic entity in the world.

21 In determining appropriate factors in this context, the *Nelson* court adopted the  
22 framework set forth in *Dillon v. City of Chicago*, 866 F.2d 902 (7th Cir. 1988). *Nelson*, 121  
23 Nev. at 836. In that case the court stayed execution of a judgment without requiring a bond  
24 from a public entity, where there was no evidence of any likelihood of a substantial delay or  
25 other difficulty in collecting the judgment in the event of an affirmance on appeal. 866 F. 2d  
26 at 905. Like *Dillon*, in the present case Hyatt presented no evidence of any unusual delay or  
27 difficulty in collecting the judgment if it is affirmed.

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1 In the district court, Hyatt's only argument on the first *Nelson* factor was that collecting  
2 on the judgment in this case will be complex because it will require a state appropriation. 2  
3 App. 408. Hyatt then went so far as to say, without any evidentiary support, that "the  
4 collection process could prove quite complex since FTB could raise budgetary and other  
5 obstacles to prevent the prompt payment of Hyatt's judgment." *Id.* Hyatt's assertions were  
6 wrong. In support of these assertions, Hyatt relied on cases standing for the proposition that  
7 the bonding requirement should not be waived if the collection process of the judgment is too  
8 complex -- such as when a state appropriation is the only means in which the judgment can  
9 be collected. *Id.* These cases, however, are distinguishable and do not mandate the conclusion  
10 that the collection process will be unduly complex in this case.

11 Although it is generally true that a state appropriation would be required to pay Hyatt's  
12 judgment, unlike the cases relied upon by Hyatt, a state appropriation is not the only manner  
13 in which Hyatt's judgment could arguably be paid. FTB maintains a general fund for  
14 appropriations. 2 App. 458. Within FTB's general fund appropriations, FTB has the authority  
15 to pay awards and judgments. *Id.* Therefore, unlike *Lightfoot v. Walker*, 797 F.2d 505 (7<sup>th</sup> Cir.  
16 1986), where there was only a state appropriations mechanism available to satisfy the  
17 judgment at issue, there is a separate mechanism that Hyatt could attempt to utilize to satisfy  
18 his judgment. *Id.*

19 Moreover, even if a state appropriation were required in this case, the appropriation  
20 process in California is not as cumbersome or complex as the appropriation processes  
21 discussed in the case law relied on by Hyatt in the district court. In California, there are basic  
22 mechanisms in place to ensure generally that the collection of judgments is swift and  
23 manageable. 2 App. 460-61. The Director of Finance for the State of California has averred  
24 that under California procedures, a judgment can be paid out of the California State Treasury  
25 once the appropriation is made by the California State Legislature. *Id.* This process is  
26 generally unremarkable. Hyatt provided no evidence to suggest that such an appropriation  
27 would not be forthcoming in this case. Equally important, Hyatt provided the district court  
28 with no evidence of any instance in which the State of California refused to pay a legally valid

1 and enforceable final judgment or engaged in any shenanigans to avoid the payment of such  
2 a judgment as his district court opposition suggested will occur in this case.

3 Nonetheless, even if a state appropriation were not immediately forthcoming, California  
4 law provides for specific contingencies to ensure the prompt payment of legally valid and  
5 enforceable final judgments. First, if an appropriation is not made, the California Attorney  
6 General reports the judgment to the Chairperson of the either the Senate Committee on  
7 Appropriations or the California State Assembly Committee on Budget, who will then  
8 introduce the required appropriating legislation. 2 App. 461. In the extremely rare  
9 circumstance that the State Legislature declines to adopt the required appropriation to pay a  
10 judgment, a party can request a California court to order payment of the judgment to be paid  
11 from an existing, available, and reasonably related appropriation. *Id.*

12 Thus, Hyatt's Opposition did not identify any part of this collection process that would  
13 be cumbersome or overly complex.

## 14 **2. Time required to obtain judgment after affirmance**

15 The second *Nelson* factor is the amount of time necessary to obtain the judgment after  
16 an affirmance. Here, the amount of time for Hyatt to obtain his money on the judgment, if it  
17 is affirmed on appeal, does not weigh heavily in favor of requiring a bond. Obviously, the  
18 larger a judgment, the more time that might be involved in paying it. But as discussed  
19 regarding the first factor, this case involves a judgment debtor consisting of an agency of the  
20 State of California. There is no reason to believe that the amount of time for FTB to pay the  
21 judgment after an affirmance would be so long that a half-billion dollar bond should be  
22 required. See *S.A. Healy Company v. Milwaukee Metro. Sewerage Dist.*, 159 F.R.D. 508 (E.D.  
23 Wis.1994) (court granted stay without bond where government entity could pay full judgment  
24 without unusual delay or difficulty), overruled on other grounds by 60 F.3d 305 (7th Cir. 1995).

25 As to this second *Nelson* factor, in the district court Hyatt only argued that "FTB has  
26 not submitted any evidence that a fund exists or that payment could be made in a timely  
27 fashion." 2 App. 409 (lines 5-7). This was incorrect. Hyatt ignored the evidence that he  
28 presented himself during the punitive damage phase of trial. Hyatt's evidence detailed the



1 State of California's ability to pay the current judgment based on the fact that California is the  
2 "eighth largest economy in the world," "California has \$47 billion in net assets," "California  
3 has \$35 billion in unrestricted assets," and "it generates \$143 million per day" in tax revenue.  
4 2 App. 264-71 (examination of Kurt Sjoberg). As a result, there was no evidence -- and  
5 Hyatt presented none -- to suggest that FTB does not have the ability to make prompt  
6 payment of Hyatt's judgment, regardless of whether his judgment is paid out of the different  
7 funds described above or through the appropriations process.

### 8 **3. Confidence in the ability to pay the judgment**

9 As to the third *Nelson* factor, i.e., the availability of funds to pay the judgment, the  
10 court need only look to Hyatt's own evidence presented at the punitive damages phase of the  
11 trial. At that time Hyatt's was seeking a huge punitive damages award, and Hyatt's goal was  
12 to convince the jury that the State of California is a wealthy cash cow with virtually unlimited  
13 assets. Hyatt's own expert witness testified that the State of California has total assets of \$183  
14 billion; a net worth of \$47 billion; cash and investments "in order to pay obligations" of \$35.3  
15 billion; and income tax revenues of \$143 million per day. 2 App. 265-69. Hyatt's expert  
16 witness further testified that "It's my opinion that the general financial status of the State of  
17 California is strong. We have significant assets. We have resources to draw from. And we  
18 have demonstrated the ability to weather economic down turns." 2 App. 270-71. Although this  
19 evidence was contested, it is clear that the jury accepted Hyatt's position regarding the State  
20 of California's financial status, as evidenced by the jury's award of \$250 million in punitive  
21 damages. Hyatt can hardly be heard to argue now that the third Nelson factor should be  
22 resolved against FTB.

23 In the district court, Hyatt entirely misinterpreted this *Nelson* factor. 2 App. 409-410.  
24 To clarify, this factor deals solely with the availability of funds for FTB to pay the judgment  
25 at hand. See Nelson, 121 Nev. at 836. Hyatt attempted to change the focus of this factor to  
26 the question of "whether FTB will pay" the judgment. 2 App. 409 (line 18, emphasis added).  
27 This is not the issue presented by this factor. When the issue is properly focused on whether  
28 the State of California and FTB have available funds to pay Hyatt's judgment, even Hyatt

1 conceded that FTB and the State of California have sufficient funds and assets available. 2  
3 App. 409 (lines 16-17). For example, Hyatt conceded that his own evidence at trial established  
4 that California currently has \$47 billion in assets. *Id.* (lines 17-18). At the time judgment was  
5 entered in this case on September 8, 2008, the total judgment that had been entered, including  
6 interest, equaled approximately \$490 million. This represents only one-tenth of one percent  
7 of California's net assets, based on Hyatt's evidence in the punitive damages phase.  
8 Moreover, Hyatt's opposition did not contest or even address his own trial evidence, which  
9 established the availability of money and assets to pay this judgment.<sup>5</sup>

10 **4. Waste of money on cost of a bond, because judgment debtor's  
11 ability to pay is plain**

12 The fourth factor is whether the defendant's ability to pay the judgment is so plain that  
13 the cost of a bond would be a waste of money. As to the defendant's ability to pay, this is the  
14 same as the third factor, discussed immediately above. Hyatt's district court papers did not  
15 even address this issue.

16 Rule 62(d) contemplates cases in which stays will be granted without bonds, where the  
17 judgment debtor has considerable assets and there is no proof of a likelihood of harm to the  
18 judgment creditor. For example, in *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n.*, 636  
19 F.2d 755 (D.C. Cir. 1980), a stay was granted under the similar federal rule, without a bond,  
20 because the judgment debtor's net worth was 47 times the amount of the judgment (and the

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22 At the hearing on FTB's motion for a stay without a bond, Hyatt's counsel referred  
23 to "those IOUs that they're sending to their taxpayers in California." 3 App. 547. Counsel  
24 was clearly trying to inject recent media reports into his argument, thereby suggesting that  
25 California will have difficulty paying the judgment because of current economic problems.  
26 Of course, there was no actual evidence to support counsel's improper statement. Moreover,  
27 counsel's suggestion completely ignored Hyatt's own expert witness (in the punitive damages  
28 phase), who specifically addressed California's ability to deal with current economic  
problems. Hyatt's expert testified that California has "demonstrated the ability to weather  
economic down turns." This was the evidence Hyatt presented to the jury; and this was the  
evidence on which the jury presumably relied in rendering its \$250,000,000 punitive  
damages verdict.

1 judgment debtor was a long-term resident with no intent to leave). In *Arban v. West Publ'g*  
2 *Corp.*, 345 F.3d 390, 409 (6th Cir. 2003), a stay without a bond was affirmed because there  
3 was a vast disparity between annual revenue of the judgment debtor (\$2.5 billion) and the  
4 amount of the judgment (approximately \$225,000). Here, Hyatt's own expert testified that the  
5 State of California has a net worth of \$47 billion, which is nearly 90 times more than the  
6 judgment. Hyatt's expert also established a vast disparity between California's annual revenue  
7 (\$52 billion per year from state income tax alone) and the amount of the judgment (slightly less  
8 than one-half billion dollars).

9 Furthermore, there can be no dispute that the cost of a bond would be a waste of  
10 money. The annual premium on a supersedeas bond can be as high as five percent of the  
11 amount of the bond. 2 App. 464. Thus, if FTB is required to post a bond for the full judgment  
12 amount plus two or three years worth of post-judgment interest (for a total of approximately  
13 \$600 million), FTB could be required to pay as much as \$30 million in annual premiums for  
14 a bond. If the appeal takes two years, FTB will pay as much as \$60 million in premiums,  
15 which are not refundable from the bonding companies, and might never be recovered from  
16 Hyatt if FTB is successful in the appeal. See NRAP 39(a) and (e).

17 Additionally, bonding companies usually require the judgment debtor to provide 100  
18 percent collateral consisting of letters of credit or other assets, in addition to the premium. *Id.*  
19 This would require more than a half billion dollars worth of California's assets to be tied up  
20 and unavailable for use by the government of California during the appeal (in addition to  
21 paying millions of dollars in annual premiums for the bond, plus the annual fee for the letter  
22 of credit). In light of the financial ability to pay the judgment, as established by Hyatt's own  
23 expert's testimony, the cost of a bond would be a complete waste of money.

24 As noted above, the *Nelson* court adopted a framework set forth in the Seventh  
25 Circuit's *Dillon* opinion. *Dillon*, in turn, relied on *Northern Indiana Pub. Serv. v. Carbon*  
26 *County Coal*, 799 F.2d 265 (7th Cir. 1986), in which commercial litigation resulted in a verdict  
27 of \$181 million against a public utility. The trial court in that case granted a stay of execution  
28 without a bond. The Seventh Circuit affirmed, noting that the appeal bond would be almost

1 \$2 million annually, and "that is not small change." 799 F.2d at 281. In ruling that the utility  
2 should not be required to post a bond on the \$181 million judgment, the court stated:  
3 "NIPSCO [the utility] has assets of more than \$4 billion, revenues of almost \$2 billion a year,  
4 and a net worth of more than \$1 billion. A public utility, it is in no financial jeopardy, it is not  
5 about to place its assets beyond the reach of this judgment creditor, and it is, in short, good for  
6 the \$181 million." *Id.*

7 In this case, Hyatt's expert testified that the State of California has assets of  
8 \$183 billion, personal income tax revenues of more than \$52 billion per year, and a net worth  
9 of \$47 billion. Hyatt's expert also testified that the State of California is in no financial  
10 jeopardy: "It is my opinion that the general financial status of the State of California is  
11 strong." 2 App. 270. As in *Northern Indiana Pub. Serv.*, FTB is not about to place assets  
12 beyond the reach of this judgment creditor. Accordingly, the enormous cost of a bond would  
13 be a complete waste of money.

#### 14 **5. Defendant's lack of a precarious financial condition**

15 The final *Nelson* factor deals with whether the defendant is in a precarious financial  
16 situation. Once again, we simply refer to Hyatt's own evidence on this point during the  
17 punitive damages phase. Hyatt should be bound by the position he took regarding the State of  
18 California's financial situation. Hyatt's own expert testified, in essence, that the State of  
19 California is not in a precarious financial condition. He testified: "It's my opinion that the  
20 general financial status of the State of California is strong." 2 App. 270 (emphasis added).  
21 Hyatt's own expert also testified that even in difficult economic times, the State of California  
22 has "demonstrated the ability to weather economic down turns." 2 App. 270-71. Obviously  
23 the jury accepted this view. Moreover, in his district court papers on the no-bond issue, Hyatt  
24 conceded that FTB is not in a precarious financial situation. 2 App. 411.

25 Therefore, all of the five factors in *Nelson* weigh in FTB's favor and dictate that a stay  
26 should be granted without requiring the California state agency to post a bond.

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28 ////

III

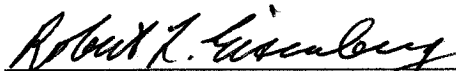
CONCLUSION

The requirement of a supersedeas bond in this case is wholly unsupportable. The huge judgment against Nevada's neighboring state of California should be stayed without a bond. This court should reject Hyatt's invitation to adopt a policy of outright hostility toward the people of California. The good relationship between the people of our two states should be fostered, not destroyed.

The interests of California and Nevada are identical on the question of whether a government agency should be required to post a supersedeas bond for a stay pending appeal. Both states have waived such a requirement. This is not a class action or a mass tort case involving numerous plaintiffs or judgment creditors. Hyatt is one person. He did not suffer any physical injury at the hands of FTB, yet he now holds a nearly half billion dollar judgment against the FTB. No public policy dictates that FTB, which is a California state agency, should be saddled with a supersedeas bond in this case.

Accordingly, FTB respectfully requests the court to grant a stay pending appeal without a bond.

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ROBERT L. EISENBERG (NSBN 0950)  
Lemons, Grundy & Eisenberg  
6005 Plumas Street, Suite 300  
Reno, Nevada 89509  
775-786-6868

JAMES W. BRADSHAW (NSBN 1638)  
PAT LUNDVALL (NSBN 3761)  
CARLA HIGGINBOTHAM (NSBN 8495)  
McDonald Carano Wilson LLP  
2300 West Shara Avenue, Suite 1000  
Las Vegas, Nevada 89102  
702-873-4100

ATTORNEYS FOR APPELLANT

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2  
3  
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**CERTIFICATE OF MAILING**

Pursuant to NRAP 25, I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date I caused to be deposited for mailing at Reno, Nevada, a true copy of Appellant's Motion for Stay Pending Appeal Without Bond and three volumes of Appendix addressed to:

Mark A. Hutchison  
Hutchison & Steffen  
10080 Alta Drive  
Suite 200  
Las Vegas, NV 89145

Peter C. Bernhard  
Bullivant Houser Bailey PC  
3883 Howard Hughes Parkway  
Suite 550  
Las Vegas, NV 89169

James W. Bradshaw  
Pat Lundvall  
Carla Higgenbotham  
McDonald Carano Wilson LLP  
100 W. Liberty Street  
10th Floor  
Reno, Nevada 89505

DATED: 2/18/09

