

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

\*\*\*\*\*

MAR 27 2009

FRANCHISE TAX BOARD OF  
THE STATE OF CALIFORNIA,

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

Appellant,

CASE NO: 53264

v.

GILBERT P. HYATT,

Respondent

**REQUEST FOR PERMISSION TO FILE REPLY IN  
SUPPORT OF MOTION FOR STAY PENDING APPEAL WITHOUT BOND**

Pursuant to NRAP 27(a), appellant (FTB) hereby requests permission to file a reply to respondent Hyatt's opposition to FTB's motion for stay pending appeal without a bond.

As indicated in the motion and the opposition, the issue on this motion involves a judgment of approximately \$490 million, with a bond that could require 100 percent collateral and bond premiums as high as \$36 million per year. FTB is a government agency of the State of California. This court's ruling on the bond issue could have a tremendous impact on the State of California and its millions of citizens.

Additionally, Hyatt's opposition raises new arguments that were never raised in Hyatt's papers in the district court, or at the district court hearing on FTB's motion for a stay without a bond. And importantly, Hyatt's opposition is accompanied by an appendix which contains documents that were never filed with the district court and never mentioned at the district court hearing. Yet Hyatt's opposition relies heavily on these documents, referring to them numerous times throughout the opposition.

Specifically, Hyatt's opposition relies on copies of letters and a proposed stipulation that his attorneys sent to FTB attorneys; FTB did not respond in the short time mandated by the letters. (Hyatt Opp. Appendix, vol. 1, Exhibits 1 and 2) Hyatt never submitted these documents to the district court during the proceedings in that court on FTB's motion for a stay without a bond; nor did Hyatt's attorneys mention the letters or the proposed stipulation during the district court hearing on the motion; nor did Hyatt suggest, in his district court papers or

RECEIVED

MAR 27 2009

LEMONS, GRUNDY  
& EISENBERG  
A PROFESSIONAL CORPORATION  
6005 PLUMAS STREET  
THIRD FLOOR  
RENO, NV 89519-6069  
(775) 786-6868

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

1 in his oral argument, that FTB's failure to respond had any particular significance to the bond  
2 issue. Consequently, FTB was never called upon to explain its version of events surrounding  
3 the letters and the proposed stipulation, and FTB never needed to present any arguments  
4 dealing with the documents.

5 Yet Hyatt's opposition in this court relies extensively on the new documents, quoting  
6 from them, referring to them, and relying on them dozens of times throughout the opposition.  
7 (E.g., Opp. pp. 1, 6, 7, 8, 9, 10, 11, 20, 21, 25, 26, 27, 28, 30). Equally important, Hyatt's  
8 opposition speculates as to the reasons why FTB did not respond to the letters and the  
9 proposed stipulation, and Hyatt asks this court to draw unfavorable inferences against FTB  
10 based on the failure to respond. (*Id.*) Hyatt's opposition proffers the new documents, and he  
11 asserts his new arguments based on them, fully aware that the district court record is devoid  
12 of any reference to these new matters, and fully aware that a reply to his opposition is not  
13 allowed without permission from this court. NRAP 27(a).

14 Under these circumstances, FTB must be given a fair opportunity to respond to the  
15 opposition's new exhibits, and to the new arguments raised for the first time ever in Hyatt's  
16 opposition to FTB's motion. Fundamental due process requires a party to receive fair notice  
17 and an opportunity to be heard before a court can deprive the party of money or property. See  
18 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50, 111 S.Ct. 2123 (1991). If this court denies FTB's  
19 motion and thereby requires a bond of nearly one-half billion dollars -- without allowing FTB  
20 to be heard on the subject of Hyatt's exhibits and arguments raised for the first time in his  
21 opposition -- FTB will be deprived of due process. And this court will not have the benefit  
22 of FTB's observations and counter-arguments in response to Hyatt's new exhibits and  
23 arguments.


24 Additionally, the complexity of the issues on this motion, coupled with the  
25 constitutional ramifications, justifies granting FTB permission to file a reply. FTB's motion  
26 raises complex and unusual issues dealing with comity between sister states, the law of the  
27 case doctrine, judicial estoppel, and the scope and application of *Nelson v. Heer*, 121 Nev.

28 ////

1 832, 122 P.3d 1252 (2005). The motion also raises constitutional issues involving the Full  
2 Faith and Credit Clause and the Due Process Clause of the United States Constitution.

3 As noted above, this court's decision on the present motion could have a huge impact  
4 of Nevada's neighboring sister state and on the millions of citizens who live in California. Of  
5 course, this court's ultimate goal must be to reach the correct decision on whether FTB should  
6 be required to post a supersedeas bond. To assist the court in reaching the correct decision on  
7 the motion for stay pending appeal without a bond, FTB respectfully requests permission to  
8 file a reply. The proposed reply is being submitted with this request.

9 DATED: March 26, 2009

10   
11 ROBERT L. EISENBERG (Bar # 0950)  
12 Lemons, Grundy & Eisenberg  
13 6005 Plumas Street, Suite 300  
14 Reno, Nevada 89519  
15 775-786-6868

16 PAT LUNDVALL (Bar # 3761)  
17 McDonald Carano Wilson LLP  
18 100 W. Liberty Street  
19 10th Floor  
20 Reno, Nevada 89505  
21 775-788-2000

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

DATED: 3/27/09

*Uta Steffen*