ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Appellant,

v.

GILBERT P. HYATT,

Respondent

CASE NO: 53264

FILED

APR 08 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL WITHOUT BOND

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

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CASES (Continued) **Page(s)**

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CASES (Continued) **Page(s)**

RULES AND STATUTES **Page(s)**

OTHERS **Page(s)**

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I

ARGUMENT

A. Argument regarding Hyatt's fugitive documents and contentions proffered for the first time in his opposition in this court.

1. This court should reject Hyatt's exhibits and arguments that were never presented to, or considered by, the district court.

The vast majority of Hyatt's opposition focuses on the fact that FTB did not respond to a request by Hyatt to sign a stipulation that Hyatt's lawyers prepared regarding the half-billion dollar judgment. Hyatt argues -- over and over again -- that because FTB did not respond to the proposed stipulation prepared by Hyatt's attorneys, this somehow establishes a basis for this court to deny FTB's motion. Specifically, Hyatt argues that because FTB did not respond to the proposed stipulation, this in some unspecified way establishes FTB's evil intent to use improper methods to prevent collection of the judgment if it is affirmed. (E.g., Opp. p. 1, lines 11-13: arguing that FTB's words and deeds, i.e., not signing Hyatt's proposed stipulation, shows that FTB has no intention of assisting or allowing satisfaction of the judgment in California, and this justifies requiring a bond; Opp. p. 8, lines 18-19, arguing that because FTB did not sign the stipulation, this somehow infers that FTB "refused to recognize the legitimacy of the Nevada judgment").

Hyatt relies on three documents regarding the proposed stipulation:

(1) a letter from Hyatt's attorney to FTB's attorneys, sent on Thursday, October 30, 2008, which was the day before a three-day holiday weekend [Opp. Exh. 1.]; this letter acknowledges certain affidavits from FTB concerning Hyatt's ability to collect on a final judgment and asks if FTB will stipulate to certain matters; no proposed stipulation was provided with the letter;

(2) a second letter from Hyatt's attorney to FTB, this one faxed on Monday, November 3, 2008, which was the next business day after the first letter [Opp. Exh. 2.]; this letter complains that FTB did not respond to the first letter (which was sent the previous

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business day), and the letter references an attached stipulation that must be agreed to within a few hours; and

(3) a proposed stipulation requiring FTB to acknowledge Hyatt's claimed constitutional right under the Full Faith and Credit Clause, yet requiring FTB to agree to matters beyond FTB's authority or control, such as requiring FTB, a tax collection agency, to take affirmative steps to help Hyatt in collection of the judgment [Opp. Exh. 2 attachments to letter.].

Hyatt's reliance on these documents permeates his opposition in this court, starting with the first substantive paragraph of his opposition (Opp. p.1, lines 11-13), and ending with the last full paragraph of his conclusion 30 pages later (Opp. p. 31, lines 1-7). Yet he fails to inform this court that he never submitted any of these documents to the district court. And he fails to inform this court that his arguments regarding the effect of the documents were never made to the district court.

In deciding issues in an appeal, this court confines its consideration to the facts reflected in the record of the district court proceedings, and "this court can only consider the record as it was made and considered by the court below." *Lindauer v. Allen,* 85 Nev. 430, 433, 456 P.2d 851 (1969). "On appeal this court will not consider anything outside the trial record." *Rhyne v. State,* 118 Nev. 1, 15, 38 P.3d 163 (2002) (emphasis added).

This court has consistently rejected efforts by attorneys to supplement the record with documents that were not part of the district court record. See e.g., *Carson Ready Mix v. First National Bank,* 97 Nev. 474, 635 P.2d 276 (1981); *Campbell v. Baskin,* 68 Nev. 469, 235 P.2d 729 (1951). Documents not properly filed in the district court cannot be considered on appeal. See *Buhecker v. R.B. Petersen & Sons Construction Co.,* 112 Nev. 1498, 929 P.2d 937 (1996) (court struck documents from appellate record, when documents had apparently never been filed in the district court); *Vacation Village, Inc. v. Hitachi America, Ltd.,* 111 Nev. 1218, 901 P.2d 706 (1995) (this court "of course" denied motion to supplement appellate record with

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new documents); *State ex rel. Mathews v. Murray,* 70 Nev. 116, 258 P.2d 982 (1953) (court struck fugitive documents).

This court cannot consider matters that were not properly part of the district court record. See *Carson Ready Mix, supra.* This court will decline to consider exhibits that were not properly presented to, or considered by, the district court. *Ardmore Leasing Corp. v. State Farm Mut. Auto. Ins. Co.,* 106 Nev. 513, 515 n.1, 796 P.2d 232 (1990). A party on appeal cannot refer to evidence that "was not part of the record before the district court." *Hurd v. State,* 114 Nev. 182, 189 n.3, 953 P.2d 270 (1998).

Additionally, this court has consistently held, with few very limited exceptions not applicable here, that the court will not consider legal arguments and contentions raised for the first time on appeal. See *Pope v. Motel 6,* 121 Nev. 307, 319, 114 P.3d 277 (2005); *Mainor v. Nault,* 120 Nev. 750, 770 n. 42, 101 P.3d 308 (2004).

Here, the parties extensively litigated FTB's motion for a stay without a bond in the district court. Hyatt's lengthy written opposition to FTB's motion never mentioned the fact that FTB did not respond to Hyatt's proposed stipulation. 2 App. 394-415. Nor did Hyatt's written opposition contain attachments or exhibits consisting of the letters and the proposed stipulation on which he now so heavily relies. *Id.* Even at the district court hearing on the motion, Hyatt never offered the documents, never referred to them in any manner, and never argued that FTB's failure to sign the stipulation had some effect on issues relating to the motion. 3 App. 545-54, 557-58. Accordingly, based on the well-established authorities cited above, Hyatt should be precluded from referring to, or relying on, the documents offered for the first time in this court. This court should disregard the documents and any arguments relying on them.

Of course, there are only two potential explanations for Hyatt's failure to mention the documents or to rely on them in his district court opposition papers and/or at the hearing in that court. Either (1) he did not really believe that FTB's failure to respond to the proposed stipulation had any particular relevance or significance, or (2) he was intentionally sandbagging and holding the documents back, waiting to use them for the first time in this

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court -- thereby hoping to deprive FTB of a meaningful chance to provide additional documentary evidence or a full explanation in the district court, and hoping to prevent a fully-developed record on the bond issue. Either way, Hyatt should not be allowed to gain a tactical advantage by withholding the documents at the district court level, then springing them on this court and the FTB for the first time in his opposition filed in this court.[1]

If Hyatt had raised his stipulation-nonresponse argument and offered the documents at the district court level, FTB would have had a full and fair opportunity to assert any objections to the documents or to any references or arguments relying on them. Likewise, FTB would have had a full and fair opportunity to explain the numerous reasons why FTB did not respond to Hyatt's proposed stipulation. Now, at this late stage, Hyatt has unilaterally attempted to supplement the district court record by simply attaching the new documents to his opposition. This is unfair and unwarranted.

Certainly, if these fugitive documents had truly been relevant and important on the question of whether a bond should be required, Hyatt would have provided copies to the district judge; and surely in the district court proceedings he would have argued the significance of the documents. He did not do so. One can only speculate why he did not. Whatever Hyatt's reason, it is entirely improper for Hyatt to ask this court to consider and rely on documents and arguments which were never submitted to, or considered by, the district

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[1] Hyatt was fully aware that if the district court denied FTB's motion for a stay without a bond, FTB would be filing such a motion with this court. 2 App. 467. Hyatt's attorneys, who are experienced in appellate practice, knew that a moving party in this court does not have the right to file a reply to an opposition (unless permission is first obtained from the court). NRAP 27(a). Hyatt's strategy of withholding any mention of the proposed stipulation during district court proceedings -- then bringing it up for the first time in his opposition in this court, knowing that FTB had no automatic right to file a reply -- may well have been designed to prevent FTB from responding at all to the new exhibits and to Hyatt's new arguments based on the exhibits.

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judge. This court should therefore reject any consideration of the documents and arguments relying on them.[2]

2. The documents do not show any evil intent by FTB regarding collection of the judgment if it is affirmed on appeal.

Repeatedly throughout Hyatt's opposition, he contends that FTB's failure to sign his proposed stipulation establishes FTB's refusal to "offer" or "pledge" or "give" its full faith and credit to any final judgment. (E.g., Opp. p.2 lines 21-23: "But in this case, California has expressly refused to offer its full faith and credit to satisfy the judgment[.]") Hyatt's contentions suggest that "full faith and credit" is a gift, or a commodity, or an asset that can be freely given -- or withheld -- by FTB. To the contrary: full faith and credit is a litigant's right secured by our United States Constitution. U.S. Const., Art. IV, § 1. No litigant can "give" or "offer" or "pledge" that right to another litigant.

Hyatt's opposition also neatly hides the fact that there was a second prong to his proposed stipulation, namely, that the FTB would be obligated to take "any and all measures necessary to satisfy the Final Judgment." (Exh. 2 to Opp.) Upon receipt of Hyatt's proposed stipulation, FTB had grave concerns about that second prong for a number of reasons. One cannot ignore the fact that the FTB is a tax collection agency. FTB's powers are granted to it by California's legislature. FTB is not empowered or authorized to take actions that would fall outside the scope of its authority granted by California's Legislature. Taking "any and all measures" is a phrase that is extremely vague and virtually unlimited in scope; and requiring FTB to assist a private litigant to execute upon a final judgment does not fall within the scope

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[2] A heading in Hyatt's opposition states that FTB refused to agree that the judgment would be entitled to full faith and credit in California, presumably referring to the proposed stipulation. (Opp. p. 6, lines 9-10) Not so. FTB could provide no response, in the allotted time, to Hyatt's time-sensitive proposed stipulation. The heading then says that the district judge "thereafter" refused to stay the judgment without a bond. *Id.* This is a subtle suggestion that FTB's non-action regarding the proposed stipulation may have been a factor in the district judge's denial of FTB's request for a stay without a bond. If this is really what Hyatt is suggesting, he is wrong. Hyatt never brought the proposed stipulation to the district judge's attention, and presumably she was unaware of it when she ruled on FTB's motion.

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of authority presently possessed by FTB. For example: Would FTB be expected to send out special tax notices to all citizens, to collect additional revenue for Hyatt? Would FTB be expected not to place tax revenue into the General Fund, but instead send it directly to Hyatt? What other actions would be required as part of FTB's vague and nebulous obligation to take "any and all measures" regarding satisfaction of the judgment?

The vague and unlimited scope of Hyatt's proposed agreement was enormously problematic to FTB. Moreover, the proposed stipulation's implied requirement that FTB had to seek, and the California Legislature had to enact, legislation expanding the scope of FTB's powers, was literally and figuratively impossible in the time frame mandated by Hyatt's counsel.

Accordingly, there were sound reasons why Hyatt's proposed stipulation was unacceptable to FTB. Contrary to Hyatt's repeated arguments, FTB's failure to respond to Hyatt's proposal in no way shows any evil intent by FTB regarding collection of the judgment if it is affirmed.

B. NRAP 8 factors.

Hyatt's opposition does not dispute any of FTB's analyses of NRAP 8. (Opp., p. 9.) Accordingly, no reply is necessary regarding our NRAP 8 arguments.[3]

C. Comity.

1. This court already determined that comity is mandatory in this case.

Hyatt argues: "[P]roperly understood, the doctrine of comity does not 'require' anything." (Opp., p. 13, lines 6-7.) Hyatt further argues: "Consistent with the Court's opinion in this case, a court's grant of comity is voluntary, not a matter of obligation." (Opp., p. 14, lines 10-11.) Hyatt's arguments disregard the factual and procedural history of this case.

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[3] It is noteworthy that although the heading in Hyatt's opposition regarding the Rule 8 factors says that the factors were "not satisfied by the FTB" (Opp. p. 9, line 5), the body of the opposition contains no discussion or argument supporting the heading's statement. (Opp. p. 9, lines 6-11) It is also noteworthy that Hyatt's opposition does not contest FTB's argument on the fourth Rule 8 factor, which is whether the appellant seeking a stay is likely to prevail on the merits of the appeal.

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In the 2000-2002 writ proceeding in this case (Docket No. 36390), FTB petitioned this court for a writ of mandamus, challenging the district court's denial of summary judgment or dismissal, based upon various principles of law, including comity. 1 App. 2-4. In the order of April 4, 2002, this court discussed the propriety of writ relief, holding that an extraordinary writ is available "to compel the district court to perform a required act." 1 App. 4 (emphasis added). The court cited NRS 34.160, which deals with writs of mandamus. Under this statute, a writ of mandamus may be issued "to compel the performance of an act which the law especially enjoins [i.e., requires] as a duty resulting from an office, trust or station."

In discussing comity, this court's April 2002 order first observed that comity gives effect to the laws of another state "out of deference and respect, to promote harmonious interstate relations." 1 App. 7. In evaluating comity, it was noted that "a Nevada court should give due regard" to whether granting comity to California's laws would contravene Nevada's policies or interests. 1 App. 7 (emphasis added). The court held that the district court "should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, . . ." *Id.* (emphasis added). The court concluded by holding that the district court "should have" declined to exercise jurisdiction over the negligence claim as a matter of comity. 1 App. 10. Accordingly, the court granted the petition and required the clerk of this court to issue a writ of mandamus requiring the district court to grant FTB's motion for summary judgment as to the negligence claim. *Id.*

In other words, this court held that the district court had a mandatory duty to apply comity and to extend immunity to California, at least to the extent that such immunity did not contravene Nevada's public policy. This court's very issuance of a writ of mandamus conclusively establishes that application of comity was mandatory in this case.

Hyatt is suggesting that comity is a doctrine that can be turned on and off like a light switch, with judges sometimes extending deference and respect to sister states, thereby promoting harmonious interstate relations, while other times refusing to grant comity if the judge feels that deference and respect for the sister state should not be given. Contrary to Hyatt's contention, comity is not a doctrine that is subject to the whim or impulse of a court.

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Respect for the laws of sister states should be encouraged, not undermined. And harmonious interstate relations should be promoted, not obstructed. This court's own April 2002 order applied comity and held that the district court had a mandatory duty to apply the doctrine. With regard to Hyatt's claims based upon FTB negligent acts, this court held:

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

1 App. 7-8.

This court concluded that "the district court should have declined to exercise jurisdiction over the negligence claim as a matter of comity," and the court directed issuance of a writ of mandamus requiring the district court to fulfill its mandatory duty. 1 App. 10. Under these circumstances, it is clear that this court viewed the application of comity as mandatory in circumstances where the sister state's laws do not contravene Nevada's public policy interests, especially in this case when dealing with a sister state's government agency.

2. California's no-bond statute does not offend Nevada's similar policy.

As this court has already held in this case, the doctrine of comity gives effect to the laws of another state, out of deference and respect, to promote harmonious interstate relations. 1 App. 7. After deciding whether to apply comity and to grant immunity to FTB, this court then considered whether granting immunity to FTB would contravene Nevada's policies and interests. *Id.* With respect to negligent investigative acts, this court observed that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." 1 App. 7-8. The court further noted that California law grants FTB immunity for such acts. *Id.* Accordingly, this court held that affording FTB immunity for negligent acts "does not contravene any Nevada interest in this case." 1 App. 7. The court also held: "Thus, Nevada's and California's interests are similar with respect to Hyatt's

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negligence claim." 1 App. 7-8. As such, comity was mandatory once it was determined that the application of the foreign law would not contravene any Nevada interest, and this court issued a writ commanding the district court to dismiss the negligence claim, thereby applying California's immunity law.

FTB's present motion for a stay without a bond seeks the same analysis that this court already applied in its April 2002 order. As noted in FTB's motion, Nevada and California both have laws recognizing that public entity judgment debtors are not required to post supersedeas bonds or other security for stays pending appeals. Motion, pp 7-8 (referring to NRCP 62(e) and CCP 995.220). These laws recognize that public entities will have the ability to pay judgments; that supersedeas bonds are disruptive to efficient functioning of a government; that requiring bonds for government entities can interfere with a government's ability to perform its functions; that such bonds can deter a government entity from appealing judgments; and that governments should not be saddled with wasteful and unnecessary expenses and burdens involved with obtaining bonds, paying premiums and complying with mandatory collateral requirements. *Id.*

In opposition, Hyatt contends, as he did at the hearing on the motion in the district court, that Nevada and California laws only exempt "domestic agencies" from bond requirements. (Opp., p. 11, lines 9-10.) Hyatt goes on to assert that "both states clearly and unambiguously require foreign agencies to post bonds." (Opp., p. 11, line 11.) Notably, Hyatt's opposition cites no actual rule or statute, in either Nevada or California, "which clearly and unambiguously" requires foreign agencies to post bonds. Why? No such laws exist.

In proffering his own view of Nevada's public policy, Hyatt states that Nevada "does not require its own agencies to post a bond because the judgment from [Nevada] is secured by the 'full faith and credit' of [Nevada]." (Opp., p. 10, lines 13-14.) Yet Hyatt cites no legal authority in support of this statement. In actuality, laws relieving government agencies from bond requirements are based upon the public policies noted above, namely, the need to avoid disruption and interference with government functions, the need to avoid wasteful and

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unnecessary expenses, and the need to avoid deterring government agencies from appealing judgments against them. (Motion, page 8.)

Hyatt has failed to demonstrate any difference, let alone a significant difference, in the public policies of California and Nevada (or, for that matter, virtually every other state), regarding whether supersedeas bonds should be required for governmental agencies. In the absence of a showing that California's no-bond statute would contravene a strong Nevada public policy, the statute of our neighboring sister state should be recognized and applied, as a matter of comity.

3. Federal case law is not applicable in this case.

Hyatt's opposition asserts that this court must require FTB to post a supersedeas bond pending appeal, because a state "must post a bond to stay enforcement of an adverse federal judgment." (Opp., p. 11, line 15.) In fact, Hyatt goes so far as to assert that "federal law confirms that a state faced with a judgment outside of its own state court is not entitled to a stay of the judgment without posting a bond." (Opp., page 13, lines 1-2.) Hyatt's argument is both misleading and irrelevant.

FTB is requesting this court to grant comity to California's law, which exempts state agencies from the requirement of posting bonds in order to obtain stays pending appeals. The comity analysis FTB is requesting here does not apply to federal courts. Although federal courts apply state substantive law, such courts apply federal procedural law to cases pending in federal courts. *Leuzinger v. County of Lake,* 253 F.R.D. 469, 472 (N.D. Cal. 2008). When the Federal Rules of Civil Procedure govern a situation, federal courts apply those rules, even if the rules are in direct conflict with relevant state law. *Id.*

Federal courts have expressly determined that the bonding requirements contained in FRCP 62 are procedural in nature. *Id.*; see also *Vacation Village, Inc. v. Clark County, Nevada,* 497 F.3d 902, 913-14 (9th Cir. 2007). As a result, federal courts refuse to apply state law relating to bonding requirements, even when those state laws directly conflict with FRCP 62. *Id.* Therefore, in federal courts, all judgment debtors (except the federal government

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itself) are required to post bonds pending appeals, unless they can establish exceptional circumstances. *Id.*

This federal jurisprudence is unique to federal courts and has no application to the issues presented in FTB's motion. Federal jurisprudence also does not prohibit, or even suggest, that this court should refuse to apply comity to the present circumstances. Thus, Hyatt's claim that federal law requires FTB and other government entities to post bonds is inaccurate and ignores the critical differences between the federal rule discussed above and the doctrine of comity.[4]

Worse still, Hyatt's assertion that under federal law "a state faced with a judgment outside its own state court is not entitled to a stay of the judgment without posting bond" misstates the very federal authorities upon which Hyatt's opposition relies. These federal authorities indicate that the bonding requirement of FRCP 62 will be waived if the judgment debtor can establish good cause. See *Brinkman v. Department of Corrections of the State of Kansas,* 815 F.Supp. 407 (D. Kan. 1993); *Vaughn v. Memphis Health Center,* 2006 W.L. 2038577 (W.D. Tenn. 2006); *United States v. Kurtz,* 528 F.Supp. 1113 (D.C. Pa. 1981). This rule, and the factors considered by federal courts in determining good cause, were expressly adopted by this court in *Nelson v. Heer,* 121 Nev. 832, 122 P.3d 1252 (2005). Simply stated,

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[4] It is noteworthy that several of the cases relied upon in Hyatt's opposition do not even involve circumstances where a state entity explicitly requested a federal court to apply a state law relating to bond requirements. *Vaughn v. Memphis Health Center,* 2006 W.L. 2038577 (W.D. Tenn. 2006) (defendant claimed that it was a quasi-federal agency, for purposes of bond requirement; court rejected this claim); *Brinkman v. Department of Corrections of the State of Kansas,* 815 F.Supp. 407 (D. Kan. 1993) (federal court rejected claim that state agency had shown good cause to waive bonding requirement; state agency did not assert any state law waiving bond requirement for public entities); *United States v. Kurtz,* 528 F.Supp. 1113 (D.C. Pa. 1981) (private citizen defendant; case did not involve issue of whether government agency should post bond; and case did not involve issue of whether federal court should apply state law relating to bond requirements). Therefore, these cases have no application to the issue at hand, and they do not support Hyatt's claim that federal law requires FTB to post a bond in this case.

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Hyatt's claim that federal courts do not permit stays without bonds for state government entities is not correct.[5]

4. FTB should be treated no worse than a Nevada government agency.

Hyatt's opposition contains a section under a heading: "This Court need not grant 'equal treatment' to the FTB as a matter of comity." (Opp., p. 13, line 4.) Hyatt then asserts: "The FTB erroneously states that the doctrine of comity requires that this Court treat it exactly like a Nevada state agency." (Opp., p. 13, lines 5-6.) Hyatt cites no place in FTB's motion where FTB made such an argument.[6] Hyatt then argues: "But, properly understood, the doctrine of comity does not 'require' anything." (Opp., p. 13, lines 6-7.) Hyatt is absolutely wrong in asserting that the doctrine of comity does not require anything. This court's own order of April 4, 2002, held that the district court was required to apply comity; that the doctrine of comity required the district court to recognize California's immunity law, to the extent that such law did not contravene Nevada's immunity policy for government agencies; and that the district court was required to dismiss the negligence claim.

Regarding whether the two states should be treated the same, Hyatt misconstrues and unnecessarily broadens the scope of FTB's arguments in the motion. FTB only asked this court to recognize California law, and thereby to treat FTB no worse than a similarly situated Nevada State agency. (FTB motion, page 29, lines 19-21 [FTB should "be treated the same as (i.e., no worse than) a similarly situated Nevada state agency"]; (Motion, p. 22, lines 4-6 [rulings of this court and United States Supreme Court establish that FTB "should be treated

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[5] In *Dillon v. City of Chicago,* 866 F.2d 902 (7th Cir. 1988), the federal court waived the bond requirement for a state government entity, after determining that good cause was established. *Id.* at 905. *Dillon* is the primary case on which this court relied in adopting factors to be considered in determining when a full supersedeas bond may be waived. *Nelson v. Heer,* 121 Nev. 832, 836, 122 P.3d 1252 (2005).

[6] Indeed, Hyatt places the word "exactly" in quotation marks twice in this section of his opposition, thereby suggesting that FTB made such an argument, using the word "exactly" in FTB's motion. (Opp., p. 15, lines 14-15, and page 16, line 4.) Hyatt's use of the quotations marks is misleading. FTB did not use the word "exactly" in this context.

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the same (i.e., no worse than) as a similarly situated Nevada government agency"]; p. 27, lines 10-13 ["the FTB should be treated no worse than a Nevada agency"]; p. 28, lines 7-9 [Hyatt convinced this court and United States Supreme Court that complete immunity should be rejected for FTB, "based on the understanding that California would not be treated worse than Nevada itself would be treated"]).

Hyatt attempts to cloud the issue by engaging in unnecessary semantical arguments and distinctions. The issue here is quite simple: should a government agency of our neighboring sister state of California be treated significantly worse than a similarly situated Nevada government agency, with regard to the necessity of a supersedeas bond. This court's April 2002 order set the stage for the answer to this question. As aptly observed by one of the United States Supreme Court justices at the oral argument in this case, the Nevada Supreme Court's April 2002 order essentially held: "The law we [Nevada courts] apply to tax collectors who act in this state is the same as we apply to Nevada tax collectors." 2 App. 296-97.

5. The law of the case doctrine.

With painstaking detail, FTB's motion analyzed cases dealing with the law of the case doctrine, and the motion provided extensive argument for application of the doctrine in this case. Specifically, we established that this court's April 2002 ruling, affirmed by the United States Supreme Court, established that FTB, as a California government agency, should be treated no worse than a similarly situated Nevada government agency. (Motion, pp. 21-27.)

Hyatt's opposition merely states that FTB's arguments "are incorrect," with barely one page of argument. The opposition fails to discuss or even recognize the existence of the Nevada cases cited in FTB's motion regarding the law of the case doctrine. (Opp., pp. 16-17). In fact, the opposition fails to cite or discuss any case, from Nevada or any other jurisdiction, regarding the law of the case doctrine. *Id.*

Instead, Hyatt argues that this court's April 2002 grant of comity to FTB, and this court's order mandating immunity for FTB on the negligence claim, constituted a "generous gesture" that should not be turned into a "mandatory rule." (Opp., p. 16, lines 7-9.) As demonstrated above, this court's writ of mandamus was not merely a "gesture" out of the

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goodness of the court's heart. Rather, application of comity, and with it, recognition of FTB's immunity for negligent acts, was a mandatory requirement resulting in a writ of mandamus.

Hyatt argues that nothing in this court's prior decision "compels a State to apply its own law to other States . . . ." (Opp., p. 16, lines 14-15.) Hyatt's view of comity is backwards. Comity does not involve application of the forum state's law to the defendant state. Rather, comity is a policy under which the courts of the forum state -- like Nevada -- "give effect to the laws and judicial decisions of another state," out of deference and respect, to promote harmonious interstate relations. 1 App. 7 (April 4, 2002 order). With regard to the present motion, FTB is requesting this court to give effect to the no-bond law of California, because California's no-bond law does not contravene Nevada's policies or interests. Although reference to Nevada's own no-bond rule is necessary in this analysis, comity will give effect to California's statute, not the Nevada rule.

Hyatt argues that the United States Supreme Court opinion also did not suggest that comity must apply. Hyatt concedes, however, that the High Court did recognize the Nevada Supreme Court's sensitivity to the principles of comity, "with a healthy regard for California's sovereign status," and with express recognition of this court's reliance "on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." (Opp., p. 16, lines 17-26.) Hyatt also concedes, as he must, that the United States Supreme Court expressed concern over the potential for one state exhibiting a policy of hostility to the public acts of a sister state. *Id.* Contrary to Hyatt's argument, however, the United States Supreme Court's opinion in this case clearly reflects a need for states to avoid hostility and to give due regard for another state's sovereign status, using the forum state's law as a benchmark.

Hyatt argues, without foundation, that a denial of FTB's motion would not be an act of hostility to the State of California. (Opp., p. 17, lines 1-9.) Hyatt is a single individual who did not suffer any personal injury at the hands of a California agency, whose claim for economic damages was dismissed, and who has been the beneficiary of a Las Vegas jury's verdict awarding $85 million for emotional distress damages, $52 million for invasion of privacy damages, and $250 million in punitive damages. With prejudgment interest, the

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judgment is close to one-half billion dollars. This all stems from FTB's investigation into Hyatt's change of residence from California to Nevada, and FTB's determination that Hyatt owes the State of California millions of dollars in taxes and fraud penalties. Yet, Hyatt is asking this court to ignore California law, to refuse to apply the comity doctrine, and to require an agency of the State of California to post a bond for more than one-half billion dollars (with collateral security requirements and millions of dollars in annual premiums for the bond). If this court does what Hyatt is requesting, it is virtually impossible to imagine a more hostile action by one state against a sister state.

FTB's motion contained a detailed discussion of Hyatt's argument in the district court suggesting that Nevada courts should retaliate for California's refusal to allow immunity in the 1979 case of *Nevada v. Hall*, 440 U.S. 410 (1979). (Motion, pp. 22-23.) We specifically noted Hyatt's argument that one state's refusal to grant comity on an issue "makes it virtually certain that the second state will return the disrespect" by rejecting a subsequent request for comity. *Id.* Our motion demonstrated that Hyatt's argument was plainly wrong, based upon this court's April 2002 order granting comity to FTB on the negligence claim, despite *Hall.* (Motion, pp. 23-26.) Hyatt's opposition completely ignores the argument he made so vigorously in the district court, and he ignores FTB's showing that his district court argument was wholly without merit.

6. Judicial estoppel.

FTB's motion contended that judicial estoppel applies in this case, because Hyatt's previous success in this court and in the United States Supreme Court was a result of his arguments that "we [Nevada] want to treat the other sovereign [California] as we do treat ourselves," and that "we [Nevada] are treating the other sovereign [California] the way we treat ourselves." (Motion, p. 28, lines 3-6.) Hyatt's opposition, which fails to cite any legal authorities on this issue, confuses the issue and discusses unrelated issues such as the law of the case doctrine. (Opp., pp. 17-18.) To the extent that Hyatt does address the applicability of judicial estoppel, he argues that he now should be allowed to contend that "California need not be and should not be treated like a Nevada state agency." (Opp., p. 18, lines 7-8.) Yet the

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argument Hyatt seeks to make here is precisely the opposite of the argument he previously made. As amply demonstrated in FTB's present motion, Hyatt consistently took the position that this court and the United States Supreme Court need not be concerned about Nevada's exercise of jurisdiction over a California agency, because the California agency would be treated no worse than a Nevada agency. Having been successful on this argument, Hyatt is now judicially estopped from changing his position and taking the opposite approach.

As part of this section of his opposition, Hyatt argues that equal treatment for FTB is not appropriate, because Nevada plaintiffs have avenues for collection of judgments against Nevada state agencies, and these avenues are not available against FTB. (Opp., p. 18-19.) Hyatt cites no law or evidence supporting his argument. Indeed, he does not even attempt to show that a Nevada plaintiff collecting a one-half billion dollar judgment against a Nevada government entity would not need to go through the same procedures in Nevada (i.e., obtain legislative appropriations and pursue normal judgment-collection procedures).

7. Hyatt's extreme statements regarding California's view of comity.

Referring to *Nevada v. Hall,* Hyatt argues that "California refused to grant comity to Nevada when Nevada requested California to do so." (Opp., p. 20, line 5) As fully explained in FTB's motion, *Hall* involved a situation where the law of the forum state, California, would not have provided immunity for its own public employees and government agencies in an automobile accident case, but where the law of the defendant state, Nevada, did provide limited immunity. In that situation, California courts declined to give the Nevada agency more protection than California would give its own agencies. But at the same time, California courts treated the defendant state, Nevada, no worse than a California government agency would have been treated as a defendant. This was simply an application of the traditional comity rule, under which a forum state recognizes the defendant state's laws unless those laws are contrary to the forum state's own policies. Hyatt simply fails to recognize that *Hall* did not involve a blanket refusal by California courts to extend comity; *Hall* did not constitute any California court's expression of disrespect for Nevada; and *Hall* did not involve a result in

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which the Nevada government defendant was treated worse than a California government agency would have been treated as a defendant in the car accident lawsuit.

In a truly amazing sentence, Hyatt asserts: "Moreover, California has never granted comity to *any* state on *any* issue." (Opp., p. 20, line 6, italics emphasis in original.) Hyatt provides no explanation as to how he could possibly know whether this extreme and exaggerated statement has any basis in truth. Hyatt and his attorneys cannot possibly know whether California trial courts have granted comity in cases that were never appealed. Hyatt cannot possibly know whether California appellate courts have granted comity in unpublished decisions. Hyatt's statement is truly outrageous and should be given no weight whatsoever in this court's decision on this motion.[7]

As a matter of fact, California has granted comity in numerous cases for numerous reasons, including tort, insurance and contract cases. Additionally, under choice of law analyses, California courts have applied Nevada's law in several cases.[8] Comity obviously includes situations where another state's law is deemed applicable under a choice of law analysis. California also applies comity frequently by allowing foreign corporations to operate within California's borders. See *People v. Alaska Pac. S.S. Co.*, 187 P. 742 (Cal. 1920) (a

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[7] If this court is willing to accept Hyatt's statement, FTB would point out the following undeniable fact: Hyatt has failed to cite a single published or unpublished ruling from a California state court at any level, in the entire 160-year history of California jurisprudence, where the California court refused to grant comity to another state's no-bond law, or where a California court required an out-of-state government agency to post a bond for a stay pending appeal.

[8] Hyatt would probably backtrack and claim that the position taken in his opposition literally means that California has not granted comity to a state agency, when that state agency has been an actual party to the litigation in which comity is requested. This position is meaningless, because of 521 California cases (reported and unreported) in a Westlaw/Lexis search containing the word "comity," only two (including *Nevada v. Hall*) appear to involve another state or state agency as a party to the litigation. California cases in which comity has been considered typically do not involve another state as a party, but that does not change the fact that comity is granted to a state when California chooses to apply another state's law or otherwise recognize a foreign state's law as a courtesy.

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business from another state derives all powers from its home state and is allowed to operate in California "by comity only"). Contrary to Hyatt's statement that "California has never granted comity to any state on any issue," California has granted comity to other states and to other countries on numerous occasions.

For example, California addresses issues related to duplicative litigation, where one case is filed in California and a same or similar case is filed in another state. California, applying comity, has stayed litigation when cases are pending in other states. See e.g. *Simmons v. Superior Court of Los Angeles*, 214 P.2d 844 (Cal. App. 1950)(applying foreign state's law); *Chavarria v. Superior Court of Fresno County*, 115 Cal. Rptr. 549 (Ct. App. 1974) (applying foreign law). Similarly, in a case involving an employment covenant, litigation was filed in California, and the defendant (Medtronic) filed suit in Minnesota. *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231 (Cal. 2002). The California court granted a temporary restraining order, prohibiting Medtronic from taking any further action in the Minnesota case. *Id.* at 234. On appeal, the California appeal court upheld the TRO, but the California Supreme Court held that a TRO was not justified, citing to principles of comity. *Id.* at 237. The California Supreme Court gave due deference to Minnesota courts, even though the California action was filed prior to the one in Minnesota. See also *Wong v. Tenneco, Inc.*, 702 P.2d 570, 575 (Cal. 1985) (it is a longstanding principle for forum states to apply foreign sovereigns' law to causes of action arising in foreign sovereigns).

Perhaps most importantly, California has chosen to apply Nevada law in several California cases, so it is simply untrue that "California has never granted comity to any state on any issue" and that Nevada should not consider granting comity to California because California would not grant comity to Nevada, as asserted by Hyatt. See e.g., *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.*, 14 Cal. Rptr. 805 (Ct. App. 1961) (holding, on comity grounds, that the contract allowed lawful acts in a lawful manner, i.e., operating a gambling establishment in Nevada, under the laws of Nevada); *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961) (action by Nevada plaintiffs against California executor; court ruled in favor of Nevada plaintiffs and held that Nevada law applied); *Cable v. Sahara Tahoe Corp.*, 155

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Cal. Rptr. 770 (Ct. App.1979) (California resident brought action in California against Nevada company, for catastrophic injuries; court applied Nevada law and dismissed case); *Denham v. Farmers Ins. Co.*, 262 Cal. Rptr. 146 (Ct. App. 1989) (court applied Nevada law against California plaintiffs).

In addition to the fact that Hyatt is incorrect that California has never granted comity to Nevada, California itself has rejected Hyatt's "eye for an eye" mentality, whereby he urges Nevada courts to refuse to grant comity to California because California refused to apply Nevada's law in *Nevada v. Hall*. In a case involving a foreign trustee's suit in California to foreclose on mortgages, California addressed whether comity should be granted to allow foreign trustees the right to sue within the state of California, because typically such officers had been denied the right to sue in a foreign court. *Iowa and California Land Co. v. Hoag*, 64 P. 1073 (Cal. 1901). Even though "[m]utuality of operation is the essence of comity," the California Supreme Court determined that it was "just and reasonable" to allow the Iowa trustee to bring suit in a California court, despite the fact that a California trustee would not be afforded the same right in Iowa. *Id.* at 1074. In sum, California has flatly rejected the position Hyatt urges the court to take in this case, i.e. to deny comity because the jurisdiction that would be granted comity in this case (California) has, on one occasion, denied comity to Nevada.

Finally, to the extent Hyatt is asserting that California has never granted comity to another state when that state is a party to litigation in a California court, such an argument is irrelevant. It appears that only two published comity cases involved states as parties. One is *Nevada v. Hall*, where the California courts declined to apply Nevada law because Nevada law was in conflict with California law. The other case was *State of Oregon v. Lillard*, 29 Cal. Rptr. 2d 909 (Ct. App. 1994), disapproved on other grounds in *Von Companies, Inc. v. Seabest*, 58 Cal. Rptr. 2d 899 (Cal. 1996). The *Lillard* court declined to refrain from exercising jurisdiction on comity grounds, but this ruling was based on the fact that the defendant State of Oregon had apparently never asked the trial court to apply comity. The

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Lillard court held that although the doctrine of comity had not been raised in the trial court, the State of Oregon "will have full opportunity to raise it in that forum." *Id.* at 915-16.

Based on the foregoing cases, it is clear that California carefully analyzes comity issues when raised, and extends such courtesy to sister states, including Nevada.

D. Constitutional considerations.

FTB's motion established that there are important constitutional considerations on the issue of whether FTB should be required to post a supersedeas bond for a stay pending appeal. (Motion, pp. 19-21) Applicable constitutional provisions include the Full Faith and Credit clause and the Due Process clause of the United States Constitution. *Id.* Hyatt does not dispute the fundamental principle that these constitutional provisions are applicable in this motion. (Opp., pp. 22-23) Rather, he badly argues that the constitutional provisions will not be violated if this motion is denied. *Id.*

As demonstrated above, requiring a California government agency to post a bond of more than one-half billion dollars, and requiring the California government agency to pay premiums amounting to several millions of dollars per year, would be the ultimate act of hostility toward Nevada's neighboring sister state. This would rise to the level of a constitutional violation. See *Franchise Tax Board v. Hyatt,* 538 U.S. 488, 499, 123 S. Ct. 1683 (2003), citing *Carroll v. Lanza,* 349 U.S. 408, 413, 75 S. Ct. 804 (1955). Such an inflexible requirement would also violate FTB's due process rights, for the reasons set forth at pages 20-21 of FTB's present motion.

Despite the very purpose of comity -- a doctrine aimed at fostering harmonious relationships among separate sovereigns -- Hyatt insists that this court should create a conflict by "voluntarily" choosing to apply a rule under which a sovereign state agency, FTB, would be treated as a non-sovereign. Simply put, Hyatt's argument is that this court may choose to ignore California's sovereign status without violating the United States Constitution.

Contrary to Hyatt's claims, there is no United States Supreme Court case law sanctioning a result so inimical to federalism. Indeed, in *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 499 (2003), the Supreme Court specifically recognized constitutional limits on the

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application of comity principles by state courts. Hyatt's opposition contains a blocked quote of a paragraph from *Franchise Tax Board*, but he omits the first sentence. (Opp. p. 16, lines 22-26) The Supreme Court's full statement actually read as follows:

> States' sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. Carroll v. Lanza, 349 U.S. 408, 413 (1955). The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.

538 U.S. at 499 (emphasis added to sentence omitted in Hyatt's opposition).

At a minimum, comity requires a "healthy regard" by a forum state court for the sovereignty of a sister state, as a matter of constitutional command. In the posture of the case at that time, the Supreme Court believed that this court met the minimum by extending to FTB, which would have been fully immune from suit in California, all of the non-conflicting immunity available under Nevada's own policies. In other words, this court did not act with "hostility" to California's sovereign immunity acts; instead, this court respected California's sovereignty by extending it immunity from suit to the extent that "no conflict" existed between the policies of Nevada and California.

It is not difficult to surmise that a different result would have obtained in the United States Supreme Court had this court refused to extend any immunity to FTB even though Nevada's own immunity policies overlapped California's. Yet that is exactly what Hyatt is asking this court to do.[9]

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[9] The United States Supreme Court has long demonstrated its sensitivity to principles of comity, even under circumstances where there is no express constitutional command. See e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971). For example, the abstention doctrine, while considered discretionary, is nonetheless mandated where failure to apply it would be in disregard of the comity between States and the Federal government. See e.g., *Pennzoil v. Texaco, Inc.*, 481 U.S. 1, 10 (1987). Abstention must promote "principles of federalism and comity." *Growe v. Emison*, 507 U.S. 25,32 (1995). Even assuming that principles of comity fall outside the Full Faith and Credit Clause, it is likely that the United States Supreme Court would resolve a conflict between two states under federal common law principles. "[T]he text of the Constitution provides the beginning rather than the final answer to every (continued)

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Under Hyatt's logic, the United States Supreme Court's carefully couched approval of this court's approach to the immunity issue is meaningless because comity is always "wholly voluntary." (Opp. p.22). Indeed, the Supreme Court's warning in *Carroll v. Lanza*, as reinforced in *Franchise Tax Board*, against policies of hostility is, in Hyatt's view, an "unsupported assertion" by FTB. (Opp. p. 22).

There are three fundamental flaws in Hyatt's position. First, Hyatt's assertion that comity is "wholly voluntary" is an overstatement. The Full Faith and Credit Clause "substituted a command for earlier principles of comity." *Milwaukee County v. M.E. White*, 296 U.S. 268, 277 (1935). "For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished in large measure the general principle of international law by which local policy is permitted to dominate rules of comity." *Broderick v. Rosner*, 294 U.S. 629, 643 (1935). The Full Faith and Credit Clause "made conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity." *Sun Oil Co., v. Workman*, 486 U.S. 717, 723 n. 1 (1988). The Supreme Court's careful statements in *Carroll* and *Franchise Tax Board* indicate that it remains particularly sensitive to the constitutional limits on a state's application of comity principles. In short, comity is not "wholly voluntary."

Second, the United States Supreme Court has acknowledged only one narrow category of cases where state courts may be free from constitutionally constrained application of comity principles. Under that category, a forum state court may refuse to voluntarily apply a sister

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(continued) inquiry into questions of federalism, for '[behind] the words of the constitutional provisions are postulates which limit and control.'" *Garcia v. San Antonio Metropolitan Transit Aut hority*, 469 U.S. 528, 447 (1985), quoting *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). "[I]nterstate ... disputes implicating the conflicting rights of States ..." fall comfortably within the small category of instances where federal common law has been applied. *Atherton v. FDIC*, 519 U.S. 213, 228-229 (1997). See also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105 (1938) (absent a compact or congressional action, judicial remedy available where essential to the adjustment of interstate controversies).

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state's law, when to do so would conflict with the forum state's own policy. That is the extent of *Carroll*.[10]

Third, contrary to Hyatt's suggestion, in admonishing forum state courts to avoid actions hostile to sister states, the Supreme Court in *Carroll* was not operating on a clean slate. The Court referenced *Hughes v. Fetter*, 341 U.S. 609 (1951) as one example of state hostility to the Acts of a sister state. *Carroll*, 349 U.S. at 413. *Hughes* involved a wrongful death action filed in a Wisconsin court by the personal representative of the decedent, a Wisconsin resident, who had been killed in an accident in Illinois. Wisconsin's policy, like that of Illinois, supported remedies for wrongful death. Wisconsin's statutory remedy, however, was territorially limited to deaths caused within that state's borders. Accordingly, the personal representative's action was based on Illinois' wrongful death statute. The Wisconsin Supreme Court interpreted the territorial reach of its own wrongful death statute to preclude recognition of a wrongful death action brought under Illinois law.

Holding that the Wisconsin Supreme Court's interpretation violated the Full Faith and Credit Clause, the United States Supreme Court reversed. Thus, under *Hughes*, where two states' policies are generally the same, a forum state cannot, consistent with the Full Faith and Credit Clause, refuse to extend comity to a sister state's Acts based on interpretations of the forum state law that create a conflict. In the words of *Carroll*, to do so is hostile to the Acts of a fellow sovereign.

While not on "all fours," the constitutional flaws of the Wisconsin court's approach in *Hughes* clearly parallel the position Hyatt asks this court to adopt on the issue of bond. Like

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[10] *Carroll* involved a situation of irreconcilable conflict between Missouri and Arkansas law. Missouri had a comprehensive workmen's compensation law that provided the "exclusive" remedy under employment contracts entered into in Missouri, whether the tort occurred inside or outside that state. Arkansas law did not preclude all common law remedies. The United States Supreme Court held that the Full Faith and Credit Clause did not require Arkansas to apply Missouri law in a tort action by a Missouri employee, all operational acts of which occurred within Arkansas' borders. In so holding, however, the Court noted that "Arkansas can adopt Missouri's policy if she likes." 349 U.S. at 413.

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the wrongful death policies of the two states in *Hughes*, Nevada and California's bond policies for sovereign state entities are the same. Yet, Hyatt asks this court to focus on the unremarkable territorial limits of each state's rule -- not simply to deny comity, but also to deny a sovereign state agency its sovereign status. As *Carroll* and *Franchise Tax Board* instruct, such an approach constitutes "hostility to the public Acts of a sister State." *Franchise Tax Board*, 538 U.S. at 499, quoting *Carroll*, 349 U.S. at 413. Indeed, unlike in *Hughes*, Hyatt affirmatively asks this court to "voluntarily" retaliate against FTB based on a 30-year-old case (*Nevada v. Hall*) that is not analogous to the issue currently before this court.[11]

E. Analysis of *Nelson v. Heer.*

FTB's motion analyzed *Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252 (2005). (Motion, pp. 30-39.) Hyatt's opposition to this analysis continues to rely heavily on the documents he improperly attached. In any event, his arguments are without merit.

1. Complexity of the collection process.

Hyatt argues that because he might need a legislative appropriation to collect his half-billion dollar judgment, collection should be considered unusually complex. Yet even if Hyatt had such a large judgment against a Nevada government entity, surely a special legislative appropriation would be needed here in Nevada as well. Although the size of his judgment is unusual, the possible need for a legislative appropriation does not necessarily mean that the collection process is unusually complex to the degree that a bond should be required.

Hyatt cites *Lightfoot v. Walker,* 797 F.2d 505 (7th Cir. 1986), where judgment collection apparently required legislative action. (Opp., p. 24.) Unlike the situation in *Lightfoot*, in the present case there is evidence in the record that there are funds set aside in

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[11] There is no serious question that the immunity statutes of Nevada and California at issue in *Nevada v. Hall* were in conflict. California applied its own statute to Nevada, and this did not run afoul of the Full Faith and Credit Clause. *Nevada v. Hall*, in short, is the same as *Carroll*, where the United States Supreme Court suggested that state forum courts may be free to apply -- or refuse to apply -- a sister state's statute that contravenes the forum state's own policy.

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an FTB general fund that may be used to satisfy a judgment. 2 App. 458. Additionally, there is no evidence in the record to insinuate that the California appropriations process would be nearly as burdensome or complex as the process in *Lightfoot*. Finally, *Lightfoot* alludes to the fact that a bond would not be required if the cost of the bond would be too significant or imperil other creditors of the defendant. *Lightfoot,* 797 F.2d at 507-508. The cost of the bond in *Lightfoot* was only $7,000, which the court characterized as "a modest amount." *Id.* at 507. Here, the evidence is uncontested that the cost of the bond will be between $22 million and $36 million per year. 2 App. 465. This is hardly "a modest amount" by any standard.

Hyatt also relies on *Southeast Booksellers v. McMaster,* 233 F.R.D. 456 (D.S.C. 2006). (Opp., p. 24.) In that case, however, the judgment debtor had "not offered any reason to excuse the bond requirement." *Id.* at 460. In the present case, FTB has provided myriad reasons to excuse the bond requirement, as set forth in FTB's motion and in this reply.

In *Nelson*, this court approved and adopted factors set forth in *Dillon v. City of Chicago,* 866 F.2d 902 (7th Cir. 1988). *Nelson*, 121 Nev. at 836. The *Dillon* court stayed execution of a judgment against a government entity, without requiring a bond. Hyatt attempts to distinguish *Dillon* as "completely inapposite." (Opp., p. 25, line 10.) In truth, there are numerous similarities between *Dillon* and the present case. First, like *Dillon*, the judgment debtor here submitted affidavits to the district court, explaining FTB's assets, its ability to pay the judgment, and the mechanisms that would be utilized to satisfy Hyatt's judgment. Hyatt did not dispute this evidence or provide his own affidavits. In addition, like *Dillon*, in the present case there is evidence that a state appropriation is not necessarily the only method of collecting the judgment. Finally, like *Dillon*, Hyatt has "failed to demonstrate a single instance in which a claim of this type has gone unpaid" by the State of California. 866 F.2d at 905.

FTB's motion established that the collection process is not so complex as to justify the huge bond in this case. (Motion, pages 32-34.) Hyatt's opposition fails to show that this factor justifies a bond.

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2. Time required to obtain judgment after affirmance.

This *Nelson* factor also weighs in FTB's favor. Hyatt's primary argument on this factor is an attempt to distinguish *S.A. Healy Company v. Milwaukee Metro. Sewerage Dist.*, 159 F.R.D. 508 (E.D. Wis. 1994). In that case the court granted a stay without a bond, where the government entity showed that it could pay the full judgment without unusual delay or difficulty. Hyatt argues that *Healy* is distinguishable because "FTB has not submitted any evidence that a fund exists or that payment could be made in such a timely fashion." (Opp., p. 26, lines 21-22.) Contrary to Hyatt's argument, the present case is very analogous to *Healy*, where the judgment was approximately two percent of the government entity's assets. In the present case, Hyatt concedes that the State of California "has the financial resources to pay the judgment here," and that California has "a net worth of 47 billion dollars." (Opp., p. 27, lines 9-10.) Hyatt concedes that "sufficient assets are obviously available" to pay this judgment. *Id.* at lines 10-11. Thus, Hyatt's judgment is barely one percent of California's assets, compared to the judgment in *Healy*, which was two percent of the government agency's assets, and where the court granted a stay without a bond.

3. Confidence in the ability to pay the judgment.

The third *Nelson* factor relates to the degree of confidence that the court has in the availability of funds to pay the judgment. This factor also weighs in FTB's favor. On this factor, Hyatt expressly concedes: "There is no disputing the fact that the State of California has the financial resources to pay the judgment here. With a net worth of 47 billion dollars, sufficient assets are obviously available." (Opp., p. 27, lines 9-11.)

4. Waste of money.

The fourth *Nelson* factor is whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money, and this factor also weighs in FTB's favor. As noted above, Hyatt has expressly conceded FTB's ability to pay the judgment. (Opp., p. 27, lines 9-11: "sufficient assets are obviously available") Hyatt does not dispute the fact that the cost of a bond could be as much as $36 million per year in premiums, or that bonding companies require, at least, 100 percent collateral. Thus, the State of California

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would be required to tie up more than a half billion dollars worth of assets, which would be unavailable for use by the government during the appeal, in addition to paying millions of dollars in annual premiums for the bond. This tremendous burden and waste of money would all occur in a case where Hyatt concedes that "California has the financial resources to pay the judgment here," and where "sufficient assets are obviously available." (Opp., p. 27, lines 9-11.)

FTB's motion observed that *Nelson* relied on the Seventh Circuit's *Dillon* opinion, and *Dillon* relied on *Northern Indiana Pub. Serv. v. Carbon County Coal,* 799 F.2d 265 (7th Cir. 1986). (Motion, pp. 37-38.) In *Carbon County Coal,* the court approved a stay of execution without a bond for a public utility. The verdict was $181 million. Hyatt attempts to distinguish *Carbon County Coal,* based upon a comparison of the judgment amount and the judgment debtor's assets. (Opp., p. 28, lines 9-15.) Contrary to Hyatt's argument, the basis for waiving the bond requirement in *Carbon County Coal* was not merely the fact that the judgment debtor had sufficient assets and revenues to satisfy the judgment. Rather, the court also determined that the cost of the bond was unnecessary. *Id.* at 281. Specifically, the court determined that the $2 million cost of the bond premium was "not small change." *Id.* In light of this excessive cost, coupled with the judgment debtor's ability to pay the judgment, the court determined that requiring a bond was inappropriate. *Id.*

In the present case, there is no dispute regarding the fact that California has the ability to pay the judgment. With undisputed evidence in the record that the cost of a bond will be as much as $36 million per year, it is specious for Hyatt to argue that the cost of a bond would not be a waste of money.

5. Judgment debtor's lack of a precarious financial condition.

The fifth *Nelson* factor deals with whether the defendant is in a precarious financial situation, such that the requirement to post a bond would place other creditors of the defendant in an insecure position. FTB's motion argued, in essence, that this factor favored FTB. (Motion, p. 38.) Hyatt's opposition argues that the fifth *Nelson* factor is irrelevant in a case such as the present case, where a bond will not force the State of California into bankruptcy.

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(Opp., p. 29, lines 13-15.) Whether FTB is correct that this factor favors FTB, or whether Hyatt is correct that the factor is irrelevant, the undisputed fact remains that FTB is not in a precarious financial situation, and the judgment is secure even without a bond.

II

CONCLUSION

Hyatt is a single individual who claims to have suffered some emotional distress and an invasion of his privacy. His claims arose out of FTB's investigation into whether Hyatt owes millions of dollars in taxes and penalties. The Las Vegas jury awarded the unprecedented amount of approximately $137 million for emotional distress and invasion of privacy damages, and an unprecedented $250 million in punitive damages, and more than $1 million for attorneys fees, all against an agency of our neighboring sister state. With prejudgment interest, the judgment is more than $490 million, and post-judgment interest accumulates as well. The district judge refused to grant any relief from the judgment, and refused to order a stay pending appeal without a bond.[12]

The interests of California and Nevada are identical on the question of whether a government agency should be required to post a bond for a stay pending appeal. Neither state requires a bond. This court should not adopt a policy of hostility toward the people of California. A stay should be granted without a bond.

DATED: March 26, 2009

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[12] The district court did not establish the amount of the bond.

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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 the foregoing addressed to:

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