

Mark A. Hutchison (4639)
Michael K. Wall (2098)
Hutchison & Steffen
10080 Alta Drive
Suite 200
Las Vegas, NV 89145
(702) 385-2500

Peter C. Bernhard (734)
Bullivant Houser Bailey PC
3883 Howard Hughes Pkwy., Ste. 550
Las Vegas, NV 89169
Telephone: (702) 669-3600

Attorneys for Respondent Gilbert P. Hyatt

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

FILED

MAR 12 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Y. [Signature]
DEPUTY CLERK

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Case No.: 53264

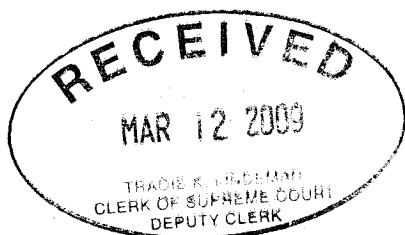
Appellant,

v.

GILBERT P. HYATT,

RESPONDENT GILBERT P. HYATT'S
OPPOSITION TO APPELLANT'S MOTION
FOR STAY PENDING APPEAL WITHOUT
BOND

Respondent.



09-06362

TABLE OF CONTENTS

PAGE NO.

| | | |
|-----|--|----|
| 1. | SUMMARY OF ARGUMENT IN OPPOSITION TO MOTION..... | 1 |
| 2. | RESPONSE TO FTB'S STATEMENT OF FACTS. | 4 |
| A. | This Court previously addressed the background of this case, the early stages of the litigation, and whether Hyatt could pursue his tort claims in Nevada state court. | 4 |
| B. | The trial and judgment in the district court. | 6 |
| C. | The FTB refused to agree that any final judgment in this matter would be enforceable and entitled to "full faith and credit" in California — the trial court thereafter refused to stay enforcement of the judgment without bond. | 6 |
| 3. | ARGUMENT. | 9 |
| A. | The NRAP 8(c) factors are not relevant to this motion and not satisfied by the FTB. | 9 |
| B. | The FTB's comparison of Nevada and California's bond statutes is misplaced and does not support the FTB's request for a stay without posting a bond. | 9 |
| (1) | <i>The FTB has refused to offer California's full faith and credit to secure the judgment in this case.</i> | 9 |
| (2) | <i>States must post a bond to stay enforcement of an adverse federal judgment.</i> | 11 |
| C. | The FTB's arguments based on comity, law of the case, and judicial estoppel are without merit. | 13 |
| (1) | <i>This Court need not grant "equal treatment" to the FTB as a matter of comity.</i> | 13 |
| (2) | <i>The FTB's law of the case arguments are incorrect.</i> | 16 |

| | | |
|----|---|----|
| 1 | (3) <i>There is no basis for saying that Hyatt is judicially estopped.</i> | 17 |
| 2 | | |
| 3 | (4) <i>The "other" comity cases cited by the FTB have no application</i> | |
| 4 | <i>here.</i> | 19 |
| 5 | (5) <i>California has affirmatively refused to grant comity to Nevada, and</i> | |
| 6 | <i>has refused to recognize that the Nevada state court judgment in</i> | |
| 7 | <i>this case will be accorded "full faith and credit" in California.</i> | 21 |
| 8 | | |
| 9 | (6) <i>The FTB's federal constitutional arguments do not support its</i> | |
| 10 | <i>request for comity.</i> | 22 |
| 11 | | |
| 12 | D. The FTB is required to post a bond pursuant to an analysis of the factors | |
| 13 | set forth in Nelson v. Heer. | 23 |
| 14 | | |
| 15 | (1) <i>The complexity of the collection process.</i> | 24 |
| 16 | | |
| 17 | (2) <i>The amount of time required to obtain a judgment after it is</i> | |
| 18 | <i>affirmed on appeal.</i> | 26 |
| 19 | | |
| 20 | (3) <i>The degree of confidence in the availability of funds to pay the</i> | |
| 21 | <i>judgment.</i> | 27 |
| 22 | | |
| 23 | (4) <i>Whether the defendant's ability to pay the judgment is so plain that</i> | |
| 24 | <i>the cost of a bond would be a waste of money.</i> | 27 |
| 25 | | |
| 26 | (5) <i>Whether the defendant is in such a precarious financial situation</i> | |
| 27 | <i>that the requirement to post a bond would place other creditors of</i> | |
| 28 | <i>the defendant in an insecure position.</i> | 29 |
| | 4. CONCLUSION. | 30 |

TABLE OF AUTHORITIES

PAGE NO.**Cases**

| | |
|---|--------|
| <i>Brinkman v. Department of Corrections of the State of Kansas</i> , 815 F. Supp. 407 (D. Kan. 1993)..... | 12 |
| <i>Carroll v. Lanza</i> 349 U.S. 408 (1955)..... | 14 |
| <i>City of S. San Francisco v. Cypress Lawn Cemetery Ass'n.</i> , 14 Cal. Rptr. 2d 323 (Cal. Ct. App. 1992)..... | 9 |
| <i>County of San Diego v. State</i> , 164 Cal.App.4th 580 (2008) | 24 |
| <i>Dillon v. City of Chicago</i> 866 F.2d 902 (7th Cir. 1988) | 25 |
| <i>Ehrlich-Bober & Co., Inc. v. University of Houston</i> , 49 N.Y.2d 574 N.Y.S.2d 604 N.E.2d 726 (1980)..... | 20 |
| <i>Executive Mgmt. v. Ticor Title Ins. Co.</i> , 118 Nev. 46, 53, 38 P.3d 872 (2002) | 11 |
| <i>Franchise Tax Board of the State of California v. the Eighth Judicial District Court of the State of Nevada, et al.</i> , 2002 Nev. LEXIS 57 (2002)..... | 4 |
| <i>Hamlin v. Township of Flint</i> , 181 F.R.D. 348, 351 (E.D. Mich. 1998) | 23 |
| <i>Head v. Platte County</i> , 242 Kan. 442 P.2d 6 (1988)..... | 22 |
| <i>Lampson Universal Rigging, Inc. v. Wash. Pub. Power Supply Sys.</i> , 715 P.2d 1131 (Wash. 1986) | 9 |
| <i>Leuzinger v. County of Lake</i> , 253 F.R.D. 469 (N.D. Cal. 2008)..... | 12 |
| <i>Lightfoot v. Walker</i> 797 F.2d 505 (7th Cir. 1986) | 24 |
| <i>McDonnell v. Illinois</i> , 163 NJ 298, 303, 748 A.2d 1105 (2000)..... | 20 |
| <i>Mianecki v. Second Judicial District Court</i> , 99 Nev. 93, 98, 658 P.2d 422, 424- 25 (1983) | 15 |
| <i>Nelson v. Heer</i> 121 Nev. 832 P. 3d 1252 (2005) | passim |
| <i>Nevada v. Hall</i> 440 U.S. 410 (1979) | 22 |
| <i>Northern Indiana Public Service Co. v. Carbon County Coal Co</i> 799 F.2d 265 (7th Cir. 1986) | 28 |
| <i>Olympia Equipment v. Western Union</i> , 786 F.2d 794 (7th Cir. 1986)..... | 29 |
| <i>Pennzoil Co. v. Texaco, Inc.</i> , 481 U.S. 1 (1987) | 23 |
| <i>Peterson v. Texas</i> , 635 P.2d. 241 (Colo. 1981)..... | 20 |
| <i>S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.</i> 159 F.R.D. 509 (E.D. Wis. 1994)..... | 26 |
| <i>Sam v. Sam</i> 134 P.3d 761 (N.M. 2006) | 19 |
| <i>Southeast Booksellers Ass'n v. McMaster</i> , 233 F.R.D. 456 (D. S.C. 2006) | 24 |
| <i>Struebin v. Iowa</i> , 322 N.W.2d 84 (Iowa 1982) | 20 |
| <i>Texaco, Inc. v. Pennzoil</i> 784 F. 2d 1133 (2d Cir. 1986) (reversed on other grounds)..... | 23 |
| <i>U.S. v. Kurtz</i> , 528 F.Supp. 1113 (E.D. Pa. 1981)..... | 11 |
| <i>Vacation Village, Inc. v. Clark County, Nevada</i> , 497 F.3d 902 (9th Cir. 2007) | 12 |

| | | |
|---|--|----|
| 1 | <i>Vaughn v. Memphis Health Center</i> , 2006 WL 2038577 (W.D. Tenn. July 20, 2006)..... | 12 |
|---|--|----|

Statutes

| | | |
|---|---|--------|
| 4 | California Code of Civil Procedure Section 995.220..... | 14, 16 |
| 5 | Federal Rules of Civil Procedure 62(e)..... | 16 |
| 6 | Nevada Rules of Civil Procedure 62(e)..... | 14, 16 |

1 the Nevada judgment in California and perhaps even to seek relief in this regard from the
2 California courts. Whether the California state legislature will voluntarily make a special
3 appropriation to satisfy this judgment while the FTB "appeals" this Court's final judgment in
4 California is highly uncertain leaving Hyatt no clear and definitive remedy for collection of the
5 judgment upon completion of this Court's review. Consequently, and contrary to the FTB's
6 suggestion that "[t]here is no evidence of unusual complexity in the 'collection process' in the
7 present case," the collection process necessary to satisfy this judgment may be one of the most
8 complex and difficult processes a judgment creditor has ever faced. Under these circumstances,
9 Hyatt should not have to wait, perhaps years, to commence this process unless a bond securing
10 the full amount of the judgment is posted by the FTB or some other adequate security measure
11 is put in place.

12 Although the FTB insists that a judgment against a California agency should be treated
13 no differently from a judgment against a Nevada agency, the two situations are not the same.
14 Unlike a judgment that is entered against a Nevada state agency, the current judgment against
15 the FTB, a California state agency, is not backed by the full faith and credit of the State of
16 Nevada. Nevada exempts its own agencies from having to post a bond when appealing an
17 adverse judgment because the judgment is backed by the full faith and credit of Nevada. A
18 judgment from a Nevada state court against a Nevada state agency will be enforced and satisfied
19 in Nevada. For identical reasons, California law exempts a California state agency from having
20 to post a bond to stay execution of an adverse judgment pending appeal in California state
21 courts. But in this case, California has expressly refused to offer its full faith and credit to
22 satisfy the judgment, thus denying Nevada citizens the recourse that they would have against
23 Nevada state agencies.

24 The decision of a State to extend comity to another State is an entirely voluntary one.
25 Although the FTB at times tries to suggest otherwise, it does not cite a single case holding that a
26 forum State must give comity to another State when the forum State concludes that the interests
27 of its own citizens would be adversely affected by doing so. Further, as detailed below, the
28 FTB's request for comity on this issue is new and quite different from its prior request. This

1 Court's narrow and limited grant of comity in dismissing Hyatt single negligence claim, while
2 allowing Hyatt's intentional tort claims to proceed to trial, does not govern this new request by
3 the FTB. Nor does the FTB's motion accurately describe the "law of the case" relative to comity
4 or Hyatt's prior positions relative to comity. Thus, each request for comity by the FTB, or any
5 sister state agency, must be evaluated on its own merits with great weight and consideration
6 being given to whether Nevada's public policy would be violated, and specifically whether the
7 grant of comity would result in harm, not protection, to citizens of Nevada. In this case, the
8 potential adverse effect on Nevada citizens, including Hyatt, outweighs the argument for
9 according preferred treatment to the FTB.

10 The FTB's law of the case and judicial estoppel arguments are similarly off the mark.
11 Although this Court previously extended comity to the FTB by dismissing the negligence claim
12 against it, the Court declined to grant further comity and dismiss the intentional tort claims,
13 observing that Nevada state agencies did not enjoy immunity from such suits. The FTB tries to
14 build a fixed "equal treatment" requirement out of this decision – and then further to bind the
15 court to it under the law of the case doctrine – but that is not a fair reading of the decision: the
16 Court plainly did not announce that equal treatment between Nevada and California was
17 required, regardless of the particular circumstances. And, despite the FTB's suggestions to the
18 contrary, the United States Supreme Court did not do so either. As for judicial estoppel, the
19 record clearly shows that, while Hyatt's attorneys pointed to this Court's use of Nevada law as
20 part of its analysis of the application of comity, they also repeatedly stated to the United States
21 Supreme Court that such treatment was not required. There is no basis, therefore, on which
22 Hyatt could be estopped from arguing that comity is neither necessary nor appropriate here.

23 Nothing in the long-recognized principles of comity demands that a sister state agency
24 be treated in all or even most instances the same as the state agencies in the forum state. There
25 is no presumption in this regard, as the FTB wrongly suggests. Rather, each application or
26 request for comity must be evaluated on its own merits. Here, the FTB's request for comity
27 lacks merit, and the request should be rejected.
28

1 Under these circumstances, the FTB's request that the Court stay execution of the
2 judgment without posting a bond must be denied.

3
4 **2. Response to FTB's Statement of Facts.**

5 **A. This Court previously addressed the background of this case, the early stages of the**
6 **litigation, and whether Hyatt could pursue his tort claims in Nevada state court.**

7 The FTB's motion starts by setting forth its summary of certain background information
8 and the early proceedings in this case. Although many of the statements in this opening section
9 of the FTB's motion are verifiable from the record below, the FTB takes liberty with the record
10 in stating other facts.¹ Hyatt will not quibble here over what the actual record demonstrates
11 relative to these facts, as they are not relevant to the present motion. These facts will no doubt
12 be fully developed in subsequent briefing in opposition to the merits of the FTB's appeal.

13 Moreover, this Court previously recited the background of this case and the early
14 proceedings in the district court and this Court in 2002, when denying, for the most part, two
15 writs filed by the FTB in 2000.² This Court explained:

16 *Background*

17 The underlying tort action arises out of Franchise Tax Board's audit of
18 Hyatt--a long-time California resident who moved to Clark County,
19 Nevada--to determine whether Hyatt underpaid California state income
20 taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed
21 substantial additional taxes and penalties against Hyatt. Hyatt formally
22 protested the assessments in California through the state's administrative
23 process, and sued Franchise Tax Board in Clark County District Court for
24 several intentional torts and one negligent act allegedly committed during
25 the audit.

26 ¹ For example, the FTB's assertion that Hyatt "claimed [in his 1991 California tax return] that he had ceased to be a
27 resident of California – and that he became a resident of Nevada – shortly before he received huge income from . .
28 patent transactions" is a gross overstatement and oversimplification of those "facts" and wrongly implies some
relation or coordination between Hyatt move to Nevada and the timing of his receipt of income from the patent
transactions.

² See *Franchise Tax Board of the State of California v. the Eighth Judicial District Court of the State of Nevada, et al.*, 2002 Nev. LEXIS 57 (2002).

...

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity and administrative exhaustion all required the application of California law, and under California law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision.³

This Court concluded:

Negligent Acts

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 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.

Intentional Acts

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency.

³ *Id.*, at 3.

1 **B. The trial and judgment in the district court.**

2 Hyatt's intentional tort claims, based on bad faith conduct by the FTB, proceeded to trial
3 in 2008. The FTB's motion suggests that Hyatt "focused on" a particular "theme" at trial.
4 Again, Hyatt will not quibble here over what the actual record demonstrates relative to Hyatt's
5 "theme" at trial, but suffice it to say Hyatt's trial presentation focused on the bad faith conduct of
6 the FTB, and the jury determined that he established each and every element of each of his
7 intentional tort claims. The FTB's Motion accurately recites the verdict returned by the jury and
8 the judgment entered by the Court.

9 **C. The FTB refused to agree that any final judgment in this matter would be**
10 **enforceable and entitled to "full faith and credit" in California — the trial court**
11 **thereafter refused to stay enforcement of the judgment without bond.**

12 The FTB describes its motion in the district court seeking a stay without posting a bond.
13 But the FTB fails to disclose to this Court that its present motion and the motion in the district
14 court would have been mooted if the FTB had simply agreed that, upon exhaustion of its appeal
15 rights, the final judgment in this action would be "enforceable, as a judgment in the State of
16 California under the Full Faith and Credit clause, Article IV, Section 1, of the United States
17 Constitution."

18 Specifically, on October 30, 2008, after the parties had briefed the FTB's motion for a
19 stay without a bond in the district court, and in particular after the FTB submitted its reply
20 papers that included new affidavits asserting that the FTB, *i.e.*, the State of California, could
21 satisfy the judgment if its appeal proved unsuccessful, Hyatt's counsel wrote to and offered to
22 FTB counsel as follows:

23 [T]he FTB's late-filed affidavits seem to say that the Hyatt judgment, once
24 it becomes final after exhaustion of all appeals, will be enforceable in
25 California and that California will be required to take steps necessary to
26 satisfy the final judgment. These affidavits seem to address the concerns of
27 Mr. Hyatt under the *Nelson v. Heers* standards.

28 Therefore, Mr. Hyatt is willing to stipulate that, consistent with these
new affidavits, he will not execute on the judgment until after it becomes
final and that no bond need be posted, provided FTB stipulates that any

1 final judgment will be entitled to full faith and credit in California and that
2 the FTB will facilitate the steps necessary to obtain satisfaction on any
3 final judgment.⁴

4 The FTB made no response to Hyatt's offer. Then, on November 3, 2008, Hyatt
5 forwarded a draft stipulation to the FTB following up his prior letter request. The stipulation
6 offered:

7 IT IS STIPULATED that:

8 (1) The Judgment, whether remaining in its current form or in any way
9 modified, amended, corrected, or changed in any manner as a result of this
10 Court's rulings on the FTB's pending post-trial motions or as a result of any
11 ruling by the Nevada Supreme Court or any ruling by the United States
12 Supreme Court following any and all appeals of the Judgment by the FTB,
13 *is enforceable as a judgment in the State of California under the Full Faith
14 and Credit clause, Article IV, Section 1 of the United States Constitution;*

15 (2) The FTB specifically agrees that upon exhaustion of all of its rights to
16 appeal the Judgment to the Nevada Supreme Court and to the United States
17 Supreme Court, resulting in a final judgment in favor of Plaintiff (the
18 "Final Judgment"), it will not (and it irrevocably waives any and all of its
19 rights, if any) to challenge the enforceability of the Final Judgment in any
20 California court or any other court, including but not limited to any
21 constitutional challenge of any kind;

22 (3) The FTB further pledges, as an agency of the State of California, that
23 any Final Judgment is backed by the Full Faith and Credit of the State of
24 California and that upon exhaustion of all of its rights to appeal the
25 Judgment to the Nevada Supreme Court and to the United States Supreme
26 Court, the FTB as an agency of the State of California will not oppose but
27 instead will help facilitate, as expeditiously as possible and without any
28 undue delay, any and all measures necessary to satisfy the Final Judgment,
including without limitation facilitating any appropriation of funds from
the State of California to satisfy the Final Judgment; and

⁴ See October 30, 2008 letter from Hyatt counsel to FTB counsel. 1 Hyatt Appendix at 1.

(4) Hyatt agrees that he will not execute on the Judgment until exhaustion of all of the FTB's rights to appeal the Judgment to the Nevada Supreme Court and to the United States Supreme Court; and the FTB need not post any bond to stay enforcement of the Judgment pending appeal. The FTB's motion seeking a stay pending appeal without bond may be taken off calendar, effective upon the Court's approval of this stipulation.⁵

The FTB similarly made no response to Hyatt's second offer. Ultimately, the motion was heard by the district court on January 29, 2009. During that hearing on the FTB's motion for a stay without posting a bond, the district court specifically commented on its concern that the FTB will not satisfy the judgment upon exhaustion of its appeal rights. The district court stated:

The Court notes FTB is not required to appeal. Mr. Hyatt has been fighting the FTB for about 16 years. FTB's conduct throughout the audit process *and this 10 year litigation does not give this Court any reason to believe that payment to Mr. Hyatt will be swift if and when FTB loses this appeal. Even as FTB attempts to reassure this Court of that fact, it raises doubts.* There is very clearly a politicized process that must take place before this judgment is paid.⁶

In short, this motion, and that in the trial court, would not have been necessary if the FTB had agreed to give "full faith and credit" to the judgment in California. The FTB, having refused to recognize the legitimacy of the Nevada judgment in this case, is not entitled to a stay of its enforcement pending its appeal without posting a bond or other acceptable security. The FTB objects that the cost of a bond would be too expensive. But FTB offers no alternative security for Hyatt or this Court to consider. Clearly, the rule contemplates forms of security other than a bond. If FTB is so concerned about the cost of the bond (and its ability to recover that cost from Hyatt if FTB is successful on appeal), then it should present an alternative security, like committing California's full faith and credit or other collateral. Pledging its full

⁵ See November 3, 2008 cover letter and draft stipulation. 1 Hyatt Appendix at 2.

⁶ See January 29, 2009 district court hearing transcript, at p. 85. 1 Hyatt Appendix at 3.

1 faith and credit for the final judgment in this case does not cost FTB anything, and it eliminates
2 any fear that Hyatt would be judgment-proof to satisfy any cost award.

3
4 **3. Argument.**

5 **A. The NRAP 8(c) factors are not relevant to this motion and not satisfied by the FTB.**

6 There is no dispute that if the FTB posts an appropriate supersedeas bond, the
7 enforcement of the judgment will be stayed pending the appeal. The FTB's discussion of the
8 four factors in determining *whether* a stay should be granted, considered under Rule 8 of the
9 Nevada Rules of Appellate Procedure ("Rule 8"), is not necessary and will not be further
10 addressed here.

11
12 **B. The FTB's comparison of Nevada and California's bond statutes is misplaced and does not support the FTB's request for a stay without posting a bond.**

13 **(1) *The FTB has refused to offer California's full faith and credit to secure the judgment in this case.***

14
15 The FTB references Rule 62(e) of the Nevada Rules of Civil Procedure ("Rule 62(e)")
16 and compares it to Section 995.220 of the California Code of Civil Procedure ("Section
17 995.220"). The FTB then argues that these laws demonstrate that public entities are not
18 required to post bonds because they have the ability to pay and it might otherwise interfere with
19 government performing its functions. The FTB cites a Washington state case involving a
20 Washington state agency.⁷ The FTB then cites a California case involving a subdivision of the
21 State of California.⁸ Neither case is applicable to the facts presented in this case, nor does the
22 FTB's argument regarding these two cases address the controlling issue presented by the FTB's
23 motion: should an agency from a sister state be granted a stay of enforcement of an adverse
24 judgment without a bond pending appeal?

25
26
27 ⁷ *Lampson Universal Rigging, Inc. v. Wash. Pub. Power Supply Sys.*, 715 P.2d 1131 (Wash. 1986).

28 ⁸ *City of S. San Francisco v. Cypress Lawn Cemetery Ass'n.*, 14 Cal. Rptr. 2d 323 (Cal. Ct. App. 1992).

1 The FTB erroneously argues that Hyatt makes merely a "technical reading" of the two
2 statutes in asserting the Nevada statute does not apply to California agencies, and vice versa.
3 The FTB then suggests that the public policies of "Nevada and California are identical
4 concerning whether a state agency is obligated to post a bond to secure a stay pending appeal."⁹
5 The FTB's argument simply ignores the plain language of both statutes. Nevada's public policy
6 reasons for not requiring *its own* agencies to post a bond pending appeal of an adverse judgment
7 may well be similar to California's public policy reasons for not requiring *its own* state agencies
8 to post a bond. But the FTB conveniently glosses over this key difference in this case.

9 The public policy behind states not requiring their own agencies (or subdivisions of the
10 state) to post a bond when appealing an adverse judgment from their own state courts has no
11 application when the judgment debtor is a sister state agency. A judgment against a Nevada
12 state agency in Nevada state court will be collected against that agency in the courts of Nevada.
13 The state, in this case Nevada, does not require its own agencies to post a bond because the
14 judgment from its own state court is secured by the "full faith and credit" of that state. There is
15 no concern that the courts of Nevada will not enforce a judgment that the court itself issued
16 against the Nevada agency. A sister state agency faced with an adverse judgment in another
17 state sits in a starkly different position. In the current case, once all appeals are exhausted,
18 neither the Nevada courts, the Nevada legislature, nor the Nevada executive branch can assist
19 Hyatt in enforcing the judgment in California.¹⁰

20 In that regard, not only is the current judgment unsecured by the full faith and credit of
21 Nevada because it is not a judgment against Nevada, the FTB has repeatedly refused to consent
22 that the judgment in this case will be given "full faith and credit" in California. As described
23 above, Hyatt twice asked the FTB to stipulate that, in lieu of posting a bond, it agree that the
24 final judgment in this case will be "enforceable as a judgment in the State of California under

25 _____
26 ⁹ FTB Motion, at 9:1-2.

27 ¹⁰ The only exception perhaps being if the State of California has any assets located in Nevada, which is an unlikely
28 proposition. But even in that case, the FTB and State of California would be no different from any private party
with assets in Nevada, and without a showing that such assets are adequate and committed as alternate security to
satisfy the final judgment, private parties are required to post a bond to secure a stay pending appeal.

1 the Full Faith and Credit clause, Article IV, Section 1 of the United States Constitution." The
2 FTB has refused each invitation. The judgment in this case is therefore not backed by the "full
3 faith and credit" of Nevada, and the FTB refuses to offer the "full faith and credit" of California
4 as security. Under these circumstances, the FTB does not stand in the same shoes as a Nevada
5 state agency faced with an adverse judgment in Nevada state court.

6 In sum, the interest of Nevada in enacting NRCP 62(e) was to exempt Nevada state
7 agencies, just as the interest of California in enacting CCP § 995.220 was to exempt California
8 state agencies. The FTB is correct in its assertion that the public policies of both Nevada and
9 California are the same, but the FTB is wrong in its statement of what that shared policy is.
10 Both states clearly and unambiguously exempt domestic agencies from the requirement of a
11 bond, and both states clearly and unambiguously require foreign agencies to post bonds. Each
12 state can offer its own respective "full faith and credit" to judgments entered against its own
13 agencies in its own state court. California has refused to offer or provide that same full faith and
14 credit to the judgment in this case.

15 ***(2) States must post a bond to stay enforcement of an adverse federal judgment.***

16 Additionally, this Court has held that "federal cases interpreting the Federal Rules of
17 Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure
18 are based in large part upon their federal counterparts."¹¹ The language of NRCP 62(e) is very
19 similar to its federal counterpart, FRCP 62(e).¹² FRCP 62 also "plainly dictates that in the
20 ordinary case execution on a judgment for money should not be stayed unless the party that
21 prevailed in the district court is secured from loss."¹³

22 Federal courts have construed FRCP 62(e) narrowly so as to permit a stay without a
23 bond on an appeal only by the United States, its officers or its agencies (per the express
24

25 ¹¹ *Executive Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

26 ¹² FRCP 62(e) reads: "The court must not require a bond, obligation, or other security from the appellant when
27 granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a
department of the federal government."

28 ¹³ *U.S. v. Kurtz*, 528 F.Supp. 1113, 1114 (E.D. Pa. 1981).

1 language of the rule). In particular, federal courts have not permitted a stay without a bond for
2 state government entities or for other entities that may be funded in whole or in part by the
3 United States Government.¹⁴ In *Leuzinger v. County of Lake*, the federal district court made it
4 clear that the federal rule, which was a procedural rule, preempted any state laws or rules that
5 might allow a state entity to obtain a stay on appeal without a supersedeas bond.¹⁵

6
7 In *Brinkman v. Department of Corrections of the State of Kansas*¹⁶ another federal
8 district court offered some strong language that a stay on appeal requires a bond from a state or
9 state agency and holding that "[g]enerally courts are reluctant to waive the bond requirement for
10 a governmental entity unless funds are readily available, such as through a general
11 appropriation, and a procedure is in place for paying the judgment."¹⁷ The court continued, "the
12 defendant [appellant and an agency in the state of Kansas] has the burden of objectively
13 demonstrating good cause why this court should deviate from the general rule of imposing a full
14 supersedeas bond before execution of the judgment is stayed pending appeal."¹⁸

15
16 In sum, the FTB is wrong in arguing that "since the interests of both Nevada and
17 California are identical concerning whether a state agency is obligated to post a bond to secure a
18 stay pending appeal, this Court must treat the FTB just as it would treat a Nevada governmental
19 agency in the same circumstances, and not require a bond from the FTB to secure a stay pending
20 appeal." Neither states' rules nor statutes govern the circumstances of this case, and the public
21 policy behind not requiring a state to post a bond to secure an adverse judgment against it in *its*

22
23 ¹⁴ See *Vacation Village, Inc. v. Clark County, Nevada*, 497 F.3d 902, 914 (9th Cir. 2007) (requiring Clark County
24 to post a supersedeas bond to obtain a stay on appeal in federal court); *Leuzinger v. County of Lake*, 253 F.R.D. 469
(N.D. Cal. 2008); and *Vaughn v. Memphis Health Center*, 2006 WL 2038577 (W.D. Tenn. July 20, 2006)(bond
required for entity that received funding from the federal government).

25 ¹⁵ *Leuzinger*, 253 F.R.D. at 474-475.

26 ¹⁶ 815 F. Supp. 407 (U.S. D. Kan. 1993).

27 ¹⁷ *Id.* at 409.

28 ¹⁸ *Id.* at 410.

1 own state court is absent here. Lastly, federal law confirms that a state faced with a judgment
2 outside of its own state court is not entitled to a stay of the judgment without posting a bond.

3 **C. The FTB's arguments based on comity, law of the case, and judicial estoppel are**
4 **without merit.**

5 **(1) This Court need not grant "equal treatment" to the FTB as a matter of comity.**

6 The FTB erroneously states that the doctrine of comity requires that this Court treat it
7 exactly like a Nevada state agency. But, properly understood, the doctrine of comity does not
8 "require" anything.

9 First, comity was not the focus of the issues that the FTB presented to this Court in its
10 writ petition filed in June of 2000 challenging the Court's jurisdiction. Rather, the FTB argued
11 that the Court lacked jurisdiction, citing the doctrines of sovereign immunity, full faith and
12 credit, choice of law, and administrative exhaustion.¹⁹ This Court rejected these primary
13 arguments by the FTB:

14 Preliminarily, we reject Franchise Tax Board's arguments that the doctrines
15 of sovereign immunity, full faith and credit, choice of law, or
16 administrative exhaustion deprive the district court of subject matter
17 jurisdiction over Hyatt's tort claims. First, although California is immune
18 from Hyatt's suit in federal courts under the Eleventh Amendment, it is not
19 immune in Nevada courts. Second, the Full Faith and Credit Clause does
20 not require Nevada to apply California's law in violation of its own
21 legitimate public policy. Third, the doctrines of sovereign immunity and
22 full faith and credit determine the choice of law with respect to the district
23 court's jurisdiction, while Nevada law is presumed to govern with respect
24 to the underlying torts. Fourth, Hyatt's tort claims, although arising from
25 the audit, are separate from the administrative proceeding, and the
26 exhaustion doctrine does not apply. The district court has jurisdiction;
27 however, we must decide whether it should decline to exercise its
28 jurisdiction under the doctrine of comity.²⁰

Second, in regard to comity, as this Court explained in its prior decision in this case:

19 FTB Writ Petition filed in this Court July 7, 2000, at pp. 24-31, 1 Hyatt Appendix at 4.

20 Franchise Tax Bd., 2002 Nev. Lexis 57 at *8.

1 The doctrine of comity is an accommodation policy, under which the
2 courts of one state voluntarily give effect to the laws and judicial decisions
3 of another state out of deference and respect, to promote harmonious
4 interstate relations. In deciding whether to respect California's grant of
5 immunity to a California state agency, a Nevada court should give due
6 regard to the duties, obligations, rights and convenience of Nevada's
7 citizens and persons within the court's protections and consider whether
8 granting California's law comity would contravene Nevada's policies or
9 interests.²¹

10 Following this principle, the Court then went on to grant comity in part and deny it in
11 part, extending immunity for the negligence claim but not for the intentional tort claims.

12 Consistent with the Court's opinion in this case, a court's grant of comity is voluntary,
13 not a matter of obligation.²² A state court has complete discretion to grant or deny comity when
14 requested. When granted, it is out of deference and respect to the sister state. When rejected, it
15 is because the State has a stronger interest in protecting its citizens. In denying comity in a
16 previous case, the Court observed:

17 In general, comity is a principle whereby the courts of one jurisdiction may
18 give effect to the laws and judicial decisions of another jurisdiction out of
19 deference and respect. [Citation omitted] The principle is appropriately
20 invoked according to the sound discretion of the court acting without
21 obligation. . . . [W]e believe greater weight is to be accorded Nevada's
22 interest in protecting its citizens from injurious operational acts committed
23 within its borders by employees of sister states, than Wisconsin's policy
24 favoring governmental immunity. Therefore, we hold that the law of

25 ²¹ *Id.* at *9.

26 ²² Indeed, the FTB largely concedes this point. See FTB Motion at 20: 5-6 ("the United States Supreme Court has
27 stated that the comity doctrine is not required by the United States Constitution . . ."). Although the FTB tries to
28 find a possible exception to this principle in *Carroll v. Lanza*, 349 U.S. 408 (1953), that decision involves the Full
Faith and Credit Clause, not the comity doctrine. Both this Court and the United States Supreme Court have
already held that the Full Faith and Credit Claim does not require the application of California law in this case.

1 Wisconsin should not be granted comity where to do so would be contrary
2 to the policies of this state.²³

3 In sum, comity is not something a sister state is entitled to receive, and the FTB has no
4 "right" to be treated in the same manner as a Nevada agency. The forum state's court, here
5 Nevada, decides whether to grant comity and the scope of its application as requests for comity
6 are made on particular issues. There is no automatic application of the doctrine.

7 Here, the grant of comity by this Court, in this case, was narrow and limited in scope and
8 certainly did not entail treating the FTB "exactly as . . . a Nevada governmental agency." This
9 Court concluded:

10 Here, we conclude that the district court should have refrained from
11 exercising its jurisdiction over the negligence claim under the comity
12 doctrine, but that it properly exercised its jurisdiction over the intentional
13 tort claims.²⁴

14 Indeed, even the limited comity accorded the FTB did not equate to being treated
15 "exactly" like a Nevada state agency as Nevada, unlike California, has not expressly granted
16 immunity to state agencies for all negligent acts. As this Court explained:

17 Although Nevada has not expressly granted its state agencies immunity for
18 all negligent acts, California has granted the Franchise Tax Board such
19 immunity. We conclude that affording Franchise Tax Board statutory
20 immunity for negligent acts does not contravene any Nevada interest in this
21 case.²⁵

22 This Court then rejected in its entirety the FTB's request for comity for the intentional
23 tort claims:

24 We believe that greater weight is to be accorded Nevada's interest in
25 protecting its citizens from injurious intentional torts and bad faith acts

26 ²³ *Mianecki v. Second Judicial District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

27 ²⁴ *Franchise Tax Bd.*, 2002 Nev. Lexis 57 at *9.

28 ²⁵ *Id.* at *10.

1 committed by sister states' government employees, than California's policy
2 favoring complete immunity for its taxation agency.²⁶

3 These holdings by this Court can in no way be construed as requiring this Court to treat
4 the FTB "exactly" like a Nevada state agency on all issues. The FTB is simply wrong in
5 arguing to the contrary.

6 **(2) *The FTB's law of the case arguments are incorrect.***

7 As we have noted, this Court previously extended comity to the FTB by ordering
8 dismissal of Hyatt's negligence claim. The FTB now tries to turn this generous gesture into a
9 mandatory rule that would tie this Court's hands at all future points in the case. But this is
10 obvious overreaching. Although the Court did refer to Nevada law in applying comity to the
11 particular immunity issues before it, it did not announce that it always had to treat the two
12 sovereigns the same or in any way limit its discretion in choosing whether, and to what degree,
13 to apply comity in any future situations. While Nevada law is certainly a factor to be
14 considered, nothing in this Court's prior decision – or in principles of comity generally –
15 compels a State to apply its own law to other States even when the States are not similarly
16 situated. That is the case here.

17 Nor is there anything in the United States Supreme Court opinion that would lock this
18 Court into any particular view of how to apply the doctrine of comity. The great majority of the
19 opinion is devoted, not to comity at all, but to the FTB's argument that the Full Faith and Credit
20 Clause required Nevada to honor California's statutory immunity. At the end, the Court then
21 observed:

22 [w]e are not presented here with a case in which a State has exhibited a
23 "policy of hostility to the public Acts" of a sister State. [Citation omitted]
24 The Nevada Supreme Court sensitively applied principles of comity with a
25 healthy regard for California's sovereign status, relying on the contours of
26 Nevada's own sovereign immunity from suit as a benchmark for its
analysis.²⁷

27 ²⁶ *Id.* at *11.

28 ²⁷ *Id.* at 499.

1 Plainly enough, the Court was not, by this language, ordering Nevada to implement an
2 “equal treatment” policy or even suggesting that it would be “hostile” not to do so. It was
3 simply noting what this Court had done, not prescribing a rule for all future questions. Because
4 the granting of comity is an entirely voluntary act, a State must be able to take into account the
5 effect on its citizens of extending comity in any particular situation. It is hardly “hostile” for a
6 forum state to recognize that, although equal treatment may sometimes demonstrate respect for
7 another sovereign without unduly harming the interests of its own citizens, such equal treatment
8 may, at other times, be a serious disservice to its own public policy. The Supreme Court hardly
9 said otherwise in its opinion.

10 ***(3) There is no basis for saying that Hyatt is judicially estopped.***

11 Finally, the FTB makes a judicial estoppel argument, saying that Hyatt cannot now argue
12 against equal treatment for the FTB. But that would be a good argument only if Hyatt had
13 argued that forum States are required to give equal treatment to defendant States. In fact, Hyatt
14 argued just the opposite. No basis for judicial estoppel thus exists.

15 The record is clear on this point. To begin with, although Hyatt noted that this Court had
16 looked to Nevada’s own immunity in deciding what immunity initially to accord the FTB, he
17 did not say — and the FTB conspicuously does not cite any evidence of him saying — that
18 Nevada had to do so. To the contrary, Hyatt’s counsel before the United States Supreme Court
19 stated no less than five times that any such decision was entirely up to the Nevada courts in the
20 exercise of their discretion and was not in any way a matter of constitutional obligation.²⁸ In
21 short, Hyatt repeatedly argued then just what he is arguing now: that it is up to the Nevada
22 court to decide how much, if any, comity to give to the FTB.

23
24
25 ²⁸ See the transcript from the oral argument before the United States Supreme Court, 2003 U.S. Trans Lexis 12
26 (February 24, 2003), 1 Hyatt Appendix at 5: p. 7 (“And I don’t think there is a federally enforceable law of state
27 comity”); p. 9 (“...comity is . . . not federal [sic] enforceable”); p. 11 (“...there is no federally enforceable state law
28 of comity”); p. 11 (“Q. Is — is the question of comity one that has a federal component so that this court should
weigh in on when it has to be exercised? A. I don’t believe so state versus state, Justice O’Connor”); p. 11 (“there
is a jurisprudence of this court with respect to federal and state relations, which does depend on comity, and that is,
of course, federally enforceable. I don’t believe there is a concomitant enforceable doctrine . . . state to state”).

1 Many factors may be a part of each decision on when and for what Nevada will grant
2 comity to California (or any other state). If, as detailed below, California has denied Nevada
3 comity on an issue for which California seeks comity (*e.g.*, a cap on compensatory damages),
4 Nevada can and almost assuredly will deny comity to California. Hyatt therefore is not
5 judicially estopped from arguing that — in regard to other laws not addressed in prior
6 proceedings and to the FTB's new request for comity having nothing to do with immunity (*e.g.*,
7 a stay on appeal without posting a bond) — California need not be and should not be treated like
8 a Nevada state agency. In so doing, Hyatt is raising different policy considerations, applicable
9 to the new issue for which FTB now requests comity - whether a stay without bond pending
10 appeal should be granted. His argument before the United States Supreme Court, regarding
11 application of comity to state agency immunity for particular types of legal claims, is not
12 contrary to his positions here, arguing against the FTB's new request for comity.

13 Hyatt is not therefore judicially estopped from now arguing, correctly, that the prior
14 decisions in this case do not require that the FTB be treated exactly like a Nevada state agency.
15 That is not the "law of the case." Further, Hyatt consistently argued in the prior proceedings in
16 this Court that the FTB was not entitled to comity on any issue, including Hyatt's negligence
17 claim.²⁹ This Court disagreed with Hyatt on that one point, while agreeing that Hyatt's
18 intentional tort claims should proceed to trial under the concept of comity.

19 That is not to say that, as one part of its comity inquiry, Nevada should not look at the
20 rules applicable to Nevada officials in making that decision. But there is no "one-size-fits-all"
21 answer to whether a forum State should treat its Sister States in exactly the same manner for all
22 purposes. Proper resolution of the issue necessarily turns on a consideration of the respect due
23 to other States along with an analysis of the potential injury resulting to Nevada citizens. Here,
24 for reasons that we have discussed, equal treatment for the FTB would not be appropriate,
25 because Nevada plaintiffs have avenues for collection of judgments against Nevada state
26 agencies that are at least in question with regard to the judgment against the FTB. The Nevada

27
28 ²⁹ See Hyatt Answer to FTB Petition for Writ of Mandamus Ordering Dismissal, filed in this Court October 17,
2000, at pp. 23-61, 1 Hyatt Appendix at 6.

1 courts do not have equal control over the FTB and thus should not grant it equal freedom to
2 appeal without the posting of a protective bond.

3
4 **(4) *The "other" comity cases cited by the FTB have no application here.***

5 The FTB's motion extensively discusses a 2006 case decided by the New Mexico
6 Supreme Court, *Sam v. Sam*.³⁰ Although there are many distinctions between that case and the
7 FTB's new request for comity relative to not posting a bond, the most obvious is that the *Sam*
8 court was addressing comity in the context of whether to grant immunity to the negligence
9 claims asserted against the State of Arizona, under Arizona's statute of limitations. The court
10 found no violation of New Mexico's public policy in dismissing the negligence claim based on
11 its own statute of limitations law and that of Arizona because the asserted claims against a
12 government entity were tardy under either statute.

13 But the *Sam* court first set forth - consistent with this Court's decision in this case and
14 United States Supreme Court precedent - that "a forum state is not required to extend immunity
15 to other states sued in its courts, but the forum state should extend immunity as a matter of
16 comity if doing so *will not violate the forum state's public policies*. . . . [I]n order to refuse to
17 honor the laws of another state, a forum state only needs to declare that the other state's law
18 would violate its own legitimate public policy."³¹

19 The *Sam* court then reviewed the four factors other courts evaluate in determining
20 whether to grant comity: (1) whether the forum state (here Nevada) would enjoy similar
21 immunity under similar circumstances; (2) whether the state seeking comity (here California)
22 has extended comity to other states; (3) whether the forum state (here Nevada) has a strong
23 interest in litigating the case; and (4) whether extending immunity would prevent forum
24 shopping.³²

25
26 ³⁰ 134 P.3d 761 (N.M. 2006).

27 ³¹ *Id.*, at 765-66.

28 ³² *Id.*, at 767.

1 Although the third and fourth factors have already been decided by this Court in
2 allowing Hyatt's intentional tort claims to proceed to trial in Nevada and therefore are less
3 relevant to the FTB's new request for comity because it is not a question of immunity, the first
4 two factors weigh heavily against the FTB and the State of California. As discussed below,
5 California refused to grant comity to Nevada when Nevada requested California to do so.
6 Moreover, California has never granted comity to *any* state on *any* issue.

7 This is in contrast to the key distinguishing holding in the *Sam* case. The New Mexico
8 Supreme Court found that it was likely that Arizona would extend comity to New Mexico if the
9 circumstances were reversed.³³ California has never demonstrated any willingness to grant
10 comity. The *Sam* case therefore does not support the FTB's new and very different request for
11 comity.

12 The FTB also cites a handful of other cases in which one state has, relative to the issue
13 of immunity, applied comity and treated a sister state as it would treat itself.³⁴ But there are also
14 numerous other cases where states have refused to do so.³⁵ Moreover, the FTB cites no case
15 where a sister state had been accorded the privilege of a stay from enforcement of a judgment
16 pending appeal without posting a bond. As described above, the public policy considerations in
17 this circumstance are very different from the immunity issue previously addressed by this Court
18 and addressed in most of the cases cited by the FTB.

19 Those cases simply do not support the FTB's new request for comity, particularly when
20 the FTB has refused to pledge the "full faith and credit" of California as security for the
21 judgment. In that regard, as discussed below, the FTB's motion addresses the complicated
22 nature of collecting a judgment against a California state agency, but the FTB carefully never
23

24 ³³ *Id.* at 767.

25 ³⁴ FTB Motion, at 15-16.

26 ³⁵ See *McDonnell v. Illinois*, 163 NJ 298, 303, 748 A.2d 1105, 1108 (2000) (holding state tax agency liable in sister
27 state); see also *Struebin v. Iowa*, 322 N.W.2d 84, 86 (Iowa 1982); *Peterson v. Texas*, 635 P.2d 241, 243 (Colo.
28 1981); *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574, 427 N.Y.S.2d 604, 404 N.E.2d 726, 730
(1980) These are just a sampling of many cases so holding.

1 declares in its motion that it will assist in seeking legislative appropriation or take whatever
2 steps are necessary to satisfy the judgment in this case after its appeal rights are exhausted.

3 Comity must be considered by a court on a request-by-request basis. In this instance,
4 Nevada's interest and that of its citizens outweigh California's interests in not posting a bond to
5 stay enforcement of the judgment pending the FTB's appeal. This is the singular issue before
6 the Court. The public policy of Nevada would not be served by permitting the FTB to avoid
7 enforcement of the judgment in this case without posting a bond pending its appeal

8 ***(5) California has affirmatively refused to grant comity to Nevada, and has refused to***
9 ***recognize that the Nevada state court judgment in this case will be accorded "full faith***
10 ***and credit" in California.***

11 California categorically denied Nevada's request for comity in the seminal case, *Nevada*
12 *v. Hall*.³⁶ The United States Supreme Court reviewed the California decision and affirmed it. It
13 found that Nevada had no sovereignty in California and that Nevada can therefore be subject to
14 unlimited damages.³⁷ The United States Supreme Court agreed that California need not limit
15 the damages recoverable from Nevada on the basis of comity.

16 By rejecting the defense in this very case, however, the California courts
17 have told us that whatever California law may have been in the past, it no
18 longer extends immunity to Nevada as a matter of comity.³⁸

19

20 In this case, California has "declared its will"; it has adopted as its policy
21 full compensation in its courts for injuries on its highways resulting from
22 the negligence of others, whether those others be residents or nonresidents,
23 agents of the State, or private citizens. Nothing in the Federal Constitution
24 authorizes or obligates this Court to frustrate that policy out of enforced
25 respect for the sovereignty of Nevada.³⁹

26 ³⁶ 440 U.S. 410 (1979).

27 ³⁷ 440 U.S. at 416-17.

28 ³⁸ 440 U.S. at 417-18.

³⁹ 440 U.S. at 426.

1 California's definitive statement refusing Nevada comity relative to its law capping
2 damages, recognized by the United States Supreme Court as a proper exercise of a state's
3 discretion whether to grant or refuse comity on a particular issue, provides guidance to this
4 Court on the policies to consider in deciding whether to grant comity to California concerning
5 posting a supersedeas bond to secure a stay. What the State of California and the FTB advocate
6 is that the State of Nevada can be assessed unlimited damages in California courts (*Nevada v*
7 *Hall*), but Nevada must accord comity to California upon California's request, on every issue
8 presented by the FTB. This Court has never required such a result in its earlier opinion in this
9 case.⁴⁰ Nevada has the discretion to refuse to grant relief to California on the basis of comity,
10 especially after California has denied Nevada's request in a case that has been good law for 30
11 years. Moreover, exhaustive research thus far reveals no reported case in which California has
12 granted comity to another state. These facts weigh heavily against granting the FTB's new
13 request for comity.

14 **(6) *The FTB's federal constitutional arguments do not support its request for comity.***

15 The FTB makes the unsupported assertion that failing to grant its request for a stay
16 without posting a bond would constitute a hostile act in violation of the United States
17 Constitution. The FTB devotes an entire page and a half to this argument, citing a 1955 United
18 States Supreme Court case (*Carroll v. Lanza*⁴¹) and the Court's opinion in this case. Neither
19 Carroll nor this Court's prior opinion in this case deems comity mandatory based on an asserted
20 "hostile" act of a forum state, nor is there any United States Supreme Court case that supports
21 the FTB's assertion.⁴² Indeed, the law is to the contrary. A grant of comity is voluntary and
22 based on the factors described above. The FTB fails to meet those factors relative to its new
23 request for comity.

24
25
26 ⁴⁰ Other courts reject comity when a sister state seeks more favorable treatment for itself than is accorded the forum state. See *Head v. Platte County*, 242 Kan. 442, 448, 749 P.2d 6 (1988)

27 ⁴¹ 349 U.S. 408 (1955).

28 ⁴² See note 22, *supra*.

1 The FTB then asserts a due process argument, citing *Texaco, Inc. v. Pennzoil*.⁴³ But that
2 case is easily distinguished. In *Texaco* the company seeking to pursue an appeal would cease to
3 exist if it was required to post a bond, thus eliminating its chance to appeal. The FTB does not
4 assert that here. To the contrary, it represents it will have more than sufficient assets to satisfy
5 the judgment after the appeal. The FTB does not suggest that California will cease to exist if
6 required to post a bond.

7 The FTB's federal constitutional arguments therefore provide no basis for the relief
8 requested in this motion.

9 **D. The FTB is required to post a bond pursuant to an analysis of the factors set forth
10 in *Nelson v. Heer*.**

11 In *Nelson v. Heer*,⁴⁴ the court adopted five factors to consider in determining when a full
12 supersedeas bond may be waived and/or alternate security substituted: (1) the complexity of the
13 collection process; (2) the amount of time required to obtain a judgment after it is affirmed on
14 appeal; (3) the degree of confidence that the district court has in the availability of funds to pay
15 the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of
16 a bond would be a waste of money; and (5) whether the defendant is in such a precarious
17 financial situation that the requirement to post a bond would place other creditors of the
18 defendant in an insecure position. These factors are discussed in turn below. But as Rule 62
19 serves the dual protective role of establishing appellant's right to a stay and appellee's right to
20 have a bond posted, a full supersedeas bond should almost always be required.⁴⁵
21
22
23

24
25 ⁴³ 784 F. 2d 1133, 1154 (2d Cir. 1986) (reversed on other grounds). In fact, the United States Supreme Court
26 vacated the entire opinion of the Second Circuit finding the District Court should never have entertained the claims
regarding the posting of the bond to stay enforcement. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 17-18 (1987). The
FTB's citation to the Second Circuit opinion is therefore highly questionable.

27 ⁴⁴ 121 Nev. 832, 836, 122 P. 3d 1252, 1254 (2005).

28 ⁴⁵ *Hamlin v. Township of Flint*, 181 F.R.D. 348 (E.D. Mich. 1998).

1 (1) *The complexity of the collection process.*

2 The first *Nelson* factor is the complexity of the collection process. The FTB
3 disingenuously suggests that there is no evidence of "unusual complexity in the 'collection
4 process' in the present case." (FTB Motion, at 32:4-5.) Yet, elsewhere in its motion it explains
5 that to obtain satisfaction of the judgment, Hyatt will likely need a special appropriation passed
6 by the California legislature. There could hardly be a more complex and uncertain collection
7 process than that. In identical situations, federal courts have refused to grant a stay to a state
8 seeking to appeal an adverse judgment without the state posting a bond.

9 In *Lightfoot v. Walker*,⁴⁶ the Seventh Circuit required the State of Illinois to post a bond
10 to stay enforcement of a judgment obtained by prisoners who brought a civil rights action
11 challenging the health care system at one of the state prisons. The State of Illinois argued that it
12 should be excused from posting a bond because it had the financial ability to pay the \$700,000
13 judgment awarded the plaintiff.⁴⁷ The court equated that argument to a "*non sequitur*," stating
14 that the fact that Illinois had the wherewithal to pay was of no comfort to the plaintiff, given that
15 "the procedure for collecting a judgment against the state is not only cumbersome and time
16 consuming, but uncertain in outcome, since the judgment cannot be paid unless and until the
17 state legislature votes to appropriate the money necessary to pay it."⁴⁸ Another federal court
18 applied the same reasoning in requiring the State of South Carolina to post a bond, finding that
19 the cumbersome, complex, and timely process of collecting a judgment against the state created
20 an uncertainty as to the likelihood and manner of payment.⁴⁹

21 In California, as in Illinois and South Carolina, money to pay judgments comes from
22 state appropriations.⁵⁰ The FTB admits as much in its motion, but then suggests it also has its
23

24 ⁴⁶ 797 F.2d 505 (7th Cir. 1986).

25 ⁴⁷ *Id.* at 506.

26 ⁴⁸ *Id.* at 506.

27 ⁴⁹ *Southeast Booksellers Ass'n v. McMaster*, 233 F.R.D. 456 (D. S.C. 2006)).

28 ⁵⁰ See, e.g., *County of San Diego v. State*, 164 Cal.App.4th 580, 594 (2008).

1 own general fund for appropriations from which a judgment can be satisfied and thereby
2 attempts to distinguish the above cases. (FTB Motion, at 33:13-14.) But the Director of
3 Finance for the state of California testified during the punitive damages phase of the trial in this
4 case that the judgment would not be applied against the FTB's budget, *i.e.* general fund
5 appropriations, to satisfy the then verdict of the jury (\$138.1 million) for compensatory
6 damages,⁵¹ and this did not even account for the later awarded punitive damages and interest
7 (which now places the judgment at over \$490 million). The FTB will need a special
8 appropriation to satisfy the judgment in this case.

9 The FTB also cites *Dillon v. City of Chicago*,⁵² a case in which the Seventh Circuit did
10 not require the City of Chicago to post a bond. But the facts were completely inapposite. In
11 *Dillon*, the city had shown that previously appropriated funds were readily available; indeed, the
12 purpose of these funds was to enable the City to pay judgments without any substantial delay or
13 impediment. *Id.* In other words, the city demonstrated precisely where and how it would pay
14 the judge. No special appropriation was needed.

15 Further, the private party cases cited and discussed by the FTB have no application here.
16 The fact that a private party defendant has wealth in excess of an adverse judgment does not
17 address the difficulty and complexity of collecting a judgment against a government entity, and
18 in this case a government entity in a different state.

19 Finally, the FTB suggests that there is no reason to believe that Hyatt will be forced to
20 go through a "complex non-voluntary collection procedures to obtain his money." (FTB Motion,
21 at 32:10-11.) At least two significant facts belie the FTB's assertion. First, as detailed above,
22 when the FTB filed its motion in the District Court, Hyatt offered to stipulate that the FTB need
23 not post a bond to stay the judgment if it simply agreed the judgment after appeal would be
24 enforceable in California under the full faith and credit clause and the FTB assisted in having
25 the judgment satisfied. The FTB *refused the following stipulation*:

26
27 ⁵¹ Michael Genest trial testimony August 11, 2008, at pp. 145: 2-146: 24, 1 Hyatt Appendix at 7.

28 ⁵² 866 F.2d 902 (7th Cir. 1988).

[T]he FTB as an agency of the State of California will not oppose but instead will help facilitate, as expeditiously as possible and without any undue delay, any and all measures necessary to satisfy the Final Judgment, including without limitation facilitating any appropriation of funds from the State of California to satisfy the Final Judgment.

Secondly, the FTB now carefully words its motion to avoid saying it will seek an appropriation or take other measures necessary to satisfy the judgment once is appeal is complete. It refused to agree to do this in the District Court proceedings, and it refuses to categorically state to this Court that it will do so. It is clear that the FTB will fight the judgment from this Nevada Court even after the FTB exhausts its appeals. Under these circumstances, the FTB should not be accorded the privilege of staying enforcement of the judgment without posting a bond.

(2) *The amount of time required to obtain a judgment after it is affirmed on appeal.*

The second *Nelson* factor concerns the amount of time required to obtain a judgment after it is affirmed on appeal. For this factor, the FTB cites *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*,⁵³ where the court granted defendant's request for a stay absent a bond because the defendant could pay the full judgment without unusual delay. But the defendant, Milwaukee Metropolitan Sewerage District (MMSD), had submitted undisputed evidence that it had a balance of \$83.4 million in a fund maintained by the State of Wisconsin for payment of the much smaller judgment.⁵⁴ This investment fund enabled MMSD to pay the judgment within seven days and without any deliberation or legislative vote by MMSD or the State of Wisconsin. *Id.* Here, FTB has not submitted any evidence that a fund exists or that payment could be made in such a timely fashion. Most significantly, it refuses to commit to even seeking a legislative appropriation after it exhausts its appeal right.

Even then, the FTB cannot guaranty whether the California Legislature will actually make a special appropriation for the judgment. If, as appears to be the case, the FTB challenges

⁵³ 159 F.R.D. 509 (E.D. Wis. 1994).

⁵⁴ 159 F.R.D. at 512-13.

1 in California courts the full faith and credit stature of the judgment from this Nevada Court, it
2 seems unlikely that Hyatt will obtain swift and certain payment of the judgment when the FTB
3 exhausts its appeal in this Court. Hyatt's ability to obtain satisfaction of the judgment could
4 conceivable take years even after this Court completes its review of the judgment. Under these
5 circumstances, this second factor under *Nelson* strongly favors requiring the FTB to post a full
6 bond.

7 **(3) *The degree of confidence in the availability of funds to pay the judgment.***

8 The third *Nelson* factor relates to the degree of confidence in the availability of funds to
9 pay the judgment. There is no disputing the fact that the State of California has the financial
10 resources to pay the judgment here. With a net worth of \$47 billion, sufficient assets are
11 obviously available. But it is here that the FTB most clearly flaunts its intent to not pay the
12 judgment, or at least not cooperate in having it satisfied once this Court completes its review of
13 the judgment. The FTB contends that the issue is not whether the State of California will pay
14 the judgment, but only whether it has the means to pay it.

15 This is a silly interpretation of *Nelson*, particularly in this case involving a judgment
16 debtor that is a government entity for which a voluntary appropriation must be made to satisfy
17 the judgment. So what if California can pay the judgment if it never intends to do so
18 voluntarily? The fact that California could satisfy the judgment, but is unambiguously revealing
19 that, at least relative to the FTB, it will never do so voluntarily does not favor granting a stay of
20 enforcement of the judgment without a bond.

21 In short, this factor under *Nelson* has no application to this case unless consideration is
22 given to whether the public entity has indicated its willingness to satisfy the judgment upon
23 exhaustion of appeal rights.

24 **(4) *Whether the defendant's ability to pay the judgment is so plain that the cost of a bond
would be a waste of money.***

25 The fourth *Nelson* factor asks whether the defendant's ability to pay the judgment is so
26 plain that the cost of a bond would be a waste of money. The FTB argues that this factor is the
27 same as the third factor relative to ability to pay the judgment. (FTB Motion, 36:12-13.) The
28

1 FTB then complains of the asserted cost of a bond. The FTB's arguments fail here for the same
2 reasons the argument above fails. There is no assurance that the final judgment in this case will
3 be satisfied. The FTB could give this assurance by definitively stating that the judgment of this
4 Nevada Court will be given full faith and credit in California and a special appropriation will be
5 sought and supported by the FTB once this Court completes its review of the judgment. In the
6 absence of such an affirmation by the FTB, it makes little difference how much money the FTB
7 has or how much a bond will cost.

9 The FTB cites *Northern Indiana Public Service Co. v. Carbon County Coal Co.*,⁵⁵ where
10 the court held that plaintiff-appellant, a public utility company, was not required to post a bond
11 of \$181 million as a condition of obtaining a stay of execution of a damage judgment pending
12 its appeal. But the plaintiff, Northern Indiana Public Service Co., had assets of more than \$4
13 billion, annual revenues of almost \$2 billion, and a net worth of over \$1 billion.⁵⁶ The judgment
14 creditor in that case could freely execute on those assets once the appeal was complete. But it is
15 not at all clear that Hyatt will be able to execute on California's assets. The only certain way of
16 obtaining satisfaction of the judgment is a special appropriation from the California legislature,
17 an event that is far from assured.

19 The cost of the bond is a cost the FTB must bear only because of its absolute refusal to
20 provide assurances that the judgment will be satisfied once its appeal is exhausted. Again, the
21 FTB confirms it can pay the judgment, but also confirms that it will not do so and will not
22 cooperate in taking steps to ensure that Hyatt's final judgment is paid promptly. The cost of the
23 bond, whatever it is, does mitigate this failing by the FTB.
24

27 ⁵⁵ 799 F.2d 265 (7th Cir. 1986).

28 ⁵⁶ 799 F.2d at 281.

(5) *Whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.*

The fifth *Nelson* factor asks whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. The FTB misinterprets this factor, implying that its stable financial condition militates in favor of waiving a bond, when in fact the converse is true.

In *Olympia Equipment v. Western Union*,⁵⁷ plaintiff had been awarded \$36 million in the underlying antitrust action. The court held that a supersedeas bond need not be posted when the judgment was so large that the bond requirement would put defendant's other creditors in undue jeopardy.⁵⁸ The court further expressed its reluctance to execute on the judgment because of the possibility that Western Union would be forced into bankruptcy as a result.⁵⁹ Instead, the court affirmed the district court's provision for adequate alternative security in the form of cash, accounts receivables, and security interest.⁶⁰

But this factor is only relevant when a bond may force a bankruptcy filing. The factor has little if any relevance when that condition is not present. The FTB itself adopted the position that the State of California is *not* in a precarious financial condition. A bond on a \$490 million judgment is merely a drop in the bucket for the State of California, as the judgment itself only constitutes approximately 0.21 percent of California's total assets of \$183 billion. (Query how the FTB can complain about the cost of a bond given its admitted significant assets!)

Moreover, the fact that the State of California will not have to file bankruptcy if it is required to post a bond in this case has virtually no relevance in light of the FTB's failure to meet the other *Nelson* factors discussed above because it has failed and refused to provide assurance that it will satisfy the judgment once it exhausts its appeals rights.

⁵⁷ 786 F.2d 794 (7th Cir. 1986).

⁵⁸ *Id.* at 796.

⁵⁹ *Id.* at 799.

⁶⁰ *Id.*

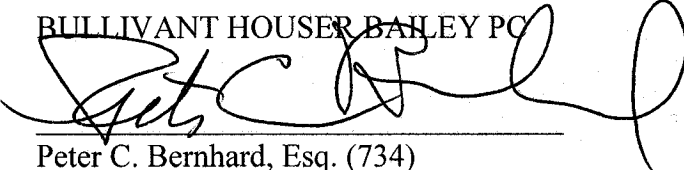
1 In all likelihood, unless the FTB is required to post a bond, Hyatt will have to expend
2 additional substantial resources over a protracted period of time trying to satisfy his judgment,
3 after this Court completes its review. Hyatt should not have to bear this risk. If the FTB wants
4 a stay of enforcement pending its appeal in this Court, despite refusing to recognize that
5 judgment from this Court will be subject to full faith and credit in California and refusing to
6 agree to assist in obtaining a legislative appropriation for the judgment, it must post a bond like
7 every other judgment creditor.

8 For all these reasons, the FTB's motion for a stay without posting a bond should be
9 denied.

10 Dated this 11 day of March, 2009.

11 HUTCHISON & STEFFEN, LTD.
12 Mark A. Hutchison, Esq. (4639)
13 Michael K. Wall (2098)
14 10080 Alta Drive
15 Suite 200
16 Las Vegas, Nevada 89145

17 BULLIVANT HOUSER BAILEY PC

18 
19 Peter C. Bernhard, Esq. (734)
20 3883 Howard Hughes Pkwy.
21 Suite 550
22 Las Vegas, Nevada 89169
23 (702) 669-3600

24 *Attorneys for Respondent Gilbert P. Hyatt*

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of **BULLIVANT HOUSER BAILEY PC** and that on this 14th day of March, 2009, I caused the above and foregoing document entitled **RESPONDENT GILBERT P. HYATT'S OPPOSITION TO APPELLANT'S MOTION FOR STAY PENDING APPEAL WITHOUT BOND** to be served as follows:

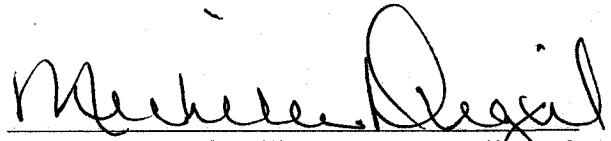
- ☒ [X] by placing same to be deposited for federal express mailing in the United States, in a sealed envelope upon which first class postage was prepaid in Las Vegas Nevada; and/or
- ☒ [X] by delivering same to a commercial carrier for delivery within 3 calendar days; and/or
- ☐ [] to be hand-delivered;

to the attorney(s) listed below at the address and/or facsimile number indicated below:

James A. Bradshaw, Esq.
Patricia Lundvall, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street
10th Floor
Reno, NV 89501

Jeffrey Silvestri, Esq.
McDonald Carano Wilson LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102

Robert L. Eisenberg
Lemons, Grundy & Eisenberg
6005 Plumas Street, Suite 300
Reno, NV 89509


An employee of Bullivant Houser Bailey PC