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9  
10 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

11 \* \* \* \*

12 **FRANCHISE TAX BOARD OF THE**  
13 **STATE OF CALIFORNIA,**

14 **Appellant,**

15 **v.**

16 **GILBERT P. HYATT,**

17 **Respondent.**

Case No.: 53264

**OBJECTION BY RESPONDENT GILBERT  
P. HYATT TO APPELLANT'S REQUEST  
TO FILE REPLY IN SUPPORT OF  
MOTION FOR STAY PENDING APPEAL  
WITHOUT BOND**

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1       **1. Introduction.**

2           Respondent Gilbert P. Hyatt submits this Objection to Appellant FTB's request for a  
3 Reply, in that the FTB's request is based on an inarguable misstatement of the record. The  
4 entire premise of the Request is that Hyatt's Opposition to the FTB's Motion for Stay Pending  
5 Appeal Without Bond cited to, quoted, and submitted documents that are purportedly not in the  
6 District Court record. This is absolutely false.

7           Not only are the subject documents in the District Court record, they were submitted by  
8 Hyatt as part of a filing seeking a continuance of the FTB's motion in the District Court seeking  
9 a stay without posting a bond. The FTB then filed a Response, even referencing the proposed  
10 stipulation. As a result, even if the FTB's repeated false statements in its current Request to this  
11 Court constitute a negligent error in its review of the record, Hyatt's objection should be  
12 sustained, and the FTB should not be allowed to file its proposed Reply in support of its current  
13 motion.

14           Further, the FTB uses its erroneous premise to re-argue every point in its motion, not  
15 simply to respond to the alleged new documents. These include rearguments regarding the size  
16 of the judgment, the cost of the bond premium, the complexities of the issues, the NRAP 8  
17 factors, comity, full faith and credit, due process, judicial estoppel, and the application of *Nelson*  
18 *v. Heer* factors. By using the "new arguments, new documents" issue as a cover, the FTB  
19 attempts to rebut Hyatt's opposition and to present additional arguments on issues it had fully  
20 briefed in its motion. This is a further basis to deny the FTB's request for a Reply

21           Moreover, if the Court allows the FTB's proposed Reply to be filed, Hyatt requests an  
22 opportunity to respond to the arguments in the FTB's proposed Reply.

23  
24       **2. The premise upon which the FTB requests a Reply Brief is false — the "new"**  
25 **documents complained of by the FTB are part of the District Court's record.**

26           Specifically in regard to the documents in question and the record before the District  
27 Court, the FTB filed its motion seeking a stay without a bond on September 30, 2008.<sup>1</sup> Hyatt

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<sup>1</sup> 2 FTB App. at 238.

1 filed his opposition on October 14, 2008.<sup>2</sup> The FTB filed a Reply on October 29, 2008.<sup>3</sup> In the  
2 FTB's Reply, FTB raised new issues not addressed in the FTB's moving papers and submitted  
3 three new affidavits asserting that Hyatt would seemingly have FTB's cooperation and be able  
4 to collect on a judgment in California, if and when the FTB appeal rights are exhausted.<sup>4</sup>

5 Hyatt wrote to FTB counsel one day after receiving FTB's Reply (October 30, 2008)  
6 seeking confirmation that the FTB "stipulates that any final judgment will be entitled to full  
7 faith and credit in California and that the FTB will facilitate the steps necessary to obtain  
8 satisfaction of any final judgment."<sup>5</sup> Later that day, Hyatt circulated a proposed stipulation.<sup>6</sup> If  
9 the FTB agreed to the stipulation, the motion seeking a stay without a bond would have been  
10 moot. But without such a stipulation, the FTB's new affidavits in its October 29, 2008 Reply  
11 would have gone unchallenged. Hyatt therefore immediately filed (on November 4, 2008) a  
12 motion with the District Court asking, both for a continuance of the hearing so Hyatt could have  
13 time to develop rebuttal for the new evidence submitted by the FTB and permission to file a  
14 Surreply to address this new evidence. A complete copy of this Hyatt motion and attachments  
15 (*filed in the District Court on November 4, 2008*) is submitted herewith.<sup>7</sup>

16 The October 30, 2008 letter and draft stipulation, which the FTB repeatedly represented  
17 were not part of the District Court record,<sup>8</sup> were attached to Hyatt's motion filed on November

18 \_\_\_\_\_  
19 <sup>2</sup> 2 FTB App. at 394.

20 <sup>3</sup> 2 FTB App. at 426.

21 <sup>4</sup> 1 FTB App. at 426-465.

22 <sup>5</sup> 1 Hyatt Appendix, Exhibit 1.

23 <sup>6</sup> 1 Hyatt Appendix, Exhibit 2.

24 <sup>7</sup> 1 Supp. Hyatt Appendix, Exhibit 8.

25 <sup>8</sup> The FTB makes the following statements in its Request and Proposed Reply: "Hyatt never submitted these  
26 documents to the district court during the proceedings in the court on the FTB's motion for a stay without a bond . .  
27 ." (FTB Request, at 1:25-26); [T]he district court record is devoid of any reference to these new matters . . ." (FTB  
28 Request, at 2:11-12); "Yet he fails to inform this court that he never submitted any of these documents to the  
district court." (FTB Proposed Reply, at 2:10-11); "withholding the documents at the district court level" (FTB  
Reply, at 4:4); and "Hyatt never brought the proposed stipulation to the district judge's attention . . ." (FTB  
Proposed Reply, fn 3, at 5:28). These are just a sampling of the FTB's misrepresentation regarding the subject  
documents.

1 4, 2008.<sup>9</sup> Moreover, and contrary to the FTB's statements in its Request and Proposed Reply,  
2 the stipulation was discussed, including the fact that it would obviate the need for the FTB's  
3 motion for a stay without a bond. Hyatt's November 4, 2008 motion for a continuance stated on  
4 pages 3 and 4:

5 Relative to the new evidence submitted by the FTB and new arguments by  
6 the FTB relative to the *Nelson* factors, the FTB's new evidence may  
7 provide a basis to resolve the Provisional Motion. The FTB's new  
8 affidavits seek to convince the Court that California can and will satisfy the  
9 final judgment in this action, since California will be *required* to  
10 appropriate the funds for the judgment once it becomes final. Hyatt  
11 therefore has asked the FTB to stipulate to this, *i.e.*, that upon exhaustion of  
12 the FTB's appeal rights, the FTB will not oppose enforcement but in fact  
13 agrees that the judgment is entitled to Full Faith and Credit under the  
14 United States Constitution, is backed by the Full Faith and Credit of the  
15 State of California, and the FTB will do all that is necessary to have  
16 California appropriate the funds to pay the final judgment. In return, Hyatt  
17 will agree and stipulate that he will not seek to execute on the judgment  
18 pending exhaustion of the FTB's appeal rights, so no stay is required, and  
19 the bond issue becomes moot.<sup>10</sup>

20 Further, the FTB filed a Response to Hyatt's motion (also on November 4, 2008) in  
21 which the FTB referenced the proposed stipulation and stated that a stipulation "is unlikely on  
22 the terms Hyatt has presently proposed."<sup>11</sup> Again, those terms were simply that the FTB need  
23 not post a bond to stay enforcement of the judgment in exchange for the FTB's agreement that  
24 the final judgment will be subject to Full Faith and Credit in California, and that FTB would do  
25 whatever was necessary to secure an appropriation to satisfy the judgment. The FTB's rejection  
26 of these terms demonstrates that it will not waive its rights to challenge this Court's final

27 <sup>9</sup> See Exhibits 1 and 2 to Hyatt's motion for a continuance filed in the District Court (1 Supp. Hyatt Appendix,  
28 Exhibit 8).

<sup>10</sup> 1 Supp. Hyatt Appendix, Exhibit 8.

<sup>11</sup> See FTB Response, fn 2, at 2:26-27 (1 Supp. Hyatt Appendix, Exhibit 9).

1 judgment and will likely argue in California courts that this Court's final judgment should not be  
2 accorded Full Faith and Credit status in California.

3 Further to this point, the FTB argues that the District Court did not have the draft  
4 stipulation and therefore it was not a factor in the District Court's decision denying the FTB's  
5 motion for a stay without posting a bond. As demonstrated above, the District Court did have  
6 the draft stipulation and did know that the FTB had rejected the terms of the stipulation, *i.e.*,  
7 FTB's refusal to concede that the judgment in this case must be accorded Full Faith and Credit  
8 status in California and that it would facilitate an appropriation to satisfy the judgment. While  
9 the stipulation was not referenced during the oral argument in the District Court, the District  
10 Court's comments in denying the FTB's motion can be interpreted as recognizing the FTB's  
11 refusal to enter into the proposed stipulation. Specifically, the District Court stated:

12 FTB's conduct throughout the audit process and this 10 year litigation *does*  
13 *not give this Court any reason to believe that payment to Mr. Hyatt will be*  
14 *swift if and when FTB loses this appeal.* Even as FTB attempts to reassure  
15 this Court of that fact, it raises doubts.<sup>12</sup>

16 **3. Conclusion: the FTB's Request should be denied.**

17 In sum, the "rogue" documents, as the FTB refers to them, were before the District Court  
18 in Hyatt's motion to continue the hearing on the FTB's motion for a stay without a bond. The  
19 District Court was aware that the FTB's Reply affidavits seemed to say that a final Hyatt  
20 judgment would be entitled to Full Faith and Credit and could be satisfied with an appropriation  
21 in California, but the FTB then steadfastly refused to so stipulate. Hyatt's Opposition filed in  
22 this Court therefore properly addressed this issue. The alleged absence of such materials in the  
23 district court record is simply untrue and provides FTB with no basis to ask for a Reply Brief in  
24 regard to its current motion.

25 Additionally, most of the FTB's proposed Reply goes far beyond the issue of Hyatt's  
26 proposed stipulation. Rather, the FTB's proposed Reply reargues many of the issues presented  
27 in its Motion and addresses Hyatt's other substantive arguments on the issues of comity,

28 <sup>12</sup> January 29, 2009 District Court hearing transcript, at 85 (1 Hyatt Appendix, Exhibit 3).

1 Constitutional considerations, and the *Nelson* factors. For all of these reasons, Hyatt  
2 respectfully objects to the FTB's Request to file a Reply. The FTB's Request should be denied.  
3

4 Dated this  /  day of April, 2009.  
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CERTIFICATE OF SERVICE

Pursuant to NPAP 25, I certify that I am an employee of BULLIVANT HOUSER  
BAILEY PC and that on this 1 day of April, 2009, I caused the above and foregoing  
document entitled **OBJECTION BY RESPONDENT GILBERT P. HYATT TO  
APPELLANT'S REQUEST TO FILE REPLY IN SUPPORT OF MOTION FOR STAY  
PENDING APPEAL WITHOUT BOND** to be served as follows:

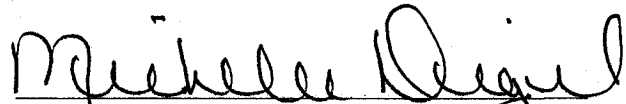
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- by delivering same to a commercial carrier for delivery within 3 calendar days; and/or
- to be hand-delivered;

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

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