

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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FRANCHISE TAX BOARD OF THE  
STATE OF CALIFORNIA,

Case No. 53264

Appellant/Cross-Respondent,  
vs.

**FILED**

GILBERT P. HYATT,

JUL 20 2009

Respondent/Cross-Appellant.

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

**MOTION FOR PERMISSION TO FILE AN OPENING BRIEF  
IN EXCESS OF THIRTY PAGES**

Pursuant to NRAP 28(g), appellant Franchise Tax Board of the State of California ("FTB") moves for permission to file a brief in excess of thirty pages – specifically 118 pages. This request exceeds the rule's thirty page limitation, but this case is sufficiently extraordinary and compelling to justify the additional length.

This is an appeal from a judgment on a jury verdict against FTB in an amount in excess of \$490 million. FTB is a state agency responsible for administering and enforcing California's personal income tax laws. This lawsuit arose out of an investigation of respondent Gilbert Hyatt by FTB; income tax and fraud assessments made at the conclusion of that investigation; and the administrative appeal of those assessments. The assessments related to Hyatt's contention that he changed residency from California to Nevada shortly before he received millions of dollars in income. Hyatt challenged the assessments through FTB's administrative process in California, and he also filed suit against FTB in Nevada. Hyatt sought declaratory relief concerning

his residency and he alleged FTB committed several torts -- including invasion of privacy and fraud -- during FTB's investigation, FTB's analytical process which lead to his assessments, and his subsequent administrative appeal.

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09-17722

1 This case must surely be recognized as an extremely important case, not just  
2 because of the size of the judgment, but also because the appeal raises important legal  
3 issues that have statewide and national significance. The appeal involves the  
4 interrelationship between our State and a sister state, California. Any decision related to  
5 this case will have wide-ranging consequences on the harmonious relationship between  
6 our two states, as well as upon the ability of any state agency, whether Nevada,  
7 California, or elsewhere, to conduct extraterritorial investigations without exposing itself  
8 to vast tort liability.

9 This \$490 million judgment includes damages of \$52 million for invasion of  
10 privacy, \$85 million for emotional distress, \$250 million for punitive damages, more  
11 than \$1 million for attorneys fees as special damages, and approximately \$102 million in  
12 prejudgment interest. The verdict was reported to be the fourth largest jury verdict in the  
13 United States for 2008. See VerdictSearch, Top 100 Verdicts of 2008 24-25 (2009).

14 The sheer size and volume of the appellate record is unparalleled. The litigation  
15 proceeded for ten years prior to reaching trial. During this time, there were three  
16 separate petitions for extraordinary relief filed with this court, and one appeal taken to  
17 the United States Supreme Court. See Franchise Tax Board v. Eighth Judicial Dist. Ct.,  
18 Nos. 35549, 36390 and 47141; Franchise Tax Board v. Hyatt, 538 U.S. 488, 499 (2003).  
19 The nationwide importance of this case is demonstrated by the fact that more than three  
20 dozen states and territories participated as amicus curiae in the United States Supreme  
21 Court case in 2003; and in the present appeal, amicus curiae participation has been  
22 requested by numerous state Attorneys General, as well as the Multistate Tax  
23 Commission (whose members consist of 47 states and the District of Columbia).

24 The pretrial activities were colossal. In all, 154 witnesses were deposed -- most  
25 lasting several days. By the close of discovery, over 168,000 documents had been  
26 exchanged. A review of the docket sheet reveals over 2,300 docket entries, which  
27 included the filings for 23 dispositive motions and 60 motions in limine -- not to  
28 mention dozens of discovery and other pretrial motions. The trial, which lasted four

1 months (74 trial days) was complicated. During three phases of trial, including two  
2 phases dealing with punitive damages, more than 50 witnesses testified and thousands of  
3 pages of trial exhibits were admitted, including one important exhibit that was itself  
4 3,470 pages in length, constituting 18 volumes in the appendix. The trial transcript is  
5 approximately 13,000 pages. After the trial, FTB filed several motions seeking relief  
6 from the numerous errors that occurred at trial. Post-trial briefing by the parties  
7 consisted of hundreds of additional pages of court filings, with lengthy hearing  
8 transcripts.

9 The factual background of this case is unique, complicated and intricate -- with a  
10 distinct possibility of confusion if the factual background is not recited in great detail in  
11 the opening brief. The appellate issues presented in the proposed opening brief also  
12 involve unusual, complex and sophisticated interrelated legal issues, including the  
13 application of an entirely new body of case law in Nevada related to discretionary  
14 function immunity, and several issues of first impression related to multiple intentional  
15 tort claims. See FTB's Docketing Statement. Review of these issues requires the  
16 analysis and overlay of both Nevada and California law, further complicating the appeal.  
17 Other issues include important questions arising out of the United States Constitution --  
18 questions that will have national significance.

19 In its Docketing Statement, FTB identified approximately 44 separate appellate  
20 issues -- not including potential subparts. After several months of painstaking work,  
21 FTB and its counsel have diligently worked to narrow the number of issues presented in  
22 its opening brief to only those issues that are either: (1) dispositive of the entire case; (2)  
23 dispositive of specific claims; or (3) seek the vacatur or, at a minimum, remittitur of the  
24 various damage awards, or a new trial. FTB and its counsel have been forced to abandon  
25 issues related to improper evidentiary rulings and jury instructions, except to the extent  
26 those issues demonstrate the dispositive issues. The appendix has been cut as much as  
27 possible, but with the length of the trial transcript and the other lengthy district court  
28 papers, the appendix is still 93 volumes.

1           The issues presented in the brief go to the heart of the litigation and viability of  
2 the \$490 million judgment. To properly analyze these issues requires a thorough  
3 analysis of substantial factual issues and accompanying procedural history. For  
4 example, in order to properly analyze the dispositive issue related to discretionary  
5 function immunity, this court's recent decisions changing the law on this subject require  
6 a painstaking analysis of all of FTB's conduct, activity and decisions involving Hyatt,  
7 which were put at issue by Hyatt. It also requires a full explanation and analysis of the  
8 state policies, as expressed in California's statutory laws and regulations, underlying  
9 those decisions. The unusual and complicated procedural history before this court and  
10 the United States Supreme Court is highly relevant to that analysis. The remainder of  
11 the legal issues, several of which are issues of first impression for this court, equally  
12 require a thorough explanation and analysis of the legal authorities that are at issue, as  
13 well as the application of those authorities to the facts of this case.

14           Extraordinary cases can justify long briefs. The additional pages requested are  
15 warranted when this case and the scope of the record is compared with other cases in  
16 which courts have permitted appellate briefs in excess of page limitations. For example,  
17 in Evans v. State, 117 Nev. 609, 642, 28 P.3d 498 (2001), this court allowed the  
18 appellant to file an opening brief 120 pages in length, where there were numerous  
19 appellate issues, including issues dealing with statutory applications and constitutional  
20 law. See also McConnell v. Federal Election Com'n, 539 U.S. 938 (2003) (complex  
21 election case; Solicitor General allowed to file 140-page brief); Penry v. Texas, 515 U.S.  
22 1304 (1995) (noting that appellant's brief in state appellate court was 375 pages long,  
23 and state's brief was 248 pages long); Fusari v. Steinberg, 419 U.S. 379, 390 (1974)  
24 (Burger, C.J., concurring; noting that appellee's brief was 122 pages long in complex  
25 case involving constitutional issues relating to eligibility for unemployment  
26 compensation benefits).

27           FTB is aware that this court limited the opening brief to 80 pages in Hernandez v.  
28 State, 117 Nev. 463, 468, 24 P.3d 767 (2001). In that case, however, the district court

1 docket shows that the trial lasted only six days, the trial transcript was only 700 pages,  
2 and there were only 20 motions filed during the six-months of pretrial activity. See  
3 Blackstone, Docket Sheet, Case No. 99-C-162952-C. Hernandez pales in comparison to  
4 the present case.

5 Accordingly, based upon the sheer size of the record in this case and seriousness  
6 of the interstate, constitutional issues presented in this case, FTB respectfully submits  
7 that its request to file an opening brief of 118 pages is reasonable under the  
8 circumstances.

9 Counsel for FTB has spent a great deal of time editing the brief to every extent  
10 possible to reduce it to the shortest possible length. For example, we have summarized a  
11 17-year history of background events and litigation in only 30 pages in the brief. We  
12 have eliminated legitimate appellate issues, and we have cut and edited the remaining  
13 arguments in the brief as much as possible. We respectfully submit that further cutting  
14 of the brief will affect its quality and the legal and factual analysis contained therein. In  
15 fact, any additional reductions will require the complete abandonment and waiver of  
16 significant dispositive legal issues.

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The judgment in this case is nearly a half-billion dollars. If affirmed, it will have a tremendous impact on the citizens of California, in addition to its nation-wide precedential impact. For the reasons discussed above, FTB respectfully requests permission from the court to file Appellant's Opening Brief, which is submitted concurrently with this motion.

Dated this 20th day of July, 2009.

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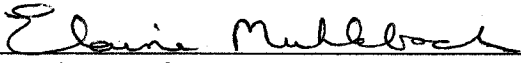
1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25, I hereby certify that I am an employee of McDonald  
3 Carano Wilson LLP, and that I served true and correct copies of the foregoing  
4 **MOTION FOR PERMISSION TO FILE AN OPENING BRIEF IN EXCESS OF**  
5 **THIRTY PAGES** on this 20th day of July, 2009 by depositing said copies with Federal  
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