

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2  
3 FRANCHISE TAX BOARD )  
4 OF THE STATE OF CALIFORNIA, )  
5 Appellant/Cross-Respondent, )  
6 vs. )  
7 GILBERT P. HYATT, )  
8 Respondent/Cross-Appellant. )  
9

No. 53264

Electronically Filed  
Aug 06 2009 03:30 p.m.  
Tracie K. Lindeman

10 **OPPOSITION TO RESPONDENT GILBERT P. HYATT'S (1) OPPOSITION TO MOTION BY**  
11 **MULTISTATE TAX COMMISSION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; (2)**  
12 **MOTION TO STRIKE AMICUS CURIAE BRIEF OF THE STATE OF UTAH; (3) MOTION TO**  
13 **STRIKE NOTICE OF CONCURRENCE**

14 This opposition is filed by and for CATHERINE CORTEZ MASTO, ATTORNEY  
15 GENERAL, through her SOLICITOR GENERAL, C. WAYNE HOWLE, in response to the  
16 multi-faceted brief filed by RESPONDENT ROBERT HYATT, dated July 28, 2009.

17 Respondent's legal brief requests three items of relief from the Court: (1) that the  
18 Multistate Tax Commission's (MTC's) amicus brief be disallowed; (2) that the joint brief of  
19 seventeen states be stricken; and (3) that the Notice of Concurrence filed by the Attorney  
20 General be stricken.

21 Regarding the first two matters, the Nevada Attorney General concurs in the briefs filed  
22 by the States and the MTC. With regard to the third, the following additional points are made  
23 for the Court's consideration.

24 I. ATTORNEY GENERAL INVOLVEMENT IS APPROPRIATE.

25 Footnote 1 of Hyatt's brief suggests that there is something unusual in the role the  
26 State Attorney General takes by helping to bring forward the states' and MTC's amicus briefs.  
27 To the contrary, the Attorney General's involvement is entirely proper. Standing as local  
28 counsel for MTC and the states is in service to the State of Nevada. The Attorney General is  
well positioned to appreciate the potential effects this matter can have on the State. On a

1 daily basis she defends the State and its officers in civil litigation. Her duties include  
2 asserting, when appropriate, the immunities of the State.<sup>1</sup> As the official attorney, the  
3 Attorney General must articulate the limitations on the legislature's waiver of immunities, as  
4 set out in NRS 41.031 (no waiver of Eleventh Amendment protection), NRS 41.035(1)  
5 (punitive awards against State prohibited; tort awards capped at \$75,000), and elsewhere.

6 The views and interests of the MTC as well as the other states are congruent with  
7 Nevada's interest. A rule of liability, jurisdiction, or comity established in this case can affect  
8 every state. The fact that seventeen other states have expressed an interest in the present  
9 case speaks for itself to the seriousness of the issues.

10 Additionally, by serving as local counsel for the MTC and the various states, the  
11 Attorney General is not engaged in the private practice of law. Although not defined in  
12 chapter 228, elsewhere the term "private practice of law" is defined to mean "the performance  
13 of legal service, for compensation, for any person or organization except [the district  
14 attorney's] county and any other governmental agency which he has a statutory duty to  
15 serve." NRS 245.0435. There is no allegation here that the MTC is paying compensation for  
16 services, and in fact it is not. Therefore the Attorney General's service as local counsel for the  
17 MTC is not the private practice of law. *Cf. Duval Ranching Co. v. Glickman*, 930 F.Supp. 469  
18 (D.Nev.1996).

19 Additionally, Attorneys General routinely assist each other by service as local counsel.  
20 States and state officers are often sued in other states, and sister states on frequent occasion  
21 assist with *pro hac vice* appearance. See e.g. Order approving *pro hac vice* appearance of  
22 Nevada counsel through California Attorney General's Office in *Beckner v. United States and*  
23 *Judge Susan Beckner*, Case no. CV08-7504 AG (JWJ) (Cent. Dist. Cal.). Exhibit 1.

## 24 II. THE ATTORNEY GENERAL FREQUENTLY APPEARS AS AMICUS.

25 The Attorney General's function as amicus is a tradition of longstanding in American  
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27 <sup>1</sup> See e.g. *Nevada v. Hall*, 440 U.S. 410 (1979), *Nevada v. Hicks*, 533 U.S. 353 (2001),  
28 *Nevada v. Hibbs*, 538 U.S. 721 (2003).

1 jurisprudence. “[The authority of] the Attorney General . . . is broad and inclusive enough . . .  
2 to appear as amicus curiae before the United States Supreme Court in cases which may  
3 directly or indirectly impact upon state functions or administrative procedures and operations.”  
4 *Young Americans For Freedom v. Gorton*, 588 P.2d 195 (Wash. 1978).

5 The singular position of the Attorney General to make known important views about the  
6 role of government is reflected in the practice of the U.S. Supreme Court, which frequently  
7 calls for the views of the Solicitor General. See David C. Thompson, *An Empirical Analysis of*  
8 *Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the*  
9 *Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237 (2009).

10 Finally, the Nevada Attorney General in this State has a longstanding tradition of  
11 amicus appearances. See e.g. *In re Report of Ormsby County Grand Jury*, 74 Nev. 80, 322  
12 P.2d 1099 (1958), *McCormick v. Sixth Judicial Dist. Court*, 69 Nev. 214, 246 P.2d 805 (1952),  
13 *Bopp v. Lino*, 110 Nev. 1246, 885 P.2d 559 (1994), *Ford Motor Credit Co. v. Crawford*, 109  
14 Nev. 616, 855 P.2d 1024 (1993).

15 Thus the role of amicus is an essential part of the Attorney General's function. The  
16 Office has every intention of fulfilling the requirements of representation required by SCR 42,  
17 and is fully capable of assessing the potential for conflict.

18 III. THE INTEREST OF THE ATTORNEY GENERAL AND AMICI IN THIS CASE IS  
19 PARTICULARLY HIGH.

20 This case is no ordinary tort action. It is a crucible of intersecting vital governmental  
21 interests. New law almost inevitably will be made, federalism law that has its incipency in  
22 *Nevada v. Hall*, 440 U.S. 410, State tort and immunity law as recently evolved in *Martinez v.*  
23 *Maruszczak*, 123 Nev. 433, 168 P.3d 720, 728 (2007). The Nevada Attorney General would  
24 be remiss to stand by in silence.

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**CONCLUSION**

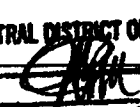
The Court would be well served by the articulation of the interests of the states and the MTC. The Attorney General is fully within her authority to present these views for the Court's consideration. Therefore, respectfully, the Motion to Strike the Attorney General's Concurrence should be denied.

Respectfully submitted this 6th day of August 2009.

CATHERINE CORTEZ MASTO,  
Attorney General for the State of Nevada  
By: /s/ C. Wayne Howle  
C. Wayne Howle  
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**EXHIBIT 1**

**EXHIBIT 1**

LODGED  
CLERK, U.S. DISTRICT COURT  
FEB 23 2009  
CENTRAL DISTRICT OF CALIFORNIA  
BY  DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FILED  
CLERK, U.S. DISTRICT COURT  
FEB 25 2009  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

GLENN ELLIOTT BECKNER, individually,  
Plaintiff(s)  
v.  
UNITED STATES, a corporation, et al.  
Defendant(s).

CASE NUMBER  
CV08-7504 AG (JWJ)

ORDER ON  
APPLICATION OF NON-RESIDENT  
ATTORNEY TO APPEAR IN A SPECIFIC  
CASE

The Court, having reviewed the accompanying Application of C. Wayne Howle,  
*Applicant-s Name*

of St. of Nevada Office of the Attorney General, 100 N. Carson St., Carson City, NV 89701  
*Firm Name / Address*

775-684-1227  
*Telephone Number*

WHowle@ag.nv.gov  
*E-mail Address*

for permission to appear and participate in the above-entitled action on behalf of Defendant Judge Janet Johnson  
and the designation of Joel A. Davis, Supervising Deputy Attorney General, CA Bar No. 109290  
*Local Counsel Designee / State Bar Number*

of California Department of Justice, 300 S. Spring Street, Los Angeles, CA 90013  
*Local Counsel Firm / Address*

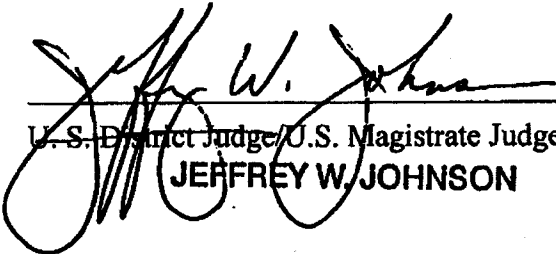
213-897-2130; Calnet: 8-647-2130  
*Telephone Number*

Joel.Davis@doj.ca.gov  
*E-mail Address*

as local counsel, hereby **ORDERS** the Application be:

- G GRANTED
- G DENIED. Fee, if paid, shall be returned by the Clerk.

Dated February 25, 2009

  
U.S. District Judge / U.S. Magistrate Judge  
**JEFFREY W. JOHNSON**

**ORIGINAL**

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of this Opposition to Respondent Gilbert P. Hyatt's (1) Opposition to Motion by Multistate Tax Commission for Leave to File *Amicus Curiae* Brief; (2) Motion to Strike *Amicus Curiae* Brief of the State of Utah; (3) Motion to Strike Notice of Concurrence were served on the following counsel of record this 6th day of August, 2009, by first class mail, postage pre-paid to the addresses show below:

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