

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent,

vs.

GILBERT P. HYATT,

Respondent/Cross-Appellant.

No. 53264

FILED

AUG 07 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

APPEAL FROM JUDGMENT – EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

* * * * *

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION
IN SUPPORT OF APPELLANT/CROSS RESPONDENT FRANCHISE
TAX BOARD OF THE STATE OF CALIFORNIA

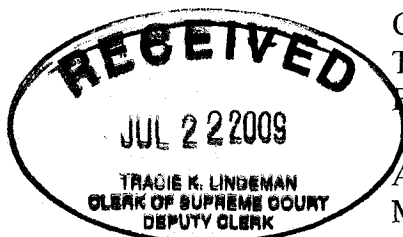
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09-17945

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1 I. INTERESTS OF *AMICUS CURIAE*

2 This brief is submitted by *amicus curiae* Multistate Tax Commission in support
3 of Appellant/Cross-Respondent the Franchise Tax Board of the State of California (“the
4 State of California” or “the FTB”). The Commission files this brief to express concern
5 with certain aspects of the lower court’s proceedings in this matter. The Commission
6 appreciates that the courts of Nevada have struggled over a period of ten years to
7 accommodate the competing interests of allowing Plaintiff and Respondent/Cross-
8 Appellant Gilbert P. Hyatt (“Hyatt”) a venue for his tort claims in Nevada, while
9 attempting to preserve California’s exclusive jurisdiction to administer its tax laws. The
10 Commission respectfully submits, however, that to the extent Hyatt was permitted to
11 argue that California’s assessment of taxes was not fair or impartial, those competing
12 interests could not have been accommodated in the Nevada trial court.

13 Simply put, damages cannot be awarded for the “unfair” assessment of taxes
14 without also determining the merits of the underlying liability for taxes and penalties.
15 The trial court proceedings in this matter have thus directly interfered with the
16 administration and enforcement of another state’s tax laws. Such interference is
17 inimical to the principles of federalism and comity, which are the necessary
18 cornerstones for the States’ continued ability to fairly tax income earned within their
19 borders by multi-jurisdictional taxpayers. For that reason, the Commission urges this
20 court to set aside the verdict in this case and to either dismiss the case in its entirety or
21 to allow a remand for a trial strictly limited to any issues which can be heard in the
22 Nevada courts without intruding on California’s sovereignty rights.

23 The Commission is the administrative agency for the Multistate Tax Compact
24 (“Compact”), which became effective in 1967. *See* RIA All States Tax Guide ¶ 701 *et*
25 *seq.*, (2005).¹ Today, forty-seven states and the District of Columbia are members of
26
27

28 ¹ The validity of the Compact was upheld in *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978).

1 the Commission. Twenty states have legislatively established full membership. Seven
2 additional states are sovereignty members and twenty-one are associate members.²

3 The purposes of the Compact are: (1) facilitation of proper determination of state
4 and local tax liability of multistate taxpayers, including equitable apportionment of tax
5 bases and settlement of apportionment disputes; (2) promotion of uniformity or
6 compatibility in significant components of tax systems; (3) facilitation of taxpayer
7 convenience and compliance in the filing of tax returns and in other phases of tax
8 administration; and (4) avoiding duplicative taxation. *See* Compact, Art. I.

9 The Compact arose as a result of threatened federal legislation that would have
10 imposed significant limitations on state taxation of interstate commerce. *See, e.g.,* H.R.
11 Rep. No. 89-952, Pt. VI, at 1143 (1965). The promise of increased uniformity
12 established by the States' adoption of the Compact was critical to preserving the
13 recognized sovereignty the states enjoyed, and continue to enjoy, with respect to
14 taxation of interstate commerce. Preserving state tax sovereignty under our vibrant
15 federalism was the primary purpose of the Compact and continues to be the key goal for
16 the Commission.

17 The Commission's primary motivation in filing this brief arises from its mission
18 of preserving our system of federalism, which demands that states respect one another's
19 sovereignty interests and policy determinations.³ Those sovereignty interests are

20 ² This brief is filed by the Commission, not on behalf of any particular member state other
21 than California. Compact Members are: Alabama, Alaska, Arkansas, California, Colorado,
22 District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New
23 Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. Sovereignty
24 Members: Georgia, Kentucky, Louisiana, Maryland, New Jersey, West Virginia and Wyoming.
Associate Members: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine,
Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio,
Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont and Wisconsin.

25 ³ The Commission also has an interest in this case because Article VIII of the Compact
26 grants authority to the Commission to conduct multistate audits of taxpayers on behalf of
27 participating states. The Commission sends auditors into virtually every state as a regular part
28 of its duties. The Commission's audits are conducted in compliance with the applicable laws
and procedures of its member states. The Commission is naturally concerned that the trial
court in this matter allowed the jury to make *ad hoc* determinations of the standard of care
applicable to audit practices that conflicted with established law and practice.

1 undermined where the court of one state casts judgment on the discretionary actions and
2 policy determinations of an agency of another state. The interests of the States in
3 pursuing their policy decisions within their own borders are especially strong in the
4 field of tax policy, since "taxes are the lifeblood of government." *Bull v. United States*,
5 295 U.S. 247, 259 (1935). States have a right to set their tax policies, including audit
6 policies and procedures, without the threat of unjustified interference from courts sitting
7 in other states, just as surely as the States expect the federal government to respect their
8 sovereign interests in pursuing non-discriminatory tax policy. *See, e.g., Fair*
9 *Assessment in Real Estate Assoc., Inc v. McNary*, 454 U.S. 100 (1981)(declining, under
10 principles of comity, to allow claims arising from state tax disputes to be heard in
11 federal court). While the State of Nevada has a legitimate interest in providing its
12 citizens with an avenue of redress for torts committed within its borders, those interests
13 do not extend to challenging the tax liability determinations made by another state's tax
14 agency.

15 The Commission is also concerned that the decision in this case, should it be
16 affirmed, will encourage collateral attacks on state tax proceedings, threatening the
17 principle of voluntary compliance and self-reporting upon which all states depend. A
18 fully functioning audit, assessment, and administrative review capability is critical to
19 maintaining the public's confidence in the voluntary compliance system. Allowing
20 juries to collaterally attack tax determinations and administrative processes by
21 challenging the motivations of tax officials would impede tax administration and would
22 quickly erode the voluntary compliance system.

23 Because comity is so important to the functioning of a tax system with
24 overlapping jurisdiction over taxpayers, the Commission is especially concerned that
25 the trial court in this case failed to heed those comity concerns in allowing the punitive
26 damages claim to be heard by the jury. A jury award intended to punish the government
27 (and hence citizens) of another state would be inconsistent with the principles of comity
28

1 and federalism, particularly where, as here, the State of Nevada provides its own
2 government with immunity from such damages.

3 The Commission believes that Hyatt's limited interests in adjudicating these tort
4 claims in Nevada were far outweighed by these considerations of comity and
5 federalism, which counsel that such claims should only be heard to the extent Nevada
6 would allow such opportunities for redress against itself.

7 II. SUMMARY OF ARGUMENT

8 Ten years ago, the first trial judge in this case properly held that matters relating
9 to the Plaintiff's tax liability could not be litigated in the courts of Nevada under
10 principles of exhaustion of remedies and comity, since the matter of tax liability was
11 then pending before California's administrative tax tribunals. Although that ruling was
12 never challenged or overturned, the trial that did occur related almost entirely to claims
13 that the State of California wrongfully assessed taxes against Hyatt. The jury was asked
14 to do the impossible: simultaneously render a verdict on the FTB's fairness and
15 impartiality in assessing taxes without also considering whether those taxes were owed.
16 Thus, for instance, the jury was improperly allowed to impose damages for emotional
17 distress arising from an assessment of taxes that may be entirely correct. So too, the
18 jury was improperly allowed to award damages for "privacy torts" based on entirely
19 lawful and ordinary audit activities, including a claim that the FTB had "falsely"
20 portrayed Hyatt as owing taxes when the FTB attempted to verify information Hyatt had
21 previously provided.

22 With respect to the award of punitive damages, the State of California should
23 have been afforded the same protections which Nevada affords to its own government.
24 The failure to do so contradicts this court's previous decision applying principles of
25 comity and federalism.

26 Although Hyatt has a limited right to choose his preferred forum for pursuing his
27 tort claims, where those claims require the adjudication of matters outside the
28

1 competency of a Nevada jury to decide, the proper solution under principles of comity
2 and federalism is to dismiss the case in its entirety, so that Hyatt may pursue all of his
3 claims in California, or to remand for a trial in Nevada limited to claims which do not
4 interfere with California's ability to administer its tax laws.

5 III. ARGUMENT

6 POINT I

7 WHERE THE TRIAL COURT PREVIOUSLY DECIDED AS A MATTER OF
8 COMITY THAT IT HAD NO JURISDICTION OVER THE ISSUE OF HYATT'S
9 TAX LIABILITY, AND THAT RULING WAS NOT APPEALED, IT WAS ERROR
10 TO ALLOW HYATT TO LITIGATE CLAIMS THAT CALIFORNIA'S
11 ASSESSMENT OF TAXES WAS NOT FAIR OR IMPARTIAL

12 A. The Trial Court Should Have Abstained From Hearing a Challenge to a
13 Pending Tax Proceeding Under Exhaustion Principles Applicable to
14 Nevada Courts.

15 It is the established law in this case that issues of Hyatt's California tax liability
16 could only be litigated in the California courts. In 1999, the first district judge assigned
17 to this case ruled that, based on principles of comity, the Nevada courts did not have
18 subject matter jurisdiction over the issue of Hyatt's California tax liability which was
19 then being adjudicated in the California tax administrative system. *Transcript of*
20 *Hearing Dated April 7, 1999, Appellant's Appendix ("AA"), Vol. 2, pp. 357-419.*
21 Hyatt's first count seeking declaratory relief that he was not a resident of California was
22 accordingly dismissed. That ruling was not appealed by Hyatt when this matter was
23 heard by the Nevada Supreme Court in 2002 and became the law of the case. *See Hsu*
24 *v. County of Clark*, 123 Nev. 625, 173 P.3d 724, 728 (2007).

25 In holding that the trial court should have also dismissed Hyatt's claims sounding
26 in negligence, this court carefully distinguished Hyatt's intentional tort claims from the
27 issues surrounding the determination of tax liability, finding that the claims as then
28 presented were "separate from the administrative proceedings, and [therefore] the
exhaustion doctrine does not apply." *California Franchise Tax Board v. Hyatt*, Nevada
Supreme Court, Docket No. 36930, *Order Granting Petition for Rehearing and*

1 *Vacating Previous Order, etc.*, (April 4, 2002)(“Second Hyatt Decision”), 5 AA 1183-
2 1196, p. 6.⁴ The lower court acted contrary to the jurisdictional contours previously
3 established in this case when it subsequently allowed Hyatt to challenge the sufficiency
4 of the evidence of his tax liability then being adjudicated in California.

5 Allowing a litigant to collaterally attack a pending administrative proceeding
6 inevitably interferes with that adjudication and invites inconsistent judgments. “When
7 acting as the forum for litigation having multistate aspects or implications [the court
8 must] respect the legitimate interests of other States and avoid infringement upon their
9 sovereignty.” *Allstate Insurance Co. v. Hague*, 449 U.S. 320, 322 (1981)(Stevens, J.,
10 concurring). This is the essence of the principle of comity, “under which the courts of
11 one state voluntarily give effect to the laws and judicial decisions of another states out
12 of deference and respect, and to promote harmonious interstate relations.” Second
13 Hyatt Decision, p. 7, citing, *Nevada v. Hall*, 440 U.S. 410, 424-27 (1978). In *Mianecki*
14 *v. Second Judicial District Court*, 99 Nev. 93, 658 P.2d 422, 424 (1983), this Court set
15 forth the standard for applying conflicts of laws under the Full Faith and Credit Clause
16 where both states grant different standards for governmental immunity:

17 ‘[t]he Full Faith and Credit Clause does not require a State to apply
18 another state’s laws in violation of its own legitimate public purpose.’ 440
19 U.S. at 424. Therefore, we must ascertain Nevada’s policies and
determine whether this state would permit itself to be sued if it had
engaged in the conduct assigned to Wisconsin in the present action.

20 There is no question that the courts of Nevada would not entertain a suit for
21 damages concerning a pending administrative action. The pendency of the
22 administrative proceedings renders the matter “non-justiciable.” *Mesagate*
23 *Homeowners’ Association v. City of Fernley*, __Nev.__, 194 P.3d 1248 (2008). In
24 *Allstate Insurance Company v. Thorpe*, 123 Nev. 565, 170 P.3d 989, 993 (2007) this
25 court wrote:

26
27
28 ⁴ The First Hyatt Decision, issued 6/13/01, ordered the dismissal of the entire case for
failure to state a claim. 5 AA 1063-1068.

1 a person generally must exhaust all available administrative remedies
2 before initiating a lawsuit, and failure to do so renders the controversy
3 nonjusticiable.” Indeed, “[t]he exhaustion doctrine gives administrative
4 agencies an opportunity to correct mistakes and conserves judicial
resources, so its purpose is valuable; requiring exhaustion of
administrative remedies often resolves disputes without the need for
judicial involvement.” [citation omitted]

5 In *Malecon Tobacco LLC v. State ex rel. Department of Taxation*, 118 Nev. 837,
6 839, 59 P.3d 474, 476 (2002), this court upheld the district court’s order dismissing a
7 suit challenging the constitutionality of assessed tax liabilities, finding that the
8 taxpayer’s arguments as to why it did not need to exhaust administrative remedies
9 “meritless.” Two exceptions to the exhaustion doctrine were recognized: (1) where the
10 facial constitutionality of a statute is challenged, and (2) where resort to the
11 administrative process would be futile. Neither exception applies in this case. *Cf.*,
12 *International Game Technology, Inc. v. Second Judicial District Court*, 122 Nev. 132,
13 127 P.3d 1088 (2006)(Attorney General properly exercised its discretion in preempting
14 “whistleblower” lawsuit for recovery of unpaid taxes, where legislature entrusted tax
15 matters to expertise of tax department to promote uniformity of enforcement and
16 administration.). Thus, the Nevada courts would not have entertained Hyatt’s suit to
17 challenge the fairness or impartiality of a pending administrative proceeding to
18 determine Nevada tax liabilities, and it should not have entertained an identical suit
19 brought against the State of California. Indeed, at this point the administrative hearing
20 officer for the State of California and a jury sitting in Nevada have rendered directly
21 opposite judgments about the same liability.⁵

22 As the Supreme Court has long recognized, comity principles play a critical role
23 in preventing inconsistent administration of taxing systems in our federal system. *Fair*
24 *Assessment in Real Estate Assoc., Inc v. McNary*, 454 U.S. 100 (1981). It was respect
25 for state sovereignty in tax matters that led to the passage in 1934 of the Tax Injunction

26 ⁵ The assessments against Hyatt, including the fraud assessments, were sustained in full by
27 the administrative hearing officer for the FTB. 92 AA 22939-229945. Hyatt has now appealed
28 that determination to the California State Board of Equalization. 93 AA 23182-23231.

1 Act, 28 U.S.C. § 1341. That statute codified the common law standard that constrained
2 federal courts from entertaining suits which might interfere with state tax
3 administration. In *McNary*, the Court noted that the Act was designed to prevent
4 taxpayers from delaying or interfering with the important state interests in resolution of
5 tax matters in their own forums. These interests are especially important because of the
6 complexity of state taxes and the expertise held in state tax courts. In holding that the
7 court-access policies underlying 42 U.S.C. § 1983 did not overcome the principles of
8 comity forbidding federal interference in state tax administration, the Court wrote:

9 This legislation, and the decisions of this Court which preceded it,
10 reflect the fundamental principle of comity between federal courts and
11 state governments that is essential to "Our Federalism," particularly in the
12 area of state taxation. See, e. g., *Matthews v. Rodgers*, 284 U.S. 521, 52
13 S.Ct. 217, 76 L.Ed. 447 (1932); *Singer Sewing Machine Co. v. Benedict*,
14 229 U.S. 481, 33 S.Ct. 942, 57 L.Ed. 1288 (1913); *Boise Artesian Water*
15 *Co. v. Boise City*, 213 U.S. 276, 29 S.Ct. 426, 53 L.Ed. 796 (1909). Even
16 after enactment of § 1341 it was upon this comity that we relied in holding
17 that federal courts, in exercising the discretion that attends requests for
18 equitable relief, may not even render declaratory judgments as to the
19 constitutionality of state tax laws. *Great Lakes Dredge & Dock Co. v.*
20 *Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943).

21 In arguments primarily addressed to the applicability of the Act,
22 petitioners contend that damages actions are inherently less disruptive of
23 state tax systems than injunctions or declaratory judgments... . We
24 disagree. Petitioners will not recover damages under § 1983 unless a
25 district court first determines that respondents' administration of the
26 County tax system violated petitioners' constitutional rights. In effect, the
27 district court must first enter a declaratory judgment like that barred in
28 *Great Lakes*. We are convinced that such a determination would be fully
as intrusive as the equitable actions that are barred by principles of
comity.

454 U.S. at 114.

The concerns expressed by the Court in *McNary* are equally applicable here,
although the comity principles are played out between co-equal states. The district
court in Nevada was placed in a position where, in order to determine whether a tort has
occurred, the jury was first required to determine Hyatt's tax liability.⁶ As the Court

⁶ The Court in *McNary* assumed that a federal district court, and not a jury, would be called upon to decide what is essentially a question of law, namely, the interpretation of a statute and its application to particular facts. Indeed, the right to a jury trial established by the 7th Amendment to the U.S. Constitution has been held not to extend to the initial determination of

1 noted in *McNary*; other federal courts have reached the same conclusion with respect to
2 litigating damages claims that arise out of tax assessments--it is impossible to litigate
3 those types of claims without also deciding the underlying issue of whether the taxes
4 were owed. The Court wrote:

5 For example, in *Advertiser Co. v. Wallace*, 446 F.Supp. 677, 680 (MD
6 Ala.1978), the court concluded that "[a]lthough perhaps less coercive than
7 anticipatory relief and less intrusive than a refund, the damage award
8 plaintiff seeks, especially its request for punitive damages, still is designed
to deter collection of the taxes now being assessed by defendants." And
the court in *Evangelical Catholic Communion, Inc. v. Thomas*, 373
F.Supp. 1342, 1344 (Vt. 1973), correctly stated:

9 'It is elementary that constitutional rights must be found to have been
10 abridged in order for damages to be recovered in a civil rights action.
11 Thus the plaintiffs in this action cannot recover damages without a
12 determination by this court that the taxation of their Newbury property
13 was effected in violation of their constitutional rights. If we were to make
14 such a determination, we would, in effect, be issuing a declaratory
judgment regarding the constitutionality of the tax levied on the plaintiffs.
As the court is prohibited from issuing such a declaratory judgment, ... the
court is also precluded as a matter of law from adjudicating the plaintiffs'
damages claims.'

15 In addition to the intrusiveness of the judgment, the very maintenance
16 of the suit itself would intrude on the enforcement of the state scheme. As
the District Court in this case stated:

17 'To allow such suits would cause disruption of the states' revenue
18 collection systems equal to that caused by anticipatory relief. State tax
19 collection officials could be summoned into federal court to defend their
20 assessments against claims for refunds as well as prayers for punitive
damages, merely on the assertion that the tax collected was willfully and
maliciously discriminatory against a certain type of property. Allowance
of such claims would result in this Court being a source of appellate
review of all state property tax classifications.'

21 454 U.S. at 115.

22 The U.S. Supreme Court subsequently extended the *McNary* rule to prohibit
23 injunctive and declaratory relief claims under Section 1983 to state court proceedings as
24 well, finding that, "an injunction issued by a state court is no less disruptive than one
25

26 tax liabilities, and this is also the law in most states, including Nevada and California.
27 *Wickwire v. Reinecke*, 275 U.S. 101 (1927); *Dorl v. Commissioner*, 507 F.2d 406 (2nd. Cir.
1974); *Sonleitner v. Sup. Court*, 158 Cal. App. 2d 258, 322 P.2d 496 (Cal. App. 1958); NRS
361.420; NRS 233B.135 (providing for district court review of tax commission
28 determinations).

1 entered by a federal court.” *National Private Tax Council, Inc. v. Oklahoma Tax*
2 *Commission*, 515 U.S. 582, 591 (1995). In *Perez v. Ledesura*, 401 U.S. 82, 128 (1971),
3 Justice Brennan wrote a dissenting opinion distinguishing the federal policy of non-
4 interference with tax administration from other types of declaratory relief:

5 The special reasons justifying the policy of federal non-interference
6 with state tax collection are obvious. The procedures for mass assessment
7 and collection of state taxes and for administration and adjudication of
8 taxpayers’ disputes with tax officials are generally complex and
9 necessarily designed to operate according to established rules. State tax
10 agencies are organized to discharge their responsibilities in accordance
with the state procedures. If federal declaratory relief were available to
test state tax assessments, state tax administration might be thrown into
disarray, and taxpayers might escape the ordinary procedural requirements
imposed by state law.

11 As the Court’s opinions make clear, the consideration of Hyatt’s “unfair
12 assessment” claims inevitably interfered with California’s right to adjudicate Hyatt’s tax
13 liability.

14 B. The Tort Claims Arising Out of the Tax Assessments Should Have Been
15 Dismissed Based on Discretionary Function Immunity Under Nevada
16 Law.

17 The Second Hyatt Decision primarily focused on the scope of immunity granted
18 to governments and their officials under Nevada and California law. Based on the
19 comity principle, this court properly held that because California granted its employees
20 immunity for negligent acts, and that immunity was consistent with Nevada’s immunity
21 for the discretionary acts of public officials (even if that discretion is abused), that the
“negligence” claims in the case should be dismissed. Second Hyatt Decision, pp. 7-8.⁷

22
23
24 ⁷ NRS 41.032 provides in pertinent part:

25 Except as provided in NRS 278.023 no action may be brought under NRS 41.031 or against
an immune contractor or an officer or employee of the state or any of its agencies or political
subdivisions which is:

26 * * * *
27 (2) Based on the exercise or performance or the failure to exercise or perform a
discretionary function or duty on the part of the state or any of its agencies or political
subdivisions or any office, employee or immune contractor of any of these, *whether or not the*
28 *discretion is abused.* (emphasis supplied).

1 In particular, this court held that an investigation is considered to be a
2 discretionary act, and thus subject to immunity, citing *Foster v. Washoe County*, 114
3 Nev. 936, 964 P.2d 788 (1988)(dismissing claims that county had improperly
4 investigated child abuse allegations). *Id.* While this court found that California's
5 absolute grant of sovereign immunity to tax officials was in conflict with the public
6 policy of Nevada, which did allow claims against the government for intentional torts,
7 nothing in the decision suggests that this court intended to allow claims which would
8 interfere with the FTB's administrative proceedings. The entire subject matter of the
9 assessment should be considered one of the discretionary functions of the State of
10 California which should have been immune from suit. In nearly identical
11 circumstances, this court dismissed claims against government agents that they abused
12 their discretion in making an adverse administrative determination out of malicious
13 intent. *Northern Nevada Association of Injured Workers v. Nevada State Industrial*
14 *Insurance System*, 107 Nev. 108, 807 P.2d 728 (1991). The plaintiff in that case
15 brought claims under 42 U.S.C. § 1983 and Nevada common law claiming that the
16 Nevada Industrial Insurance Commission had "maliciously" deprived him of his civil
17 rights by improperly evaluating the nature of his work-related injuries in bad faith. 807
18 P.2d at 729. This court held that NRS 41.032 provided *complete immunity* against
19 claims that the Commission failed to properly evaluate the facts in the case. There is
20 simply no way to square the holding in *Northern Nevada* with the trial court's
21 allowance of claims in this case that California failed to impartially evaluate the
22 conflicting evidence of Hyatt's tax liability.

23 Since the time of the Second Hyatt Decision, this court has further defined the
24 discretionary function immunity encompassed by NRS 41.032, adopting the federal
25 position, based on separation of powers principles, that a government's policy choices
26 cannot form the basis of a tort claim. *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d
27 720 (2007). Citing *U.S. v. Gaubert*, 499 U.S. 315 (1991), this court held that

1 discretionary act immunity applies to prohibit tort claims when government agents are
2 acting in a manner grounded in policy and not expressly prohibited by statute. 168 P.3d
3 at 728. The focus of the inquiry is not on the subjective intent of government
4 employees, but rather, on the policy nature of their actions. *Butler ex rel. Miller v.*
5 *Bayer*, 123 Nev. 450, 168 P.3d 1055 (2007). The discretionary function immunity has
6 been applied by this court to dismiss a suit claiming that a city engineer had
7 intentionally induced a bidder not to hire a subcontractor who had prevailed in a lawsuit
8 against the city out of spite, while the engineer asserted he had made the
9 recommendation because of prior work performance. *City of Boulder City v. Boulder*
10 *Excavating, Inc.*, __Nev. __, 191 P.3d 1175 (2008). And in *Ransdell v. Clark County*,
11 __Nev. __, 192 P.3d 756 (2008), claims that the city violated a property owner's rights
12 in determining whether its land constituted a nuisance were dismissed as a discretionary
13 function subject to immunity. *See also, ASAP Storage, Inc. v. City of Sparks*, 123 Nev.
14 639, 173 P.2d 734 (2007).

15 If the policy choices of Nevada government agencies cannot form the basis for
16 an intentional tort claim in Nevada, it follows under principles of comity that the policy
17 choices of California agencies also cannot form the basis of an intentional tort claim in
18 Nevada.

19 It cannot be seriously gainsaid that the determination of Hyatt's tax liability – a
20 discretionary function which was solely within the realm of California's tax
21 adjudication system – permeated every aspect of the trial below, including the award of
22 damages. Nowhere is the connection between Hyatt's tax liability and the basis for
23 damages more apparent than in the fourth claim for relief, "For Invasion of Privacy—
24 Casting Plaintiff in a False Light." Second Amended Complaint, 13 AA 3257, 3272.
25 This count alleges that confirming letters were sent to various references supplied by
26 Hyatt, not to establish his residency, but rather to "falsely portray" him as having
27 engaged in "illegal and immoral conduct", i.e., as having failed to pay taxes. *Id.* The
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1 letters which form the core evidence supporting this cause of action do not suggest that
2 Hyatt failed to pay his taxes.⁸ The letters certainly do not insinuate that Hyatt was a tax
3 cheat. But, if Hyatt did owe the taxes in question, it is hard to see how the letters could
4 have portrayed him in a false light. In order for the jury to award millions of dollars of
5 damages for this tort cause of action, it first must have found that Hyatt in fact had no
6 tax liability.

7 POINT II

8 THERE IS NO BASIS IN LAW FOR THE ASSESSMENT OF PUNITIVE
9 DAMAGES IN THIS CASE; ALLOWING SUCH DAMAGES IS CONTRARY TO
10 THE LAWS OF BOTH CALIFORNIA AND NEVADA AND VIOLATES THIS
11 COURT'S PREVIOUS COMITY DETERMINATIONS

12 The award of \$250 million in punitive damages in this case by a Nevada jury
13 against the government (and thus the people) of California offends basic principles of
14 intergovernmental relations under the United States Constitution. Allowing a jury to
15 consider how it should punish the citizens of another state on behalf of one of its own is
16 exactly the type of conflict which the delegates to the Constitutional Convention of
17 1787 intended to prevent, through adoption of the Full Faith and Credit Clause, U.S.
18 Const., Art. IV, § 1; the Privileges and Immunities Clause, Art. IV., § 2, cl. 1; the
19 Extradition Clause, Art. IV, § 2, cl. 2; the Commerce Clause, Art. I, § 3, cl. 8; the
20 Import-Export Clause, Art. I, § 10, cl. 2; and the Compacts Clause, Art. I, § 10, cl. 3.
21 Each of these elements of the constitutional framework of interstate relations is
22 designed to further the goal of interstate harmony and cooperation, by guaranteeing
23 respect for the laws of other states, by guaranteeing that the citizens of one state will
24 provide the same protections to the citizens of other states, and by guaranteeing that
25 states will not engage in economic protectionism against other states. *See generally*, 1
26 *The Federalist* 39 (No. 7, Hamilton, "On the Causes of War Between States")(1788),

27 ⁸ The letters ask individuals and business—often those identified by Hyatt as supporting his
28 Nevada residency claims—only to confirm basic information such as when Hyatt joined a club.
See, e.g., 63 AA 15896-97; 64 AA 15945; 64 AA 15990-93.

1 reprinted in, A. Hamilton, J. Hay & J. Madison, et. al., *Federalist and Other*
2 *Constitutional Papers* (E. Scott, Ed. 1898).

3 In the present case, a Nevada jury was asked to punish the citizens of California
4 in a manner which Nevada has determined it would not punish its own citizens. The
5 Commission thus respectfully urges this Court to set aside the award of punitive
6 damages against the State of California.

7 A. Punitive Damages Are Not Available Under Common Law Against
8 Governments, And Are Contrary to the Public Policy of Both Nevada And
California.

9 At common law, punitive damages were not and are not available against a
10 governmental body. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981);
11 *Accord, Vermont v. Stevens*, 529 U.S. 765 (2000). In addition, neither California nor
12 Nevada has waived its sovereign immunity from suit for such damages. Both states
13 explicitly provide by statute that punitive damages cannot be awarded against their
14 respective governments. In Nevada, NRS 41.031(1)(1995) provides in part: “[A]n
15 award for damages [against a public entity] in an action sounding in tort may not
16 include any amount as exemplary or punitive damages.” Similarly, California law
17 provides that: “Notwithstanding any other provision of law, a public entity is not liable
18 for damages awarded under Section 3294 of the Civil Code or other damages imposed
19 primarily for the sake of example and by way of punishing the defendant.” Cal. Gov’t
20 Code § 818.

21 The Franchise Tax Board submitted a motion for partial summary judgment on
22 January 1, 2006, seeking an order excluding punitive damages from this case because
23 the award of such damages would run contrary to the public policy of both states and
24 the common law. See *Clements v. Airport Authority*, 69 F.3d 321 (9th. Cir.
25 1995)(construing Nevada law); *Schultzen v. Woodbury Central Community School*, 187
26 F. Supp.2d 1099 (N.D. Iowa 2002) (reviewing history of punitive damages); See also,
27 *Annotation, Recovery of Exemplary or Punitive Damages Against Municipality*, 1 ALR

1 4th 448 (listing scores of cases holding that punitive damages are not recoverable)
2 (1980). The trial court denied the FTB's motion on March 14, 2006. The trial court
3 later declined to reconsider that decision in motions made after the "compensatory"
4 damages phase of the trial and on post-trial motions. Although the trial court was
5 required to make a preliminary determination of the basis for such damages, *Evans v.*
6 *Dean, Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000), it never issued any
7 written guidance, depriving this Court and the parties of any guidance as to its
8 reasoning.

9 In *City of Newport v. Fact Concerts, Inc.*, *supra*, the U.S. Supreme Court held
10 that municipalities could not be subjected to liability for punitive damages under the
11 federal civil rights statute authorizing suits against governments, 42 U.S.C § 1983. In
12 so holding, the Court made clear that the basis for its decision was that governments
13 were traditionally immune from punitive damages (absent a statutory waiver of that
14 immunity), and the drafters of the statute were presumed to have intended to carry over
15 that immunity into Section 1983, and the common law immunity continued to the
16 present day. 453 U.S. at 258. The Court held that a further inquiry into the policies
17 behind the rule was necessary since Section 1983 did intentionally abrogate some
18 common law immunities. *Id.* at 258-259. Those policy reasons included the fact that
19 the economic burden of punitive damages would be borne by innocent taxpayers, not
20 the tortfeasors, citing, *McGary v. President & Council of the City of Lafayette*, 12 Rob.
21 668, 674 (La.1846), and that the relationship of the officers of a municipality to its
22 citizens are different from the relationship of a corporate officer to its shareholders, as
23 the former are acting in the furtherance of a public purpose, while the latter are engaged
24 in a profit-making venture, citing *Hunt v. City of Boonville*, 65 Mo. 620 (1877). The
25 Court further noted that punitive damages serve no purpose in "equitably distributing
26 the losses resulting from [government] misconduct", as the awards do not represent
27 compensation for a loss at all. *Id.* at 265. In regards to retribution, "it remains true that
28

1 an award of punitive damages against a [government] punishes only the taxpayers, who
2 took no part in the commission of a tort.” *Id.* at 267. The Court saw no reason to
3 believe that low-level or even policy-making officials would be deterred from unlawful
4 conduct by the knowledge that punitive damages might be assessed “based on the
5 wealth of the municipality.” *Id.* at 269. In addition, the Court noted that public officials
6 are not merely motivated by concerns over the public treasury, but are “motivated by
7 concern for the Government’s integrity”, citing *Carson v. Green*, 446 U.S.14, 21
8 (1980). *Id.*

9 Finally, the Court noted that exposure to punitive damages “place the financial
10 integrity of governments in doubt”, since the range of permissible or required
11 government activity is so broad. The Court presciently anticipated that because the
12 wealth of a defendant is traditionally admissible in establishing the size of an award:

13 the unlimited taxing power of a municipality may have a prejudicial
14 impact on the jury, in effect encouraging it to impose a sizable award. The
15 impact of such a windfall recovery is likely to be both unpredictable and,
16 at times, substantial, and we are sensitive to the possible strain on local
treasuries and therefore on services available to the public at large.
Absent a compelling reason for approving such an award, not present
here, we deem it unwise to inflict the risk.

17 *Id.* at 271.

18 The Supreme Court’s concerns were vividly brought home by the verdict in this
19 case, where the jury was asked to establish the net worth of a sovereign state and urged
20 to use that net worth as its guide in punishing its 23 million citizens.

21 Nevada’s legislature and California’s legislature have of course already spoken
22 on the matter and similarly concluded that the dubious and uncertain deterrence effects
23 of an award of such damages are easily outweighed by the many policy arguments
24 standing against them.

25 B. Under the Law of the Case, Punitive Damages Should Have Been
26 Dismissed Based on the Principle of Comity Adopted by This Court.

27 In the Second Hyatt Decision, this Court held that where California law did not
28 conflict with the public policy of Nevada, it would give effect to California law under

1 principles of comity. *Id.* at 7-8. Both Nevada and California have identical laws and
2 public policies with respect to the imposition of punitive damages against state
3 governments: they are not allowed. It is clear that the U.S. Supreme Court also
4 understood that California would enjoy whatever immunities that Nevada allowed for
5 itself. *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 499 (2003). In *Nevada v. Hall*, 440
6 U.S. 410, 414 (1979), the Court held that comity does not require the forum state to treat
7 a sister government in its court system more favorably than it would treat itself. Hyatt's
8 counsel argued to the Court in *Hyatt* that *Nevada v. Hall* should not be revisited because
9 state courts already applied comity principles to ensure equal treatment of other
10 sovereigns:

11 Justice Stevens: "Do I understand, your comity argument basically
12 is...it's kind of a self-executing thing, because each time a state has to
13 answer a comity question, it asks the question, what would I do if the
14 tables were reversed? And as history teaches us, they generally treat the
other sovereign as they would want to be treated themselves...and that's
the rule that seems to have developed without any overriding
constitutional command order here.

15 Mr. Farr: "That's correct, Justice Stevens. And, in fact, they have
16 become more specific in applying comity in saying we treat the other
17 sovereign as we do treat ourselves, not just as how we want to be treated.
We are treating the other sovereign the way we treat ourselves."

18 Transcript of Oral Argument, available at: http://oyez.org/cases/2000-2009/2002/2002_02_42.

19
20 Although the Court did not recognize an exception to *Nevada v. Hall* for
21 "essential government functions" as California had urged, the Court left no doubt that a
22 state was not free to treat the sister government *less* favorably than it would treat itself
23 under the Full Faith and Credit Clause, U.S. Const., Art. IV, § 1. Citing *Carroll v.*
24 *Lanza*, 349 U.S. 408, 413 (1955), the Court made clear that failure to afford California
25 equal treatment would evidence "a hostility to the public acts of a sister government."
26 538 U.S. at 499.

1 The trial court erred when it failed to apply the comity principles outlined in this
2 Court's Second Hyatt Decision and in *Franchise Tax Board v. Hyatt, supra*. Failing to
3 afford California the same immunity from punitive damages which Nevada enjoys itself
4 would clearly treat California in a hostile manner.

5 C. No Compelling Reason Exists in This Case for Overturning the Common
6 Law And Ignoring Nevada Statutory Law.

7 Despite the clarity of the law of the case, Hyatt urged the trial court recognize a
8 new common-law right to impose punitive damages against a government, arguing that
9 without such damages, there would not be an adequate remedy available to Nevada
10 residents to prevent abuses of government power from foreign governments. 12 AA
11 2946-2948. Hyatt's argument in favor of upsetting 200 years of common law in this
12 case-- that only the imposition of punitive damages can prevent governmental abuse of
13 power--is wrong both legally and factually. First, the Nevada legislature has the ability
14 to set policy for actions taken within its borders, including establishing laws regulating
15 investigatory practices. It has not chosen to establish laws which vary from California's
16 in this regard. The federal government could also legislate in these areas were it
17 convinced that interstate tax audit procedures needed reform, as it did when it
18 established minimum standards for the privacy of motor vehicle and driver's license
19 records. *See Driver's Privacy Protection Act of 1994*, P.L. 103-322, *codified at*, 18
20 U.S.C. § 2721.

21 To obtain redress for these "tax liability evaluation" torts committed in
22 California, Hyatt could have chosen to pursue his remedies under California law in the
23 California courts. Despite appearing as a non-resident, the Privileges and Immunities
24 Clause guaranteed that he would have the same right of redress as any citizen of that
25 state.

26 Hyatt presumably could also have sued named officials acting in their individual
27 capacities for punitive damages under 42 U.S.C. § 1983 to the extent those officials
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1 deprived him of his rights (except as to tax-related claims). *Smith v. Wade*, 461 U.S. 30
2 (1983). But Hyatt would have been required to show that those officials knew that their
3 actions violated clearly established law, and that Hyatt suffered actual damage thereby.
4 *Butler ex rel. Miller v. Bayer*, 123 Nev. 450, 168 P.3d 1055 (2007); *Northern Nevada*
5 *Association of Injured Workers v. Nevada State Industrial Insurance System*, 107 Nev.
6 108, 807 P.2d 728 (1991). Hyatt has introduced no such evidence.

7 D. Hyatt's Punitive Damages Claims Against the Franchise Tax Board
8 Should Have Been Dismissed for Failure to State a Cognizable Claim.

9 Leaving aside the failure to follow this court's comity holding, the trial court
10 erred when it allowed Hyatt to proceed with his intentional tort claims against the FTB
11 as a person. That error prejudiced the FTB during the consideration of the case-in-chief
12 and also during the consideration of punitive damages. A properly pled cause of action
13 for intentional torts should have necessitated the introduction of evidence demonstrating
14 that named officials acted with malice against him in committing specific torts. *See,*
15 *e.g., City of Boulder City v. Boulder Excavating, Inc.*, __Nev. __, 191 P.3d 1175
16 (2008)(dismissing claims against city where no evidence showed that decision-maker
17 acted out of malice in refusing bids using subcontractor).

18 By allowing punitive damages claims against the FTB as a whole, instead of
19 requiring particularized allegations against named individuals, the trial court deprived
20 the FTB of the level of protection it would have been afforded in Nevada courts even as
21 a private employer engaged in a profit-making venture. In 1995, the Nevada legislature
22 significantly curtailed the liability of an employer for the acts of its agents or
23 employees.⁹ NRS 42.007 now provides that punitive damages can only be awarded
24 against an employer if: (a) the employer had advance knowledge of the employee's

25 _____
26 ⁹ Prior to 1995, Nevada followed the *Restatement (Second) of Torts*, § 909, which
27 limited the vicarious liability of a principal for the acts of its agents to situations where: (a) the
28 principal authorized the tortuous act, (b) the agent was unfit and the principal employed that
agent recklessly, (c) the agent was a manager acting in the scope of employment, or (d), the
principal ratified or approved the conduct. *See Smith Food & Drug Centers v. Belgrade*, 114
Nev. 602, 610, 958 P.2d 1208, 1214 (1998).

1 unfitness and employed him anyway in conscious disregard for the rights of others; (b)
2 the employer *expressly* authorized or ratified the wrongful conduct of the employee, or
3 (c) the employer was *personally* guilty of oppression, fraud or malice, express or
4 implied. (emphasis supplied). Failure to instruct a jury based on Nevada's punitive
5 damage law as set forth in NRS 42.007 is an abuse of discretion. *Countrywide Homes*
6 *Loans, Inc. v. Thitchener*, __ Nev. __, 192 P.3d 243 (2008). In this case, the trial court
7 gave no instruction as to the standards upon which the FTB could be held liable in
8 punitive damages for the alleged acts of its agents.

9 The employer in this case is the state of California. As a government, it is
10 presumed to be incapable of personally acting with malice; it can only act through its
11 employees. *City of Newport v. Fact Concerts*, *supra* at 261; *Cf.*, *ASAP Storage, Inc. v.*
12 *City of Sparks*, 123 Nev. 639, 173 P.3d 734, 747 (2007) ("governments, like
13 corporations, have no ability to act except through its agents/employees.") (Maupin,
14 C.J., concurring).

15 There was no testimony to suggest that the state employed unfit people with
16 conscious disregard of the rights of others; to the contrary, the FTB's auditors and their
17 supervisors were experienced and well-regarded. *See, e.g.*, 93 AA 23090-23126. As
18 for whether the state expressly ratified the wrongful conduct of others, without a jury
19 finding on this point the court can only speculate as to what particular conduct the jury
20 viewed as wrongful and how and whether the jury concluded that conduct was ratified
21 or approved by the state of California. For instance, even if the jury accepted as true the
22 allegation that one of the FTB's auditors said disparaging remarks about Hyatt, or the
23 allegation that the auditor improperly looked at his mail, there was no evidence
24 introduced that FTB managers knew of these remarks or activities. 46 AA 1390 (138);
25 46 AA 11461 (78).

26 By allowing punitive damages claims to proceed against the FTB as if it were a
27 "person", the trial court permitted the jury to disregard the lack of evidence that
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1 individuals acted out of malice and improper motive, or that the FTB knew of and
2 condoned such actions. This failure of pleading and proof deprived the FTB of
3 protections afforded to employers and principals under Nevada law, *Restatement*
4 (*Second*) of *Torts*, § 909 and NRS 42.007, and was reversible error.

5 E. The Award of Punitive Damages in This Case Deprived California
6 Citizens of the Protections Afforded by the Due Process Clause of the 14th
Amendment to the United States Constitution.

7 Because the trial court failed to make any preliminary findings as to the basis for
8 the imposition of punitive damages as required by Nevada law, and because only a
9 general verdict was returned on all counts, it is impossible to identify exactly what
10 conduct formed the basis for the jury's award of \$250 million in punitive damages in
11 this case. The Due Process Clause has long been interpreted to provide substantive
12 protections to civil defendants against the award of punitive damages by a jury. Those
13 protections were not afforded by the trial court in allowing this case to proceed to the
14 jury on these facts.

15 The most fundamental protection afforded by the Due Process Clause is the
16 notion of fairness and notice. In *Cooper Industries Inc. v. Leatherman Tool Group*, 532
17 U.S. 424, 433 (2001), the Supreme Court wrote:

18
19 This constitutional concern, itself harkening back to the Magna Carta,
20 arises out of the basic unfairness of depriving citizens of life, liberty, or
21 property, through the application, not of law and legal processes, but of
22 arbitrary coercion. The reason is that elementary notions of fairness
enshrined in our constitutional jurisprudence dictate that a person receive
fair notice not only of the conduct that will subject him to punishment, but
also of the severity of the penalty that a State may impose.

23 In this case, Hyatt was permitted to argue that legal conduct undertaken in
24 California, for instance, publishing a list of cases pending in open court, 83 AA 20694-
25 89 AA 22050, and sending verification letters to businesses identified by Hyatt as able
26 to support his residency claims, constituted invasions of privacy. A new common-law
27 standard of care was imposed by the jury retroactively, and a quarter-billion dollar
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1 punishment was exacted against the citizens of California based on the new standard.
2 There was no notice to California that this conduct, lawful in California, could give rise
3 to a claim for damages, much less punitive ones, in Nevada. In *Gore v. BMW of North*
4 *America, Inc.*, 517 U.S. 559, 572 (1996), the Court wrote:

5 A State cannot punish a defendant for conduct that may have been
6 lawful where it occurred. *Bigelow v. Virginia*, 421 U.S. 809, 824, 95 S.Ct.
7 2222, 44 L.Ed.2d 600 (1975); (“A State does not acquire power or
8 supervision over the internal affairs of another State merely because the
welfare and health of its own citizens may be affected when they travel to
that State”).

9 This point was also made in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-
10 822 (1985), where the Court wrote:

11 Nor, as a general rule, does a State have a legitimate concern in
12 imposing punitive damages to punish a defendant for unlawful acts
13 committed outside of the State's jurisdiction. Any proper adjudication of
14 conduct that occurred outside Utah to other persons would require their
inclusion, and, to those parties, the Utah courts, in the usual case, would
need to apply the laws of their relevant jurisdiction.

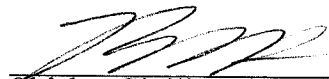
15 The jury in this case was simply without power to “supervis[e]... the internal
16 affairs” of another state and should not have been permitted to perform that role. 517
17 U.S. at 572. In *State Farm Mutual. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003),
18 the Supreme Court warned of the dangers of allowing a jury to impose punitive
19 damages against a large out-of-state defendant with a small presence within the state.
20 538 U.S. at 418. Special care must be taken in such circumstances, the Court warned, to
21 protect against resulting abuses. *Id.* The trial court failed to exercise that care in
22 allowing the punitive damages claim to go to the jury, and failed to exercise that care in
23 upholding the award of \$250 million. These failures deprived the citizens of California,
24 who will presumably be called upon to pay this award should it be upheld, of their right
25 to Due Process guaranteed by the U.S. Constitution.

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IV. CONCLUSION

For the reasons set forth above, *amicus curiae* the Multistate Tax Commission respectfully urges this Court to set aside the judgment below, and to either dismiss the case in its entirety, so that Hyatt may pursue all of his claims in California, or to allow a remand for trial on such limited and discrete claims as may be tried in Nevada courts consistently with the principles of comity that have previously been announced by this court.

Respectfully submitted,


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Certificate of Service

I hereby certify I served a true and correct copy of this *Brief of Amicus Curiae* Multistate Tax Commission in Support of Appellant/Cross-Respondent Franchise Tax Board of the State of California on the following counsel of record by depositing the same in first class mail, postage prepaid, on this 20th day of July, 2009:

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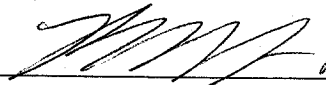
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By: C. Wayne Howle, Esq.
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Certificate of Compliance

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of July, 2009


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