

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 * * * * *

3 FRANCHISE TAX BOARD OF
4 THE STATE OF CALIFORNIA,

5 Appellant,

6 v.

7 GILBERT P. HYATT,

8 Respondent

Electronically Filed
Jan 07 2010 04:12 p.m.
Tracie K. Lindeman
CASE NO. 53264

9 OPPOSITION TO MOTION TO PERMIT EXPANDED BRIEFING FOR
10 RESPONDENT'S BRIEF

11 Appellant (FTB) hereby opposes respondent Hyatt's motion to file a 198-page brief.

12 Hyatt apparently believes he is special -- he is beyond the reach of this court's rules and
13 orders. But he is not special; he is not entitled to special privileges; and his motion should be
14 denied. For the court's understanding of why the motion should be denied, FTB will provide
15 a brief summary of the procedural history leading to Hyatt's present motion.

16 This is an appeal from a judgment in favor of Hyatt, against FTB, in the total amount of
17 approximately \$490 million. This is not enough for Hyatt, and he has cross-appealed, seeking
18 even more money. FTB submitted its opening brief on July 31, 2009, having received only one
19 30-day extension of time. FTB's brief was 118 pages long, which this court allowed.

20 On August 6, 2009, Hyatt filed a motion seeking an extension of time for the answering
21 brief, and seeking permission to file a brief consisting of 148 pages (118 pages for the
22 answering brief, and 30 pages for his opening brief on his cross-appeal). Hyatt's motion
23 expressly conceded that "Respondent [Hyatt] believes that the appellate issues are fairly
24 straight-forward" in this case. (Hyatt's Motion, 8/6/09, page 3, lines 10-11.) His request to file
25 a 148-page brief was based upon his argument that this appeal involves numerous issues, a
26 lengthy voluminous appendix, and a large jury award. (*Id.* at page 4, lines 17-20.) Hyatt argued
27 that he needed "to file a brief of the same length as allowed to Appellant, plus thirty (30)
28 additional pages," with the additional 30 pages necessary because Hyatt "must present his issues
and argument involved in his cross-appeal." (*Id.* at page 3, lines 15-20.)

1 In an order entered by Chief Justice Hardesty on August 21, 2009, the court granted
2 Hyatt's request for an extension for his brief, allowing 90 days from August 7, 2009, thereby
3 establishing a new due date of November 5, 2009. The court denied Hyatt's request to file a
4 148-page brief. Instead, the court ordered: "Respondent/cross-appellant may file a brief with
5 excess pages; however, he is limited to 20 pages longer than appellant/cross-respondent's
6 opening brief." Thus, the court limited Hyatt's brief to 138 pages.¹

7 As the due date for his brief approached, Hyatt filed a second motion for an extension
8 of time. This motion, which was filed on October 14, 2009, sought 45 more days for his brief.
9 Like his first motion, his second motion was based upon the fact that this case involves
10 numerous issues, a voluminous record and a large jury award. (Hyatt's Motion 10/14/09, page
11 3, lines 9-12.) Hyatt's motion expressly acknowledged this court's earlier order "allowing
12 Respondent's Answering Brief to be 20 pages longer than Appellant's Opening Brief." (*Id.*,
13 page 2, lines 14-15.) His motion was completely silent as to any need for more than 138 pages,
14 as this court had previously ordered.

15 On November 6, 2009, Chief Justice Hardesty granted Hyatt's motion for a second
16 extension of time, establishing a new due date of December 21, 2009. The court warned Hyatt
17 that no further extensions of time would be permitted absent extreme and unforeseeable
18 circumstances.

19 The December 21, 2009 due date arrived, with Hyatt making no request for relief from
20 this court's earlier order limiting his brief to 138 pages. Instead, at 2:30 p.m. on the due date,
21 Hyatt electronically filed a motion for yet another extension of time for his brief. This motion
22 sought 15 additional days. The motion made not attempt to establish extreme or unforeseeable
23 circumstances. Instead, the motion was essentially based upon the same grounds Hyatt had
24 asserted in earlier motions, specifically, the size and scope of this case. (Hyatt's 12/21/09

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27 The court's August 21, 2009 order was a single-justice procedural order. If Hyatt was
28 dissatisfied with the page limit in the order, his remedy would have been a request for review
or reconsideration by the court under NRAP 27(c). He did not seek this remedy.

1 motion, page 2, lines 13-17.) Hyatt simply argued that he needed an additional 15 days to
2 finalize his brief, offering no explanation as to why this was not accomplished earlier.
3 Significantly, Hyatt's December 21, 2009 motion was utterly silent as to this court's previous
4 order establishing the 138-page limitation for Hyatt's brief. Hyatt's motion gave no hint to this
5 court or to FTB that his brief would exceed this page limitation established by this court four
6 months earlier.

7 FTB opposed Hyatt's motion for the third extension, pointing out Hyatt failed to
8 demonstrate any extreme or unforeseeable circumstances entitling him to another extension.
9 FTB also pointed out Hyatt's procedural manipulations, both in this court and elsewhere, in his
10 attempts to gain unfair procedural advantages. (FTB Opposition 12/22/09, pages 2-3.)

11 On December 28, 2009, Chief Justice Hardesty granted Hyatt's third motion for an
12 extension of time, establishing a new due date of January 5, 2010. But the Chief Justice gave
13 Hyatt an ultimatum: "We will not consider another extension of time for Hyatt to file his brief.
14 If Hyatt fails to file his brief in this court by January 5, the case shall stand submitted without
15 his brief."

16 Normal business hours on the new due date passed until 4:20 p.m., when Hyatt
17 electronically filed his present motion seeking permission to file the 198-page brief, which is
18 60 pages longer than ordered by this court on August 21, 2009. The motion is based upon the
19 same old arguments Hyatt used to obtain his multiple extensions, i.e., the size of FTB's opening
20 brief and the voluminous nature of the appellate record. (Hyatt's motion of 1/5/10, pages 2-3.)
21 Hyatt's motion offers no explanation as to why he did not previously seek reconsideration or
22 other relief from this court's August 21, 2009 order; he offers no explanation as to why he never
23 expressed even the slightest dissatisfaction with the August 21, 2009 order during the four
24 months since Chief Justice Hardesty issued the order; and he offers no adequate explanation as
25 to why he needs to file a 198-page brief in a case where "the appellate issues are fairly straight-
26 forward." (Hyatt's motion 8/6/09, page 3, lines 10-11.) Interestingly, although Hyatt's August
27 6, 2009 motion argued that he needed 30 pages for his cross-appeal brief, his proposed brief
28 now only contains 15 pages devoted to the cross-appeal.

1 The court should also note that the text in the body of Hyatt’s proposed brief uses a font
2 size smaller than required by NRAP 32, with 720 footnotes using an even smaller font size.²
3 Additionally, Hyatt unilaterally decided to ignore the requirement of citing to the appendix after
4 every factual assertion in a brief. See NRAP 28(e). Instead, he decided, without permission,
5 to “place a single footnote after several sentences or an entire paragraph,” because he wants to
6 “avoid further lengthening the brief by inserting a footnote after each sentence.” (Hyatt’s
7 proposed Answering Brief, page 10, lines 24-26, fn 12.) If Hyatt had complied with font size
8 requirements and with the requirement of an appendix citation after every factual assertion in
9 his brief, his brief would probably approach 250 pages.

10 Chief Justice Hardesty’s order of December 28, 2009, conveyed a clear and unequivocal
11 message that enough is enough. Hyatt’s present motion and his accompanying brief flaunt this
12 court’s rules and the prior orders in this case. The motion and the accompanying brief also once
13 again establish Hyatt’s procedural manipulations designed to gain unfair and improper
14 advantages.

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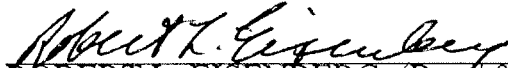
23

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24 Because this appeal was docketed before July 1, 2009, the briefs in this case are
25 governed by the Nevada Rules of Appellate Procedure in force prior to that date. The version
26 of NRAP 32(a) governing Hyatt’s brief requires the type to be “no smaller than 10 characters
27 per inch.” The rule does not allow a party to use a smaller font size in footnotes. The font size
28 in the body of Hyatt’s brief is approximately 14 or 15 characters per inch, which is nearly 50
percent smaller than the font size allowed by the rule; and the font size in his 720 footnotes is
even smaller, with approximately 17 characters per inch.

1 For the reasons set forth above, FTB respectfully requests this court to deny Hyatt's
2 motion; to reject the proposed answering brief; to determine that Hyatt failed to obey this court's
3 order of December 28, 2009; and to enforce the December 28, 2009 order, thereby submitting
4 this case without Hyatt's brief.³

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6 DATED: Jan. 7, 2010

7 
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26 If the court decides not to submit this case without Hyatt's brief, FTB hereby requests
27 that Hyatt's motion be denied; that he be given no more than one week in which to file a new
28 brief that complies with the page limit in this court's August 21, 2009 order; that he be required
to comply with the Rules of Appellate Procedure dealing with font size and citations to the
record; and that he and his attorneys be sanctioned as the court may deem appropriate.

1 CERTIFICATE OF MAILING

2 Pursuant to NRAP 25, I certify that on this date I caused to be deposited for mailing
3 at Reno, Nevada, a true copy of the foregoing addressed to:

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DATED: 1/7/10

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