

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of **KAEMPFER CROWELL  
RENSHAW GRONAUER & FIORENTINO** and that on this 13 day of August, 2010, I  
caused the above and foregoing document entitled **MOTION FOR LEAVE TO FILE SUR-  
REPLY OF 30 PAGES IN PARTIAL RESPONSE TO THE FTB'S 145 PAGE REPLY  
BRIEF** to be served by the method(s) indicated below:

_____	via U.S. mail, postage prepaid;
<u>  X  </u>	via Federal Express;
_____	via hand-delivery;
_____	via Facsimile;


upon the following person(s):

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

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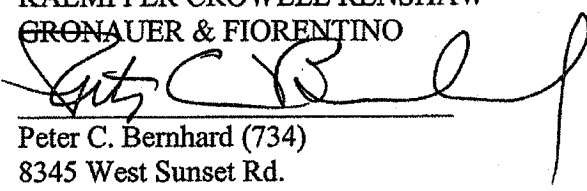
**CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read this **MOTION FOR LEAVE TO FILE SUR-REPLY OF 30 PAGES IN PARTIAL RESPONSE TO THE FTB'S 145 PAGE REPLY 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, and in particular NRAP 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: August 13, 2010.

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*Attorneys for Respondent/Cross-Appellant  
Gilbert P. Hyatt*

1  
2 **III. CONCLUSION**

3 The FTB attempts to use its 145 page reply brief to unfair advantage by using expanded  
4 briefing to inject new issues, arguments and authorities in its reply. Realizing the briefing must  
5 end at some point, but also needing to address new and vastly expanded issues set forth by the  
6 FTB in its reply, Hyatt seeks permission from this Court for leave to file the accompanying sur-  
7 reply brief of up to 30 pages.

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9  
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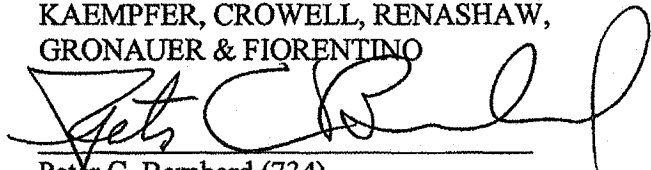
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 5 in the short sur-reply requested. But Hyatt has had no real opportunity to address these legal  
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 7 issues in a short sur-reply.

8 *New facts asserted on appeal.*

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 11 the anti-Semitic comments by the FTB lead auditor, residency facts, and even a wholly  
 12 unrelated audit by the Internal Revenue Service.<sup>16</sup> The FTB thereby invites this Court to  
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 14 sets forth factual assertions based upon evidence it now submits to the Court in a reply appendix  
 15 that was never before the jury and in some instances was never before the District Court except  
 16 in the form of a listed trial exhibit that was never offered or entered into evidence.<sup>17</sup>

17 Hyatt should be given the chance to briefly address in a short sur-reply these new facts as  
 18 well as the new assertions that are based on evidence not presented at trial.<sup>18</sup>

19  
 20 <sup>16</sup> See, e.g., FTB Reply Brief, at 8-10, 10-16, 21-26, 129-30.

21 <sup>17</sup> In particular, the FTB now seeks to attack that employment status of third party witness Candace Les. But the  
 22 FTB cites Ms. Les' complaint to the FTB regarding Ms. Cox from 1997-98 and the FTB's internal memoranda  
 23 describing the purported basis for Ms. Les' termination of employment. FTB Reply Brief, at 9:7-8, citing 39 ARA  
 24 9635-41, 9644-50, and 39 ARA 9651-52, 9672-79. But these memos were not offered nor admitted into evidence  
 25 at trial. The FTB also neglects to inform this Court that Ms. Les successfully sued the FTB for wrongful  
 26 termination, including winning the right to be re-instated. RRA 00001-00037 (consisting of July 20, 1999 State  
 27 Personnel Board Decision)] These facts were not before the jury, nor were they detailed in the FTB's opening brief.  
 28 Similarly the FTB uses its reply to argue and submit purported new evidence regarding its assertion that Hyatt and  
 Ms. Jeng backdated the deed under which Hyatt sold her the LaPalma house. See FTB Reply, p. 12, fn. 10. The  
 new evidence cited by the FTB consists of the notary's unsworn statement and her notary log. 34 ARA 8452, 8478-  
 79. These documents were listed as pre-trial exhibits by the FTB (Trial Exhibits 2653 and 2654) but were never  
 offered or admitted at trial nor put forth as part of the FTB's opening brief.

<sup>18</sup> FTB Reply, p. 12, fn. 10, citing 34 ARA 8452, 8478-79 consisting of pre-trial exhibits 2653 and 2654 that were  
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1 its opening brief. Not having addressed this issue in its opening brief, the FTB seeks to take  
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 5 Court that led to the need for the corrective instruction,<sup>10</sup> but argues that no corrective  
 6 instruction should have been given.<sup>11</sup> Hyatt should be given the chance to address this new  
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8 ***101 new legal authorities and expansion of issues barely referenced in its opening brief.***

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25 <sup>11</sup> FTB Reply, at 2, 51-52.

26 <sup>12</sup> FTB Opening Brief, at 84.

27 <sup>13</sup> Hyatt Answering Brief, at 97-102, 104-105.

28 <sup>14</sup> FTB Opening Brief, pages 74-79.

<sup>15</sup> FTB Opening Brief, at 93-95.

1 have so argued in its opening brief. Again, it raised other arguments regarding bad faith, but not  
2 this one. Because the FTB saved this argument for its reply brief, Hyatt requires a sur-reply to  
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4 The FTB may argue that its arguments regarding admission of evidence of bad faith was in  
5 response to Hyatt's argument that bad faith, while not an element of the torts at issue, was highly  
6 relevant evidence as to the issue of intent, *i.e.*, evidence of bad faith by the FTB constituted  
7 relevant and material evidence that the FTB's actions were intentional and despicable and not  
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13 ***Jury Instruction No. 24.***

14 The FTB's reply, but not its opening brief, claims that the District Court erred in giving a  
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necessary, despite the hundreds of pages of briefing submitted thus far by the parties, so that Hyatt has the opportunity to address arguments the FTB deems material and dispositive but which Hyatt has had no fair opportunity to address.

## II. ARGUMENT

Pursuant to NRAP 28(c), “[a] reply brief . . . must be limited to answering any new matter set forth in the opposing brief.” Rather than answering Hyatt’s arguments in the answering brief, the FTB has raised new issues in the reply brief, and has greatly expanded its arguments with respect to other issues. Hyatt’s proposed sur-reply addresses the following issues for which he had no opportunity to respond in his answering brief.

### *Bad faith not an element of the torts alleged.*

The FTB’s reply, but not its opening brief, argues that evidence of the FTB’s bad faith conduct in the audits should never have been presented to the jury because “bad faith” is not an element of Hyatt’s intentional tort claims. The FTB could have and should have raised this additional argument relative to bad faith in its opening brief. It did raise other arguments regarding bad faith that Hyatt was able to respond to and rebut in his answering brief. For example, the FTB argued in its opening brief that bad faith conduct was no longer material based on recent precedent.<sup>1</sup> Hyatt fully rebutted this in his answering brief.<sup>2</sup> Another example is that the FTB’s opening brief attacked Hyatt’s “bad faith fraud claim,”<sup>3</sup> including arguing that Hyatt presented no evidence of intent.<sup>4</sup> Hyatt also fully rebutted this in his answering brief.

The FTB knew full well that at trial Hyatt argued that intent was demonstrated by, among other evidence, the FTB’s bad faith.<sup>5</sup> If the FTB wanted to argue, as it does in its reply, that Hyatt should not have been allowed to present evidence of bad faith at trial, the FTB should

<sup>1</sup> FTB Opening Brief, at 52-54.

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1 Respondent/Cross-Appellant Gilbert P. Hyatt ("Hyatt"), by and through his attorneys of  
2 record, respectfully moves this Court for an order granting leave to file a Sur-Reply of 30 pages  
3 in partial response to Appellant/Cross-Respondent FTB's 145 Reply Brief. This Motion is based  
4 on NRAP 28(c) (no additional briefs are allowed without leave of the Court), NRAP 27  
5 (motions), the points and authorities attached hereto, and all other papers and pleadings on file  
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## 7 POINTS AND AUTHORITIES

### 8 I. INTRODUCTION

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21 But the FTB's 145-page reply brief now presents new arguments not put forth in the FTB's  
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5               Appellant/Cross-respondent,

6               v.

7       **GILBERT P. HYATT,**

8               Respondent/Cross-appellant.  
9

Supreme Court Case No. 53264  
District Court Case No. A382999  
Electronically Filed  
Aug 13 2010 04:57 p.m.  
Tracie K. Lindeman

Notice of Appeal Filed March 4, 2009

10                                   **MOTION FOR LEAVE TO FILE SUR-**  
11                                   **REPLY OF 30 PAGES IN PARTIAL**  
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13                                   **REPLY BRIEF**

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 15 that was never before the jury and in some instances was never before the District Court except  
 16 in the form of a listed trial exhibit that was never offered or entered into evidence.<sup>17</sup>

17 Hyatt should be given the chance to briefly address in a short sur-reply these new facts as  
 18 well as the new assertions that are based on evidence not presented at trial.<sup>18</sup>

19  
 20 <sup>16</sup> See, e.g., FTB Reply Brief, at 8-10, 10-16, 21-26, 129-30.

21 <sup>17</sup> In particular, the FTB now seeks to attack that employment status of third party witness Candace Les. But the  
 22 FTB cites Ms. Les' complaint to the FTB regarding Ms. Cox from 1997-98 and the FTB's internal memoranda  
 23 describing the purported basis for Ms. Les' termination of employment. FTB Reply Brief, at 9:7-8, citing 39 ARA  
 24 9635-41, 9644-50, and 39 ARA 9651-52, 9672-79. But these memos were not offered nor admitted into evidence  
 25 at trial. The FTB also neglects to inform this Court that Ms. Les successfully sued the FTB for wrongful  
 26 termination, including winning the right to be re-instated. RRA 00001-00037 (consisting of July 20, 1999 State  
 27 Personnel Board Decision)] These facts were not before the jury, nor were they detailed in the FTB's opening brief.  
 28 Similarly the FTB uses its reply to argue and submit purported new evidence regarding its assertion that Hyatt and  
 Ms. Jeng backdated the deed under which Hyatt sold her the LaPalma house. See FTB Reply, p. 12, fn. 10. The  
 new evidence cited by the FTB consists of the notary's unsworn statement and her notary log. 34 ARA 8452, 8478-  
 79. These documents were listed as pre-trial exhibits by the FTB (Trial Exhibits 2653 and 2654) but were never  
 offered or admitted at trial nor put forth as part of the FTB's opening brief.

<sup>18</sup> FTB Reply, p. 12, fn. 10, citing 34 ARA 8452, 8478-79 consisting of pre-trial exhibits 2653 and 2654 that were  
 never offered or admitted at trial.

1  
2 **III. CONCLUSION**

3 The FTB attempts to use its 145 page reply brief to unfair advantage by using expanded  
4 briefing to inject new issues, arguments and authorities in its reply. Realizing the briefing must  
5 end at some point, but also needing to address new and vastly expanded issues set forth by the  
6 FTB in its reply, Hyatt seeks permission from this Court for leave to file the accompanying sur-  
7 reply brief of up to 30 pages.

8 DATED: August 13, 2010

9  
10 HUTCHISON & STEFFEN, LTD.

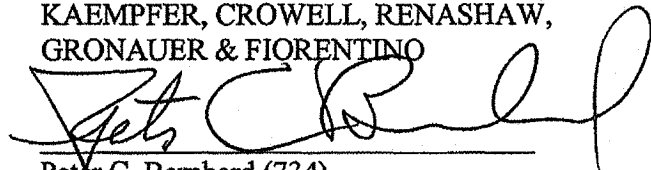
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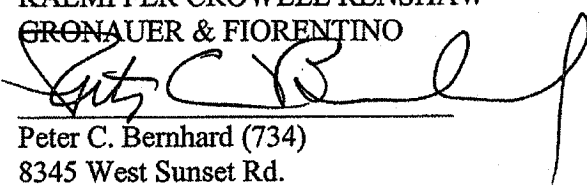
**CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read this **MOTION FOR LEAVE TO FILE SUR-REPLY OF 30 PAGES IN PARTIAL RESPONSE TO THE FTB'S 145 PAGE REPLY 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, and in particular NRAP 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: August 13, 2010.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of **KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO** and that on this 13 day of August, 2010, I caused the above and foregoing document entitled **MOTION FOR LEAVE TO FILE SUR-REPLY OF 30 PAGES IN PARTIAL RESPONSE TO THE FTB'S 145 PAGE REPLY BRIEF** to be served by the method(s) indicated below:


_____	via U.S. mail, postage prepaid;
<u>  X  </u>	via Federal Express;
_____	via hand-delivery;
_____	via Facsimile;

upon the following person(s):  
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