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IN THE SUPREME COURT OF THE STATE OF NEVADA

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FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Appellant/Cross-Respondent

Electronically Filed
Dec 15 2014 11:27 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

v.

GILBERT P. HYATT,

Respondent/Cross-Appellant.

Case No. 53264

**MOTION TO STAY REMITTITUR PENDING APPLICATION TO U.S. SUPREME
COURT FOR A WRIT OF CERTIORARI, OR TO
ENLARGE TIME FOR ISSUANCE OF REMITTITUR
(REMITTITUR TO ISSUE ON DECEMBER 22, 2014)**

Pursuant to NRAP 41(a) and (b), appellant (FTB) hereby moves to stay issuance of the remittitur pending FTB’s anticipated petition to the Supreme Court of the United States for a writ of certiorari or, at a minimum, to enlarge the time for issuance of the remittitur. This court issued its order denying rehearing on November 25, 2014. Therefore, in the ordinary course, the court’s remittitur would issue on December 22, 2014. See NRAP 41(a)(1) (remittitur shall issue 25 days after entry of order denying petition for rehearing).

Two provisions of NRAP 41 authorize the court to stay issuance of the remittitur. First, subpart (a) states that the remittitur shall issue 25 days after an order denying a petition for rehearing, “unless the time is shortened or enlarged by order.” Second, subpart (b) provides that a party may file a motion “to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari.” It further provides that the stay pending application to the Supreme Court “shall not exceed 120 days unless the period is extended for cause shown.” And “[i]f there is filed with the clerk of the Supreme Court of Nevada a notice from the clerk of the Supreme Court of the United States that the party who has obtained the stay has filed a petition for the writ in that

1 court," the stay "shall continue until final disposition by the Supreme Court of
2 the United States." Subpart (b) states only one procedural requirement: "The
3 motion must be served on all parties."

4 In short, NRAP 41(b) provides that a party may obtain a minimum 120-day
5 stay of the issuance of the remittitur "pending" its application to the Supreme
6 Court for a writ of certiorari; and once the petition for a writ of certiorari is
7 actually filed, the stay remains in place until the Court disposes of the petition.
8 The rule thus essentially envisions a stay of the remittitur while a party goes
9 through the time-consuming process of determining whether to file a certiorari
10 petition and preparing that petition, and a further stay once the petition is filed.
11 Both stays are intended to save the parties and lower court the time, burden,
12 and expense of undertaking proceedings that may be mooted by Supreme Court
13 review.

14 FTB satisfies the requirements for the minimum 120-day stay pending
15 application to the Supreme Court for a writ of certiorari (NRAP 41(b)) or, at a
16 minimum, an extension of time in which the remittitur shall be entered (NRAP
17 41(a)). FTB is evaluating whether to file a petition for writ of certiorari in the
18 Supreme Court challenging those aspects of the court's September 18, 2014
19 decision adverse to it. Potential issues for review include, but are not limited to,
20 whether the court correctly interpreted the scope and applicability of the
21 discretionary-immunity rule, whether the court correctly interpreted the scope
22 and applicability of the comity doctrine, and whether the court correctly
23 permitted the case to proceed notwithstanding principles of state sovereign
24 immunity. FTB believes that the Supreme Court may reverse on one or more of
25 these issues. While FTB has not reached a final decision whether to seek
26 certiorari, it anticipates doing so. A petition for certiorari by FTB would be due
27 at the Supreme Court by February 23, 2015. A 120-day stay of issuance of the
28 remittitur would amply cover this period. FTB has thus satisfied the

1 requirements for issuance of the 120-day stay or, at a minimum, an extension of
2 time in which the remittitur shall be entered.

3 While NRAP 41 allows for entry of a 120-day stay simply upon a “motion ...
4 served on all parties,” it bears noting that no party will be prejudiced by a stay of
5 the remittitur. Given the length of time in which this case has been pending, an
6 additional 120 days before remittitur does not burden either party. If the
7 remittitur is not stayed, however, the parties and the district court will be forced
8 to deal with myriad issues relating to the new trial—discovery, motions in
9 limine, other motions, pretrial preparation, and the trial itself—that would all be
10 wasted time, effort, and money if the Supreme Court ultimately grants relief to
11 FTB. Therefore, the interests of sound judicial administration weigh in favor of
12 staying issuance of the remittitur pending FTB’s anticipated certiorari petition.

13 NRAP 41 does not establish guidelines for postponing issuance of the
14 remittitur, and there are apparently no Nevada published opinions dealing with
15 the rule. A California court dealt with the issue in *Reynolds v. E. Clemens Horst*
16 *Co.*, 172 P. 623 (Cal. App. 1918), where the appellant requested a stay of the
17 remittitur from the Court of Appeal, in order that the appellant “may have an
18 opportunity to apply to the Supreme Court of the United States for a writ of
19 certiorari.” *Id.* at 623-24. The *Reynolds* court held that there was “no doubt”
20 that the court had inherent power to grant the stay. *Id.* at 624.

21 The respondent in *Reynolds* argued that the Supreme Court would
22 probably not entertain the writ. The *Reynolds* court expressed its view that the
23 appellant’s position would probably not prevail, but the court recognized that
24 “courts do not always agree, and the Supreme Court of the United States might,
25 of course, find merit in appellant’s position.” *Id.* Finding an absence of any
26 significant prejudice to the respondent, the *Reynolds* court stayed the
27 remittitur. See also *Filardo v. Foley Bros.*, 78 N.Y.S. 2d 689 (N.Y. Sup. Ct. 1948)


1 (court has power to stay judgment pending application to Supreme Court of
2 United States for writ of certiorari).

3 In an analogous context, this court has already determined that a stay is
4 appropriate. At the onset of this appeal, FTB moved for a stay of execution in
5 the district court. The district court granted the motion but required FTB to post
6 a bond to secure the judgment (which was in excess of \$480 million at that
7 time). FTB sought relief from this court regarding the bond requirement. On
8 April 8, 2009, this court determined that a stay pending appeal was warranted,
9 and that FTB would not be required to provide a bond or other security for the
10 stay. Although the court's order did not contain a detailed explanation for the
11 court's determination that a stay was warranted, presumably the court based its
12 decision on the analysis that FTB provided regarding NRAP 8 factors. In all
13 events, the court has already recognized the merit of staying further trial court
14 proceedings pending the outcome of potentially dispositive appellate
15 proceedings, and that same reasoning should apply to FTB's request here.

16 Accordingly, FTB hereby seeks an order staying issuance of the remittitur
17 for 120 days pending FTB's anticipated petition for in the Supreme Court of the
18 United States or, alternatively, enlarging the time for issuance of the remittitur.

19 DATED: Dec. 15, 2014

21 By:


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Franchise Tax Board of the State of
California

CERTIFICATE OF MAILING

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I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellant's Motion to Stay Remittitur Pending Application to U.S. Supreme Court for a Writ of Certiorari, or to Enlarge Time for Issuance of Remittitur was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master list as follows:

- Peter Bernhard
- Mark Hutchison
- Pat Lundvall
- Michael Wall
- Daniel Polsenberg

I further certify that on this date I served a copy, postage prepaid, by U.S. Mail to:

Donald J. Kula
Perkins Coie
1888 Century Park East, Suite 1700
Los Angeles, California 90067-1721

DATED: 12/15/14

Heidi Segura