

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF CALIFORNIA,
Appellant/Cross-respondent,
v.
GILBERT P. HYATT,
Respondent/Cross-appellant.

) Supreme Court 53264
) District Case No. A3829999
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APPEAL

from the Eighth Judicial District Court, Clark County
THE HONORABLE JESSIE WALSH, District Judge

**RESPONDENT GILBERT P. HYATT'S SUPPLEMENTAL ANSWERING
BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF
THE UNITED STATES**

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NRAP 26.1 DISCLOSURE

I certify that the following are persons and entities described in NRAP 26.1,
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Gilbert P. Hyatt is an individual.

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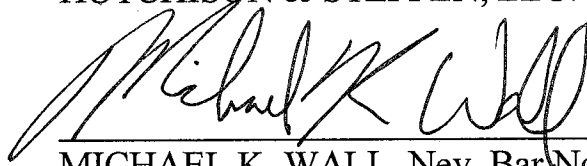
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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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**SUPPLEMENTAL ANSWERING BRIEF FOLLOWING
MANDATE FROM THE SUPREME COURT OF THE
UNITED STATES**

Pursuant to this Court’s order of June 24, 2016, Respondent Gilbert P. Hyatt (“Respondent” or “Hyatt”) submits this Supplemental Answering Brief in response to Appellant Franchise Tax Board of the State of California’s (“Appellant” or “FTB”) Supplemental Opening Brief Following Mandate From the Supreme Court of the United States.

I. Introduction.

The U.S. Supreme Court in *Hyatt II*¹ accepted review and ruled on only two issues: (I) whether to reverse *Nevada v. Hall*, 440 U.S. 410 (1979) and (ii) whether the amount of damages affirmed by this Court violated the prior U.S. Supreme Court decision in this case. The U.S. Supreme Court did not reverse *Nevada v. Hall* but did reverse this Court’s *2014 Opinion*² on the single issue of the amount of damages that may be awarded against Appellant FTB, an agency of the State of

¹ *Franchise Tax Board of California v. Hyatt*, __ U.S. __, 136 S.Ct. 1277 (2016)(“*Hyatt II*”). For the Court’s convenience given the substantial procedural history in this case, Hyatt has submitted herewith a Supplemental Appendix (Volume 1) of Prior United States Supreme Court and Nevada Supreme Court Opinions in This Case (“Supp. Append Vol. 1”). *Hyatt II* is attached to Supp. Append. Vol. 1, at Tab 5.

² *Franchise Tax Board of California v. Hyatt*, 335 P.3d 125 (Nev. 2014)(the “*2014 Opinion*”). *2014 Opinion* is attached to Supp. Append. Vol 1, at Tab 3.

California. All that is left now for this Court to do is to re-issue its *2014 Opinion* modifying the amount of damages awarded in accord with *Hyatt II* and prior FTB argument in this appeal that damages are limited to \$75,000 per claim. That is all that is intended by the U.S. Supreme Court's decision and all that is procedurally proper.

No other issue from this Court's *2014 Opinion* is implicated by *Hyatt II*. In suggesting otherwise, FTB disregards constitutional law and procedural rules. Indeed, *Hyatt II* did not create any new law, it merely reinforced the first U.S. Supreme Court decision in this case from 2003, *Hyatt I*.³ FTB argued in *Hyatt II* that this Court failed to follow *Hyatt I* by affirming damages to Hyatt in excess of what would be allowed against a Nevada state agency. The U.S. Supreme Court agreed and enforced the holding of *Hyatt I*.

FTB did not argue in its appeal before this Court or to the U.S. Supreme Court that this Court's *2014 Opinion* violated *Hyatt I* in any other way. Yet, now citing *Hyatt II*, FTB seeks reconsideration of the unrelated issues on which it lost in the *2014 Opinion*. It is too late for FTB to make such arguments, and in any event FTB already lost on the merits of the unrelated issues it now attempts to re-

³ *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 123 S.Ct. 1683 (2003) ("*Hyatt I*"). *Hyatt I* is attached to the Supp. Append. Vol. I, at Tab 1.

raise.

Despite the myriad of issues addressed and decided by this Court in its *2014 Opinion*, the U.S. Supreme Court accepted review only on the two narrow and focused issues described above. The Court ruled in favor of FTB only on this second issue and concluded by stating, “We vacate [the Nevada Supreme Court’s] judgment and remand the case for further proceedings not inconsistent with this opinion.”⁴

FTB nonetheless now argues all issues decided and resolved by this Court in its *2014 Opinion* are fair game in light of *Hyatt II*. How can that be? *Hyatt II* held only that this Court’s damage award violated *Hyatt I*. If FTB asserts that any other issue addressed in this Court’s *2014 Opinion* violated *Hyatt I*, it should have made those arguments to this Court in its appeal from the judgment and then sought review of those issues from the U.S. Supreme Court. FTB did not. It has therefore waived any right for review of the issues it now raises, and in some cases re-raises.

Indeed, most if not all of the issues FTB now raises are also barred by the law-of-the-case doctrine. This Court already determined in its *2014 Opinion* and,

⁴ *Hyatt II*, at 1283.

in some cases, in its *2002 Opinion*,⁵ each point FTB now raises. FTB is asking for nothing short of reconsideration of these issues under the guise of the limited holding from *Hyatt II*. While this Court may have discretion to revisit and review issues unrelated to the *Hyatt II* damages issue, there is no reason to do so here. It would also be bad public and judicial policy to set a precedent that long resolved issues can be revisited by this Court after a case is reviewed by the U.S. Supreme Court on an unrelated issue.

Specifically, FTB now attempts to reargue the following issues. First, in seeking to avoid the liability findings against it in regard to the fraud and IIED claims, FTB blatantly re-argues the discretionary function immunity issue despite no new law or facts. FTB lost this issue in the *2014 Opinion*, and the U.S. Supreme Court specifically refused to review this issue. FTB therefore asks this Court to revisit the discretionary function immunity issue based on *Hyatt II* even though FTB was denied review of this very issue by the U.S. Supreme Court.⁶

⁵April 4, 2002 Order Granting Petition For Rehearing, Vacating Previous Order, Granting Petition for Writ of Mandamus In Part In Docket No. 36390, And Granting Petition For A Writ Of Prohibition In Part In Docket No. 35549 (the “*2002 Opinion*”). The *2002 Opinion* is attached to Supp. Append. Vol. 1, at Tab 1.

⁶ *Franchise Tax Board of the State of California v. Hyatt*, United States Supreme Court Case No. 14-1175, Petition for Writ of Certiorari, at 15-20, filed March 23, 2015 (“FTB Cert. Pet.”); *Franchise Tax Board of California v. Hyatt*, 576 U.S. ___, Order List at 13 (Jun. 30, 2015)(granting review of Questions 2 and 3 but denying

Discretionary function immunity is therefore an issue FTB cannot in good faith argue was implicated by *Hyatt II*.

Further, in seeking reconsideration of the liability findings made against it, FTB grossly misstates this Court's holding in *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d 888 (1991), even substituting words in a quote from that decision to falsely portray the holding as supporting FTB's new IIED argument. As is clear from the decision, *Falline* did not hold that IIED claims cannot be brought against Nevada state agencies. *Falline* was a worker's compensation case. It held that an emotional distress claim cannot be brought in worker's compensation cases. The decision did not address whether IIED claims can be brought against state agencies. Case law in fact confirms that state agencies can be sued for IIED.

Moreover, FTB never argued below that IIED claims cannot be brought against Nevada state agencies. FTB has therefore waived this argument. Indeed, the law of the case is the exact opposite of what FTB now argues. In this Court's *2002 Opinion*, Hyatt argued specifically that intentional torts, including IIED as described in detail in his briefing, could be brought against state agencies. This

review of Question 1 which sought review of the discretionary function immunity issue), attached to Supp. Append. Vol. 1, at Tab 4.

Court so found in its *2002 Opinion*, and that has been the law of the case since that time for both the IIED and fraud claims.

As to Hyatt's fraud claim, FTB now also argues for the first time that no precedent allows such a claim – while citing no case to support its position. FTB conveniently forgets this Court's *2002 Opinion*, which found that intentional torts including fraud can be pursued against state agencies in accord with *Falline*. The law-of-the-case doctrine holds that Hyatt can bring such claim. *Hyatt II* does not change this. And case law in other jurisdictions is consistent with this Court's ruling that fraud claims can be brought against state agencies.

Further as to the fraud claim, FTB re-asserts the same arguments it previously made in attacking the judgment as to the sufficiency of the evidence. This Court rejected those arguments in its *2014 Opinion*. Nothing in *Hyatt II* provides a basis for reconsideration of this issue. Similarly, FTB re-argues whether the evidentiary errors were harmless as to the liability findings for the IIED and fraud claims. Nothing in *Hyatt II* provides a basis for this Court to revisit that issue.

Finally, FTB's argument on exhaustion of administrative remedies is also barred by the law-of-the-case doctrine in accord with this Court's *2002 Opinion*. This issue is in no way implicated by *Hyatt II*. FTB again misconstrues the cases

it cites for exhaustion of administrative remedies because those cases involved attempts to stop or circumvent an administrative process. In this case, the Nevada courts have kept strictly separate this tort case and the still ongoing California administrative process. This case does not stop or interfere with the California administrative process. The two matters have always been and remain two different trains traveling on separate tracks.

In sum, this Court previously reviewed lengthy briefing and heard oral arguments on two occasions before issuing the *2014 Opinion*. Nothing warrants revisiting that decision now except to modify the damage award in accord with *Hyatt II*. FTB's request now for reconsideration of unrelated claims should be denied. This Court should therefore re-issue its *2014 Opinion* with a modified damages amount for the fraud claim to conform with Nevada's statutory damages cap, which FTB's prior briefing in this case specified is \$75,000 per claim. In addition, for the IIED claim the Court should either (i) allow Hyatt to re-try the claim in the district court as ordered in the *2014 Opinion* or (ii) direct the district court to enter judgment on the IIED claim in favor of Hyatt for the \$75,000 statutory maximum as previously argued by FTB, thereby allowing a final judgment to be entered with no further proceedings before the district court (other than entry of the judgment and as necessary to enforce judgment).

II. Statement of the issues.

1. In light of *Hyatt II*, is current review limited to modifying the damages awarded to Hyatt?
2. Is FTB barred by waiver from arguing that this Court's *2014 Opinion* violated *Hyatt I* other than as to the damages awarded?
3. Is FTB barred by the law-of-the-case doctrine from arguing that Hyatt may not bring a fraud or IIED claim against the FTB?
4. Under Nevada substantive law as already decided by this Court, is there any bar to bringing a fraud or IIED claim against a state agency?

III. Statement of the case.

This Court issued a decision in this case on April 4, 2002 (the “*2002 Opinion*”), affirming the ruling of the district court that the FTB was not entitled to immunity under California law for the bad faith conduct and intentional torts at issue in this Nevada tort action. The U.S. Supreme Court then granted the FTB's petition for certiorari, but then unanimously affirmed this Court's decision in *Hyatt I*.

This Court issued a decision in this case on September 18, 2014 (the “*2014 Opinion*”) that affirmed in part and reversed in part the judgment entered by the

district court. This Court's *2014 Opinion* addressed and resolved the following issues:

Discretionary function immunity

This Court determined that “FTB was not immune from suit under comity because discretionary-function immunity in Nevada does not protect Nevada’s government or its employees from intentional torts and bad-faith conduct.”⁷ Indeed, the Court spent multiple pages discussing how a Nevada agency would be treated. This Court then applied the holding from *Hyatt I* and determined that because tort claims as alleged and proven by Hyatt could be brought against a Nevada government agency, FTB could be sued by Hyatt for intentional torts. It therefore ruled in its *2014 Opinion* entirely consistently with *Hyatt I*. *Hyatt II* therefore provides no basis for reconsideration of this issue.

Invasion of privacy causes of action

This Court found that Hyatt did not establish the elements of his invasion of privacy claims. The Court therefore reversed the judgment as to these causes of action.⁸ *Hyatt II* provides no basis for reconsideration of this issue.

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⁷ *2014 Opinion*, at 134-39.

⁸ *2014 Opinion*, at 139-42.

Breach of confidential relationship claim

This Court found that Hyatt cannot as a matter of law establish the type of confidential relationship with FTB that is needed to sustain this claim. It therefore reversed the judgment as to this cause of action.⁹ *Hyatt II* provides no basis for reconsideration of this issue.

Abuse of process claim

This Court found that Hyatt did not establish the elements of abuse of process. It therefore reversed the judgment as to this cause of action.¹⁰ *Hyatt II* provides no basis for reconsideration of this issue.

Fraud claim - liability

After discussion of the necessary elements under Nevada law and the evidence presented by Hyatt, this Court affirmed the jury verdict that Hyatt established all necessary elements of this cause of action.¹¹ *Hyatt II* provides no basis for reconsideration of this issue.

Fraud claim - damages

This is the issue, and the only issue, upon which the U.S. Supreme Court reversed this Court's *2014 Opinion*.

⁹ *2014 Opinion*, at 142-43.

¹⁰ *2014 Opinion*, at 143-44.

¹¹ *2014 Opinion*, at 144-45.

The *2014 Opinion* addressed the FTB's argument that Nevada's damages cap for state agencies (NRS 41.035) limited Hyatt's damages to \$75,000 per claim. This Court decided that it need not apply Nevada's damages cap on the basis that Nevada had a paramount interest in providing adequate redress for Nevada citizens. This Court therefore denied FTB's request for comity to FTB on this issue, *i.e.* for application of the holding in *Hyatt I*.¹² The U.S. Supreme Court disagreed and reversed the *2014 Opinion* on this single point.

The *2014 Opinion* must therefore be modified in accord with the prior FTB argument in this appeal that Nevada's statutory damages cap limits Hyatt's recovery to \$75,000 per claim (NRS 41.035), or in this Court's discretion the current cap of \$100,000. That is all that is necessary to conform the *2014 Opinion* to the holdings in *Hyatt I* and *Hyatt II*.

Intentional infliction of emotional distress claim - liability

After discussion of the necessary elements under Nevada law and the evidence presented by Hyatt, this Court affirmed the jury verdict that Hyatt established all necessary elements of this cause of action.¹³ *Hyatt II* provides no basis for reconsideration of the liability issue for this cause of action.

¹² *2014 Opinion*, at 146-47.

¹³ *2014 Opinion*, at 147-49.

As addressed below, this Court went on to find that evidentiary errors required a new trial on damages only for this cause of action.

Evidentiary and jury instruction errors warrant new trial on damages only for the IIED claim

This Court addressed multiple evidentiary errors by the district court at trial. These included certain evidence the district court improperly admitted, as well as other evidence the district court excluded which FTB had sought to introduce on the basis that it may have been an alternative cause of Hyatt's emotional distress.¹⁴ The Court concluded "that substantial evidence exists to support the jury's finding as to liability against FTB on Hyatt's IIED claim regardless of these errors, but we conclude that the errors significantly affected the jury's determination of appropriate damages, therefore, these errors were prejudicial and require reversal and remand for a new trial as to damages."¹⁵ *Hyatt II* provides no basis for reconsidering this issue.

Recoverable damages on remand for IIED

This Court referenced its discussion of fraud damages and similarly determined that it would not apply Nevada's damages cap for retrial of the amount

¹⁴ *2014 Opinion*, at 149-53.

¹⁵ *2014 Opinion*, at 153.

of damages for the IIED claim.¹⁶ *Hyatt II* therefore also reversed on the amount of recoverable damages for Hyatt's IIED claim.

The *2014 Opinion* must therefore be modified on this point in accord with the prior FTB argument in this appeal that Nevada's statutory damages cap limits Hyatt's recover to \$75,000 per claim. This modification would conform the *2014 Opinion* to the holdings in *Hyatt I* and *Hyatt II*. As a result, if the total amount awarded by a jury in the re-trial exceeds \$75,000, the Court should direct that the amount of the recoverable damages be limited to \$75,000.

Alternatively, and to bring this long-running case to the most efficient resolution possible, the Court has discretion to rule that more than sufficient admissible evidence was introduced to establish that Hyatt suffered emotional distress damages of at least \$75,000. Indeed, the fact that Hyatt suffered emotional distress damages was affirmed by this Court in finding that Hyatt established all elements of the IIED claim.¹⁷ \$75,000 damages, in light of the damages cap, would be an efficient conclusion to this claim.

This case has been hotly-contested from its inception, and the costs and fees of any retrial of the IIED claim will easily exceed the maximum \$75,000 recovery.

¹⁶ *2014 Opinion*, at 153.

¹⁷ *2014 Opinion*, at 147-49.

When the additional time and resources of the district court are taken into consideration, a retrial is simply inefficient to determine the amount of IIED damages, which were previously determined to be \$52 million but would now be capped at \$75,000. Even accounting for the evidentiary errors found by this Court, more than sufficient admissible evidence was adduced at trial to support IIED damages in excess of \$75,000.¹⁸

As a result, in lieu of a re-trial on damages for the IIED, the Court can alternatively modify its *2014 Opinion* to direct that judgment be entered in favor of Hyatt on both the fraud and IIED claims and each in the amount of the \$75,000, for a total of \$150,000. This will save the Nevada courts and the parties valuable time and resources, and moot a re-trial and possible appeal on the amount of IIED damages that Hyatt should recover.

Punitive damages

This Court determined that Hyatt could not be awarded punitive damages from FTB because Nevada does not allow such damage against its own government agencies. In short, the Court granted comity to FTB on this issue, in

¹⁸ See NRCP 1 and discussion of sufficient fraud and IIED liability evidence, *infra*, at 30-31.

accord with *Hyatt I* and its corollary *Hyatt II*.¹⁹ *Hyatt II* provides no basis for reconsideration of this issue.

Costs

This Court reversed the cost award, finding the district court should determine after entry of a new judgment whether Hyatt is still entitled to costs, and if so, what costs are recoverable.²⁰ *Hyatt II* provides no basis for reconsideration of this issue.

Hyatt's cross-appeal

This Court affirmed the district court's dismissal of Hyatt's claim for economic damages, finding Hyatt did not present sufficient evidence at summary judgment to support such a claim.²¹ *Hyatt II* provides no basis for reconsideration of this issue.

IV. Statement of facts.

This Court is no doubt familiar with the facts of this case. FTB's Supp. Brief referenced its statement of facts from prior briefing. Hyatt also references here but does not repeat his Statement of Facts that can be found at pages 9 to 51 of Respondent Hyatt's Answering Brief ("RAB").

¹⁹ *2014 Opinion*, at 153-54.

²⁰ *2014 Opinion*, at 154-55.

²¹ *2014 Opinion*, at 155-56.

V. Summary of argument.

FTB's attempt to re-argue and seek reconsideration of virtually every issue on which it lost in the *2014 Opinion* is procedurally improper and not supported by the U. S. Supreme Court decision in *Hyatt II*. FTB mischaracterizes the decision in *Hyatt II*, this Court's *2014 Opinion*, and particularly this Court's key precedent, *Falline*.

FTB raises no issue for which this Court should amend or correct the *2014 Opinion* other than modifying the amount of damages Hyatt may recover for his fraud and IIED claims. The amount of damages which Hyatt may recover for each of his fraud and IIED claims is \$75,000 for each claim, as FTB previously argued in this appeal.²² This Court should reissue its *2014 Opinion* with corrected damages and direct the district court to enter a judgment in favor of Hyatt for \$150,000 plus costs as determined by the district court.

VI. Argument.

A. In light of *Hyatt II*, this Court should re-issue its *2014 Opinion* in its entirety after correcting the amount of damages awarded for each the fraud and IIED claims.

Hyatt II provides no basis for this Court to revisit every issue on which it ruled against the FTB in the *2014 Opinion*. FTB's petition for U.S. Supreme

²² See discussion of prior FTB briefing, *infra* at 16-17.

Court review, FTB's merits briefing submitted to the U.S. Supreme Court, its oral argument in support thereof, and the decision in *Hyatt II* related only to the award of damages against FTB for Hyatt's fraud and IIED claims. The Court has already considered the issues now raised by FTB, and rejected FTB's arguments, or FTB failed to previously make such arguments.

1. Prior FTB briefing in this appeal arguing violation of *Hyatt I* was limited to the damages cap issue.

The only argument FTB raised in its briefing before this Court in regard to the district court violating *Hyatt I* was that the award of compensatory damages to Hyatt was in excess of the statutory damages cap under NRS 41.035 that can be awarded against a Nevada state agency.²³ Specifically, on pages 100 to 102 of FTB's opening brief and pages 109 to 115 of its reply brief in this Appeal FTB argued the damages awarded against it violated *Hyatt I*.²⁴ FTB did not argue as to any other issue that the district court had failed to abide by *Hyatt I*, and certainly did not make the circular argument it now offers in regard to the effect of *Hyatt II* on the liability findings for the fraud and IIED claims. FTB has not previously argued that a Nevada citizen cannot sue Nevada agencies for those specific torts (a conclusion which Hyatt rebuts below).

²³ See Appellant's Opening Brief ("AOB") and Appellant's Reply Brief ("ARB").

²⁴ *Id.*

Indeed, *Hyatt I*, affirming this Court's 2002 *Opinion*, held that Hyatt could pursue fraud and IIED claims on the very rationale argued by FTB above. Yet, in the most circular of arguments, FTB now argues that *Hyatt II*, which simply enforced *Hyatt I*, requires that this Court not allow Hyatt to pursue his fraud and IIED claims against FTB.

2. Review of this Court's 2014 *Opinion* by the U.S. Supreme Court in *Hyatt II* was limited to the amount of damages awarded in violation of *Hyatt I*.

There were two discreet issues reviewed by the U.S. Supreme Court in *Hyatt II*: (I) whether the Court should affirm or overturn its prior decision *Nevada v. Hall* and (ii) whether the 2014 *Opinion* in accord with *Hyatt I* must apply the statutory damages cap as to the FTB.

Starting with FTB's petition for certiorari filed with the U.S. Supreme Court, through its briefing on the merits and then oral argument, the second issue was laser-focused on the Nevada damages cap. FTB's petition for certiorari argued:

As *Hyatt I* establishes, it is one thing for Nevada to refuse FTB the absolute immunity it would enjoy under California law, but it is altogether different and impermissibly hostile for Nevada to refuse to apply the immunity granted by California even to the extent

consistent with Nevada law—that is, to refuse FTB the same protection *against unlimited damages* that a Nevada entity would enjoy.²⁵

FTB’s briefing to the U.S. Supreme Court similarly argued and focused on the amount of damages awarded by the Nevada court as a violation of *Hyatt I*. In the opening two paragraphs of its merits brief FTB stated that Hyatt claimed “*hundreds of millions of dollars in damages*” and the Nevada jury returned a verdict that “dramatically demonstrates the dangers of having a sovereign State haled into another State’s courts against its will: The jury found for Hyatt on every one of his claims and awarded him *nearly half a billion dollars in damages*,” and that after appellate review this Court “*still awarded a million dollars in damages* while denying FTB the benefit of the damages cap Nevada extends to its own government entities.”²⁶

The U.S. Supreme Court ruled in favor of FTB on the damages cap issue, finding *Hyatt I* required Nevada to apply the cap here. But now FTB seeks to expand that limited and narrow review and reversal of this Court’s *2014 Opinion*

²⁵ FTB’s Cert. Pet., p. 23 (emphasis added).

²⁶ *Franchise Tax Board of the State of California v. Hyatt*, United States Supreme Court Case No. 14-1175, Brief for Petitioner, at 1 (emphasis added), filed September 3, 2015.

to a review of virtually every ruling that has been made in this case, even wrongly arguing its Supplemental Opening Brief that the U.S. Supreme Court “vacated the *2014 Opinion* in its entirety so that it carries no further legal force or effect.”²⁷

That is not what the U.S. Supreme Court did in *Hyatt II*. Rather, it concluded its opinion with the same language it uses in virtually every case: “We vacate the judgment and remand the case for further proceedings not inconsistent with this opinion.”²⁸

Similar to the language used by this Court when returning a matter to a lower court instructing it to proceed “consistent with” the opinion issued, such language by the U.S. Supreme Court does not open up all issues thus far decided in the case.²⁹ It is clear on the face of the U.S. Supreme Court’s opinion, as well as the briefing, that the U.S. Supreme Court intended that this Court modify its *2014 Opinion* to reduce the damages awarded consistent with the Nevada law applicable to Nevada government agencies. That is all.

²⁷ FTB Supp. Brief, at ix.

²⁸ *Hyatt II*, at 1283.

²⁹ The cases cited by FTB on pages 9-10 of its Supplemental Brief in which FTB argues *Hyatt II* requires this Court reconsider all issues addressed in the *2014 Opinion* are not on point. The cases address the general proposition of appellate law that require lower courts to follow the decision of the reviewing court. None of the cited cases support the expansive re-review of unrelated issues now sought by FTB.

Further, as addressed below, the issues now asserted by FTB have all been previously addressed and adjudicated by this Court and/or have been waived by FTB and are in no way implicated by *Hyatt II*. FTB is blatantly seeking second and third bites on issues that have been definitively decided in this case. FTB is not entitled to this disguised petition for re-hearing on fully adjudicated and decided issues.

3. *Hyatt I*'s comity holding, as affirmed in *Hyatt II*, does not provide a basis to review all issues on which FTB lost in the 2014 Opinion.

FTB argues that the Court should reconsider any part of the 2014 Opinion “that might be tainted by Sister-State Hostility.”³⁰ There is no other part of the 2014 Opinion that fails to treat the FTB as a Nevada state agency would be treated. But even if there were, FTB does not set forth the correct standard as articulated in *Hyatt II*, nor does it address the case law upon which Hyatt relies in interpreting the Full Faith and Credit clause in this context. Despite FTB’s protestations, a state need not treat a sister state agency exactly the same as it would treat its own agencies in every instance. In *Hyatt II* the U.S. Supreme found that “Nevada has not offered ‘sufficient policy considerations’ to justify the application of a special rule . . .” *Hyatt II*, at 1282 (quoting *Carroll v. Lanza*, 349

³⁰ FTB Supp. Brief, at 9.

U.S. 408, 413, 75 S.Ct. 804 (1955)).

As the dissent emphasized, the determinative issue in *Hyatt II* was whether “Nevada has a ‘sufficient’ policy interest in protecting Nevada residents from such injuries” to justify not applying Nevada’s damages cap to FTB in this case. *Hyatt II*, at 1287. The majority found the policy interest expressed by Nevada to be insufficient to deviate from Nevada’s damages cap in this case. This analysis and conclusion does not address or apply to the myriad of other issues upon which FTB now seeks to apply the holding from *Hyatt II*.

Indeed, FTB merely argues there is an “Anti-California Hostility” in the *2014 Opinion* and thereby concludes all issues can and should be reconsidered.³¹ To support its assertion of a hostility toward California, FTB misquotes decisions from this Court (as discussed below) and unapologetically reargues points on which it lost which have no relation to the holding in *Hyatt II* (also discussed below). The absurdity of FTB’s position is seen from its attempt to re-argue every issue in the *2014 Opinion* without application of the actual standard set forth in *Hyatt II*.

For example, FTB brazenly re-argues discretionary function immunity, asserting the same arguments and citing the same cases it did in losing the issue in

³¹ FTB Supp. Brief, at 12, *et seq.*

the *2014 Opinion*.³² FTB's current brief does not even make a subtle attempt to argue that *Hyatt II* has resulted in some change in law that requires a reconsideration of this Court's discretionary function immunity ruling in the *2014 Opinion*. Indeed, FTB previously viewed this issue as wholly unrelated to the damages cap issue addressed in *Hyatt II*, as FTB sought separate review of the discretionary function immunity issue from the U.S. Supreme Court but was denied review.³³ *Hyatt II* therefore provides no basis to re-review the issue in light of this record.

Similarly, FTB's attempts to reargue the issues of exhaustion of administrative remedies and sufficiency of the evidence for the fraud claim, each of which are also unrelated to the issues addressed in *Hyatt II*. Again, *Hyatt II* provides no basis to review these issues.

4. The only correction to the *2014 Opinion* that should be made is to the amount of damages recoverable by Hyatt for each of the two claims on which he prevailed.

FTB's opening and reply briefs for this appeal, on the precise point on which it ultimately prevailed in the U.S. Supreme Court, sought that the damages

³² See FTB Supp. Brief, at 17-22, compared to AOB, at 34-52.

³³ FTB's Cert. Pet., p. 23 (emphasis added); *Franchise Tax Board of California v. Hyatt*, 576 U.S. ___, Order List at 13 (Jun. 30, 2015), attached to Supp. Append. Vol. 1, at Tab 4.

awarded Hyatt should be capped at \$75,000 per claim in accord with NRS 41.035.

FTB's Opening brief

The district court denied FTB's request to apply comity and to limit compensatory damages to \$75,000 per claim, which would be the limit for a Nevada government entity. 92 AA 22965; NRS 41.035(1). . . . Nevada's statute allows damages against a government entity up to \$75,000; (3) California's immunity statute must be applied, to the same extent that a Nevada entity would receive immunity, and as such Hyatt's damages are capped at \$75,000. . . .³⁴

FTB's Reply brief:

For the reasons articulated at pages 100-101 of the opening brief, all compensatory damages should have been capped at \$75,000 per claim. . . . Regarding compensatory damages California allows no recovery against FTB, but Nevada allows tort plaintiffs to recover up to \$75,000 per claim against government entities. See NRS 41.035(1). Therefore, California's complete immunity statute for FTB would only offend Nevada's policy to the extent that plaintiffs are deprived of the ability to recover up to \$75,000 per claim. . . . Accordingly, the

³⁴ AOB, at 100-02.

compensatory damages award against FTB, if allowed to stand at all, should be capped at \$75,000 per claim.³⁵

FTB's repeated argument for a cap of \$75,000 per claim under NRS 41.035 recognizes Hyatt's claim for bad faith delay of the protests did fully accrue until late 2007 when the case was on the eve of trial. This Court in its *2014 Opinion* cited the 11 year bad faith delay in the protest process as part of the significant evidence in affirming the fraud claim and IIED claim on liability in Hyatt's favor.³⁶ This issue, however, but did not become a part of the case until the discovery commissioner cited the long delay and approved discovery on the issue in 2005.³⁷ Discovery was then taken including depositions of the protest officers in 2005 and 2006 that confirmed an intentional hold was put on the protests as referenced in internal FTB documents.³⁸ Most significantly, not until late in 2007 did FTB issue a final decision in the protest process essentially rubber stamping the audit decisions from eleven years earlier.³⁹ At that point, the 11 year delay in

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³⁵ ARB, at 110-11, 115-116.

³⁶ *2014 Opinion*, at 144-46, 148-49.

³⁷ 14 RA 00 3262-3276.

³⁸ 76 AA 18980, 18992; 85 RA 021224, 021240; RT June 17, 91:1 - 92:5 (as discussed in RAB, at 45-46); *see also* RT June 16, 72:9-13; 56:14 - 57:3, 58:7 - 60:4, 61:14-25, 75:18 - 77:6.

³⁹ 54 AA 13330, 13404-13406, 88 RA 021826 (as discussed in RAB, at 42).

deciding the protests ended. At that time, the damages cap was \$75,000 per claim.⁴⁰

FTB also acknowledged in its prior briefing that where, as here, there are separate causes of action that can be separately maintained against the government entity, NRS 41.035 provides for recovery by the plaintiff on each claim up to the statutory cap. *See State of Nevada, ex rel., Department of Transportation v. Hill*, 114 Nev. 810, 818, 963 P. 2d 480 (1998) (“The *Webster* court reasoned that ‘the term ‘action’ [as used in NRS 41.035] is the wrong done, not the measure of compensation or the character of the relief sought[.]’”)(quoting *State v. Webster*, 88 Nev. 690, 695 , 504 P. 2d. 1316, 1320 (1972)).

Here, this Court confirmed in the *2014 Opinion* that separate damages were to be awarded for the fraud and IIED claims, affirming the jury’s separate award of damages for fraud and ordering retrial for the amount of the separate IIED damages.⁴¹ There can be no dispute, therefore, that Hyatt is entitled to a separate award of damages for each claim up to the statutory damages cap.

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⁴⁰ The current damages cap under NRS 41.035 is \$100,000 per claim. The Court should consider using its considered discretion to impose the higher cap given the long-running nature of this case.

⁴¹ *2014 Opinion*, at 145-47, 149-50.

Hyatt II therefore requires only that this Court's *2014 Opinion* be modified so that the damages are limited to \$75,000 per claim.⁴² Specifically, the fourth paragraph of the *2014 Opinion* (on page 131 of the Pacific Reporter version) that starts with "In connection with . . ." must be stricken and replaced with a discussion that based on *Hyatt II* the jury's award of \$1,085,282.56 in damages for the fraud claim must be capped at the Nevada statutory damage limit of \$75,000, and that upon re-trial of the damages issue for the IIED claim, the damages award must be similarly capped at \$75,000 even if the jury in a new trial awards an amount in excess of \$75,000.

As noted above, the Court should consider directing judgment in Hyatt's favor on the IIED claim in the statutory maximum amount of \$75,000. Just as sufficient evidence from the prior trial supports the liability finding for the IIED claim, and notwithstanding the evidentiary errors noted by this Court in the *2014 Opinion* that required the \$52 million damage award be vacated, sufficient evidence supports an award of at least \$75,000 (or even the current cap of

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⁴² To the extent the Court views application of the damages cap per claim as anything beyond a mechanical application to the two claims on which Hyatt prevailed, Hyatt requests that the Court order additional briefing on this issue or return the matter to the district court for a determination and application of the damages cap issue.

\$100,000) for the IIED claim. Such an award is also in the interests of justice and efficiency.⁴³

The following sections of the *2014 Opinion* must also be so modified: the entire discussion under the heading “Fraud damages” (on pages 145-47 of the Pacific Reporter version); the entire discussion under the heading “Recoverable damages on remand” (page 153 of the Pacific Reporter version); and the two sentences under heading “Conclusion” (page 157 of the Pacific Report version) that start “We uphold the amount of damages awarded . . .” and “Any damages awarded on remand . . .”

No other correction of the *2014 Opinion* was intended by the U.S. Supreme Court’s decision in *Hyatt II*, nor is any other correction needed or warranted.

B. FTB waived any right to argue any additional portions of the *2014 Opinion* violated *Hyatt I*.

“[P]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.” *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542 (2010) (affirming grant of summary judgment and ruling that appellant waived factual

⁴³ *Hyatt* refers the Court to pages 147-49 of the *2014 Opinion* that discuss the evidence from trial that supported *Hyatt*’s IIED claim. *See also* discussion, *infra.*, at 22-25.

and legal arguments in opposition to summary judgment that were not raised below; comma error in original); *Tupper v. Kroc.*, 88 Nev. 146, 150, 494 P.2d 1275 (1972) (ruling that appellant waived argument that the respondent was required to prove that the sale of appellant's partnership interest was necessary before a sale could be ordered; "Upon the rule . . . that a party on appeal cannot assume and [sic] attitude or accept a theory inconsistent with or different from that at the hearing below, we will not consider that issue.") (internal citations omitted); *see also Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 167, 172, 252 P.3d 676 (2011) ("[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981 (1981) (same).

In a similar vein, this Court will not consider arguments raised for the first time in a party's reply papers. *See State Dep't of Taxation v. Kawahara*, 131 Nev. Adv. Op. 42, 351 P.3d 746, 748 (2015) ("[T]he Department did not argue priority based on this statute and, indeed, did not mention the statute until the reply brief. We therefore decline to consider any argument regarding the statute."); *Edelstein v. Bank of New York Mellon*, 128 Nev. Adv. Op. 48, n. 13, 286 P.3d 249, 261 (2012) ("[Edelstein] does not make this argument in his opening brief thus, we do

not consider it.”); *Bongioli v. Sullivan*, 122 Nev. 556, 569, n.5, 138 P.3d 433, 443 (2006) (declining to consider argument raised for the first time in an appellant brief.).

In the context of this case, the same principal must be applied when a case returns after review by the U.S. Supreme Court. If FTB failed to make an argument in its appeal before this Court, it should not be allowed to do so now where it is not related to or implicated by the decision of the U.S. Supreme Court.

The U.S. Supreme Court’s opinion in *Hyatt II* was limited to amount of damages. There is no reason for this Court to read more into the opinion than is there. In analogous situations, this Court would not expect or want a trial court doing what the FTB advocates here in terms of re-arguing and re-deciding unrelated issues fully addressed and resolved by this Court. *See, e.g., Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263–64, 71 P.3d 1258 (2003) (“When a reviewing court determines the issues on appeal and reverses the judgment specifically directing the lower court with respect to particular issues, the trial court has no discretion to interpret the reviewing court’s order; rather, it is bound to specifically carry out the reviewing court’s instructions.”); *see also Cooney v. Goldberg*, 124 Nev. 1459, 238 P.3d 803 (2008) (“[T]he trial court has no discretion to interpret the reviewing court’s order; rather, it is bound to

specifically carry out the reviewing court’s instructions.”) (alterations in original) (quoting *Wheeler Springs Plaza, LLC*, 119 Nev. at 263–64).

As a result, FTB’s attempt to now argue the comity issue addressed in *Hyatt I* and affirmed in *Hyatt II* – outside the issue of the application of Nevada’s statutory damages cap – should not be considered by this Court. Specifically, FTB’s prior (and extensive) briefing to this Court limited its argument that the *2014 Opinion* violated *Hyatt I* to the issue of Nevada’s statutory damages cap.⁴⁴

At no point did FTB argue that under *Hyatt I* and its application of comity and the Full Faith and Credit clause that this Court erred in its *2014 Opinion* in allowing Hyatt to pursue his fraud and IIED claims, or in finding Hyatt adduced sufficient evidence to establish his fraud claim, or in rejecting FTB’s failure to exhaust administrative remedies, or any other argument FTB now makes. FTB made arguments on different grounds for the fraud and IIED claims.⁴⁵ Nor did FTB make the exhaustion of administrative remedies argument it now makes. Instead, FTB argued the district court violated that prior ruling that allowed the intentional tort claims to proceed.⁴⁶ FTB therefore waived its right to now argue *Hyatt II* provides some basis for this Court to review these issues at this time.

⁴⁴ AOB, at 100-102; ARB, at 109-11.

⁴⁵ AOB, at 33-52, 70-71, and 93-95.

⁴⁶ AOB, at 54-60.

C. Under the law-of-the-case doctrine, FTB is precluded from rearguing whether Hyatt may pursue the fraud and IED claims against the FTB.

1. The law-of-the-case doctrine is well established under Nevada law.⁴⁷

“[T]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.” *Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521 (2003); *Geissel v. Galbraith*, 105 Nev. 101, 103 (1989) (holding modified by *Willerton v. Bassham, by Welfare Div., State, Dep't of Human Res.*, 111 Nev. 10, 889 P.2d 823 (1995) (“[W]here an appellate court states a principal or rule of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower courts and on subsequent appeals, so long as the facts remain substantially the same.”)).

In order for the law-of-the-case doctrine to apply to an issue, the “appellate court must [have] actually address[ed] and decide[d] the issue explicitly *or by necessary implication.*” *Dictor v. Creative Management Services, LLC*, 126 Nev. 41, 44, 1223 P.3d 332, 334 (2010) (emphasis added); *see also, Ferguson v. LVMPD*, 131 Nev. ___, 364 P.3d 592, 597 (Adv. Op. 94, December 24, 2015) (“Application of the doctrine requires that the appellate court actually address and

⁴⁷ FTB is well familiar with the law-of-the-case doctrine having argued it in its appeal to this Court. *See* AOB, at 54-60.

decide the issue explicitly or by necessary implication.”) (internal quotation marks and citations omitted).

This Court has repeatedly observed that the law-of-the-case doctrine prevents further litigation of this issue and “cannot be avoided by a more detailed and precisely focused argument.” *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797 (1975); *see also, State v. Haberstroh*, 119 Nev. 173, 188–89, 69 P.3d 676, 686 (2003) (“The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same, and that law cannot be avoided by more detailed and precisely focused argument made after reflecting upon previous proceedings.”) (internal citations omitted).

This Court “will depart from [its] prior holdings only where [it] determine[s] that they are so clearly erroneous that continued adherence to them would work a manifest injustice.” *See Clem*, 199 Nev. at 620; *see also, Hsu v. Cty of Clark*, 123 Nev. 625, 630–31, 173 P.3d 724 (2007) (“Nevertheless, as the U.S. Supreme Court has noted, absent those extraordinary circumstances, a court should be loath to revisit its prior decisions.”) (internal citations and quotation marks omitted). Alternatively, the law of the case doctrine does not apply when there is a change of law that occurs during the pendency of the appeal. *See Hsu*, 123 Nev. at 632 (“[T]he doctrine of the law of the case should not *apply* where, in

the interval between two appeals of a case, there has been a change in the law by . . . a judicial ruling entitled to deference.”). (emphasis added). Neither circumstance exists here.

2. This Court has already determined, twice, that fraud and IIED claims can be asserted against FTB because intentional torts may be pursued against a Nevada government agency.

The procedural history of this case in this Court is telling and contradicts the relief now sought by FTB. In this Court’s *2002 Opinion*, after several rounds of briefing and after issuing and vacating its own initial decision, this Court unambiguously held that Nevada government agencies do not have immunity for “intentional torts committed within the course and scope of employment” citing *Falline v. GNLV Corp*, 107 Nev. 1004, 1009 (1991), and other cases.⁴⁸

It is indisputable that Hyatt’s fraud and IIED claims were encompassed within this Court’s *2002 Opinion* that Hyatt could pursue intentional tort claims. Hyatt’s briefing before the Court set forth intentional torts he had alleged and even outlined the evidence gathered to that date to support the claims asserted. Fraud was a focus of the briefing on that point, while much the same evidence discussed

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⁴⁸ *2002 Opinion*, at 5 and 8.

also supported the outrage claim, *i.e.*, IIED.⁴⁹ FTB’s briefing argued against these claims on the grounds Hyatt did not set forth sufficient evidence.⁵⁰ Notably, FTB did not argue at that time, or later, that these two claims could not be brought against Nevada government agencies.⁵¹

Similarly, when FTB raised and briefed issues for this appeal it did not argue or assert that fraud and IIED claims could not be brought against a Nevada government agency. Instead, FTB argued for clarity on discretionary function immunity and sought to overturn *Falline*.⁵² This Court rejected FTB’s arguments and reaffirmed *Falline*, holding that FTB could be sued for intentional torts.⁵³ In its decision, this Court explicitly discussed Hyatt’s fraud and IIED claims against FTB, upholding the liability finding in favor of Hyatt and against FTB as to both.⁵⁴

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⁴⁹ Hyatt Petition For Rehearing from 2001, at 6-10, attached to Supp. Append. Vol. 2, at Tab 1. For the Court’s convenience Hyatt has also submitted herewith a Supplemental Appendix (Volume 2) of select prior briefing from this Court’s first consideration of this case (“Supp. Append Vol. 2”).

⁵⁰ FTB Response to Petition for Rehearing, at 6, attached Supp. Append. Vol. 2, at Tab 3.

⁵¹ *Id.*

⁵² AOB, at 34-52, 70-77, and 93-96.

⁵³ *2014 Opinion*, at 134-39.

⁵⁴ *2014 Opinion*, at 144-45, 147-49.

On two occasions in this case, therefore, this Court has considered and decided that fraud and IIED claims can be pursued against FTB because Nevada state agencies are not immune from intentional torts.

3. FTB’s discretionary function immunity argument was not addressed or altered by *Hyatt II*.

The first issue addressed and decided by this Court in its *2014 Opinion* was rejection of FTB’s discretionary function immunity argument. The specific finding of this Court was that “FTB is not immune from suit under comity because discretionary-function immunity in Nevada does not protect Nevada’s government or its employees from intentional torts and bad faith conduct.”⁵⁵ This Court then explained its decision in a detailed, five page discussion of the issue.⁵⁶

FTB’s petition for certiorari to the U.S. Supreme Court sought review of this issue.⁵⁷ But the Court denied that portion of the petition, declining to review this Court’s ruling that FTB does not have discretionary function immunity in regard to Hyatt’s fraud and IIED claims.⁵⁸

⁵⁵ *2014 Opinion*, at 134.

⁵⁶ *Id.*, at 134-39.

⁵⁷ FTB’s Cert. Pet., at 15-20.

⁵⁸ *Franchise Tax Board of California v. Hyatt*, 576 U.S. ___, Order List at 13 (Jun. 30, 2015)(granting review of Questions 2 and 3 but denying review of Question 1 which sought review of the discretionary function immunity issue), attached to Supp. Append. Vol. 1, at Tab 4.

With no new law, and no new facts, FTB nonetheless now begs this Court to again address the issue as applied to this case and specifically Hyatt's fraud and IIED claims. FTB's arguments in its supplemental brief are remarkably similar to its prior briefing. As a matter of procedure the Court should not re-visit this issue. As also discussed below, substantively, there is no basis for the Court to reverse its prior, well-reasoned decision in this case on discretionary function immunity.

As a result, the procedural history of this case prohibits FTB from now re-arguing the same issue this Court has decided twice in this case.

4. Falline does not bar IIED claims against Nevada government agencies, nor does any other authority.

The cornerstone of FTB's argument seeking that the Court reconsider its prior ruling on discretionary function immunity is FTB's complete misstatement of the holding in *Falline*.⁵⁹ *Falline* indisputably arose out of the workers

⁵⁹ Hyatt extensively briefed the discretionary function immunity issue in his Answering Brief. While FTB repeats much of its prior briefing on this issue, Hyatt will not repeat his briefing but instead directs the Court to Hyatt's Answering Brief to the extent the Court determines it is necessary to review Hyatt's prior briefing. (RAB, at 54-67.) It is clear that the Court understood (and accepted) Hyatt's prior briefing and arguments as the Court stated in its *2014 Opinion* addressing the discretionary function immunity issue: "Hyatt maintains that the *Martinez* case did not alter the exception created in *Falline* and that discretionary immunity does not apply to bad-faith misconduct because an employee does not have discretion to undertake intentional torts or act in bad faith." (*2014 Opinion*, at 135.) *Martinez* refers to *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007), which the Court also extensively discussed in the *2014 Opinion*, at pp. 134-139.

compensation context and bars a plaintiff in that context from making an IIED claim:

Moreover, recognizing a cause of action for emotional distress in the workmen's compensation context raises the specter of "almost every emotion-based case turning up as some kind of tort suit."

Falline, at 1013 (citation omitted).

FTB nonetheless makes repeated misstatements about this holding in *Falline* and then punctuates its inaccuracy by intentionally misstating the above quoted language from the decision. Specifically, FTB misstates on pages 4 and 13 of its Supp. Brief that *Falline* holds that an IIED claims "is prohibited by law" and "will not lie" against a Nevada government actor." (FTB Supp. Brief, at 4, 13.) FTB then recasts the above quote from *Falline* out of context and substitutes the words "[an administrative]" context for the actual words "the workmen's compensation" context. Indeed, FTB prefaces its erroneous quote with a false description of the *Falline* holding. According to FTB:

In *Falline*, the Court summarily dismissed the IIED claim because no such claim could be brought against a government agency:

Moreover, recognizing a cause of action for emotional distress in [*an administrative*] context raises the specter OF "almost every emotion-

based case turning up as some kind of tort suit.”⁶⁰

Neither in the *Falline* opinion itself, nor in the Court’s decisions in this case discussing *Falline*, has this Court held or intended to convey that *Falline* bars IIED claims against government actors. To the contrary, this Court has approvingly cited *Falline* in twice finding that Hyatt’s IIED claim is not barred by either FTB’s claimed immunity under California law or this Court’s application of Nevada’s discretionary function immunity for government actors.

In the *2002 Opinion*, this Court cited *Falline* and other cases in holding that Nevada does not provide immunity to its state agencies for acts taken in bad faith or for intentional torts.⁶¹ In its *2014 Opinion*, this Court extensively discussed *Falline* in addressing the discretionary function immunity argument of FTB. The Court rejected FTB’s argument in affirming *Falline*: “We therefore affirm our holding in *Falline* that NRS 41.032 does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, “by definition, [cannot] be within the actor’s discretion.”⁶²

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⁶⁰ FTB Supp. Brief, at 14 (emphasis added).

⁶¹ *2002 Opinion*, at 5.

⁶² *2014 Opinion*, at 139.

The Court then went on and approved the liability finding against FTB on the IIED claim.⁶³ There is no basis for FTB's wishful but erroneous interpretation and assertion of the holding from *Falline*. An IIED claim can be sustained against a Nevada government agency when, as here, the conduct at issue constituted an intentional tort or was carried out in bad faith. Here, both qualifications were met as FTB committed an intentional tort and acted in bad faith in so doing.⁶⁴

5. Other case law reaffirms that IIED claims may be brought against Nevada government agencies.

Pre-*Martinez* this Court's rulings demonstrated that IIED claims could be brought against government agencies. See *Posadas v. City of Reno*, 109 Nev. 448, 450, 851 P.2d 438, 440 (1993)(reversing grant of summary judgment for city for various causes of actions by plaintiff, including IIED, thereby allowing the claims to proceed to trial and holding specifically that factual issues precluded summary judgment on the IIED claim); see also *Nunez v. City of N. Las Vegas*, 116 Nev. 535, 541, 1 P.3d 959, 963 (2000) (reversing dismissal of IIED claim against the city "to allow discovery on these claims to proceed. The merits of the emotional distress claims may be revisited thereafter either by pre-trial motion or at trial."); *Plaza v. City of Reno*, 111 Nev. 814, 815, 898 P.2d 114 (1995) (reversing grant of

⁶³ 2014 Opinion, at 147-49.

⁶⁴ 2014 Opinion, at 147-49.

summary judgment in favor of city for claims including IIED because “there are still genuine issue of material fact, and summary judgment was therefore inappropriate.”)

California similarly allows IIED claims against its state agencies and officials. *See Catsouras v. Dept. of California Highway Patrol*, 181 Cal. App. 4th 856, 875 (2010); *Asgari v. City of Los Angeles*, 15 Cal. 4th 744, 760 (1997).

As a result, IIED claims against Nevada government agencies are not barred by *Falline*, *Martinez* or any other case. This is entirely consistent with the law of this case as already determined by this Court. FTB has no basis to now re-argue to the contrary.

6. Case law also affirmatively supports that a fraud claim can be brought against government agencies.

FTB suggests there is also no precedent for allowing a fraud claim against a Nevada government agency. Again, not true. Beyond and in addition to the *2014 Opinion* and *Falline*, case law in other jurisdictions supports holding government agencies liable for fraud. *See Doe ex rel. Christina H. v. Medford Sch. Dist. 549C*, No. 10-3113-CL, 2011 WL 1002166, at *9 (D. Or. Feb. 22, 2011), report and recommendation adopted, No. CIV. 10-3113-CL, 2011 WL 976463 (D. Or. Mar. 18, 2011) (Oregon) (denying school district’s motion to dismiss state law claims

including fraud claim); *Del Vecchio By Del Vecchio v. Nassau Cty.*, 118 A.D.2d 615, 617, 499 N.Y.S.2d 765, 767 (1986) (New York) (allowing misrepresentation claims against city to proceed); *Burr v. Bd. of Cty. Comm'rs of Stark Cty.*, 23 Ohio St. 3d 69, 78, 491 N.E.2d 1101, 1109 (1986) (Ohio) (affirming judgment for fraud against county); *see also Canyon del Rio Inv'rs, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 344, 258 P.3d 154, 162 (Ct. App. 2011) (Arizona) (affirming dismissal of misrepresentation claim on the basis of failure to file notice of claim as required by statute, not because of governmental immunity.); *Benedict Realty Co. v. City of New York*, 45 A.D.3d 713, 714, 846 N.Y.S.2d 294, 295 (2007) (New York) (affirming summary judgment on fraud claim in favor of City because Plaintiff failed to raise triable issue of fact—not because of governmental immunity).

D. Even if the Court entertains FTB's attempt to reargue the sufficiency of the fraud evidence, more than sufficient evidence was presented at trial to sustain the jury's verdict on the fraud claim.

Again, there is no basis for this Court to reconsider its prior ruling affirming the jury's finding that the FTB committed fraud directed at Hyatt. In finding sufficient evidence in the record to support Hyatt's fraud claim, this Court held in its *2014 Opinion* that FTB falsely promised to protect Hyatt's confidential information and treat him courteously and cited the following evidence in support of the jury's finding of fraud:

- *Massive disclosure of confidential information:* “At trial, Hyatt presented evidence that FTB disclosed his social security number and home address to numerous people and entities and that FTB revealed to third parties that Hyatt was being audited. In addition, FTB sent letters concerning the 1991 audit to several doctors with the same last name, based on its belief that one of those doctors provided Hyatt treatment, but without first determining which doctor actually treated Hyatt before sending the correspondence.”⁶⁵
- *Bad faith delay of protests.* “Hyatt showed that FTB took 11 years to resolve Hyatt’s protests of the two audits. Hyatt alleged that this delay resulted in \$8,000 in interest per day accruing against him for the outstanding taxes owed to California.”⁶⁶
- *Auditor’s Anti-Semitic remarks:* “Hyatt presented evidence through Candace Les, a former FTB auditor and friend of the main auditor on Hyatt’s audit, Sheila Cox, that Cox had made disparaging comments about Hyatt and his religion . . .”⁶⁷
- *FTB intent on assessing:* “Cox essentially was intent on imposing an

⁶⁵ 2014 Opinion, at 144-45; see also RAB, at 35-42.

⁶⁶ 2014 Opinion, at 145; see also RAB, at 43-51.

⁶⁷ 2014 Opinion, at 145; see also RAB, at 15-17.

assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken."⁶⁸

Hyatt II does not alter any of the analysis used by the Court to affirm the jury's finding that FTB committed fraud.⁶⁹ The singular issue in *Hyatt II* was the amount of damages this Court affirmed in favor of Hyatt. The reduction of the amount of damages Hyatt can recover on his fraud claim from the \$1,085,281.56 to \$75,000 as argued by FTB does not provide a basis for FTB to reargue the liability finding made against it on the fraud claim. There is no reason for the Court to reconsider and essentially re-weigh the fraud evidence.

E. FTB is also precluded from rearguing exhaustion of administrative remedies, which argument in any event fails as this tort case is wholly separate from the California administrative tax process.

Again, nothing in *Hyatt II* relates or provides a basis to re-argue FTB's failure to exhaust administrative remedy defense. More fundamentally, FTB now tries to re-argue the very exhaustion of administrative remedy argument it lost on in the *2002 Opinion*. In sum, as first decided by then Judge Saitta (now former Justice Saitta), this tort action is separate from the California administrative

⁶⁸ *2014 Opinion*, at 145; *see also* RAB, at 32-35.

⁶⁹ This Court cited much of the same evidence in affirming the liability finding for the IIED claim. (*2014 Opinion*, at 147-49.)

process that will decide the tax dispute.⁷⁰ This tort case will not decide the tax case, nor will resolution of the tax case address and resolve the issues put forth in this tort case. This Court affirmed this ruling and the separateness of the two proceedings in its *2002 Opinion*:

Preliminary, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or *administrative exhaustion* deprive the district court of subject matter jurisdiction over Hyatt's tort claims. . . . Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply.⁷¹

Indeed, the separateness of the two proceeding was the basis of some of the evidentiary errors found by this Court to have been committed by the district court during the trial. This Court found that certain evidence should not have been admitted because it went only to the issue of whether taxes were owed, not whether a tort was committed.⁷²

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⁷⁰ 2 AA 357-419, 420-421.

⁷¹ *2002 Opinion*, at 6 (emphasis added).

⁷² *2014 Opinion*, at 149-50 (evidence challenging audit conclusions as improper), 150-51 (evidence of audit determinations).

FTB now attempts to reargue that there should not even have been a tort action. But the cases cited by FTB are inapposite. They all involve an attempt by the plaintiff to stop or alter an administrative proceedings. The descriptions of the cases discussed by FTB on pages 33-35 of its Supp. Brief establish this very point. FTB does not cite a case involving a tort claim separate from the administrative proceeding.

FTB's retreat of its administrative exhaustion argument must again be rejected by the Court. The Court has ruled on this, and it is the law of this case. Further, the issue is in no way implicated by *Hyatt II*.

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VII. Conclusion.

For all of the foregoing reasons, the relief sought by FTB should be denied. The Court should re-issue its *2014 Opinion* after correcting the amount of damages awarded to the \$75,000 maximum per claim as FTB argued in its prior briefing in this appeal.

DATED: October 24, 2016.

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ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 10,539 words.

3. Finally, I 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 NRAP 28(e)(1), 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 the

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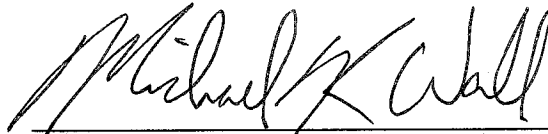
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accompanying brief is not in conformity with the requirements of the Nevada
Rules of Appellate Procedure.

DATED this 24 day of October, 2016.

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A handwritten signature in cursive script that reads "Michael K. Wall". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **RESPONDENT GILBERT P. HYATT'S SUPPLEMENTAL ANSWERING BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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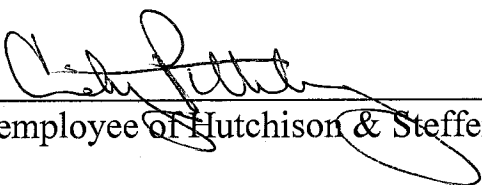
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