IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent
v.

GILBERT P. HYATT
Respondent/Cross-Appellant

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

APPELLANT'S SUPPLEMENTAL REPLY BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES

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I. INTRODUCTION

In its 2014 Opinion this Court fashioned a special judge-made rule of law that held FTB to a different standard than a Nevada agency. *See Franchise Tax Bd. of Calif. v. Hyatt* ("2014 Opinion"), 130 Nev. Adv. Op. 71, 335 P.3d 125, 147 (2014). The United States Supreme Court rejected this sister-state hostility and vacated the 2014 Opinion as unconstitutional. *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S.Ct. 1277, 1282 (2016) ("*Hyatt II*"). According to FTB's research, just a handful of times in history, absent some intervening new law, has a Nevada Supreme Court decision been thrown out by the country's highest court.[1] Given this rare circumstance, the Supreme Court's mandate to comply with the Full Faith and Credit Clause should not be taken lightly. Rather, the Court must issue a new judgment that is free from sister-state hostility in all respects.

The Court justified the 2014 Opinion's anti-California discrimination with its belief that California's system to control its own agencies did not provide "adequate" recourse to Nevada's citizens. 335 P.3d at 147. According to the 2014 Opinion, California's agencies purportedly "operate[] outside" the systems of "legislative control, administrative oversight, and public accountability" that

[1] *See Powell v. Nevada*, 511 U.S. 79, 85 (1994) (vacating and remanding "for further proceedings not inconsistent with this opinion"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058 (1991) (reversing without remanding); *Brooks v. Dewar*, 313 U.S. 354, 362 (1941) (reversing and remanding with instructions); *Crandall v. Nevada*, 73 U.S. 35 (1867) (reversing and remanding with instructions).

Nevada has for its own agencies. *Id.* (quoting *Faulkner v. Univ. of Tenn.*, 627 So.2d 362, 366 (Ala.1992)).

Hyatt II repudiated this rationale, declaring that this Court's explanation for its sister-state hostility "amount[ed] to little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls." 136 S.Ct. at 1282. Such disparagement "cannot justify the application of a special and discriminatory rule." *Id.*

Notwithstanding this language, Hyatt contends that *Hyatt II* still allows Nevada to discriminate against FTB so long as it can articulate a constitutionally allowable policy for doing so. (Suppl. AB 21-22). But the only policy reason articulated by this Court was the disparagement of California's legislative, judicial and administrative controls that the Supreme Court deemed unconstitutional. *Hyatt II*, 136 S.Ct. at 1282, quoting 2014 Opinion, 335 P.3d at 147. Nowhere in the 2014 Opinion did the Court otherwise justify its failure to treat FTB the same as Nevada's Department of Taxation, and Hyatt offers no additional policy reasons for the Court's consideration.

As to the numerous instances of sister-state hostility that FTB identifies, Hyatt provides only a procedural, rather than substantive, response. Hyatt makes the internally contradictory arguments that FTB is allegedly relitigating issues, yet purportedly waived those same issues by not raising them earlier. Having argued

all along for comity, FTB preserved its right to request that this Court's new judgment comply with the Full Faith and Credit Clause in all respects. And where the Supreme Court agreed with FTB that the 2014 Opinion contained unjustified discriminatory animus towards California, FTB is not seeking to relitigate closed issues.

Hyatt does not address – and therefore does not dispute – dispositive arguments made in FTB's supplemental opening brief. For example, Hyatt provides no response to the cases and statutes cited by FTB that give deference to the Nevada Department of Taxation's fact finding and legal conclusions and immunity for its audit work. Therefore, FTB was entitled to that same immunity and deference. Likewise, Hyatt does not dispute that intent to defraud cannot be proven by statements the legislature requires the Nevada Department of Taxation to make through the Taxpayers' Bill of Rights. Therefore, FTB could not be found to possess fraudulent intent in sending a legislatively mandated notice to Hyatt. Hyatt's silence confirms the merits of FTB's arguments.

Where this Court failed to articulate a constitutionally allowable policy for treating FTB differently than a Nevada agency, the Court cannot simply "modify or correct" the 2014 Opinion with the elementary interlineations offered by Hyatt. (Suppl. AB 27-28). The Court must comply with the letter and spirit of the Supreme Court's mandate and cannot look elsewhere to determine its next steps.

Reviewing the facts and applying the law as if FTB were Nevada's Department of Taxation, the Court should conclude that FTB cannot be liable to Hyatt.

II. ARGUMENT

A. Hyatt Asks This Court To Disregard The Supreme Court's Mandate And Enter A New Judgment That Is Unconstitutional.

1. To Comply With The Mandate, The Court's New Judgment Must Be Free Of Sister-State Hostility.

Hyatt improperly asks this Court to ignore language from the Supreme Court's mandate that bars any anti-California discrimination. "After the appeal had been taken, the power of the court below over its own decree was gone. **All it could do after that was to obey [the Supreme Court's] mandate when it was sent down**." *Durant v. Essex Co.*, 101 U.S. 555, 556-57 (1879) (emphasis added).

Here, the Supreme Court's mandate broadly attacked every unconstitutional aspect of the 2014 Opinion:

> **[I]nsofar as the Nevada Supreme Court has declined to apply California law in favor of a special rule of Nevada law that is hostile to its sister States, we find its decision unconstitutional.** We vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

Hyatt II, 136 S.Ct. at 1283 (emphasis added). Hyatt's supplemental answering brief ignores this bolded language. (Suppl. AB 3, 20).

The only judgment that would be consistent with the Supreme Court's mandate is one that is free of sister-state hostility in all respects. Therefore, the

Court cannot, as Hyatt argues, simply reissue the 2014 Opinion with the damages cap inserted. (Suppl. AB 16). If this Court were to enter a new judgment that retains any of the 2014 Opinion's anti-California hostility, that new judgment would be "inconsistent" with *Hyatt II* and therefore in violation of the Full Faith and Credit command. *Hyatt II*, 136 S.Ct. at 1283.

To the extent this Court failed to treat FTB as it would Nevada's taxing authority – whether by allowing IIED and fraud verdicts based on California's legislatively mandated statements and FTB's discretionary audit decisions; failing to cloak FTB with the same immunities that would protect Nevada's Department of Taxation; failing to defer to FTB's fact finding and legal conclusions; and permitting Hyatt to sidestep the California administrative process – the 2014 Opinion violated the Full Faith and Credit clause.

2. The Court Must Look At The Supreme Court's Mandate, Not Simply The Issues Presented, To Determine The Scope Of Its Authority On Remand.

Contrary to Hyatt's assertion (Suppl. AB 1-2), this Court can look only to the mandate itself, not the issues presented to the Supreme Court, to guide its post-remand decision making. "[W]here the directions contained in the mandate are precise and unambiguous, it is the duty of the subordinate court to carry it into execution, ***and not to look elsewhere to change its meaning***." *Cook v. Burnley*, 78 U.S. 672, 674 (1870) (emphasis added). The Supreme Court's "power to decide is

not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978). Rather, the Supreme Court has discretion to issue a mandate that is broader in reach than the issues presented. *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005); *see also Haynes v. United States*, 390 U.S. 85, 101 (1968) (holding that the Supreme Court has "plenary authority under 28 U.S.C. §2106 to make such disposition of the case as may be just under the circumstances") (internal quotation omitted).

In light of these authorities, this Court cannot second guess the breadth of the Supreme Court's mandate by looking at the scope of FTB's arguments to the Supreme Court. *See Cook*, 78 U.S. at 674. If the Supreme Court wanted this Court to simply apply the statutory cap, it could have said so in its mandate and vacated the damages award only. *See* 28 U.S.C. §2106. It did not. *See Hyatt II*, 136 S.Ct. at 1283. It also did not identify the damages award as the sole reason why the 2014 Opinion was unconstitutional. *See id.* Instead, the mandate clearly specified that **any aspect** of the 2014 Opinion that was hostile to a sister state was unconstitutional. *See id.* at 1282-83.

3. This Court Must Rectify All Of The Sister-State Hostility Expressly And Impliedly Rejected By The Supreme Court's Mandate.

On remand, a lower court must tailor its new judgment to conform to any matter that the Supreme Court has disposed of either expressly or impliedly. *See*

Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 24 (1st Cir. 2010). "[T]he power of a [lower] court to act in any litigation after the issuance of a mandate on appeal is limited by an obligation to ***do nothing contrary to either the letter or the spirit of the mandate***, as explained or elucidated by the opinion." *Goldwyn Pictures Corp. v. Howells Sales Co.*, 287 F. 100, 102 (2d Cir. 1923) (emphasis added); *see also Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (looking to whether post-mandate conduct of lower court was consistent "with either the spirit or the express terms of our decision"); *In re Coudert Bros. LLP*, 809 F.3d 94, 99 (2d Cir. 2015) (holding that the lower court "must follow both the specific dictates of the remand order as well as the broader spirit of the mandate") (internal quotations and citations omitted). Hyatt summarily brushed aside this proposition and the supporting legal authorities cited by FTB. (Suppl. AB 20, n.29).

Embodied in the *Hyatt II* opinion is an extensive discussion of the Full Faith and Credit requirements. 136 S.Ct. at 1280-83. As the Supreme Court emphasized, a state may not "adopt any policy of hostility to the public Acts of that other State." *Id.* at 1281, *quoting Carroll v. Lanza*, 349 U.S. 408, 413 (1955). The Supreme Court expounded at length regarding why this Court's discriminatory conduct was unconstitutional:

> Nevada has not applied the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies. Rather, it has applied a special rule of law applicable only in lawsuits against its sister States, such as California… [A] State that disregards its own

> ordinary legal principles [based on the presumption that the sister state's legislative, judicial and administrative controls will be ineffective] *is* hostile to another State. A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others. Imagine, for example, that many or all States enacted such discriminatory, special laws, and justified them on the sole basis that (in their view) a sister State's law provided inadequate protection to their citizens. Would each affected sister State have to change its own laws? Entirely? Piece-by-piece, in order to respond to the new special laws enacted by every other State? It is difficult to reconcile such a system of special and discriminatory rules with the Constitution's vision of 50 individual and equally dignified States. In light of the constitutional equality among the States, … Nevada has not offered sufficient policy considerations to justify the application of a special rule of Nevada law that discriminates against its sister States. *Id.* at 1282 (internal quotations omitted).

This language broadly admonished the Court that no sister-state hostility of any kind can persist in a new judgment. *See id.*, *citing* 2014 Opinion, 335 P.3d at 145.

B. Hyatt's Supplemental Answering Brief Fails To Offer Justification For The Numerous Examples Of Sister State Hostility Identified By FTB.

Rather than address the multiple instances of anti-California discrimination identified by FTB, Hyatt makes the unfounded assertion that "[t]here is no other part of the 2014 Opinion [other than failure to apply the damages cap] that fails to treat FTB as a Nevada state agency would be treated." (Suppl. AB 21). Hyatt's contention is wrong, and by resting on this bald assertion without analysis, Hyatt concedes the merits of FTB's arguments.

1. Hyatt Does Not Dispute That The Court Did Not Give FTB The Deference It Gives To The Nevada Department Of Taxation's Fact Finding And Legal Conclusions.

Hyatt does not dispute a dispositive argument advanced by FTB: the Court would defer to the Nevada Department of Taxation's fact finding and legal conclusions. (*See* Suppl. OB 26-36 and cases cited therein).

> [S]tate law entrusts the primary responsibility for making factual evaluations under, and legal interpretations of, the revenue statutes to the expertise of Nevada's Department of Taxation.
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> * * *
>
> [T]he determinations of fact-based legal issues under the tax statutes should not be made by the courts; rather, those determinations are best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into the facts of the case. Further, we have repeatedly recognized the authority of agencies, like the tax department and Tax Commission, to interpret the language of a statute that they are charged with administering; as long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts.

See Int'l Game Tech., Inc. v. Second Jud. Dist. Ct., 122 Nev. 132, 157-58, 127 P.3d 1088, 1093, 1106 (2006) (internal quotation omitted). Hyatt makes no effort to distinguish this case or justify how the Nevada tort case could proceed without giving deference to FTB's audit findings and conclusions.

2. Hyatt Does Not Dispute That The Nevada Department of Taxation Would Be Immune From Hyatt's Attack On The Administrative Process.

Hyatt's supplemental answering brief is also silent and therefore concedes that Hyatt's tort case would have never proceeded against the Nevada Department of Taxation because Nevada affords its revenue agencies special immunities (beyond discretionary function immunity) that other agencies do not share. *See* NRS 360.140(3); NRS 372.670; NRS 375B.370; *see also Wells Fargo and Co. v. Dayton*, 11 Nev. 161, 168 (1876). The underlying purpose of this immunity is to prevent interference with the tax collecting process:

> It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. *Wells Fargo*, 11 Nev. at 168, *citing Dows vs. The City of Chicago*, 78 U.S. 108, 110 (1870).

By failing to cloak FTB with Nevada's statutory immunities, the 2014 Opinion did not treat FTB the same way Nevada treats its own Department of Taxation.

3. Hyatt Presents No Cogent Argument Why *Falline*'s Prohibition On IIED Claims In the Workers' Compensation Context Would Not Apply In All Administrative Proceedings.

Hyatt's attempt to limit *Falline*'s bar on IIED claims to just workers' compensation proceedings is nonsensical. *Falline* held that, like punitive damages,

an IIED claim could not lie against a self-insured employer and plan administrator for delay in payment of workers' compensation benefits. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1013, 823 P.2d 888, 894 (1991). As explained by the Court, the IIED tort "would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case." *Id.* In other words, the defendants' immunity from an IIED claim in *Falline* derived from a Nevada agency's immunity from punitive damages. *See id.*

Contrary to Hyatt's assertion, FTB made no "misstatement" regarding the *Falline* decision. (Suppl. AB 38). *Falline's* analytical underpinning was that a public entity is exempt from punitive damages that are otherwise allowed under NRS 42.005. *See Falline*, 107 Nev. at 1013, 823 P.2d at 894. The fact that *Falline* arose in the workers' compensation context is immaterial to that analysis. *See id.* In the 2014 Opinion, the Court granted FTB immunity from punitive damages because punitive damages are unavailable against Nevada's public agencies. 335 P.3d at 154. Just as the Court held that *Falline*'s bad-faith exception to discretionary function immunity applied outside the workers' compensation context, to enforce *Falline* in a non-discriminatory manner, it must also conclude that FTB cannot be subject to an IIED claim. *See id.*

The pre-*Martinez* cases cited by Hyatt do not alter this conclusion. (Suppl. AB 40-41 and citations therein). None of the defendants in those cases appear to have raised an immunity defense, and the Court provided no analysis on this issue. In contrast, *Falline* expressly points to a public agency's exemption from NRS 42.005 as the basis for granting immunity from the plaintiff's IIED claim. *See* 107 Nev. at 1013, 823 P.2d at 894.

The California cases cited by Hyatt also are not persuasive because it is undisputed that FTB would have complete immunity from liability in California's courts. *See* Cal. Govt. Code Ann. § 860.2. Moreover, the *Asgari* case allowed a new trial on punitive damages, which as this Court recognized in the 2014 Opinion, clearly are not allowed against a Nevada agency or FTB. *Compare Asgari v. City of Los Angeles*, 937 P.2d 273 (Cal. 1997), as modified on denial of reh'g (Mar. 17, 1997) *with* 2014 Opinion, 335 P.3d at 154.

4. Hyatt Does Not Identify Any Nevada Precedent That Allows A Fraud Claim Against A Nevada Agency.

The cases from other jurisdictions cited by Hyatt confirm there is no Nevada precedent for a fraud claim against a public entity and, to the extent the Court wants to make new law now, they constitute a shaky foundation for doing so. (Suppl. AB 41). The leading case on which Hyatt relies is an unpublished disposition from a federal court in Oregon adopting a magistrate judge's report and recommendation. *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). The court's decision was based on an "aiding and assisting theory" that the public entity could be liable for the intentional torts of individual employees. *Id.* at *9, appearing to refer to *7.[2] Hyatt advanced no such theory.

Moreover, not a single case that Hyatt cites involves a fraud claim that depends on statements made in a legislatively mandated form document to prove intent to defraud. For the fraud verdict against FTB to survive the *Hyatt II* mandate, the Court must establish new Nevada law that the Nevada Department of Taxation can be liable for fraud based on the Taxpayer Bill of Rights. *See* NRS 360.291(1)(a). No such precedent exists or should exist.

C. Hyatt's Use Of The Nevada Jury Verdict To Manipulate The California Administrative Process Underscores The Dangers Of Sister-State Hostility.

1. Hyatt's Contention That His California Administrative Appeal And Nevada Tort Case Are Separate Is Wholly Disingenuous As The Record Is Clear He Tried His Tax Case To The Las Vegas Jury.

Rather than address FTB's substantive arguments, Hyatt deceitfully contends that his Nevada tort case and California administrative appeal are distinct. (Suppl. AB 7). Hyatt cannot sidestep the 2014 Opinion's failure to grant FTB the

[2] The *Christina H* court's discussion mixed its analysis of the fraud and false imprisonment claims, further confirming that it provides shaky authority to support Hyatt. 2011 WL 976463 at *9.

protections of Nevada's exhaustion, immunity and deference doctrines by misrepresenting what his trial was all about: a collateral attack on the California administrative process.

The record is clear that Hyatt tried his tax case to the Nevada jury (AOB 23-27 and citations therein), thereby exceeding the jurisdictional limitations established by the Supreme Court. *See Franchise Tax Bd. of Calif. v. Hyatt* ("*Hyatt I*"), 538 U.S. 488, 499 (2003). From start to finish, Hyatt's counsel specifically told the jury it was their job to act as a "check and balance" on California's legislative and executive functions. 32 AA 07974 (131); 52 AA 12837 (90). The jury heard nearly two full days of testimony from Hyatt's expert Malcolm Jumelet, who expressed expert opinions critical of how FTB analyzed and weighed information obtained in the audits. 2014 Opinion, 335 P.3d at 150; 44 AA 10814-10946. Hyatt's trial attorneys then relied heavily on Jumelet's testimony in both their initial and rebuttal closing arguments.

For example, Hyatt's counsel referred the jury dozens of times to Jumelet's testimony that FTB had reached the wrong result concerning Hyatt's tax liability. *See, e.g.*, 52 AA 12835-36, 12853, 12893, 12894, 12901, 12905, 12910, 12912, 12915, 12923. In fact, Hyatt's counsel expressly asked the jury to tie Jumelet's testimony to the IIED claim. 52 AA 12894(28-29) (counsel discusses Jumelet's testimony, immediately followed by: "The FTB certainly knew how to inflict the

emotional distress on Mr. Hyatt."); *see also* 53 AA 13166-67, 13169, 13172, 13176.

The 2014 Opinion clearly recognized that Hyatt's trial strategy was to get a Las Vegas jury to review FTB's audit. 2014 Opinion, 335 P.3d at 150. As stated by this Court, the inadmissible expert testimony from Malcolm Jumelet "is precisely what this case was not allowed to address" because it "went to the audits' determinations and had no utility in showing any intentional torts …." *Id.* Given these acknowledgements, it is clear the 2014 Opinion violated the Full Faith and Credit mandate of *Hyatt I* and *II* insofar as it affirmed liability determinations made by a Las Vegas jury that second-guessed the agency statutorily charged with making factual findings and legal conclusions as to Hyatt's tax liability. *See Int'l Game Tech.*, 122 Nev. at 157-59, 127 P.3d at 1093, 1106.

2. Hyatt Misused A Nevada Discovery Order To Conceal From The California Protest Hearing Officer Documents That Undermined His Protests.

Hyatt does not dispute FTB's argument that the protective order Hyatt obtained from the district court ("Nevada Protective Order") interfered with FTB's administrative review of Hyatt's protest. (Suppl. OB 25). Shielded by the Nevada Protective Order, Hyatt abused the Nevada litigation process to hide key documents from FTB's auditors and hearing officer, including contracts, royalty schedules and wire transfer documents that showed he received $56 million of

income in 1991 instead of 1992, as Hyatt had represented to FTB. (AOB 20-21, 23-37 and record citations therein).

FTB's Nevada litigation attorneys learned of these hidden documents, but because of the Nevada Protective Order that prohibited them from sharing that information with others within FTB, the hearing officer who presided over Hyatt's protests did not. (*Id.*). Hyatt not only asked that his protest hearing be delayed, but because of Hyatt's litigation tactics, the protest hearing officer could not proceed until Hyatt provided all documents that had been requested in the administrative proceeding. (*Id.*). Yet the district court precluded FTB from presenting this evidence to the jury, and this Court then used the Hyatt-caused delay as a basis to affirm the jury's IIED verdict. 2014 Opinion, 335 P.3d at 148-49.

In light of this evidence in the record, Hyatt's contention that the Nevada tort case and the California administrative proceedings are purportedly "two different trains traveling on separate tracks" is entirely disingenuous. (Suppl. AB 7). Hyatt's trial tactic was to attack every discretionary decision made by FTB in Hyatt's audit. Then, based on one-sided evidence and manipulation of the California administrative process through overreaching Nevada discovery and evidentiary orders, the Nevada jury determined that FTB's routine audit procedures constituted fraud and IIED. *See* 2014 Opinion, 335 P.3d at 148; AOB 23:3-27:9

and record citations therein. This is precisely the "derange[d]" intrusion into a sovereign's tax collection that this Court long ago prohibited. *Wells Fargo*, 11 Nev. at 168. It likewise exhibits the "chaotic interference" into a state's taxing functions that the Supreme Court deemed unconstitutional. *Hyatt II*, 136 S.Ct. at 1282.

3. Hyatt Continues to Misuse The Nevada Jury Verdict To Manipulate His Administrative Appeal in California.

Should this Court question whether Hyatt has intertwined this case and the administrative appeal, it need look no further than Hyatt's actions in California. Buoyed by his success in his Nevada tort case, Hyatt now parades the Nevada jury verdict in his ongoing California administrative appeal before the California State Board of Equalization ("BOE") to argue that the tax liability issues have already been litigated in his favor. (*See* documents attached to Request for Judicial Notice).[3]

In his submissions to BOE, Hyatt made the following statements with specific citations to the 2014 Opinion and evidence presented at his Nevada trial:

- "It has been ***conclusively determined*** that FTB committed fraud, intentionally inflicted emotional distress and acted in bad faith in its

[3] FTB requests that the Court take judicial notice of these documents and concurrently files a separate motion to that effect. *See* NRS 47.130.

audits and protests of Mr. Hyatt." RJN 053:2-13, RJN 089:23-090:3, RJN221 (emphasis added).

- "A Nevada jury found that FTB engaged in gross misconduct and fraud, including bad faith acts, referring to Mr. Hyatt in derogatory terms, and much more. FTB's bad faith continues in these appeals." RJN 018:15-17; *see also* RJN 053:12-13 ("Nowhere in its briefing [to the BOE] has FTB addressed the fraud, intentional infliction of emotional distress, and bad faith ***found by the Nevada jury***") (emphasis added); RJN 090:10-11; RJN260.
- "***The Nevada Supreme Court found that FTB committed fraud and intentional infliction of emotional distress in part because of its delays***… In upholding the Nevada jury finding that FTB personnel committed fraud in Mr. Hyatt's audits and protests, the Nevada Supreme Court expressly highlighted FTB's extreme delay in processing Mr. Hyatt's two protests." RJN 216:1-8 (emphasis added).
- Hyatt asked for interest abatement based on "[t]he Nevada Supreme Court [finding] that FTB committed fraud and intentional infliction of emotional distress in part because of its delays." RJN 037:15-18.
- "The Nevada Supreme Court upheld the Nevada jury findings that FTB committed fraud in connection with his audits and protests. The

jury found that FTB made specific representations to Mr. Hyatt that it intended Mr. Hyatt to rely upon, but which FTB did not intend to fully meet." RJN221 (citing the same findings from the 2014 Opinion that Hyatt referenced at Suppl. AB 43).

- "The Nevada Supreme Court upheld the Nevada jury findings that FTB intentionally inflicted emotional distress against Mr. Hyatt." RJN222 (citing 2014 Opinion's findings regarding FTB's audit procedures); *see also* RJN236.

Hyatt's manipulation of his administrative appeal using the jury's verdict and this Court's 2014 Opinion underscores the dangers of sister-state hostility. The Court allowed Hyatt to circumvent the exhaustion requirement; declined to grant deference to FTB's fact finding and legal conclusions; and deprived FTB of the immunity that protects Nevada's Department of Taxation. Had Hyatt sued Nevada's Department of Taxation, the Court would have granted immunity to the agency. *See* NRS 372.670; NRS 375B.370. At a minimum, the Court would have required Hyatt to finish the administrative process and, thereafter, would have afforded deference to the agency's findings and conclusions. *See Int'l Game Tech.*, 122 Nev. at 157-59, 127 P.3d at 1093, 1106. Hyatt could not then substitute a Nevada jury verdict for the agency's own decision-making process, as the Court allowed him to do with FTB. *See id.*

D. The Court Has No Authority To Simply Enter Judgment Against FTB At The Statutory Cap Because The Jury In A New Trial May Award No Damages.

1. The 2014 Opinion Held That FTB Has The Constitutional Right To A New Trial On Damages.

The Court cannot, based on the "efficiency" argument advanced by Hyatt (Suppl. AB 13-14, 27-28), summarily enter judgment against FTB in the amount of the statutory cap. The presumptuousness of Hyatt's request is staggering, and Hyatt identifies no legal process to justify taking away what the 2014 Opinion recognized as FTB's constitutional right to a new trial. *See* Nev. Const. Art. I, § 3 (securing right to jury trial); 2014 Opinion, 335 P.3d at 149. The 2014 Opinion remanded for a new trial on emotional distress damages, and nothing in the *Hyatt II* mandate alters that decision in favor of FTB. 335 P.3d at 131. The jury at the new trial may very well award no damages to Hyatt, and FTB is entitled to a trial that could lead to this favorable result.

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2. Hyatt's Maximum Damages Recovery Is $50,000 Per Claim, Not $75,000.

Contrary to Hyatt's assertion (Suppl. AB 24-26), the applicable statutory cap at the time of Hyatt's alleged injuries was $50,000 per claim, not $75,000.[4] For actions accruing before 2007, the cap was set at $50,000. *See* 1995 Nev. Stat. 1071, 1073.4. That cap increased to $75,000 for actions accruing between Oct. 1, 2007 and Oct. 1, 2011, and to $100,000 for actions accruing after the latter date. 2007 Nev. Stat. 3015, 3024-25, 3027. A tort claim accrues at the time of the plaintiff's alleged injuries. *See LVMPD v. Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503, 509 (2013).

Hyatt's alleged injuries occurred prior to the filing of his complaint in 1999, at which time the statutory cap was $50,000. *See* 1995 Nev. Stat. 1071, 1073.4. The law does not give this Court discretion to impose a higher cap. *See* NRS 41.035(1). As a result, under no circumstance could the Court enter a judgment

[4] FTB's opening and reply briefs stated that the applicable statutory cap was $75,000. (AOB 100, 102; ARB 110-11, 115-16). This was incorrect because the applicable version of NRS 41.035(1) at the time of Hyatt's alleged injuries (i.e. prior to Hyatt's 1999 filing of the complaint) was $50,000. 1995 Nev. Stat. 1071, 1073.4. FTB corrected the error in its briefing to the Supreme Court, in which it argued that $50,000 was the applicable statutory cap. (SCOTUS Brief of Petitioner at 9, FTB's Suppl. App. ASA 021). Hyatt did not contest FTB's assertion of the corrected amount, instead arguing that the damages cap only applied to Nevada agencies, not FTB. (SCOTUS Brief of Respondent at 14, FTB's Suppl. App. ASA 100). The additional briefing requested by Hyatt is neither warranted nor justified. (Suppl. AB 27 n.42).

against FTB for more than $50,000 on Hyatt's remaining claims, which is what the Supreme Court concluded in *Hyatt II*. *See* 136 S.Ct. at 1282.

3. There Is Insufficient Evidence To Support The Fraud Verdict.

The "evidence" cited on page 42 of Hyatt's supplemental answering brief does not, as a matter of law, satisfy the essential elements of a fraud claim and therefore could not support the Court summarily entering judgment in the amount of the statutory cap. To establish fraud, the plaintiff must prove by clear and convincing evidence that the defendant knew or believed that his or her representation was false or had insufficient information to make the representation. *Bartmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-47, 956 P.2d 1382, 1386 (1998). The only alleged "representation" referenced by Hyatt is the 1991 notice of audit that California's Legislature required FTB to send to taxpayers who are being audited. Calif. Revenue & Tax. Code §21007.

As explained by FTB (Suppl. OB 16-17), just as Nevada's Taxpayer Bill of Rights would not show intent to defraud, the notice of audit that the California Legislature required FTB to send likewise cannot. *Compare* NRS 360.291(1)(a) *to* Calif. Revenue & Tax. Code §21007. The California Legislature's intent – not the intent of any FTB employee – is all that can be discerned from the notice of audit. *See id* Hyatt's supplemental answering brief is silent on this point.

The FTB employee who sent out the legislatively mandated notice of audit could not know what FTB's auditors would or would not do in the course of the audit in relation to the statements in the notice. Indeed, the 2014 Opinion does not even identify the employee who sent the notice or discuss any facts relating to what that employee did or did not know. Absent the requisite intent, the fraud claim fails as a matter of law. *See Reno Air, Inc.*, 114 Nev. at 446-47, 956 P.2d at 1386.

FTB does not ask the Court to "re-weigh the fraud evidence" as Hyatt contends. (Suppl. AB 44). It simply asserts that: (1) no evidence in the record can satisfy the intent element of fraud and (2) the Court has never and would never make the Nevada Department of Taxation liable for fraud based upon statements in the Taxpayers' Bill of Rights. *See* NRS 360.291(1)(a). By affirming the fraud verdict based upon statements in the 1991 notice of audit, the Court has engaged in the precise sister-state discrimination that the Supreme Court held unconstitutional. *See Hyatt II*, 136 S.Ct. at 1282-83.

4. There Is Insufficient Evidence To Support The IIED Verdict.

Additionally, in the 2014 Opinion, the Court allowed FTB's routine audit procedures, which the Court expressly held should have been outside the province of the jury, to serve as evidence of "extreme and outrageous conduct." 335 P.3d at 148-49. That same evidence, the Court acknowledged, was tainted by evidentiary

and instructional errors that were prejudicial to FTB. *Id.* at 150-153, 157. Concurrently, the Court held that FTB's audit procedures were insufficient to prove Hyatt's privacy-based tort claims. *Id.* at 140, 142. As a result, contrary to Hyatt's assertion (Suppl. AB 28 n.43), had the Court viewed FTB as Nevada's taxing authority, it would have concluded that Hyatt did not satisfy the elements of his IIED claim. *See Int'l Game Tech.*, 122 Nev. at 138, 157-58, 127 P.3d at 1093, 1106.

E. Hyatt's Procedural Arguments Are Not Supported By The Law Or The Record.

1. The 2014 Opinion Is Not "Law Of The Case" Because It Was Vacated By The Supreme Court

Because of the intervening *Hyatt II* decision, the 2014 Opinion it is not "law of the case." As even Hyatt recognizes (Suppl. AB 32-33), "the 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." *Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (quotation omitted). "[A]n exception to the law of the case doctrine occurs when … an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 264 n.3, 71 P.3d 1258, 1260 n.3 (2003) (internal quotation omitted).

The *Hyatt II* mandate, not the 2014 Opinion, is the law that this Court must follow because *Hyatt II* constitutes intervening law that dismantled the precedential effect of any part of the 2014 Opinion adverse to FTB. *See Durant*, 101 U.S. at 556-57. The "rule of mandate presents a specific and more binding variant of the law of the case doctrine…." *Ischay v. Barnhart*, 383 F. Supp. 2d 1199, 1214 (C.D. Cal. 2005) (internal quotation omitted). Moreover, to retain an unconstitutional decision would "work a manifest injustice" against FTB. *See id.*

Even if any portion of the 2014 Opinion adverse to FTB could be deemed to remain intact (which FTB disputes), the law of the case doctrine "merely expresses the [general] practice of the courts" and is "not a jurisdictional rule … or a limit to the[courts'] power." *Hsu*, 123 Nev. at 630, 173 P.3d at 728. Hyatt concedes that, at a minimum, this Court has "discretion to revisit and review issues unrelated to the *Hyatt II* damages issue." (Suppl. AB 4). The Court should exercise that discretion to ensure that its new judgment complies with its Full Faith and Credit responsibility in all respects.

2. FTB Adequately Preserved All Of The Arguments It Now Presents To The Court.

Hyatt erroneously argues throughout his supplemental answering brief that FTB's only argument that the district court violated *Hyatt I* concerned the award of

compensatory damages in excess of Nevada's statutory cap. (Suppl. AB 17, 28-31). This is simply untrue and is contradicted by the record in this case.[5]

FTB's opening brief was premised on the argument that the district court "failed to provide FTB with any of the protections and limitations to which a similarly situated Nevada government agency would have been afforded." (AOB 2, 34). FTB argued that Hyatt's tort case was an improper attack on the California administrative process, which Hyatt should have exhausted prior to seeking judicial review. (AOB 2, 34-51, 55-58). As FTB emphasized, the district court impermissibly allowed a Las Vegas jury to review and second guess the discretionary decisions made by FTB in its audit process. (AOB 2-3, 34-51). The district court's errors, FTB argued, were of constitutional magnitude, "exhibiting hostility toward FTB and the State of California." (AOB 4, 33).

Moreover, in its opening brief, FTB argued that the district court had violated the immunity statutes and exceeded the jurisdictional scope authorized by the *Hyatt I* decision. (AOB 58-60, n.53 and n.55 and citations therein). On remand from *Hyatt I*, the district court allowed Hyatt to morph his case into an attack

[5] Hyatt is not in a legitimate position to raise a waiver argument where he argued to the district court repeatedly that "this is not a bad faith case" (*see* 51 AA 12502 (79), 12507 (99) (100), 12511 (110-111)) yet then, in defense of the jury verdict, argued on appeal that a bad-faith exception to discretionary function immunity should be applied to FTB (RAB 57-60) and now makes approximately 2,000 "bad-faith" accusations throughout his BOE appeal. (*See* Request for Judicial Notice, Ex. 6).

against California's tax laws and process. 14 AA 3257-3300; 32 AA 07974 (131); 52 AA 12837 (90). Through its affirmative defenses, trial memorandum and proposed jury instructions, FTB labored to keep the case within the jurisdictional confines authorized by *Hyatt I*. 14 AA 3437; 24 AA 5804-6000; 25 AA 6001-6145.

The district court disregarded those efforts, and in the 2014 Opinion, this Court deemed the district court's extra-jurisdictional conduct to be erroneous as to the jury's liability determinations but then, inexplicably, found those errors to be harmless.[6] 2014 Opinion, 335 P.3d at 146 n.14, 152-53. The waiver doctrine does not apply to jurisdictional issues, which can be raised any time. *Vaile v. Eighth Jud. Dist. Ct.*, 118 Nev. 262, 276, 44 P.3d 506, 516 (2002). In light of *Hyatt II's* mandate that Nevada treat FTB as Nevada treats its own tax collectors, FTB's arguments that Hyatt's fraud and IIED claims must be dismissed are simply in furtherance of the jurisdictional argument FTB has asserted all along.

[6] The gravity of the Court's "harmless error" finding is particularly acute in the context of Hyatt's administrative appeals to BOE. In his briefs to the BOE, Hyatt has already signaled a harbinger of what is to come by making approximately 2,000 allegations of "bad faith" conduct by FTB in the course of the BOE appeal. (Request for Judicial Notice, Ex. 6). Having successfully circumvented the audit and protest process in California through his Nevada tort case, Hyatt appears to be planning a second Nevada trial to challenge FTB's discretionary decisions in the SBE appeal. Because *Hyatt II* prohibits the Court from facilitating Hyatt's collateral attack on a sister-state's administrative process, should the Court remand, it should do so with instructions that Hyatt may not further supplement the pleadings.

In addition, in its earlier briefing to this Court, FTB focused on the argument that the then-new *Martinez* decision, which adopted the federal *Berkowitz-Gaubert* test for discretionary function immunity, rendered *Falline* obsolete. (AOB 34-36, *citing Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007)). To the extent FTB was immune from being sued in tort, Hyatt's IIED and fraud claims necessarily failed, as a matter of law. (AOB 38-52). The Court rejected FTB's argument and embraced *Falline* as continuing to be good law.[7] 2014 Opinion, 335 P.3d at 138-39. FTB could not have anticipated that in retaining *Falline*'s "bad faith" carve out, this Court would then stray from *Hyatt I*'s equal treatment mandate and apply *Falline* in a discriminatory fashion. *See* 2014 Opinion, 335 P.3d at 147-49.

Because FTB simply submits that the 2014 Opinion has numerous constitutional defects, the arguments in FTB's supplemental opening brief are consistent with all arguments that FTB made previously. *See Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (barring only theories raised on appeal that are inconsistent with arguments raised below); *see also Brown v. E. Side Nat. Bank of Wichita*, 411 P.2d 605, 609 (Kan. 1966) (holding that a party can "challenge a judgment on consistent alternative grounds without being charged

[7] FTB petitioned for certiorari on the issue of whether this Court properly interpreted the *Berkowitz-Gaubert* test. The Supreme Court's decision to deny certiorari on that issue did not address whether this Court applied the holding of *Falline* to FTB in a non-discriminatory manner.

with estoppel by admission or acquiescence"). The errors that FTB contests are of jurisdictional and constitutional dimension, which may be reviewed *sua sponte* whether or not they were preserved in earlier proceedings. *See Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992) (*citing Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991)). Once the 2014 Opinion was vacated as unconstitutional for its failure to afford FTB the protections of Nevada's damages cap, all similarly unconstitutional sister-state hostility became subject to challenge on remand and must now be rectified. *See Hyatt II*, 136 S.Ct. at 1282-83.

III. CONCLUSION.

Hyatt's answering brief does not dispute FTB's numerous examples of sister-state hostility in the 2014 Opinion. Instead, Hyatt urges this Court to ignore the Supreme Court's wide-reaching mandate and to enter a new judgment that would be inconsistent with the *Hyatt II* opinion. This is not permitted. Viewing this case as if FTB were Nevada's Department of Taxation, Hyatt's fraud and IIED claims should be dismissed as a matter of law.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 2nd day of December, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,993 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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), which requires every assertion 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 this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of December, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of McDonald Carano Wilson LLP and on the 2nd day of December, 2016, I certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

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