

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

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Electronically Filed  
Dec 13 2016 01:16 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPEAL**

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

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**RESPONDENT GILBERT P. HYATT'S RESPONSE TO APPELLANT FRANCHISE  
TAX BOARD OF CALIFORNIA'S REQUEST FOR JUDICIAL NOTICE**

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## **RESPONSE TO REQUEST FOR JUDICIAL NOTICE**

Respondent Gilbert P. Hyatt (“Respondent” or “Hyatt”) submits this Response to Appellant Franchise Tax Board of the State of California’s (“Appellant” or “FTB”) Request for Judicial Notice (“RJN”) submitted on December 5, 2016, simultaneous with FTB’s Supplemental Reply Brief Following Mandate From the Supreme Court of the United States.<sup>1</sup>

### **I. FTB’S REQUEST FOR JUDICIAL NOTICE IS BASED ON A MISREPRESENTATION OF HYATT’S BRIEFING IN THE CALIFORNIA ADMINISTRATIVE PROCEEDINGS.**

FTB’s Request for Judicial Notice erroneously asserts that in the California tax proceedings Hyatt has argued that the jury verdict in this case on the fraud and IIED claims, and this Court’s affirmance of those findings, “conclusively determined’ California tax liabilities in Hyatt’s favor.” (FTB RJN, at 2.) This is demonstratively not true as shown by the very pages from Hyatt’s briefing in the California administrative proceedings to which FTB cites.

Specifically, to support its above quoted misstatement, FTB cites to pages 53, 89 and 221 of its Exhibits to its Request for Judicial Notice. Nowhere in those cited pages, or elsewhere in his administrative briefing, does Hyatt state or argue

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<sup>1</sup> To the extent the Court treats FTB’s Request for Judicial Notice as a motion, Hyatt has timely filed this Objection and Response of no more than ten pages within seven court days of the filing of the motion. Nev. App. Rule 27.

what FTB claims in its Request for Judicial Notice. Rather, Hyatt references the verdicts on the fraud and IIED claims, and this Court's affirmance of those claims, in the context of issues relevant to the tax proceedings, but never argues that the results of the Nevada tort case require any particular finding regarding Hyatt's tax liabilities or "conclusively determined" Hyatt's tax liabilities.

Regarding the cites to pages 53 and 89 of the Exhibits to Request for Judicial Notice, Hyatt's administrative briefing addresses whether in the tax proceedings the FTB has met its burden on several issues including FTB's request to impose a fraud penalty against Hyatt. After discussing the misconduct of the auditor, among other issues, Hyatt's brief describes the results of this Nevada tort case saying, "It has been conclusively determined that FTB committed fraud, intentionally inflicted emotional distress and acted in bad faith in its audits and protests of Mr. Hyatt."<sup>2</sup> But at no point does Hyatt make the follow-up argument that the results of the Nevada tort case resolve or decide any issue in the tax

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<sup>2</sup> Hyatt's statement is entirely consistent with this Court's 2014 decision. As Hyatt argued in his Supplemental Opposition Brief, the recent remand from the United States Supreme Court requires only that the 2014 decision be modified to award damages consistent with an award of damages against a Nevada state agency. There is no basis or reason for this Court to revisit its affirmance of the liability findings against FTB on the fraud and IIED claims.

proceedings. FTB's statement to the contrary in its Request for Judicial Notice is a misrepresentation of the record from the California tax proceedings.

Regarding the cite to page 221 of the Exhibits to Request for Judicial Notice, Hyatt again cites to the results of this Nevada tort case. There, Hyatt's administrative briefing provided a more detailed listing of this Court's 2014 decision. Notably, FTB makes no argument that Hyatt misstated this Court's 2014 decision. At no point in the California briefing, however, did Hyatt argue that the results from this Nevada tort case compel a result in the California tax proceedings. Again, FTB's statement to the contrary is a misrepresentation of the record from the California tax proceedings.

**II. FTB'S REQUEST FOR JUDICIAL NOTICE ALSO INACCURATELY ASSERTS THAT HYATT HAS NOT KEPT THE TWO PROCEEDINGS SEPARATE.**

FTB's Request for Judicial Notice also erroneously asserts that Hyatt has disingenuously referred to the two proceedings as traveling on separate tracks (FTB RJN, at 4) and misrepresents that this tort case and the tax proceedings are distinct. (FTB RJN, at 2.) That is simply not true. Hyatt has consistently advocated, and still advocates, that this Nevada tort case and the California tax proceedings are separate proceedings to be decided by the respective courts and administrative board in each state. Giving notice to the Court here or the

administrative board in California of what has transpired in the other proceeding does not change the fact that there are two separate proceedings in which the result of one does not compel or require a result in the other. That has always been the case, and is still the case.

By the same token, the administrative board in California is free to consider and give whatever weight it deems appropriate to the results from this Nevada tort case. Hyatt therefore has made the administrative board fully aware of the 2014 decision and advocated that the board should give consideration to findings from this case. The administrative board has given no indication whether it will or will not do so.

More importantly here, and contrary to the FTB's implicit, if not explicit, argument that this Court should reconsider portions of the 2014 decision merely because Hyatt advocated a position in the tax proceeding and cited the 2014 decision in support thereof, this Court's decision on the FTB's request presently before the Court is and must be entirely independent of the administrative proceedings in California.

That fact that California agencies or even the legislature are informed of the results of this case is entirely proper as it is up those agencies or the California legislature to decide what weight or impact this Court's decision has on any

decisions they make. In this regard, FTB lead counsel Pat Lundvall told the jury at the trial in this case that the verdict from this Nevada tort case would be the subject of legislative hearings in California centered around what conduct of the FTB was found to be outrageous. 90 AA 22295, 22316-22317. The California legislature and relevant administrative agencies should be informed of the results of this Nevada tort case and can give weight to it or take action as they see fit. But any notice of this Court's 2014 decision by Hyatt or anyone else to a California administrative board should have no bearing on what this Court decides in this case.

### **III. FTB'S REQUEST FOR JUDICIAL NOTICE MAKES ADDITIONAL MISSTATEMENTS OF THE RECORD.**

FTB's Request for Judicial Notice argues that "Hyatt tried his tax case to the Nevada jury" and suggests that he is using the verdict and this Court's 2014 decision to argue his tax case in the tax proceedings. (FTB RJN, at 2.) As explained above, this type of assertion by the FTB is patently false. As set forth in prior briefing, Hyatt tried his tort case to the Nevada jury. To the extent this Court found some evidentiary errors during the trial relating to admissions of evidence concerning the tax proceedings, this Court fully addressed those issues in its 2014 decision affirming the liability findings for the fraud and IIED claims on other

substantial evidence. FTB presents no basis for the Court to reconsider and re-determine those issues, and certainly no support exists for doing so based on Hyatt's briefing from the tax proceedings.

FTB's Request for Judicial Notice also argues that Hyatt asserts in the tax proceedings that the Nevada jury found the FTB acted in bad faith, but that Hyatt also argued to the district court that the tort case was "not a bad faith case." (FTB RJN, at 4.) The jury's finding of fraud and this Court's affirmance based on the evidence cited in the 2014 decision support Hyatt's argument that the jury found FTB acted in bad faith. This is far different from whether this case is a "bad faith case" in the context addressed by the district court. The very record citation put forth by FTB disproves its argument. (FTB cites: AA 12502(79), 12507(99-100), 12511 (110-111).)

**IV. HYATT DOES NOT OBJECT TO THE COURT TAKING JUDICIAL NOTICE OF THE HYATT'S BRIEFING FROM THE CALIFORNIA TAX PROCEEDING.**

FTB's specific request before the Court is to take judicial notice of 275 pages of briefings and submissions by Hyatt in the California tax proceedings. As a technical matter, Hyatt does not object to the Court taking judicial notice of these materials.



Hyatt does object to FTB's repeated misstatements and general attempt to mislead this Court as to what statements Hyatt has made and positions he has taken in the California tax proceedings. To the extent this Court feels Hyatt's briefing and submissions in the California tax proceedings are relevant to and have a bearing on the issue now before the Court, Hyatt prefers that the Court have and review his actual briefing and submissions as opposed to FTB's mischaracterizations of those submissions.

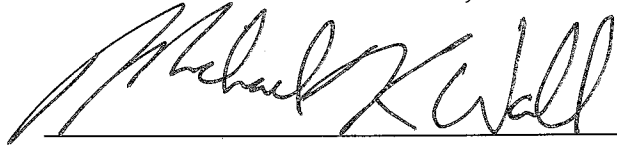
**V. CONCLUSION**

Based on the foregoing, Hyatt asks that the Court disregard the many misstatements and misrepresentations made by FTB in its request for judicial notice but then nonetheless take judicial notice of the briefings from the California tax proceedings as requested by FTB.

DATED: December 13, 2016.

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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 RESPONSE TO APPELLANT FRANCHISE TAX BOARD OF CALIFORNIA'S REQUEST FOR JUDICIAL NOTICE** 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

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DATED this 13<sup>th</sup> day of December, 2016.

  
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