

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 80884

Electronically Filed
~~Jul 31 2020~~ 11:33 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant,

v.

GILBERT P. HYATT

Respondent.

Appeal Regarding Judgment and Post-Judgment Orders
Eighth Judicial District Court
District Court Case No.: A382999

**APPELLANT'S APPENDIX
VOLUME 1**

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10/15/2019	FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party	1	AA000019	AA000039
10/15/2019	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party – Volume 1	2	AA000040	AA000281
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DATE	DOCUMENT	VOLUME	PAGE	RANGE
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Dated this 31st day of July, 2020.

McDONALD CARANO LLP

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 31st day of July, 2020, a copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

/s/ Beau Nelson

An Employee of McDonald Carano LLP


IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Appellant/Cross-Respondent,
vs.
GILBERT P. HYATT,
Respondent/Cross-Appellant.

No. 53264

FILED

AUG 05 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REMAND

This case comes to us on remand from the United States Supreme Court. In *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. ___, ___, 139 S. Ct. 1485, 1499 (2019), the Court concluded that states retain sovereign immunity from private suits in other courts, overruling *Nevada v. Hall*, 440 U.S. 410 (1979), and reversed our December 26, 2017, opinion affirming in part and reversing in part the district court's judgment in favor of respondent/cross-appellant Gilbert Hyatt. Therefore, we remand this matter to the district court with instructions that the court vacate its judgment in favor of Hyatt and take any further necessary action consistent


19-32774

AA000001

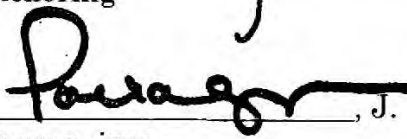
with this order and *Hyatt*, 587 U.S. ___, 139 S. Ct. 1485. Accordingly, we


ORDER this matter REMANDED to the district court for proceedings consistent with this order.


Gibbons C.J.


Pickering, J.


Hardesty, J.

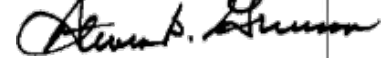

Parraguirre, J.


Stiglich, J.


Cadish, J.


Silver, J.

cc: Hon. Linda Bell, Chief Judge
Eighth Judicial District Court, Dept. 10
McDonald Carano LLP/Reno
Lewis Roca Rothgerber Christie LLP/Las Vegas
Eighth District Court Clerk



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4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**

6 Gilbert Hyatt,

Case No.: 98A382999

7 Plaintiff(s)

Department: X

8 v.

9 California State Franchise Tax Board,
10 et al,

11 Defendant(s)
12

13 **NOTICE OF HEARING**

14
15 PLEASE TAKE NOTICE that this matter is now set for **Further Proceedings:**
16 **Supreme Court Order** on **TUESDAY, AUGUST 27, 2019**, at the hour of **9:30 A.M.**, in
17 District Court Department 10 in the Regional Justice Center, 200 Lewis Avenue, 14th Floor,
18 Courtroom 14B, Las Vegas, Nevada.

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20 DATED: 8/13/19
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24 TIERRA JONES
25 DISTRICT JUDGE
26 DEPARTMENT 10
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CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was served electronically pursuant to the Nevada Electronic Filing Rules, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

James Bradshaw, Esq.


Robert Eisenberg, Esq.

Jeffrey Silvestri, Esq.

Peter Bernhard, Esq.

Mark Hutchison, Esq.

Patricia Lundvall, Esq.



Tess Driver
Judicial Executive Assistant
Department 10



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DISTRICT COURT

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CLARK COUNTY, NEVADA

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GILBERT HYATT,

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Plaintiff,

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vs.

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CALIFORNIA STATE FRANCHISE
TAX BOARD,

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Defendant.

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BEFORE THE HONORABLE TIERRA D. JONES
DISTRICT COURT JUDGE
TUESDAY, SEPTEMBER 3, 2019

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RECORDER'S TRANSCRIPT OF PENDING MOTIONS

16

17

APPEARANCES:

18

For the Plaintiff:

MARK A. HUTCHISON, ESQ.

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For the Defendant:

PAT LUNDVALL, ESQ.

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RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Las Vegas, Nevada, September 3, 2019

[Case called at 9:29 a.m.]

THE COURT: -- California State Franchise Tax Board. Good morning, counsel.

MR. HUTCHISON: Good morning, Your Honor.

THE COURT: If we could have everyone's appearances for the record.

MR. HUTCHISON: Your Honor, Mark Hutchison on behalf of Gilbert P. Hyatt. Mr. Hyatt is with me in the courtroom, as well, Your Honor.

THE COURT: Okay.

MS. LUNDVALL: Good morning, Your Honor. Pat Lundvall from McDonald Carano here on behalf of the California Franchise Tax Board. I, too, have a representative with me, Scott DePeel.

THE COURT: Okay. Okay. S this is on for a -- basically, we put it on for a status check based on the Supreme Court's order of remand. So it's been remanded in regards to the damages, as well as in regards to the costs. Do you guys think this is something that you guys have an agreement on, or how do you guys want to proceed with this?

MR. HUTCHISON: Well, Your Honor, I don't think we have an agreement. I was handed -- and I'm sure counsel gave you copies -- but I was handed an order that I think counsel is going to present to the Court for consideration.

THE COURT: Okay.

1 MR. HUTCHISON: We object to the order, Your Honor, on
2 the very basis by which the Court has had this case remanded to the
3 Court. As the Court knows, we've got an order of remand.

4 THE COURT: Right.

5 MR. HUTCHISON: And what the order of remand says is that
6 the U.S. Supreme Court reverses *Nevada v Hall*, and then the Nevada
7 Supreme Court's opinion is that of December 26th, 2007, which actually
8 affirmed in part and reversed in part the judgment in favor of Mr. Hyatt.
9 The Court then said, therefore, we remand this matter to the District
10 Court with instructions that the Court vacate its judgment in favor of
11 Hyatt and take other further necessary actions consistent with this order
12 and the U.S. Supreme Court's order.

13 What the judgment that's being proposed by counsel does is
14 actually enter judgment favor of the FTB, which of course, there's no
15 instruction at all from the Court -- the Nevada Supreme Court, that the
16 judgment be entered in favor of the Franchise Tax Board. To the
17 contrary, the only direction in terms of dealing with the judgment is to
18 vacate the judgment of favor of Hyatt, Your Honor.

19 And so we don't believe that the Court can follow the form
20 that is being presented by the FTB, based on the Court's order of
21 remand. There is no judgment in favor of the FTB. There never has
22 been. There never will be, Your Honor. The jury found in favor of Mr.
23 Hyatt to the tune of \$388.1 million. Judgment was entered in Mr. Hyatt's
24 favor on the Nevada tort case based on that \$388 million judgment.

25 It then went to the Nevada Supreme Court twice. The

1 judgment was affirmed on various levels, still maintaining the judgment
2 in favor of Mr. Hyatt. The only reasons we're even here is because after
3 22 years of litigating, the U.S. Supreme Court now has reversed the case
4 law, and there's good case law that says that just because the underlying
5 case law is reversed, it doesn't make you the prevailing party, it doesn't
6 entitle you to a judgment, Your Honor.

7 So that issue is hotly contested, and we would vehemently
8 object to any form that would suggest that the FTB is either entitled to a
9 judgment or is, in fact, the prevailing party. We believe Mr. Hyatt
10 continues to be the prevailing party in this Nevada tort case, and for the
11 procedural grounds that I've just repeated -- and I'm happy to go into
12 much more detail -- where Mr. Hyatt won at virtually every turn in this
13 Court, and then Your Honor -- and this case -- this Nevada tort case, is
14 based on a residency audit.

15 The whole question was, did Mr. Hyatt move to the State of
16 Nevada or was he still a California resident. That audit was not
17 determined in Nevada, but the torts, the underlying torts that were
18 committed as a result of that audit, is what this case was all about. Mr.
19 Hyatt won at every turn in this Court, and by the way, Your Honor, in the
20 California residency audit case, he won on the residency question, hands
21 down.

22 The residency audit Mr. Hyatt prevailed on in California, that
23 was the basis of the Nevada tort claim, so to suggest that there should
24 be a judgment entered in favor of the FTB, or that there should be a
25 prevailing party determination as the FTB, as a prevailing party, we think

1 it's completely wrong, Your Honor.

2 THE COURT: Counsel?

3 MS. LUNDVALL: Good morning, Your Honor. I think you've
4 got a little bit of a difficult task. You're walking into a case that is now
5 going on its 22nd year of existence. There's a little bit of history,
6 obviously, that went on in this case, and that history is something that is
7 important. Mr. Hutchison has given you part of that history. May I give
8 you the balance of that history?

9 THE COURT: Yes.

10 MS. LUNDVALL: The case was originally filed in 1998. What
11 happened that preceded 1998, is that the FTB had conducted an audit of
12 Mr. Hyatt, and he did not like the results of that audit. What he did, is he
13 took certain legal proceedings then in the State of California, but he also
14 filed this action here in the State of Nevada.

15 Originally, when this case was first filed, we had contested
16 whether or not that the Court had jurisdiction over this case. That issue
17 was briefed. It went to the Nevada Supreme Court. After it went to the
18 Nevada Supreme Court, it went to the U.S. Supreme Court for the first
19 time. And before the U.S. Supreme Court for the first time, we had taken
20 the position that we could fall within the scope of an exception that had
21 been created by the U.S. Supreme Court concerning immunity and
22 State's rights, and we lost before the U.S. Supreme Court back in 2003.

23 The case came down here to the District Court then after
24 being remanded to the Nevada Supreme Court, and then ultimately, back
25 to this Court. There was a trial. The results of that trial then were

1 contested. We went up on appeal to the Nevada Supreme Court, and the
2 Nevada Supreme Court sharply, sharply reduced the judgment. That
3 judgment went from \$490 million down to around a million dollars.

4 We believe that there were certain errors that were
5 committed by the Nevada Supreme Court, and we took an appeal then to
6 the U.S. Supreme Court, once again, contesting the immunity issue. We
7 had advanced actually two arguments the second time around. We
8 prevailed on the first argument, and the Court split four to four on the
9 second argument. The justice that was unable to participate in the final
10 decision was Justice Scalia. When Justice Scalia passed, then the Court
11 had split four to four on the issue of whether or not the FTB was immune
12 from suit here in the State of Nevada.

13 That case then in 2015, was remanded back to the Nevada
14 Supreme Court. We took further proceedings, and in those further
15 proceedings, once again, reduced the judgment even further, down from
16 a million some odd dollars, down to a hundred thousand dollars. And at
17 that point in time, we believe that there were additional errors that were
18 committed. Took an appeal for the third time to the U.S. Supreme Court.
19 And in May of this year, the U.S. Supreme Court issued its decision.

20 I don't have a copy of that decision here, but I didn't
21 anticipate the argument that was being prepared by Mr. Hutchison
22 today, but I will provide a copy to the Court, if in fact, the Court -- I think
23 that it would be important for the Court to take a look at it.

24 That decision says this. That the State of California, its
25 Franchise Tax Board, was immune from suit here in the State of Nevada.

1 And therefore, that Mr. Hyatt could take nothing by reason of his suit
2 because there was no jurisdiction by this Court over the State of
3 California, their Franchise Tax Board.

4 The case then was remanded back to the Nevada Supreme
5 Court, and recently, the Nevada Supreme Court issued a remand order.
6 That remand order gave this court two instructions, for lack of a better
7 word. One was to vacate the judgment that was entered, first, in favor of
8 Mr. Hyatt. And the second was to take further proceedings in accord
9 with the U.S. Supreme Court decision, a two-fold point.

10 And so what we did today is we prepared a judgment. That
11 judgment pursuant to Rule 54, and the proceedings in the District Court
12 as it relates to liability on the claims that were asserted by Mr. Hyatt. We
13 included within the proposed judgment both of the directives that were
14 given to you by the Nevada Supreme Court.

15 The first directive is that it vacate the judgment that was
16 originally entered in favor of Mr. Hyatt. The second piece then is that it
17 enters judgment in favor of the FTB against Mr. Hyatt on all of the
18 claims, and that's the second piece of the directive that was given by the
19 Nevada Supreme Court based upon the U.S. Supreme Court's decision.

20 And it sounds like that counsel and I don't have an
21 agreement on this document, and my instinct is that possibly, the Court
22 may benefit by briefing on this single point of whether or not judgment
23 should be entered in favor of the FTB based upon the U.S. Supreme
24 Court decision. I'm happy to supply briefing if the Court sees fit, but in
25 the meantime, if the Court would allow me to approach, I would like to at

1 least hand the Court a draft copy of the judgment that we had given a
2 copy to Mr. Hutchison in advance of the hearing.

3 THE COURT: Sure. Please.

4 MS. LUNDVALL: Thank you.

5 THE COURT: Thank you.

6 MS. LUNDVALL: Would you like me to hand it to the Clerk or
7 you?

8 THE COURT: You can give it to me. Thank you.

9 And, Mr. Hutchison, what is your position in regards to
10 briefing the issue on whether or not judgment should be issued in favor
11 of FTB?

12 MR. HUTCHISON: Well, Your Honor, I think that the Court
13 can consider the order of remand and do exactly what the Nevada
14 Supreme Court said, which is just simply to vacate the judgment and the
15 Court can do that today.

16 THE COURT: Well, yeah, because I don't think -- I think that's
17 undisputed --

18 MR. HUTCHISON: Right.

19 THE COURT: -- that the Nevada Supreme Court ordered me
20 to vacate the judgment that was previously entered.

21 MR. HUTCHISON: Right.

22 THE COURT: But in regards to where we go from there.

23 MR. HUTCHISON: That's right, and if the Court is
24 considering any way more than that, Your Honor, then we would like an
25 opportunity to present --

1 THE COURT: Okay.

2 MR. HUTCHISON: -- a competing order to the Court, along
3 with briefing. We also think, Your Honor, again -- excuse me -- Your
4 Honor, I don't want to repeat my argument, but I think just based on just
5 a simple vacation of the judgment and the fact that there's no judgment
6 entered in favor of the FTB, which is not what the Supreme Court has
7 ordered, then I think you could just simply say there is no prevailing
8 party, and we're all done.

9 To the extent that the Court wants to look behind that, on
10 prevailing party, I think it would be prudent for the Court to have briefing
11 on whether there is a prevailing party, because we've got 22 years of
12 costs and potentially parties seeking fees. The Court shouldn't wade
13 through -- really, the parties frankly shouldn't brief unless -- until the
14 Court has determined the fundamental question, whether there even is a
15 prevailing party here, Your Honor.

16 So that would be our recommendation. I mean, our desire is
17 for the Court to simply enter judgment consistent with the Supreme
18 Court's order of remand, just vacate the judgment in favor of Hyatt.
19 That's it. If the Court wants to move beyond that and have us submit
20 competing orders and briefing, we're happy to do that, Your Honor, but
21 then if the Court does that, there has to be a fundamental question
22 answered first, which is, is there a prevailing party upon which you'd like
23 to spend time briefing the Court, as well, Your Honor.

24 MS. LUNDVALL: And I think what Mr. Hutchison is
25 previewing for this Court is that, in essence, what Mr. Hyatt's goal is, is

1 not to have any result that comes from the U.S. Supreme Court decision
2 that was issued in May of 2019.

3 In essence, he's saying, jump ball. That this case ends in a
4 tie, in an even, so that neither party is the prevailing party. And I think
5 the preview of what he's giving to the Court is this. He wants to deprive
6 the prevailing party of being able to recover costs, as well as attorney's
7 fees. In advance of the trial that was done in this case in 2007, we had
8 made an offer of judgment to Mr. Hyatt to formally resolve this case.

9 It had been preceded by many informal offers to resolve the
10 case, and it was post-ceded by many offers to resolve the case, but the
11 offer of judgment, though, is something that we sent to Mr. Hyatt, and
12 there are consequences, as the Court well knows, pursuant to Rule 68,
13 from failing to accept an offer of judgment that you do not heed.

14 And so to the extent that I think what's happening here is
15 that you're seeing a preview then of an attempt to deprive the FTB of any
16 result, and so that result deprives the FTB of presenting to the Court a
17 bill of cost, as well as a motion requesting reimbursement of certain of
18 our attorney's fees.

19 THE COURT: Well, and I mean, I --

20 MR. HUTCHISON: Your Honor, may I just quickly respond?

21 THE COURT: Yes.

22 MR. HUTCHISON: Judge, you have to determine whether
23 there's a prevailing party. So you would have to make that
24 determination. I think there's a reason that you didn't hear the amount
25 of the offer of judgment, \$110,000. \$110,000 before *Nevada v. Hall* was

1 reversed. *Nevada v. Hall* is still good law. We go on to get a \$380
2 million verdict.

3 Now, somehow in that rejection -- and the Court knows this
4 case law in terms of whether or not that was rejected in bad faith and
5 that sort of thing, or it was grossly inadequate, or problematic for a party
6 to reject that. So Judge, we're happy to tee that up.

7 What I'm previewing for the Court is we're going to ask the
8 Court to enter judgment, just as I asked, just simply vacating the
9 judgment, and we are going to ask the Court to have a determination
10 that there is no prevailing party based on the procedural history of this
11 case, and if there is a prevailing party, it's Mr. Hyatt in this case. That's
12 what we're going to be arguing.

13 And by the way, Your Honor, it would not be unprecedented --
14 in fact, there's Nevada Supreme Court precedent on published decisions,
15 by the way, I'll just tell the Court, that says, sometimes, it is a jump ball.
16 Sometimes, there is no prevailing party. There doesn't have to be a
17 prevailing party.

18 And in fact, there's also further case law that says when the
19 underlying law in a case changes, and just you -- and a party is a
20 fortuitous beneficiary, is how the Court says it, that doesn't mean you're
21 the prevailing party. You're a fortuitous beneficiary of a change in the
22 law that we started this case on that was decades long precedent
23 through the vast recourse.

24 THE COURT: Well, I mean, I think these issues are definitely
25 -- I mean, clearly, these are going to be issues that we have to sort out

1 before any decision can be made on that.

2 So what I'm going to do is I am going to allow you guys to
3 submit competing orders to the Court, but I am going to also require that
4 you brief this issue of -- I think the prevailing party is an important issue
5 because if there's ever ever going to be any sort of determination of if
6 there's fees, if there's costs, if there's any of these things, that's
7 something that has to be determined before we can even get there.

8 So I do need you guys to brief the issue of is there a
9 prevailing party. If there is a prevailing party, who is that, and why is
10 that the case, as well as whether or not -- I want you to brief the issue of
11 whether or not judgment should be issued in favor of the Franchise Tax
12 Board, okay?

13 MR. HUTCHISON: Yes, Your Honor.

14 MS. LUNDVALL: Yes.

15 THE COURT: And I want you guys to do this blindly --

16 MR. HUTCHISON: Okay.

17 THE COURT: -- in regards to your briefs. So how long do
18 you guys think it will take for you? I mean, I know this may take like
19 some digging in archives for your files and things like that, so I don't
20 want to put you on a short timeframe only for you to go back to your
21 computer and find out there's documents that you don't have or things
22 that you have to reobtain.

23 MR. HUTCHISON: Your Honor, I know we've got multiple
24 things, my client has multiple legal proceedings. Can I just consult with
25 him for just a minute?

1 THE COURT: Yes.

2 MR. HUTCHISON: Just to see what we need to do.

3 [Pause]

4 MR. HUTCHISON: Your Honor, if we could get 45 days to do

5 opening briefs, that's what we would request.

6 THE COURT: What's your position on 45 days?

7 MS. LUNDVALL: I think it's a little long, but in the event that

8 that's what they need, we will comply within 45 days, Your Honor.

9 THE COURT: Okay. So both briefs will be due in 45 days.

10 That date is?

11 THE CLERK: October 15th.

12 THE COURT: If the Court can proceed with an order after that

13 date, I'll proceed with an order. If not, we will reset this for hearing.

14 MR. HUTCHISON: And I'm sorry. Was it October 15th?

15 THE CLERK: Correct.

16 MR. HUTCHISON: Great.

17 THE COURT: Okay?

18 MR. HUTCHISON: All right. And thank you very much. We

19 had requested this to be recorded, and we would just like it to be

20 expedited, just for the record. Thank you so much.

21 THE COURT: Okay.

22 MS. LUNDVALL: Thank you, Your Honor.

23 THE COURT: Thank you, counsel. Thank you.

24 /////

25 /////

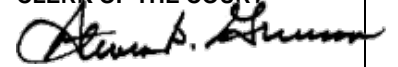
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MR. HUTCHISON: Thank you, Your Honor.
THE COURT: Have a good day.
[Proceedings concluded at 9:48 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708



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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

vs.

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA, and DOES 1-100, inclusive,

Defendants.

Case No.: 98A382999

Dept. No.: X

**FTB's BRIEF RE THE
REQUIREMENT OF ENTRY OF
JUDGMENT IN FTB'S FAVOR AND
DETERMINATION THAT FTB IS
PREVAILING PARTY**

On September 3, 2019, the Court held a status check in this matter during which the Court requested that plaintiff Gilbert Hyatt ("Hyatt") and defendant Franchise Tax Board of the State of California ("FTB") submit blind briefing addressing two issues:

- (1) Whether judgment must be entered in FTB's favor because of the U.S. Supreme Court's May 2019 decision in FTB's favor and in compliance with the Nevada Supreme Court's subsequent orders on remand; and
- (2) Whether there is a prevailing party in this litigation, and if so, which party prevailed.

See September 3, 2019 Transcript ("Sept. 3 Trans.") at 12:8-12, on file with the Court. The Court's request was prompted by Hyatt's argument that the Court should vacate the final judgment originally entered September 8, 2008, without entering a new one, and that despite Hyatt recovering nothing in this lawsuit because of the U.S. Supreme Court's May 2019 decision, Hyatt was the prevailing party in this lawsuit. See *id.* at 4:7-21 and 8:12-21.

Hyatt was incorrect on both points. First, on the question of whether the Court must enter a new judgment after vacating the prior judgment, the Nevada Supreme Court is unwavering in requiring a final judgment. NRCP 54 and 58 command a district court to enter a final judgment in every case before it. See NRCP 54(a) and 58(b). Several procedural rules regarding attorney's fees and costs, offers of judgment, amending and enforcing judgments, and taking appeals therefrom cannot be triggered without a final judgment. See, e.g., NRCP 54, 59, 60, 62, and 68, and NRAP 3A and 4. Moreover, a final judgment implicates issue and claim preclusion doctrines that bring about finality to a case. Consequently, a final judgment that resolves all issues presented in the case is an inescapable procedural requirement under Nevada law. Hyatt's suggestion to the contrary—that the Court can vacate the prior judgment without entering a new one—would leave this case in a procedural quagmire where neither party could seek post-judgment remedies, appeal any contested issues, or claim the protection of issue or claim preclusion. Additionally, the Court cannot statistically close the case without a final judgment. Nevada law, therefore, requires a final judgment in this case, and that judgment must be in FTB's favor given the U.S. Supreme Court's May 2019 decision.

Second, on the issue of determining which party is the prevailing party, the Court cannot make such determination until there is an actual motion for attorney's fees or bill of costs before it which would implicate prevailing party analysis since the analysis varies dependent upon the grounds upon which the motion for attorney's fees or costs are sought. As such, FTB provides briefing herein on prevailing party status to comply with the Court's direction, but believes the Court cannot presently determine the prevailing party until FTB files a motion seeking its attorneys fees or a memorandum of costs.

Moreover, Hyatt has the unenviable task of convincing the Court that the U.S. Supreme Court erred in already deciding that FTB is the prevailing party for imposition of costs. The U.S. Supreme Court has already granted FTB's costs as the prevailing party. In other words, Hyatt brazenly suggests that the U.S. Supreme Court erred when it determined FTB was the prevailing party for the purposes of costs on appeal, and that this

1 Court is empowered to reverse the U.S. Supreme Court. The U.S. Supreme Court has
2 already found that FTB prevailed, and there is no justification for Hyatt's suggestion that this
3 Court overrule that finding. Nor is there any justification that this Court has the power to
4 reverse the U.S. Supreme Court's determination.

5 Hyatt's fallback position—that prevailing party analysis in this Nevada case should
6 turn on what allegedly happened in the California tax audit which was a separate
7 independent legal proceeding—is without precedential support and contradicts multiple
8 representations Hyatt has made to appellate courts in this case. As FTB urged from its
9 very appearance in this case, the U.S. Supreme Court's May 2019 decision clearly ruled
10 that the State of Nevada did not have jurisdiction over FTB and consequently Hyatt's lawsuit
11 asserting common law claims in Nevada was *void ab initio* because of this absence of
12 jurisdiction. As even Hyatt now admits, he lost all his claims in Nevada. In contrast, FTB
13 prevailed on the very position it asserted from day one. In such circumstances, there can
14 be no clearer prevailing party under Nevada law, and that party is FTB. FTB was the party
15 that achieved all its litigation objectives. FTB successfully defended against the entirety of
16 Hyatt's Nevada lawsuit. Hyatt received no relief from this case.

17 FTB therefore respectfully requests that the Court enter judgment in FTB's favor
18 pursuant to the proposed judgment that FTB submitted at the September 3, 2019 hearing,
19 a courtesy copy of which is attached as **Exhibit A**. FTB further requests that, upon the filing
20 of a proper motion for attorney's fees or a memorandum of costs, the Court ultimately find
21 that FTB was the prevailing party in this litigation.

22 Dated this 15th day of October, 2019.

23 McDONALD CARANO LLP

24 /s/ Pat Lundvall

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF RELEVANT FACTS.

A. Hyatt's Tax Dispute.

Hyatt is a former 23-year resident of California who received hundreds of millions of dollars in fees related to technology patents he once owned and developed in California. In 1992, Hyatt filed a California tax return stating he had ceased to be a California resident, and had become a Nevada resident on October 1, 1991.

FTB, the State of California government agency responsible for collecting personal income tax, became aware of circumstances suggesting that Hyatt had not actually moved to Nevada in October 1991, as he claimed. Accordingly, the FTB commenced an audit in California of Hyatt's 1991 return. The audit concluded that Hyatt did not move to Nevada until April 1992, and that he remained a California resident until that time. FTB accordingly determined that Hyatt owed approximately \$1.8 million in unpaid California income tax for 1991, plus penalties and interest. Because FTB determined that Hyatt resided in California for part of 1992 yet paid no California taxes, it also opened an audit for 1992 which concluded Hyatt owed an additional \$6 million in taxes and interest, plus further penalties.

Disputes over these deficiency assessments between Hyatt and FTB over the validity of those audit determinations have consumed over two decades and are currently ongoing in California pursuant to California administrative and statutory procedure.

1. The Nevada Litigation Begins.

In January 1998, as California's administrative review of FTB's deficiency assessment was just beginning, Hyatt brought this lawsuit against FTB. In a Nevada state court, Hyatt alleged that the FTB had committed several torts in the course of auditing his tax returns. Hyatt sought compensatory and punitive damages. See **Exhibit B**, Complaint.

FTB began its defense of the Nevada litigation by asserting its immunity from the suit. See **Exhibit J**, Answer to First Amended Complaint. FTB moved for judgment on the pleadings, arguing that Nevada lacked the necessary jurisdiction to hear Hyatt's claims. See **Exhibit K**, Defendant's Motion for Judgment on the Pleadings. FTB also moved for

1 summary judgment and ultimately petitioned the Nevada Supreme Court for a writ of
2 mandamus, arguing FTB was immune from suit in Nevada courts. See **Exhibit L**, FTB's
3 Motion for Summary Judgment. The Nevada Supreme Court rejected FTB's claim of
4 complete immunity, which set up the first decision from the U.S. Supreme Court. *Franchise*
5 *Tax Bd. of Cal. v. Hyatt (Hyatt I)*, 538 U.S. 488 (2003).

6 2. Hyatt also files suit in federal court seeking to avoid his tax liabilities.

7 Beyond the California tax proceedings and the case in front of this Court, Hyatt also
8 sued FTB in the United States District Court for the Eastern District of California. See *Hyatt*
9 *v. Chiang*, 2015 WL 545993 at *1 (E.D. Cal. Feb. 10, 2015). In that case, Hyatt claimed
10 FTB's efforts in processing his California administrative tax appeal violated his constitutional
11 rights under the due process and equal protection clauses. See *id.* He thus sought an
12 offensive injunction barring FTB from "continuing the investigation and administrative
13 proceedings against him" and from "continuing to assess or threaten to assess [Hyatt], or
14 collect or threaten to collect from [Hyatt], taxes, penalties, or interest." *Id.*

15 Much like this case in Nevada, Hyatt went on the offensive seeking to interject
16 another court's ruling, this time from a federal district court, into the California tax
17 proceedings as a mechanism to avoid tax liability. The district court in that case stated, "[i]t
18 is evident that [Hyatt] seeks to void the tax or taxes assessed against him." *Id.* at *6. But
19 the federal district court was unconvinced regarding Hyatt's claims, and so it dismissed the
20 lawsuit against FTB. See *id.* Hyatt appealed to the United States Court of Appeals for the
21 Ninth Circuit, but that court also remained unconvinced by Hyatt's arguments and instead
22 affirmed the district court's dismissal of his case. See *Hyatt v. Yee*, 871 F.3d 1067, 1078
23 (9th Cir. 2017).¹

24
25
26 ¹ Attached at **Exhibit C** is a copy of a brief filed with the Ninth Circuit Court of Appeals
27 offering details explaining the length of time the tax proceedings have consumed since Hyatt
28 first contested his tax liability to the State of California. FTB will not seek recovery of any
attorney's fees incurred in Hyatt's tax proceedings or its directly related litigation but offers
this information for context.

1 B. FTB Submits an Offer of Judgment to Hyatt But He Rejects It to Go to Trial.

2 After the U.S. Supreme Court's decision in *Hyatt I*, the parties engaged in massive
3 discovery and pretrial proceedings. Those efforts are well documented in the docket entries
4 for this case. See **Exhibit D**, Docket Report of Eighth Judicial District Court in Case No.
5 98-A382999 as of 10/8/2019.

6 On November 26, 2007, nearly ten years after Hyatt filed suit and nearly twelve
7 years before this brief, FTB served an offer of judgment (the "Offer") upon Hyatt pursuant
8 to NRCP 68 and NRS 17.115 offering to settle this case for \$110,000, "inclusive of all pre-
9 offer, prejudgment interest, taxable costs and attorneys fees." See **Exhibit E**, Offer of
10 Judgment. FTB made the Offer after the parties conducted voluminous discovery in this
11 case and after discovery had closed.

12 From this case's very beginning, FTB contended that it was immune from suit in
13 Nevada courts. See *Hyatt I*, 538 U.S. at 492 (noting FTB's summary judgment motion
14 "argued that the District Court lacked subject matter jurisdiction because principles of
15 sovereign immunity, full faith and credit, choice of law, comity, and administrative
16 exhaustion" required dismissal). Because of its belief that FTB was immune from suit in
17 Nevada, FTB explicitly made the Offer case concluding of the Nevada litigation: "This Offer
18 of Judgment shall apply to all claims asserted by Hyatt against FTB in the above referenced
19 action and if accepted, shall completely resolve this matter." **Exhibit E**, Offer at 1:26-27.
20 Hyatt rejected the Offer.

21 After Hyatt's rejection, the parties did substantial additional work preparing the case
22 for trial. See **Exhibit D**, Docket Report. Between FTB's Offer and trial, Hyatt filed nearly
23 20 pretrial motions. See *id.* The trial itself began April 15, 2008 and lasted four months,
24 covering over 75 trial days. See *id.* The trial included a substantial number of witnesses
25 and over 2000 multi-page exhibits. Ultimately, a jury found in Hyatt's favor on all claims
26 tried and with interest and costs, the judgment was over \$490 million in money damages,
27 the majority coming from punitive damages. See *Franchise Tax Bd. of California v. Hyatt*,
28 130 Nev. 662, 674, 335 P.3d 125, 133-34 (2014) and **Exhibit F** (2008 Judgment to be

1 vacated).

2 C. Subsequent Appeals Reduce Hyatt's 2008 Judgment to Nothing.

3 FTB appealed the jury awards to the Nevada Supreme Court, which affirmed in part
4 and reversed in part the 2008 Judgment in Hyatt's favor. *Id.* Notably, the Nevada Supreme
5 Court again rejected FTB's immunity contentions. *Id.* FTB again appealed to the U.S.
6 Supreme Court, which granted certiorari on two questions. *Franchise Tax Bd. of Cal. v.*
7 *Hyatt (Hyatt II)*, 136 S.Ct. 1277, 1280 (2016). Several states filed amicus briefs at both the
8 petition stage and merits stage in support of FTB, including the State of Nevada.

9 Thereafter, the U.S. Supreme Court divided equally on the two questions. On one
10 question, the U.S. Supreme Court held that the Full Faith and Credit Clause does not
11 "permit [] Nevada to award damages against California agencies under Nevada law that
12 are greater than it could award against Nevada agencies in similar circumstances." *Id.* at
13 1281. "In light of the constitutional equality among the states," "Nevada has not offered
14 'sufficient policy considerations' to justify the application of a special rule of Nevada law
15 that discriminates against its sister states." *Id.* at 1282. On the second question, because
16 of the death of Justice Antonin Scalia and the resulting temporary composition of 8 justices,
17 the U.S. Supreme Court divided equally on the issue of whether *Nevada v. Hall*, 440 U.S.
18 410 (1979), addressing sovereign immunity should be overruled. *Id.* at 1279.

19 On remand from the U.S. Supreme Court, and after supplemental briefing in which
20 the FTB raised concerns about continuing hostile and discriminatory treatment in Nevada
21 courts, the Nevada Supreme Court issued a new decision. *See Franchise Tax Bd. of*
22 *California v. Hyatt*, 133 Nev.826, 407 P.3d 717 (Dec. 26, 2017). From that decision, FTB
23 once again petitioned for certiorari which was granted and resulted in *Franchise Tax Bd. of*
24 *Calif. v. Hyatt (Hyatt III)*, 587 U.S. at ___, 139 S. Ct. at 1488 (2019).

25 In *Hyatt III*, the U.S. Supreme Court outlined the lengthy history of this case and its
26 factual predicate before concluding that Hyatt had no right to assert claims against FTB in
27 Nevada courts without the State of California's consent. *See id.* at 1492. The U.S.
28 Supreme Court stressed that "States' immunity from suit is a fundamental aspect of the

sovereignty” that States enjoy in our constitutional system and that the United States Constitution “embeds interstate sovereign immunity within the constitutional design.” *Id.* at 1493 and 1497. This echoed the U.S. Supreme Court’s previous statement in *Hyatt II* that haling FTB into state court in Nevada and applying special rules would “cause chaotic interference by some States into the internal, legislative affairs of others.” *Hyatt II*, 578 U.S. at ___, 136 S. Ct. at 1282. In doing so, the U.S. Supreme Court effectively made a vital point: Nevada courts never properly acquired jurisdiction over FTB, and consequently Hyatt’s lawsuit was *void ab initio*, with Hyatt achieving none of his litigation objectives. See *id.*

After the remand from the U.S. Supreme Court to the Nevada Supreme Court, the latter issued a notice of remittitur and order of remand instructing this Court to “vacate its judgment in favor of Hyatt and take any further necessary action consistent with this order and [*Hyatt III*], 587 U.S. ___, 139 S. Ct. 1485.” See Nevada Supreme Court Order of Remand , on file with the Court.

II. LEGAL ARGUMENT.

A. The Court Must Enter a New Judgment in FTB’s Favor.

The parties agree that the Nevada Supreme Court’s order of remand requires the Court to vacate its prior final judgment from 2008 in Hyatt’s favor. See *id.*; see also September 3 Trans. at 8:16-20. Hyatt, however, also takes the opportunity to argue that the Court should simply vacate that prior final judgment without entering a new judgment in FTB’s favor. See *id.* at 8:12-15. In other words, Hyatt argues that there should be no final judgment in this case. See *id.* This position is absolutely untenable under well-established Nevada law.

1. A Final Judgment Is An Inescapable Step To Conclude Litigation In Nevada.

There is a long line of Nevada cases stating the importance of fully resolving litigation through entry of a final judgment. “A final judgment is an order that disposes of all issues and leaves nothing for future consideration.” *Warren v. Eighth Judicial Dist. Ct.*

1 of the State of Nevada in and for Clark Cty., 134 Nev. Adv. Op. 77, 427, P.3d 1033, 1036
2 (2018). This is an important concluding step, as a final judgment “promot[es] judicial
3 economy by avoiding the specter of piecemeal appellate review.” *Valley Bank of Nevada*
4 *v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 733 (1994). Moreover, with very few
5 exceptions, an appellate court cannot acquire jurisdiction over a case without a final
6 judgment, and the final judgment “preclud[es] multiple appeals arising from a single action.”
7 *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 127 Nev. 86, 87, 247 P.3d 1107,
8 1108 (2011). Indeed, it has long been the rule in Nevada that “there can be but one final
9 judgment in a case.” *Elsman v. Elsman*, 54 Nev. 20, 3 P.2d 1071, 1072 (1931).

10 A final judgment in every case serves three vital roles in the Nevada judiciary. First,
11 a final judgment puts to rest all issues in the case by describing whether any liability exists
12 and awarding or denying money damages or equitable relief based upon the same. It is a
13 single document that indicates the rules of issue preclusion or claims preclusion now apply
14 to bar subsequent actions. See Restatement (Second) of Judgments § 13 (1982) (noting
15 the requirement of finality through judgments).

16 Second, a final judgment marks the end of the case’s trial phase and provides the
17 blueprint for the parties to determine how to proceed on post-judgment issues. See *id.* at
18 § 14 (effects of judgment occur upon the “date of its rendition”). Several procedural actions
19 in Nevada cannot occur by rule until a final judgment is entered. For example, NRCP 54(d)
20 does not allow a party to move for attorney’s fees until written notice of entry of judgment
21 is served. Additionally, any such motion must “specify the judgment . . . entitling the movant
22 to the award.” *Id.* Consequently, without a final judgment, there can be no award of
23 attorney’s fees under NRCP 54(d). NRS Chapter 18 also states that the Court cannot
24 award costs until it determines the “party against whom judgment is rendered.” NRS
25 18.020. Moreover, a verified memorandum of costs is triggered by “entry of judgment.”
26 NRS 18.110(1). Finally, NRCP 68 does not allow a party to enforce an offer of judgment
27 unless the offeree has rejected an offer and failed “to obtain a more favorable judgment.”
28 NRCP 68(f)(1). Without a final judgment, the Court cannot properly analyze FTB’s Offer.

1 Third, to the extent either party wishes to appeal, it cannot do so under NRAP 3A
2 without entry of a final judgment. See NRAP 3A(b)(1) (allowing appeal from a “final
3 judgment entered in an action or proceeding commenced in the court in which the judgment
4 is rendered”). A final judgment marks the beginning of any appellate phase, and this finality
5 prevents parties from prematurely taking multiple appeals during the pendency of a case.
6 It also presents a consolidated case to any appellate court so that it may consider all issues
7 properly before it with the full benefit of the trial court’s record.

8 As such, there is no doubt that a final judgment is required in this case and all others.
9 The Nevada Supreme Court has ordered this Court to vacate the prior 2008 final judgment.
10 The Court now has a duty to enter a new final judgment reflecting the case’s current
11 procedural posture. That includes all appeals in front of the Nevada Supreme Court, and
12 it also includes Hyatt II and Hyatt III in front of the U.S. Supreme Court, in which that Court
13 ultimately concluded that Nevada courts had no jurisdiction over FTB and so FTB achieved
14 a complete victory and Hyatt received nothing.

15 Only through entry of a final judgment will all issues in the case be resolved, and it
16 is entry of a new final judgment that triggers post-judgment proceedings for attorneys fees
17 and costs.

18 2. The Court Must Issue The Final Judgment In FTB’s Favor.

19 At the September 3, 2019 status check, FTB proposed a final judgment that declared
20 two things: (1) the Court’s prior judgment dated September 8, 2008 is vacated; and (2)
21 judgement is now entered in FTB’s favor on any and all claims asserted in this action. See
22 Proposed Judgment, attached as **Exhibit A**.² Hyatt objected and instead suggested that
23 the Court should simply vacate the prior judgment without entering any final judgment in
24 FTB’s favor. See Sept. 3 Trans. at 9:2-23.

25 Doing so not only would violate the case law indicated above showing that Nevada
26

27
28 ² FTB’s counsel submitted this proposed judgment at the September 3, 2019 status
check and does so again here for ease of reference. See **Exhibit A**.

1 requires a final judgment, but it also obfuscates what has occurred in this case. FTB
2 obtained a complete victory and is entitled to judgment on the same. In *Hyatt III*, the U.S.
3 Supreme Court unequivocally held that the United States Constitution does not permit a
4 State to be sued by a private party in the courts of a different State without the State's
5 consent. See 587 U.S. ___, ___, 139 S. Ct. 1485, 1488 (2019). In doing so, the U.S.
6 Supreme Court found that the Constitution required it to vacate Hyatt's prior 2008 final
7 judgment and further that the Nevada courts did not have jurisdiction over the case. See
8 *id.* at 587 U.S. at ___, 139 S. Ct. at 1499-1500 (noting Hyatt will lose "a final judgment
9 against [FTB]" and that FTB is "immune from Hyatt's suit in Nevada's courts"). Thus, the
10 U.S. Supreme Court was not only casting aside Hyatt's judgment but also instructing
11 Nevada state courts to dismiss his action against FTB for want of jurisdiction. See *id.*
12 Vacating the prior final judgment without entering a new judgment reflecting this dismissal
13 for want of jurisdiction would leave a gap in the case's procedural history.

14 Moreover, dismissal of a lawsuit is a final judgment on the parties' claims and
15 defenses. See *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1058, 194 P.3d 709, 715
16 (2008) (holding dismissal of a lawsuit "is properly considered a final judgment"). For FTB
17 to obtain the appropriate issue and claim preclusion protection from this case, the Court
18 must enter a new final judgment reflecting FTB's victory. This is not a *de minimis* request,
19 as Hyatt has a lengthy history of litigating every issue possible in multiple jurisdictions. See
20 Part I(A), *supra*. A clear final judgment in FTB's favor will prevent the specter of this
21 occurring again.

22 Consequently, the Court must enter FTB's proposed judgment, which is
23 conservatively drafted only to reflect that, pursuant to *Hyatt III*, the prior judgment is vacated
24 and FTB is entitled to judgment on any and all of Hyatt's claims in this action. Doing so not
25 only creates the required finality, but it also protects FTB on issue and claim preclusion
26 grounds from any collateral or subsequent litigation by Hyatt.

27 B. FTB Is the Prevailing Party in This Case.

28 At the September 3, 2019 status check, Hyatt also suggested that the Court simply

1 find that neither party prevailed in this case, i.e. the Court could vacate the prior judgment
2 and dispose of the case without any need for additional action. See Sept. 3 Trans. at 9:4-
3 8 (“[B]ased on just a simple vacation of the judgment and the fact that there’s no judgment
4 entered in favor of the FTB . . . then I think you could just simply say there is no prevailing
5 party, and we’re all done.”). This is a sleight of hand, though, as it obscures that FTB may
6 be entitled to recovery of costs and FTB made an offer of judgment that does not require
7 the Court to engage in any prevailing party analysis to enforce it. Presumably, Hyatt was
8 hoping the Court would focus exclusively on statutory fees and costs, which do rely on
9 prevailing party analysis, and overlook FTB’s offer of judgment under NRCP 68, which
10 does not include prevailing party analysis. But in addition to finding FTB was the prevailing
11 party for statutory costs, the Court cannot overlook the other bases by which FTB may seek
12 its attorney’s fees or costs.

13 1. FTB Was The Prevailing Party In This Case.

- 14 a. The U.S. Supreme Court already found that FTB prevailed and
15 Hyatt cannot encourage the Court to overrule that finding.

16 Rule 43 of the Rules of the Supreme Court of the United States allows the prevailing
17 party to recover its costs upon appeal. Here, the U.S. Supreme Court has already decided
18 that FTB prevailed in the litigation by awarding FTB its costs on appeal and ruling that FTB
19 was entitled to a complete victory because of lack of jurisdiction. See U.S. Supreme Court
20 Cost Award, attached as **Exhibit G**; see also *Hyatt III*, 587 U.S. at ___, 139 S. Ct. at 1488.
21 At the September 3, 2019 hearing, Hyatt suggested the Court could deviate from the U.S.
22 Supreme Court’s finding that FTB prevailed, but Hyatt provided no legal citation to support
23 this claim. Nor could he, as it has long been recognized that state courts are bound to
24 follow directives of the U.S. Supreme Court. See, e.g., *Bargas v. Warden, Nev. State*
25 *Prison*, 87 Nev. 30, 31, 482 P.2d 317, 318 (1971) (“We are bound by the decisions of the
26 United States Supreme Court.”).

27 The U.S. Supreme Court’s ruling in *Hyatt III* and its subsequent award of FTB’s costs
28 make it clear who the prevailing party is in this litigation: FTB. The Court need only affirm

1 the U.S. Supreme Court's prior ruling in determining that FTB prevailed in this case.

- 2 b. Nevada case law affirms the U.S. Supreme Court's finding that
3 FTB prevailed in this case.

4 In considering prevailing parties, the Nevada Supreme Court has held that a party
5 prevails if it succeeds on any significant issue in litigation which achieves some of the
6 benefit it sought in bringing suit. *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d
7 1198, 1200 (2005). But this is not an open-ended inquiry, as "a prevailing party must win
8 on at least one of its claims" for relief to be entitled to attorney's fees or costs. *Golightly v.*
9 *Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016).

10 Here, there is no doubt that FTB is the prevailing party. First, despite *Golightly's*
11 directive that a party must win on at least one of its claims to prevail, Hyatt did not succeed
12 on any of his claims after Hyatt III. See *Hyatt III*, 587 U.S. at ___, 139 S. Ct. at 1488. Hyatt
13 filed suit seeking recovery on eight causes of action. The U.S. Supreme Court ruled that
14 Nevada courts did not have jurisdiction over FTB. See *id.* Consequently, Hyatt lost on all
15 eight of his claims. *Id.*

16 Second, Hyatt did not succeed on any significant issue in litigation that conferred a
17 benefit upon him. *Valley Elec. Ass'n*, 121 Nev. at 10, 106 P.3d at 1200. Hyatt sought
18 substantial money damages against FTB and further brought a declaratory relief claim
19 regarding his purported Nevada residency. But because the U.S. Supreme Court ruled
20 that the Nevada courts do not have jurisdiction over FTB, Hyatt neither recovered money
21 damages nor a determination by a Nevada court that he was a Nevada resident during the
22 relevant time periods. Simply put, Hyatt did not achieve success on any issue, much less
23 a significant one.

24 Third, FTB achieved its primary objective in the case, which was a complete victory
25 because Nevada courts lacked jurisdiction over FTB as a California agency. FTB asserted
26 this from the case's beginning and doggedly pursued the argument throughout proceedings
27 in several appellate courts. See **Exhibit J**, FTB's Answer to First Amended Complaint at
28 6:24-26 (asserting lack of jurisdiction as an affirmative defense); see *a/so* **Exhibit K**, FTB's

1 Motion for Judgment on the Pleadings at 8:23-12:4 (arguing the Court does not have
2 jurisdiction under several constitutional principles); **Exhibit L** FTB's Motion for Summary
3 Judgment at 2:1-23, all on file with the Court. FTB ultimately succeeded in the U.S.
4 Supreme Court in *Hyatt III* on this very point. As such, FTB achieved its primary goal in
5 the case and is accordingly the prevailing party.

6 c. Hyatt is judicially estopped from arguing that prevailing party
7 analysis in the Nevada case turns on what may occur in the
8 California tax audit.

9 Hyatt now seems to argue that his litigation goal was to use the Nevada court
10 proceeding to achieve success in his California tax audit and so the Court should consider
11 the California tax audit when determining the prevailing party in this Nevada case. See
12 Sept. 3 Trans. at 4:7-8:1. Amazingly, Hyatt makes this argument after decades of arguing
13 in multiple courts that the two cases were not intertwined, including most recently when he
14 argued to the Nevada Supreme Court in October 2016 that “the two matters have always
15 been and remain two different trains traveling on separate tracks.” See Hyatt’s
16 Supplemental Answering Brief Following Mandate from the Supreme Court of the United
17 States (“Hyatt Supp. Brief”) at 7, relevant portions attached as **Exhibit H**.³ In the same
18 brief, Hyatt argued that “[t]his tort case will not decide the tax case, nor will resolution of
19 the tax case address and resolve the issues put forth in this tort case.” *Id.* at 45.

20 But Hyatt is judicially estopped from asserting these inconsistent positions. “Judicial
21 estoppel is an equitable doctrine used to protect the judiciary’s integrity.” *Déjà vu Showgirls*
22 *v. State, Dept. of Tax.*, 130 Nev. 711, 716, 334 P.3d 387, 390 (2014). Judicial estoppel’s
23 main purposes is “to prevent parties from deliberately shifting their position to suit the
24 requirements of another case concerning the same subject matter.” *Matter of Frei*
25 *Irrevocable Trust Dated October 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017).

26
27 ³ Hyatt made this argument in response to FTB’s contention that Hyatt was required
28 to administratively exhaust his remedies in California before proceeding with this separate
case in Nevada. See Hyatt Supp. Brief at 7. He contended the cases were separate, and
so the doctrine of administrative exhaustion did not apply. See *id.*

1 The doctrine applies when “(1) the same party has taken two positions; (2) the positions
2 were taken in judicial or quasi-judicial administrative proceedings; (3) the party was
3 successful in asserting the first position; (4) the positions are totally inconsistent; and (5)
4 the first position was not taken as a result of ignorance, fraud, or mistake.” *NOLM, LLC v.*
5 *Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d. 658, 663 (2004).

6 Here, there is no doubt regarding any of the doctrine’s elements. Hyatt is the same
7 party in both this Court and in front of the Nevada Supreme Court, and Hyatt asserted both
8 positions in judicial proceedings. See *id.* Hyatt was successful in previously arguing to the
9 Nevada Supreme Court that this case and the California tax audit were not intertwined, as
10 the Nevada Supreme Court’s December 26, 2017 opinion did not embrace FTB’s argument
11 regarding administrative exhaustion. See generally *Franchise Tax Board of California v.*
12 *Hyatt*, 133 Nev. 826, 407 P.3d 717 (2017). The positions are also totally inconsistent. In
13 front of the Nevada Supreme Court, Hyatt argued that “the two matters have always been
14 and remain two different trains traveling on separate tracks.” Hyatt Supp. Brief at 7. Now,
15 however, Hyatt argues that, for purposes of prevailing party analysis, the track involving
16 the Nevada case led directly into the track involving the California Tax Audit. See Sept. 3
17 Trans. at 4:7-8:1. These inconsistent positions cannot be reconciled. Finally, they are not
18 the result of ignorance, fraud, or mistake, as Hyatt has been represented by esteemed trial
19 and appellate counsel during the entirety of this case. Hyatt was well aware of the strategic
20 advantage of arguing the separateness of this case and the California tax audit, and he
21 took advantage of that strategy to win a short-lived victory in front of the Nevada Supreme
22 Court in 2017.⁴

23
24 ⁴ Hyatt took this strategic position not only in front of various courts but also in
25 communications with FTB. In a 2002 letter, Hyatt’s counsel could not have been clearer
26 that Hyatt was asserting the two cases were unrelated:

27 Mr. Hyatt’s California residency status during 1991 and 1992 has not been an
28 issue in the Nevada case since 1999. Instead, the central focus of the case,
as I understand it from Mr. Hyatt’s counsel in Nevada, has been the events
and misconduct of FTB personnel starting with the commencement of the
[footnote continued on next page]

Now, he seeks to argue the contrary after losing the entirety of his case on appeal to the U.S. Supreme Court. He cannot do so, as this is a textbook case of judicial estoppel applying to protect the integrity of this Court.

d. Hyatt's suggestion that he should be the prevailing party in this Nevada case because of his residency audit in California is unsupported by Nevada law.

Trying to avoid the inescapable conclusion that FTB prevailed because it won a complete victory in this Nevada case, Hyatt suggests the Court should look to the California residency audit in considering who prevailed in this litigation. See Sept. 3 Trans. at 4:15-5:1. But there is no support for the position that, in determining the prevailing party in litigation in one State, a trial court should look to an administrative hearing in another State.

Such an analytical framework would turn existing Nevada law on its head. As discussed above, the appropriate focus in determining prevailing party analysis is what happened with the substantive claims and defenses that were at issue in that litigation. See *Valley Elec. Ass'n*, 121 Nev. at 10, 106 P.3d at 1200 (focusing on significant issues "in the litigation"); see also *Golightly*, 132 Nev. Adv. Op. 41, 373 P.3d at 107 (focusing on a plaintiff's claims). The focus is not on outside issues or collateral administrative litigation between the parties in another state. FTB can find no case where a Nevada court determined the prevailing party by considering issues outside the case from another jurisdiction.

And Nevada's approach is echoed by multiple other states that hold prevailing party analysis focuses only on what occurred in litigation before the trial court and not on outside issues. See *Reyher v. State Farm Mut. Auto. Ins. Co.*, 280 P.3d 64, 72 (Colo. App. Ct. 2012) ("[T]he focus of the prevailing party analysis is not on procedural victories during the course of the litigation, but on the final disposition of the substantive issues."); see also

audit in 1993 and beyond.

July 22, 2002 Letter from Hyatt's Counsel to FTB (emphasis in original), attached as **Exhibit I**.

1 *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 656 (Tex.
2 2009) (“Neither law nor logic favors a rule that bestows ‘prevailing party’ status upon a
3 plaintiff who requests \$1 million for actual injury but pockets nothing except a jury finding
4 of non-injurious breach; to prevail in a suit that seeks actual damages . . . there must be a
5 showing that the plaintiff was actually harmed, not merely wronged.”); *Niguel Shores*
6 *Comm. Ass’n v. Buehler*, 2002 WL 31121089 at *5 (Ca. App. Ct. 2002) (“We question
7 whether issues decided outside of the litigation are relevant to determining the prevailing
8 party.”). This laser focused approach was perhaps stated best by the Idaho Supreme Court
9 when it said “[i]n determining the prevailing party, the court examines the final result
10 obtained in relation to the relief sought, whether there were multiple claims or issues, and
11 the extent to which either party prevailed on each separate issue or claim.” *American*
12 *Semiconductor, Inc. v. Sage Silicon Solutions, LLC*, 162 Idaho 119, 134, 395 P.3d 338,
13 353 (2017).

14 In this case, there is no doubt that FTB prevailed on all the claims and issues
15 involved in the case because the U.S. Supreme Court found that Nevada courts lacked
16 jurisdiction over FTB. Though Hyatt brought eight separate claims against FTB, they have
17 now all been dismissed for lack of jurisdiction. And though Hyatt sought hundreds of
18 millions of dollars for purported torts during FTB’s audit of his residency, he walks away
19 with no monetary recovery. Finally, though Hyatt invited this Nevada court to become
20 involved in the California residency audit by declaring him a Nevada resident, he also lost
21 on this claim because the Court does not have jurisdiction over FTB. Comparing the final
22 result to the relief sought by Hyatt, FTB is clearly the prevailing party. See *id.*

23 e. Hyatt’s argument that FTB was a “fortuitous beneficiary” of a
24 change in law and thus not the prevailing is similarly without
legal support.

25 At the September 3, 2019 hearing, Hyatt also argued that FTB could not be the
26 prevailing party because of purported case law holding that “when the underlying law in a
27 case changes . . . and a party is a fortuitous beneficiary . . . that does not mean [the party]
28 is the prevailing party.” Sept. 3 Trans. at 11:18-23. FTB has exhaustively searched cases

1 from the Nevada Supreme Court and has not located any case suggesting a winning party
2 benefitting from a change in law should be punished when determining prevailing party
3 status.

4 Moreover, FTB was not a “fortuitous” beneficiary of any change in law. See Black’s
5 Law Dictionary, 8th Ed. 2004 (defining a “fortuitous event” as a “happening that, because
6 it occurs only by chance or accident, the parties could not have reasonably foreseen.”). On
7 the contrary, FTB **caused** the change in law by asserting immunity immediately in the
8 lawsuit and twice appealing the issue to the U.S. Supreme Court and convincing the U.S.
9 Supreme Court of the merits of FTB’s argument. Compare with *Petrone v. Sec’y of Health*
10 *& Human Servs.*, 936 F. 2d 428, 430 (9th Cir. 1991) (noting a party could not benefit from
11 Congress changing a law during the pendency of its case because “no clear causal
12 relationship” existed between the lawsuit and the congressional action). Specifically, FTB
13 raised immunity and Nevada’s lack of jurisdiction in its first filings in this case. See **Exhibit**
14 **J**, FTB’s Answer to First Amended Complaint at 6:24-26 (asserting lack of jurisdiction as
15 an affirmative defense); see *a/so* **Exhibit K**, FTB’s Motion for Judgment on the Pleadings
16 at 8:23-12:4 (arguing the Court does not have jurisdiction under several constitutional
17 principles); **Exhibit L**, FTB’s Motion for Summary Judgment at 2:1-23, all on file with the
18 Court. FTB maintained that position for the next two decades before prevailing in the U.S.
19 Supreme Court. This is not a fortuitous change, but rather a change that FTB specifically
20 brought about, and so FTB should be rewarded for its litigation success.

21 2. Prevailing Party Analysis Does Not Apply To FTB’s Offer Of
22 Judgment.

23 Finally, it appears that Hyatt is trying to distract the Court from FTB’s offer of
24 judgment and the fee-shifting penalties in NRCP 68 that make Hyatt liable for FTB’s post-
25 offer of judgment attorney’s fees and costs and further foreclose on Hyatt’s ability to recover
26 his own attorney’s fees and costs. To be clear, prevailing party analysis only applies to
27 attorney’s fees and costs sought pursuant to NRS Chapter 18. NRS 18.020 provides that
28 “[c]osts must be allowed of course to the prevailing party against any adverse party against

1 whom judgment is entered . . . in an action for the recovery of money or damages, where
2 the plaintiff seeks to recover more than \$2,500.” NRS 18.020(3). Similarly, NRS 18.010
3 requires the Court to award fees “to a prevailing party when the prevailing party has not
4 recovered more than \$20,000” or “without regard to the recovery sought,” when the Court
5 finds that the non-prevailing party brought claims without “reasonable ground or to harass
6 the prevailing party.” NRS 18.010(2)(a)-(b). Thus, if the Court determines a prevailing
7 party in this case pursuant to its request for supplemental briefing, that determination only
8 informs awarding fees or costs based upon NRS Chapter 18.

9 By comparison, however, NRCP 68 does not require the Court to determine the
10 prevailing party. Instead, NRCP 68 is a fee shifting statute “designed to facilitate and
11 encourage settlement.” *Matthews v. Collman*, 110 Nev. 940, 950, 878 P.2d 971, 978
12 (1994). The statute saves “time and money for the court system, the parties, and the
13 taxpayers . . . by rewarding a party who makes a reasonable offer and punishing the party
14 who refuses to accept such an offer.” *Dillard Dep’t Stores, Inc. v. Beckwith*, 115 Nev. 372,
15 382, 989 P.2d 882, 888 (1999). Specifically, the rule allows a party to “serve an offer in
16 writing to allow judgment to be taken . . . to resolve all claims in the action between the
17 parties to the date of the offer, including, costs, expenses, interest, and if attorney fees are
18 permitted by law or contract, attorney fees.” NRCP 68(a). If an offeree rejects the offer of
19 judgment and proceeds to a final judgment, the rule requires the Court to conduct an
20 apples-to-apples analysis of the offeree’s ultimate judgment versus the amount of the offer
21 of judgment. *See also McCrary v. Bianco*, 122 Nev. 102, 107, 131 P.3d 573, 576 (2006)
22 (detailing the appropriate apples-to-apples numerical analysis under NRCP 68).

23 If an offeree does not obtain a judgment greater than the offer of judgment, the
24 offeree may not recover its own attorney’s fees and costs and NRCP 68 shifts the offeror’s
25 post-Offer attorney’s fees and costs to the offeree. *See* NRCP 68(g) (“To invoke the
26 penalties of this rule, the court must determine if the offeree failed to obtain a more
27 favorable judgment” than the offer). Thus, an offeree could “prevail” on its claims in the
28 case and still be punished under NRCP 68 if the offeree’s recovered judgment was less

1 than the offer it rejected.

2 Here, FTB's Offer was for \$110,000. See **Exhibit E**. Because Hyatt recovered
3 nothing after *Hyatt III*, he therefore failed to beat the Offer. NRCP 68(f) therefore applies
4 to shift FTB's post-Offer fees and costs to Hyatt. As important, NRCP 68(f) precludes Hyatt
5 from recovering his own attorneys fees and costs. Consequently, the prevailing party
6 analysis relevant to NRS Chapter 18 does not apply to Hyatt, and FTB surmises Hyatt only
7 suggests it to distract the Court from the enforceability of FTB's Offer.

8 **III. CONCLUSION.**

9 Nevada precedent sets a clear pathway forward for the Court. First, the Court must
10 vacate the prior 2008 judgment in Hyatt's favor and enter a new judgment in FTB's favor.
11 As with all other cases, this one requires a final judgment for finality purposes, and that
12 judgment can only be in FTB's favor given *Hyatt III*.

13 Second, FTB is the prevailing party in this case. The U.S. Supreme Court has
14 already found that FTB was the prevailing party in this case when it awarded FTB costs on
15 appeal. Moreover, because of *Hyatt III*, Hyatt did not win on any of his claims for relief,
16 and instead it was FTB that achieved each of its litigation objectives. In such
17 circumstances, FTB is the prevailing party.

18 Accordingly, FTB respectfully asks that the Court enter FTB's proposed final
19 judgment (**Exhibit A**).

20 Dated this 15th day of October, 2019.

21 McDONALD CARANO LLP

22 /s/ Pat Lundvall

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*Attorneys for Defendant
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1 **CERTIFICATE OF SERVICE**

2 I certify that on this 15th day of October, 2019, I caused a true and correct copy of
3 the **FTB's BRIEF RE THE REQUIREMENT OF ENTRY OF JUDGMENT IN FTB'S FAVOR**
4 **AND DETERMINATION THAT FTB IS PREVAILING PARTY** to be electronically filed and
5 served to all parties of record via this Court's electronic filing system to all parties listed on
6 the e-service master list:

7
8 /s/ Beau Nelson
9 An employee of McDonald Carano LLP