

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 80884

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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 37**

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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
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 2	3-4	AA000282	AA000534
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Dated this 31st day of July, 2020.

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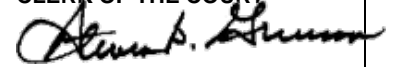
Attorneys for Appellant

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

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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 OPPOSITION TO PLAINTIFF
GILBERT P. HYATT'S MOTION TO
STRIKE, MOTION TO RETAX AND,
ALTERNATIVELY, MOTION FOR
EXTENSION OF TIME TO PROVIDE
ADDITIONAL BASIS TO RETAX
COSTS**

In his Motion to Strike, Motion to Retax And, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs (the "Motions"), Hyatt argues that the Court must strike defendant Franchise Tax Board of the State of California's ("FTB") Memorandum of Costs (the "Memorandum"), summarily retax the same, or alternatively, grant Hyatt additional time to respond to the Memorandum because of the voluminous nature of FTB's supporting invoices and cost documentation. See Motions at 2:2-4:11. As to the last request for additional time, FTB does not oppose it.¹

¹ As discussed in FTB's Motion for Attorney's Fees, because Hyatt correctly identifies that review of FTB's supporting documentation will take substantial time and effort from the parties and the Court, FTB agrees with Hyatt that consideration of costs and attorney's fees should be bifurcated. See FTB's March 13, 2020 Motion for Attorney's Fees at pp. 9-11. FTB suggests that the Court first determine Hyatt's liability under the relevant legal rules before then considering the amounts that Hyatt may owe FTB under the same. See *id.*

1 As to Hyatt's request to strike the Memorandum or alternatively retax FTB's costs
2 and summarily deny them, Hyatt is incorrect under Nevada law. First, the Court cannot
3 strike FTB's Memorandum. Hyatt relies on NRCP 12(f) in this request, but by its own terms,
4 NRCP 12(f) only applies to pleadings. FTB's Memorandum is not a pleading under NRCP
5 7 and so NRCP 12(f) does not allow the Court to strike it. Nevada's Supreme Court has
6 been unrelenting on this legal principle. Moreover, and respectfully, the Court procedurally
7 erred when it made a prevailing party determination *sua sponte* in the recently entered
8 Judgment without a pending memorandum of costs or motion for attorney's fees and costs
9 from either party. The only way to correct such error is through FTB's filing of the valid
10 Memorandum (as FTB did) and full briefing and hearing on the same. Striking FTB's
11 Memorandum, as requested by Hyatt, would only cement the legal error in making a
12 prevailing party determination without a pending motion or full briefing on the issue.

13 Second, in asking the Court to summarily retax FTB's costs, Hyatt mistakenly argues
14 that FTB was not the prevailing party under NRS Chapter 18. Hyatt relies exclusively on
15 *Eberle v. State ex rel. Nell J. Redfield Tr.* in suggesting there should be no costs awarded
16 in this matter because there was no prevailing party. See Motions at 5:3-4 (arguing there
17 should be no costs awarded where there is no prevailing party). Remarkably, however,
18 Hyatt omits relevant language from *Eberle* to conceal why that trial court found there was
19 no prevailing party and thus no cost award. In *Eberle*, the plaintiff raised a statutory
20 challenge based on NRS Chapter 266. During the case, the Nevada State Legislature
21 passed an amendment to the statute and so the trial court did not enter a substantive
22 judgment because the case was dismissed as moot. As such, the Nevada Supreme Court
23 affirmed there can be no prevailing party in an action without a judgment. In this case,
24 however, there is a Judgment, and it is substantive in nature because it arose from a final
25 decision by the Supreme Court of the United States. FTB accordingly prevailed, and it is
26 entitled to costs under NRS 18.020 and NRS 18.110. *Eberle* does not state otherwise, nor
27 does it control this case.

28 Accordingly, while FTB does not oppose Hyatt's request for more time to respond to

1 FTB's Memorandum, FTB respectfully requests that the Court deny the portions of the
2 Motions seeking to strike the Memorandum under NRCP 12(f) and summarily retax FTB's
3 costs under NRS 18.110.

4 Dated this 16th day of March, 2020.

5
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF RELEVANT FACTS.

- A. Without A Pending Memorandum Of Costs Or A Motion For Attorney's Fees,
And Without Full Briefing Or A Hearing On The Same, The Court Enters A
Judgment Purporting to Determine Prevailing Party Status.

In FTB's Motion for Attorney's Fees, FTB detailed the lengthy procedural history of this case, which ultimately ended in an opinion from the Supreme Court of the United States entirely in FTB's favor. See FTB's March 13, 2020 Motion for Attorney's Fees at pp. 4-9, on file with the Court. After the Supreme Court of the United States issued that opinion, it remanded the matter to the Nevada Supreme Court, who then remanded the matter to this Court with instructions to vacate the prior judgment and hold any additional proceedings consistent with the Supreme Court of the United States' opinion. See Order of Remand Dated August 5, 2019 ("Remand Order"), on file with the Court.

After remand, the Court scheduled a status conference. See Notice of Hearing, on file with the Court. During this time, there were no pending motions. See Court's Docket.

1 At the status conference, Hyatt's counsel suggested that the Court vacate the prior
2 judgment without entering a new one, and he further suggested there was no prevailing
3 party and so the parties were "done" with the case. See September 3, 2019 Transcript
4 ("Sept. Trans.") at 8:12-9:23, attached as **Exhibit A**. FTB's counsel identified that Hyatt's
5 request would short circuit FTB's due process rights to file a memorandum of costs and a
6 valid motion for attorney's fees. See *id.* at 10:14-18. Ultimately, the Court ordered
7 supplemental briefing from the parties on two issues: (1) whether a "judgment should be
8 issued in favor of" FTB; and (2) whether there is a "prevailing party" in the action. See *id.*
9 at 12:2-7. The Court required the parties to submit a single blind brief without any
10 opportunity to reply to the other party's brief. See *id.* at 12:2-13:16.

11 The parties timely submitted their blind briefs, and without a hearing on the briefing,
12 the Court issued a judgment (the "Judgment") on February 21, 2020. See Judgment, on
13 file with the Court. In the Judgment, the Court recited the detailed procedural history of the
14 case, ultimately concluding that the case should be dismissed and that Hyatt should "take
15 nothing from any of the causes of action he asserted in this action." *Id.* at 8:13-14. In
16 contravention of NRCP 54(a) the Court went a step farther, though, by summarily
17 determining *sua sponte* that neither party prevailed in this case. See *id.* at 8:14-16. The
18 Court did so without a memorandum of costs or a motion for attorney's fees on file from
19 either party. See *id.*

20 In the Court's *sua sponte* analysis, it conflated prevailing party analysis under NRS
21 Chapter 18 with the NRCP 68 analysis under *Beattie v. Thomas*. NRS 18.020 and 18.110
22 explicitly refer to the "prevailing party" in litigation and require a trial court to determine which
23 party prevailed before awarding costs. By comparison, however, NRCP 68 does not
24 reference the "prevailing party" in litigation because it is entirely irrelevant to enforcing an
25 offer of judgment under that rule. See, e.g., NRCP 68(f) (even where an offeree "prevails"
26 through a judgment, it may still be liable under NRCP 68's fee shifting penalty if that
27 judgment fails to beat the amount of the offer). Enforcement of an offer of judgment under
28 NRCP 68(f) proceeds through factors identified by the Nevada Supreme Court in *Beattie*

1 without regard to prevailing party determination. The Court's analysis in the "Judgment"
2 incorrectly uses the *Beattie* factors to determine which party prevailed, ultimately resulting
3 in the erroneous legal conclusion that there should be no fees or costs awarded in this case.
4 See Judgment at 8:17-9:15.

5 B. Because NRS 18.110 and NRCP 54 Set Out Procedural Requirements For
6 Awarding Fees And Costs, FTB Files The Memorandum And A Motion For
7 Attorney's Fees After The Court Entered Its Judgment.

8 NRS 18.110 and NRCP 54 establish the procedural roadmap for the Court to
9 consider an award of costs or attorney's fees. Under NRS 18.110, which governs costs, a
10 party "in whose favor judgment is rendered" must "file with the clerk, and serve a copy upon
11 the adverse party, within 5 days of entry of judgment . . . a memorandum of the items of the
12 costs in the action or proceeding." NRS 18.110. The memorandum must be verified under
13 oath and declare that the costs were "necessarily incurred in the action or proceeding." *Id.*
14 Upon such a filing, the "adverse party may move the court, upon 2 days' notice, to retax
15 and settle the costs." NRS 18.110(4). Importantly, NRS 18.110 expressly requires the
16 Court to hear the motion to retax costs: "Upon the hearing of the motion the court or judge
17 shall settle the costs." And a motion under EJDRC 2.20 clearly allows for an opposition
18 brief and a reply brief. EJDRC 2.20(e) and (g). Pursuant to this statutory procedure, after
19 the Court entered the Judgment, FTB timely filed the Memorandum seeking recovery of its
20 costs, and Hyatt timely moved to retax such costs. Only after briefing and hearing on that
21 motion should a determination be made concerning entitlement to statutory costs to the
22 party "in whose favor judgment is rendered."

23 NRCP 54, which governs attorney's fees, also requires that a "claim for attorney fees
24 [] be made by motion." NRCP 54(d)(2)(A). The moving party must file that motion "no later
25 than 21 days after written notice of entry of judgment is served" and must "specify the
26 judgment and the statute, rule, or other grounds entitled the movant to the award." NRCP
27 54(d)(2)(B). Thus, by NRCP 54(d)'s plain language, a party cannot move for attorney's fees
28 until after entry of judgment because such a motion must "specify the judgment" that entitles
the movant to fees. See *id.* Also, NRCP 54(d)(2)(c) does not allow the Court to extend the

1 time to file such a motion, and so a party waives its right to seek fees under NRCP 54 if it
2 does not timely file a motion for attorney's fees. Again, pursuant to this statutory procedure,
3 FTB timely filed a Motion for Attorney's Fees under NRCP 68 based on FTB's prior offer of
4 judgment to Hyatt. See FTB's Motion for Attorney's Fees, on file with the Court.

5 Through Hyatt's Motions, he challenges FTB's Memorandum and indicates that he
6 will challenge FTB's Motion for Attorney's Fees on the same basis. See *generally* Motions.

7 **II. ARGUMENT**

8 **A. The Court Cannot Strike FTB's Memorandum.**

9 Hyatt argues that the Court should summarily strike FTB's Memorandum under
10 NRCP 12(f). See Motions at 4:12-7:9. This argument is flawed in several respects.

11 **1. By Its Plain Terms, NRCP 12(f) Does Not Apply To A Motion Or 12 Memorandum Of Costs.**

13 Hyatt exclusively relies upon NRCP 12(f) to argue that the Court must strike FTB's
14 Memorandum, but the express language of NRCP 12(f) prevents this. NRCP 12(f) allows
15 the Court to "strike from a pleading an insufficient defense or any redundant, immaterial,
16 impertinent, or scandalous matter." But a memorandum of costs or a motion is not a
17 pleading under NRCP 12. NRCP 7 defines exactly what a pleading is under Nevada law,
18 and that term is limited to a complaint, an answer to a complaint, an answer to a
19 counterclaim designated as a counterclaim, an answer to a crossclaim, a third-party
20 complaint, an answer to a third-party complaint, and if the trial court orders one, a reply to
21 an answer. See NRCP 7(a)(1)-(7). FTB's Memorandum is none of those things, and so
22 NRCP 12(f) does not apply. See *Price v. Brimacombe*, 58 Nev. 156, 72 P.2d 1107, 1108
23 (1937) ("The motion to strike is not a pleading. The pleadings are formal allegations by the
24 parties, of their respective claims and defenses, and are such as are prescribed in the Civil
25 Practice Act."); see also *Hernandez v. Palmer*, 127 Nev. 1141, 373 P.3d 921 (2013)
26 (unpublished) ("But neither a motion to dismiss, nor an opposition thereto, is a pleading
27 identified under NRCP 7(a).").

28 Here, Hyatt has provided the Court with no other rule or statute that would allow the

1 Court to strike FTB's Memorandum. And because FTB's Memorandum is not a pleading,
2 NRCP 12(f) does not give the Court discretion to strike it.

3 2. NRS Chapter 18 Requires The Court To Hear FTB's Memorandum And
4 Hyatt's Motion To Retax.

5 Hyatt provides no other rule or statute allowing the Court to strike FTB's
6 Memorandum precisely because NRS Chapter 18 requires the Court to hear the same.
7 NRS 18.110(1) states that the party in whose favor judgment is rendered "must file with the
8 clerk" a memorandum of costs. This is not discretionary language but rather mandatory
9 language that required FTB to file the Memorandum if it wanted to preserve its statutory
10 right to seek costs. See NRS 18.110(1).

11 Moreover, NRS 18.110(4) permits Hyatt to move to retax those costs, as he has
12 done, and it requires the Court to hear the Memorandum and the Motion to Retax: "Upon
13 the hearing of the motion the court or judge shall settle the costs." Consequently, and with
14 due respect to the Court, it does not have the power to award or deny costs under NRS
15 Chapter 18 without holding a hearing on the same.

16 Hyatt's request that the Court strike FTB's Memorandum and refrain from holding a
17 hearing is an invitation to create legal error.

18 3. Striking FTB's Memorandum Would Cement The Court's Prior
19 Procedural Error.

20 Procedural due process requires that a party seeking relief must be given "adequate
21 notice and an opportunity to be heard." *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 84,
22 847 P.2d 731, 735-36 (1993) (reversing a trial court's decision to enter summary judgment
23 *sua sponte* without a complaint even being on file). The Nevada Rules of Civil Procedure
24 protect these rights by allowing a court to rule only upon a valid pleading or motion being
25 filed. See NRCP 7. NRCP 7(b)(1) requires that "a motion shall be in writing unless made
26 during a hearing or trial." *Monroe, Ltd. v. Cent. Tel. Co., S. Nevada Div.*, 91 Nev. 450, 452-
27 53, 538 P.3d 152, 154 (1975). NRCP 5(a) requires service of the motion upon all parties,
28 a requirement "intended to guarantee that the adverse party be informed not only of its

1 pendency, but also the basis upon which the movant seeks the order.” *Id.* Thus, the
2 Nevada Supreme Court has explained that there is no rule, statute, or other authority by
3 which a trial court may bypass the requirement of a written motion in determining the parties’
4 substantive rights. See *United Pac. Ins. Co. v. St. Denis*, 81 Nev. 103, 111, 399 P.3d 135,
5 140 (1965) (reversing a trial court’s issuance of an order to show cause when there was no
6 predicate motion filed to obtain the same).

7 Here, and again with due respect to the Court, Hyatt’s request that the Court
8 summarily strike FTB’s Memorandum would cement the Court’s prior procedural error in
9 determining prevailing party status without a pending written motion. NRCP 54 requires a
10 written motion before the Court can rule on attorney’s fees. NRS 18.110 requires a written
11 memorandum of costs, a motion to retax, and a hearing before the Court can award or deny
12 costs. Neither of those were on file when the Court issued the Judgment and purportedly
13 determining prevailing party status, and so it was error for the Court to make such a
14 determination without them. That is especially true given briefing was blind, FTB as the
15 party requesting fees and costs was not allowed to file a reply to Hyatt’s brief to address its
16 many errors, and the Court did not hold a subsequent hearing on either fees or costs. This
17 violated FTB’s due process rights to be heard on a formal written motion presented under
18 NRS 18.110 and NRCP 54. Striking FTB’s valid Memorandum, as Hyatt requests, would
19 again deny FTB its due process rights under NRS 18.110. And treating FTB differently than
20 other Nevada litigants would further demonstrate the prohibited discriminatory treatment
21 FTB has received in Nevada courts, which was one ground for the action by the United
22 States Supreme Court. *Franchise Tax Bd. of California v. Hyatt* (“*Hyatt II*”), 136 S.Ct. 1277,
23 1284 (2016) (Nevada may treat other Nevada litigants different than FTB since Nevada
24 “cannot justify the application of a special and discriminatory rule. Rather, viewed through
25 a full faith and credit lens, a state that disregards its own ordinary legal principles on this
26 ground is hostile to another state.”) (emphasis in original).

27 FTB is mindful of the procedural deluge this case presents. As FTB’s counsel
28 indicated at the September 3, 2019 status conference, this case has been pending for 22

1 years, it involved a trial lasting several months and multiple appeals thereafter, and the
2 record in the case undoubtedly takes up several offices in the firms that have represented
3 Hyatt and FTB through those two decades. See Exh. A, Sept. Trans. at 5:3-8. Given the
4 uniqueness of this case, the post-judgment issues of attorney's fees and costs are vitally
5 important to the parties, and those issues deserve full briefing and hearing. Accordingly,
6 FTB respectfully requests that the Court decline Hyatt's invitation to minimize them by
7 striking FTB's Memorandum.

8 B. The Court Cannot Summarily Retax FTB's Costs As Hyatt Suggests.

9 Parroting his contention at the September 3, 2019 status conference, Hyatt suggests
10 that the Court can rely on *Eberle* to summarily grant Hyatt's Motions and award FTB no
11 costs. See Motions at 5:3-4 (citing *Eberle* to claim that "no costs are to be awarded where
12 there is no prevailing party") and 7:14-19. Hyatt contends that, consistent with *Eberle*, the
13 Court has already determined neither FTB nor Hyatt prevailed, and so there is no award of
14 costs required.

15 In doing so, however, Hyatt misreads *Eberle* and strategically omits key language
16 from the Nevada Supreme Court in "quoting" the case. See Motions at 6:12-18. That
17 language is vital to the Court's decision in this case and so FTB provides the opinion in full
18 while highlighting the language that Hyatt strategically omitted:

19 We turn to a discussion of the merits of respondents' motion for costs.
20 Pursuant to NRS 18.110(1), costs, including witness fees, can be recovered
21 by 'the party in whose favor judgment is rendered.' Appellants assert that
22 because this court found the issues on appeal to be moot, there is no party in
23 whose favor judgment was rendered. We agree.

24 **We have held that a party cannot be considered a prevailing party in an**
25 **action that has not proceeded to judgment. In this case, respondents**
26 **sought to prevent the incorporation of the specific proposed new city**
27 **primarily on statutory grounds, and also raised a constitutional**
28 **challenge to the entire statutory scheme for incorporating cities in**
general.

The district court never ruled on the statutory challenges to the new city,
but ruled only on the legal issue of constitutionality of the statutory
scheme. Appellants were then deprived by an act of the legislature of
their opportunity to test the district court's purely legal conclusions in

1 **this court.** In our opinion, **under these peculiar circumstances**, the action
2 was terminated by the legislature. Thus, the district court erred in awarding
3 expert witness fees and costs to respondents. Accordingly, we reverse the
order of the district court granting expert witness fees and costs.

4 *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590-91, 836 P.2d 67, 69-70
5 (1992) (emphasis added) (internal citations omitted). In *Eberle*, there could be no prevailing
6 party because there was no final judgment since the Nevada Legislature amended NRS
7 Chapter 266 during the case, thereby mooted the plaintiffs' statutory challenge. *Id.* at 589,
8 836 P.2d at 68-69 (noting the Legislature amended NRS Chapter 266 during the case and
9 that "[a]fter hearing oral argument, this court dismissed the appeal as moot based on the
10 amendment of NRS Chapter 266."). Because of the Nevada Legislature's amendment,
11 *Eberle* only involved a preliminary injunction and did not proceed to a full trial, nor to any
12 substantive decision on the merits. *See id.*

13 This case is entirely different from the "peculiar circumstances" of *Eberle* and so
14 *Eberle* has no application here. *Id.* at 590, 836 P.2d at 69. Hyatt's case went to trial, through
15 several appeals, and **ultimately ended in a substantive Judgment on the merits in**
16 **FTB's favor.** *See generally* Judgment. Thus, *Eberle's* instruction that "a party cannot be
17 considered a prevailing party in an action that has not proceeded to judgment" is far afield
18 of what has occurred in this case. *See* 108 Nev. at 590, 836 P.2d at 69. There is a
19 Judgment, it is in FTB's favor, and so FTB has prevailed such that it is entitled to the costs
20 listed in the Memorandum.

21 Hyatt wishes to challenge those costs, and he has done so through the Motions,
22 which triggers a hearing under NRS 18.110. *Eberle* does not prevent such a hearing as
23 Hyatt suggests.

24 C. FTB Does Not Oppose Hyatt's Request For Additional Time To Supplement
25 The Motions, Subject To FTB Being Allowed To Also Supplement This
26 Opposition In Response To Future Filings By Hyatt.

27 As discussed above, FTB is sensitive to Hyatt's claim that reviewing FTB's
28 supporting documentation will take "six months or longer" and require "significant time,
resources, and expense." Motions at 3:2-4. FTB agrees with Hyatt precisely because FTB

1 went through painstaking detail in compiling the documentation to comply with its
2 obligations under *Cadle Co. v. Woods & Erickson, LLP*, and so FTB has already spent the
3 time, resources, and expense in reviewing the documentation. This is also why, in FTB's
4 separately filed Motion for Attorney's Fees, FTB embraced Hyatt's suggestion that the Court
5 bifurcate a decision on fees and costs by first determining Hyatt's liability for such fees and
6 costs in stage one before then moving to stage two and determining the amount of any such
7 fees and costs. It is only the second stage that would require detailed review of FTB's
8 invoices and supporting documentation.

9 Consequently, FTB agrees that Hyatt should be given an extension to supplement
10 his Motion to Retax so long as FTB is given a similar opportunity to reply to any
11 supplemental filing that Hyatt makes. This is a substantial and serious matter that requires
12 the parties' full time and attention, and FTB takes no issue with Hyatt asking for more time.

13 **III. CONCLUSION.**

14 As described above, there is no basis to strike FTB's Memorandum or otherwise
15 summarily retax the costs listed in the same. FTB is entitled to its day in court to put forth
16 argument under NRS Chapter 18 regarding costs, and it has provided the required backup
17 to comply with *Cadle Co.* Hyatt is also entitled to challenge the same, which he has done
18 through the Motions. NRS 18.110(4) now requires a hearing, after which the Court can
19 settle the costs.

20 Accordingly, to the extent that Hyatt's Motions ask the Court to strike FTB's
21 Memorandum or summarily retax and deny the same, FTB respectfully requests that the
22 Court deny Hyatt's Motions. To the extent Hyatt's Motions ask the Court to extend his time
23 to file supplemental papers supporting his Motion to Retax, FTB does not oppose this
24 request so long as FTB is also given a chance to supplement this Opposition in response

25 ///

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1 to Hyatt's supplemental filings.

2 Dated this 16th day of March, 2020.

3 McDONALD CARANO LLP

4 /s/ Pat Lundvall

5 Pat Lundvall (NSBN 3761)
6 McDONALD CARANO LLP
7 2300 West Sahara Avenue, Suite 1200
8 Las Vegas, Nevada 89102
9 Telephone: (702) 873-4100
10 Facsimile: (702) 873-9966
11 lundvall@mcdonaldcarano.com

12 *Attorneys for Defendant*
13 *Franchise Tax Board of the State of California*

14 **CERTIFICATE OF SERVICE**

15 I certify that on this 16th day of March, 2020, I caused a true and correct copy of the
16 **FTB's OPPOSITION TO PLAINTIFF GILBERT P. HYATT'S MOTION TO STRIKE,**
17 **MOTION TO RETAX AND, ALTERNATIVELY, MOTION FOR EXTENSION OF TIME TO**
18 **PROVIDE ADDITIONAL BASIS TO RETAX COSTS** to be electronically filed and served
19 to all parties of record via this Court's electronic filing system to all parties listed on the e-
20 service master list:

21 /s/ Beau Nelson

22 An employee of McDonald Carano LLP
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EXHIBIT A

EXHIBIT A

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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.

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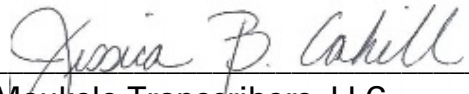
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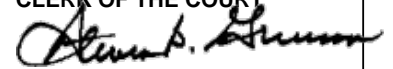
MR. HUTCHISON: Thank you, Your Honor.

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 NOTICE OF APPEAL OF
JUDGMENT**

Franchise Tax Board of the State of Nevada ("FTB") hereby gives notice that FTB
appeals to the Supreme Court of Nevada from the following:

- Judgment Dated February 21, 2020 ("Judgment"), notice of which was entered
on February 26, 2020.

FTB appeals from that portion of the Judgment determining that "neither party is deemed
the prevailing party for the purpose of awarding costs or attorney's fees, and neither party
is therefore awarded costs or attorney's fees in this action." Judgment at 8:14-16.

///

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///

1 A true and correct copy of the Judgment is attached as **Exhibit A**.

2 Dated this 20th day of March, 2020.

3
4 McDONALD CARANO LLP

5 /s/ Pat Lundvall

6 Pat Lundvall (NSBN 3761)
7 Rory T. Kay (NSBN 12416)
8 McDONALD CARANO LLP
9 2300 West Sahara Avenue, Suite 1200
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13 lundvall@mcdonaldcarano.com
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15 *Attorneys for Defendant*
16 *Franchise Tax Board of the State of California*

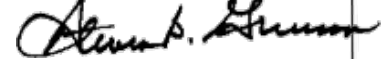
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CERTIFICATE OF SERVICE

19 I certify that on this 20th day of March, 2020, I caused a true and correct copy of the
20 **FTB's NOTICE OF APPEAL OF JUDGMENT** to be electronically filed and served to all
21 parties of record via this Court's electronic filing system to all parties listed on the e-service
22 master list:

23
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25
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27
28 /s/ Beau Nelson

An employee of McDonald Carano LLP

EXHIBIT A



1 JUDG

2 EIGHTH JUDICIAL DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5) CASE NO.: 98A382999
6)
7) DEPT. NO.: X
8)
9 GILBERT P. HYATT,)
10)
11) Plaintiff,)
12)
13) vs.)
14)
15) FRANCHISE TAX BOARD OF THE STATE OF)
16) CALIFORNIA, and DOES 1-100 inclusive,)
17)
18) Defendants.)
19)

20 JUDGMENT

21 This case has been remanded back to this Court by order of the Nevada Supreme
22 Court dated August 5, 2019 for proceedings consistent with its order and consistent with
23 the United States Supreme Court decision in this case, *Franchise Tax Board of California*
24 *v. Hyatt*, 587 U.S. 139 S. Ct. 1485, 1499 (2019). In accordance with those instructions, the
25 Court enters judgment in this action as follows:
26

27 CASE PROCEDURAL HISTORY

28 Complaint

Plaintiff Gilbert Hyatt ("Hyatt") filed this action against Defendant California
Franchise Tax Board ("FTB") on January 6, 1998, alleging: First Cause of Action –
Declaratory Relief; Second Cause of Action – Invasion of Privacy, Unreasonable Intrusion
Upon the Seclusion of Another; Third Cause of Action – Invasion of Privacy –
Unreasonable Publicity Given to Private Facts; Fourth Cause of Action – Invasion of
Privacy – Casing Plaintiff in a False Light; and Fifth Cause of Action – Tort of Outrage.

1 On June 11, 1998, Hyatt filed a First Amended Complaint, which added three
2 causes of action: Sixth Cause of Action – Abuse of Process; Seventh Cause of Action –
3 Fraud; and Eighth Cause of Action – Negligent Misrepresentation.

4
5 Franchise Tax Board's Motion for Judgment on the Pleadings

6 On February 9, 1999, the FTB filed a Motion for Judgment on the pleadings. The
7 FTB argued its motion that this Court should dismiss the case in its entirety as a matter of
8 comity in order to give full faith and credit to California's immunity laws that protect the FTB
9 from suit in California. The FTB cited Nevada v. Hall, 440 U.S. 410 (1979) and argued that
10 its holding was not applicable in this case because the FTB's taxing power was a sovereign
11 function. The FTB did not argue that Nevada v. Hall was wrongly decided and should be
12 reversed. Hyatt argued that the Court could and should hear this case citing Nevada v.
13 Hall, which held that a state court has jurisdiction over an agency from a sister state and is
14 not required to provide immunity to the sister state but can decide whether to grant
15 immunity to the sister state as a matter of comity.

16 On April 7, 1999, this Court, the Honorable Nancy Saitta, District Judge, presiding,
17 denied the FTB's motion for judgment on the pleadings as to Hyatt's tort claims, while only
18 granting the FTB's motion as to Hyatt's claim for declaratory relief.

19
20 Franchise Tax Board's Motion for Summary Judgment

21 On January 27, 2000, the FTB filed a Motion for Summary Judgment. The FTB
22 argued in its motion, among other arguments, that this Court should dismiss the case in
23 order to give full faith and credit to California's immunity laws that protect the FTB from suit
24 in California. The FTB again cited Nevada v. Hall, 440 U.S. 410 (1979) and again argued
25 that its holding was not applicable in this case because the FTB's taxing power was a
26 sovereign function. The FTB again did not argue that Nevada v. Hall was wrongly decided
27 and should be reversed. Hyatt again argued that the Court has jurisdiction over the FTB

1 and could and should hear this case, again citing Nevada v. Hall.

2 On May 31, 2000, this Court, the Honorable Nancy Saitta, District Judge, presiding,
3 denied the FTB's Motion for Summary Judgment.

4
5 First Writ Proceeding in the Nevada Supreme Court

6 On July 7, 2000, the FTB filed a petition for a writ of mandamus seeking review of
7 this Court's order denying the FTB's motion for summary judgment. On September 13,
8 2000, the Nevada Supreme Court accepted review of the FTB's petition for writ of
9 mandamus. The FTB's petition again argued that this Court should dismiss the case in
10 order to give full faith and credit to California's immunity laws that protect the FTB from suit
11 in California. The FTB again cited Nevada v. Hall, 440 U.S. 410 (1979) and again argued
12 that its holding was not applicable in this case because the FTB's taxing power was a
13 sovereign function.

14 On June 13, 2001, the Nevada Supreme Court issued an order granting the FTB's
15 petition for a writ of mandamus regarding this Court's order denying the FTB's summary
16 judgment motion on the basis that Hyatt did not put forth sufficient evidence to establish his
17 alleged tort claims.

18 On July 2, 2001, Hyatt filed a petition for rehearing of the Nevada Supreme Court's
19 June 13, 2001 order dismissing the case. Hyatt argued that the FTB's petition had not
20 raised the issue of the sufficiency of the evidence to support Hyatt's tort claims, that the
21 parties had not briefed that issue, and that Hyatt had sufficient evidence to establish each
22 tort claim. On July 13, 2001, the Nevada Supreme Court ordered additional briefing from
23 both sides on Hyatt's petition for rehearing.

24 On April 4, 2002, the Nevada Supreme Court granted Hyatt's petition for rehearing
25 and reversed its prior order dismissing the case, concluding that Nevada has jurisdiction to
26 hear Hyatt's intentional tort claims against the FTB under Nevada v. Hall and that Nevada
27 would not dismiss those claims on the ground of comity because the State of Nevada
28

1 allows its state agencies to be sued in Nevada District Court for intentional torts. The
2 Nevada Supreme Court, however, dismissed Hyatt's Eighth Cause of Action – Negligent
3 Misrepresentation against the FTB on the ground of comity because the State of Nevada
4 does not allow its state agencies to be sued in Nevada District Court for negligence.

5
6 First Review by the United States Supreme Court

7 On October 15, 2002, the United States Supreme Court granted the FTB's petition
8 for certiorari, which sought review of the Nevada Supreme Court's April 4, 2002 order. The
9 FTB's petition for review and its briefing on the merits did not assert for seek review on the
10 issue of whether Nevada v. Hall was wrongly decided and should be reversed, but rather
11 again argued that an exception to Nevada v. Hall should be established, so that certain
12 "sovereign" functions, such as taxing activities, be exempted from the holding in Nevada v.
13 Hall. Hyatt opposed the FTB's arguments, again citing Nevada v. Hall.

14 On April 23, 2003, the United States Supreme Court issued a decision denying the
15 FTB's appeal in a unanimous 9 to 0 decision that cited Nevada v. Hall, rejected the FTB's
16 asserted exception to Nevada v. Hall, and concluded that the Nevada Supreme Court had
17 appropriately applied comity by allowing Hyatt's intentional tort claims to proceed in
18 Nevada state court while dismissing Hyatt's negligence claim. Franchise Tax Board of
19 California v. Hyatt, 538 U.S. 488 (2003) ("*Hyatt I*"). On May 23, 2003, the United States
20 Supreme Court issued the mandate returning this case to Nevada state court.

21
22 Second Amended Complaint

23 On April 18, 2006, after obtaining leave of court, Hyatt filed a Second Amended
24 Complaint that added a single cause of action: Eighth Cause of Action – Breach of
25 Confidentiality.

26 //

27 //

1 Franchise Tax Board's Offer of Judgment

2 On November 26, 2007, the FTB made an offer of judgment to Hyatt under Nevada
3 Rules of Civil Procedure 68 and former Nevada Revised Statute 17.115 in the amount of
4 \$110,000, inclusive of costs and fees. Hyatt did not respond to the offer within the Rule's
5 10-day period, so it expired.

6
7 Trial, Verdict, and Judgment

8 On April 14, 2008, this matter came on for trial before this Court, the Honorable
9 Jessie Walsh, District Judge, presiding, and a jury, concluding with the verdicts of the jury
10 on August 6, 2008 (*liability for and amount of compensatory damages*), on August 11, 2008
11 (*liability for punitive damages*), and on August 14, 2008 (*amount of punitive damages*).
12 The jury rendered a verdict in favor of Hyatt and against the FTB on all causes of action
13 presented to the jury, specifically Hyatt's second cause of action for invasion of privacy
14 (*intrusion upon seclusion*), third cause of action for invasion of privacy (*publicity of private*
15 *facts*), fourth cause of action for invasion of privacy (*false light*), fifth cause of action for
16 intentional infliction of emotional distress, sixth cause of action for abuse of process,
17 seventh cause of action for fraud, and eighth cause of action for breach of confidential
18 relationship. The jury awarded Hyatt compensatory damages of \$85,000,000 for emotional
19 distress; compensatory damages of \$52,000,000 for invasion of privacy; attorney's fees as
20 special damages of \$1,085,281.56; and punitive damages of \$250,000,000.

21 On September 8, 2008, this Court entered a judgment consistent with the jury's
22 verdicts. On January 4, 2010, this Court awarded Hyatt costs in the amount of
23 \$2,539,068.65 as the prevailing party in the case.

24
25 Appeal of the Judgment

26 On February 10, 2009, the FTB filed a notice of appeal from the judgment with the
27 Nevada Supreme Court, and thereafter the FTB and Hyatt filed their respective briefs for
28

1 the appeal. The FTB filed an opening brief on August 7, 2009. The FTB noted in footnote
2 80 that "it is questionable whether there is still validity to "Nevada v. Hall and that the
3 Nevada Supreme Court "may evaluate the continuing validity of an old United States
4 Supreme Court opinion."

5 On September 18, 2014, the Nevada Supreme Court affirmed in part and reversed
6 in part the judgment entered by this Court on September 8, 2009, without any reference to
7 or discussion of Nevada v. Hall. The Nevada Supreme Court affirmed the portion of the
8 judgment in favor of Hyatt on his cause of action for fraud and the award of \$1,085,281.56
9 in damages and affirmed specific findings as to the evidence that supported the fraud
10 claim. The Nevada Supreme Court also affirmed the portion of the judgment in favor of
11 Hyatt as to liability on his cause of action for intentional infliction of emotional distress while
12 ordering a new trial as to the amount of damages for that claim. The Nevada Supreme
13 Court reversed the judgment in favor of Hyatt on his other claims for invasion of privacy
14 (*intrusion upon seclusion*), invasion of privacy (*publicity of private facts*), invasion of privacy
15 (*false light*), abuse of process and breach of confidential relationship, ordering Hyatt to take
16 nothing for those claims and ordering the award of costs to be re-determined.

17
18 Second Review by the United States Supreme Court

19 On June 30, 2015, the United States Supreme Court granted the FTB's petition for
20 certiorari, which sought review of the Nevada Supreme Court's September 18, 2014
21 decision. The FTB's petition for review and then briefing on the merits argued that Nevada
22 v. Hall should be reversed on the grounds that a state court has no jurisdiction over a sister
23 state or its agencies or, alternatively, that the award of damages in favor of Hyatt must be
24 limited to \$50,000 per claim in accord with Nevada law applicable to claims made against
25 Nevada state agencies. Hyatt opposed the FTB on both grounds.

26 On April 19, 2016, the United States Supreme Court in a 4 to 4 vote denied the
27 FTB's request to reverse Nevada v. Hall, but granted the FTB's alternative request for relief

1 and ordered that the FTB must be treated the same as a Nevada state agency in regard to
2 damage limitations. The United States Supreme Court ordered the case remanded to the
3 Nevada state court for treatment consistent with the Court's ruling. Franchise Tax Board of
4 California v. Hyatt, 163 S. Ct. 1271 (1016) ("*Hyatt II*"). On May 23, 2016, the United States
5 Supreme court issued the mandate returning the case to Nevada Supreme Court.

6
7 *Revised Decision from the Nevada Supreme Court*

8 On December 26, 2017, the Nevada Supreme Court issued a decision ordering that
9 Hyatt's recovery for his fraud claim and his intentional infliction of emotional distress claim
10 be limited to \$50,000 each and remanded the case to this Court to decide the issue of
11 costs.

12
13 *Third Review by the United States Supreme Court*

14 On June 29, 2018, the United States Supreme Court granted the FTB's petition for
15 certiorari, which sought review of the Nevada Supreme Court's December 26, 2017
16 decision. The FTB's petition for review and then briefing on the merits again argued that
17 the Nevada v. Hall should be reversed on the ground that a state court has no jurisdiction
18 over a sister state or its agencies. Hyatt again opposed the FTB's appeal on this ground.

19 On May 13, 2019, the United State Supreme Court in a 5 to 4 decision reversed
20 Nevada v. Hall and remanded the case to the Nevada state court for treatment consistent
21 with the Court opinion. Franchise Tax Board of California, 139 S. Ct. 1485 (2019) ("*Hyatt*
22 *III*"). On June 17, 2019, the United States Supreme Court issued the mandate returning
23 the case to the Nevada Supreme Court.

24
25 *Remand to this Court*

26 On August 5, 2019, the Nevada Supreme Court issued a remittitur returning the
27 case to this Court ordering that it vacate the judgment in favor of Hyatt and take any further
28

1 necessary action consistent with its order and the United States Supreme Court's order.
2 On September 3, 2019, this Court vacated the prior judgment in favor of Hyatt and ordered
3 both Hyatt and the FTB to submit briefing by no later than October 15, 2019, to address the
4 form of judgment to be entered in this action and who, if either party, is the prevailing party
5 in this action.

6
7 **JUDGMENT**

8 NOW, THEREFORE, and based on the foregoing, this Court has reviewed and
9 considered the procedural history in this case, including the decisions and orders in this
10 case issued by the United States Supreme Court and the Nevada Supreme Court, and the
11 recent briefing submitted by the parties in the form of judgment to be entered in this case
12 and who, if either party, is the prevailing party.

13 IT IS ORDERED, ADJUDGED AND DECREED that (i) this case is dismissed and
14 Hyatt take nothing from any of the causes of action he asserted in this action, and (ii)
15 neither party is deemed the prevailing party for the purpose of awarding costs or attorney's
16 fees, and neither party is therefore awarded costs or attorney's fees in this action.

17 Hyatt brought this action in good faith in reliance on the United States Supreme
18 Court precedent Nevada v. Hall. During the last 21 years while relying on Nevada v. Hall,
19 Hyatt prevailed in both the Nevada Supreme Court (2002) and the United States Supreme
20 Court in 2003 (*Hyatt I*) and then obtained a large jury verdict and final judgment against the
21 FTB (2008), which the Nevada Supreme Court affirmed in part (2014). The United States
22 Supreme Court's reversal of its long-standing Nevada v. Hall precedent in Hyatt III in 2019
23 stripping this Court of jurisdiction over the FTB could not have been anticipated by Hyatt.

24 Hyatt also had a good faith belief that he would prevail at trial on his claims and
25 recover in excess of the \$110,000 offer of judgment made by the FTB in 2007. Hyatt did
26 obtain a verdict and final judgment well in excess of that amount. The damages limitation
27 to Hyatt's claims was not decided and imposed until 2016 in *Hyatt II*. It was therefore not
28

1 grossly unreasonable or in bad faith for Hyatt to not accept the FTB's offer of judgment of
2 the \$110,000 in 2007. The FTB may have believed when it served its offer of judgment
3 that the offer was reasonable in its amount or timing and would be accepted by Hyatt, but
4 Hyatt was relying on Nevada v. Hall, which had been the law since 1979. As of 2007, the
5 FTB had not asserted any argument or taken any action to reverse the Nevada v. Hall
6 precedent. Further, as of 2007, this case had been reviewed by both the Nevada Supreme
7 Court (2002) and the United States Supreme Court (2003), and the FTB had not argued
8 that Nevada v. Hall was wrongly decided and should be reversed. The FTB did not assert
9 that argument or seek that relief with the United States Supreme Court until 2015 after
10 ruling by this Court and exhausting all appeals in the Nevada Supreme Court.

11 The Court therefore concludes that based on the orders of the United States
12 Supreme Court and the Nevada Supreme Court, this case is dismissed. This Court further
13 concludes that consistent with the orders of the higher courts, as a matter of law and
14 equity, there is no prevailing party in this action and neither party is entitled to an award of
15 costs or attorney's fees.

16 IT IS SO ORDERED.

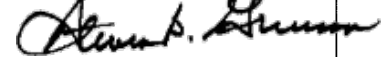
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18 DATED this 21st day of February, 2020.

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21 TIERRA JONES
22 DISTRICT COURT JUDGE
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Electronically served on all parties as noted in the Court's Master Service List and/or mailed to any party in proper person.


Tess Driver
Judicial Executive Assistant
Department 10



OPP

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Attorneys for Plaintiff Gilbert P. Hyatt

**DISTRICT COURT
CLARK COUNTY, NEVADA**

GILBERT P. HYATT,
Plaintiff,

v.

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

Case No. 98A382999
Dept. No. X

HEARING REQUESTED (EDCR 2.20)

**PLAINTIFF GILBERT P. HYATT'S
OPPOSITION TO FTB'S MOTION FOR
ATTORNEY'S FEES PURSUANT TO
NRCP 68**

Plaintiff Gilbert P. Hyatt ("Plaintiff" or "Hyatt") files this opposition to the California Franchise Tax Board's (the "FTB") Motion for Attorney's Fees Pursuant to NRCP 68.

1. Introduction.

The FTB's improper motion for reconsideration should be denied. The Court has seen and heard all the arguments now set forth by the FTB and decided the issue squarely against the FTB. On October 15, 2019 the parties each submitted extensive briefing including on whether the FTB is entitled to attorney's fees under NRCP 68. On February 21, 2020, this Court issued a lengthy ruling and final judgment finding no prevailing party in the case and that neither party is

1 entitled to costs or attorney's fees, including under NRCP 68. The FTB did not seek
2 reconsideration of the ruling under Local Rule 2.24 within 10 days of service of the notice of the
3 judgment, or at any time. This motion by the FTB, however, seeks to reargue whether the FTB is
4 entitled to attorney's fees under NRCP 68. The motion should be denied on the basis that it is an
5 improper, tardy and thinly disguised motion for reconsideration.

6 ***The FTB's request for attorney's fees under NRCP 68 should again be rejected by the***
7 ***Court.*** If the Court decides to again consider the merits of the FTB's request for attorney's fees
8 under NRCP 68, it must again reject the request on the merits. Hyatt filed this case in Nevada in
9 1998 seeking relief for intentional torts committed by the FTB, an agency of the State of
10 California. Hyatt pursued the case for 21 years relying in good faith on the United States
11 Supreme Court precedent, *Nevada v. Hall*, 440 U.S. 410 (1979). Hyatt won virtually every
12 contested phase of the case, until the United States Supreme Court's thirteenth hour reversal of its
13 long-standing *Nevada v. Hall* precedent. The FTB did not seek to challenge the 40-year *Nevada*
14 *v. Hall* precedent until it had lost every other stage of the case and had no other appeals.

15 As this Court has already determined, Hyatt acted in good faith in filing this case, and
16 throughout this case, in relying on the *Nevada v. Hall* precedent. Hyatt also acted in good faith in
17 rejecting the FTB's offer of judgment in 2007, and instead proceeding to trial and winning a
18 verdict of hundreds of millions of dollars. At that time the FTB had not even suggested that it
19 would challenge the *Nevada v. Hall* precedent and did not until many years later.

20 The *Beattie* factors¹ specified by the Nevada Supreme Court require that this Court again
21 reject the FTB's motion for attorneys' fees under NRCP 68.² Specifically, the Court must decide
22 whether: (i) Hyatt filed and pursued the action in good faith; (ii) the FTB's pretrial offer of
23 judgment was reasonable and in good faith in both its timing and amount; and (iii) Hyatt's
24 rejection of the offer and proceeding to trial was grossly unreasonable or in bad faith.³

25 In considering the *Beattie* factors, it is evident that Hyatt filed, and then pursued the case

26
27 ¹ *Beattie v. Thomas*, 99 Nev. 579, 588-89 (1983).

² NRS 17.115 has been repealed by the Nevada Legislature effective October 1, 2015.

28 ³ *Id.* If a court decides to award fees under NRCP 68 or former NRS 17.115, it must determine whether the fees sought are reasonable and justified in amount. See *Beattie*, 99 Nev. at 588-89.

1 for 21 years, in good faith. To conclude otherwise, the Court would have to reach the
2 extraordinary conclusion that somehow Hyatt knew that the *Nevada v. Hall* precedent would be
3 reversed 21 years after he filed the case, and therefore he filed the complaint in bad faith. The
4 FTB cannot argue this in good faith or with a straight face. Instead, the FTB's current motion
5 ignores this key procedural history and disingenuously asserts it argued immunity from the
6 beginning. In fact, the FTB never challenged the *Nevada v. Hall* precedent until it had exhausted
7 all other bases for appeal.

8 All evidence confirms that Hyatt had a good faith belief in the merits of his case at its
9 outset, which continued throughout the case. The jury, the trial court, the Nevada Supreme Court,
10 and the United States Supreme Court all agreed with Hyatt. Hyatt prevailed at virtually every
11 phase of the litigation, until *ex post facto* the FTB sought and obtained this change in the law,
12 after the FTB had lost the case on the merits and exhausted its appeals. As described in the
13 detailed procedural history set forth below, before proceeding to trial Hyatt prevailed in the
14 United States Supreme Court and the Nevada Supreme Court, obtaining their respective approvals
15 for the litigation to proceed to trial. Hyatt then prevailed at trial, receiving a large jury verdict for
16 the damages caused by the FTB's intentional misconduct. The Nevada Supreme Court confirmed
17 part of the verdict in Hyatt's favor, including over \$1 million in damages, and reached the
18 conclusions that the record supported the jury's finding that the FTB committed fraud and
19 intentional infliction of emotional distress directed at Hyatt.

20 No interpretation of this case's 21-year history can conclude that Hyatt brought the case
21 and pursued the case in anything other than good faith. This first and most crucial *Beattie* factor
22 negates any legal basis for the FTB to seek an attorneys' fee award under NRCP 68. Hyatt
23 prevailed once in the United States Supreme Court⁴ and twice in the Nevada Supreme Court,⁵
24 which judicial rulings confirmed that this Court had jurisdiction over a California agency based
25 on *Nevada v. Hall*, 440 U.S. 410 (1979) and that this case could proceed to a jury trial in Nevada.

27 ⁴ *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*").

28 ⁵ *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Ct.*, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) and
Franchise Tax Bd. of Cal. v. Hyatt, 130 Nev. 662, 710 (2014).

1 Hyatt then prevailed at trial, and the Nevada Supreme Court later affirmed part of the judgment in
2 Hyatt's favor. Having exhausted its appeals in Nevada and lost virtually every phase of the case,
3 the FTB asked the United States Supreme Court—17 years after this case was filed—to reverse
4 its long-standing *Nevada v. Hall* precedent and retroactively strip this Court of jurisdiction. After
5 two reviews over a four-year period, the United States Supreme Court granted the FTB's request
6 and reversed *Nevada v. Hall*, leaving this Court without jurisdiction over the FTB.

7 Similarly, the second and third *Beattie* factors also negate any FTB request for attorney's
8 fees under NRCP 68. The FTB's offer of judgment of \$110,000, inclusive of all costs, was
9 neither reasonable nor made in good faith in its timing or amount. The United States Supreme
10 Court and Nevada Supreme Court both had already ruled, at the time FTB served its pretrial offer
11 of judgment, that this Court had jurisdiction and the case could proceed to trial in accord with the
12 *Nevada v. Hall* precedent. And the FTB had not directly challenged that long-standing precedent,
13 nor indicated it would do so. Further, in terms of the value of the offer, the jury's significant
14 award of damages and the partial confirmation by the Nevada Supreme Court for an amount
15 substantially more than the FTB's offer establish that the offer was not reasonable at the time.
16 Similarly, it was not grossly unreasonable or in bad faith for Hyatt to reject the FTB's offer. In
17 accord with these mandatory *Beattie* factors, there is neither legal nor factual grounds upon which
18 the Court could award the FTB attorney's fees under NRCP 68.

19 **2. The Procedural History of This Case.**

20 **A. Hyatt filed this action in 1998 based on the long-standing *Nevada v. Hall* precedent.**

21 Hyatt filed this action in this Court on January 6, 1998, against the FTB, the California
22 state agency responsible for assessing state income taxes.⁶ Hyatt's suit against the FTB in

23
24 ⁶ Exhibit 1 to Appendix of Materials re Case Procedural History (the "Appendix") that was submitted with Hyatt's
25 October 15, 2019 Brief. References to "Appendix" and "Exhibit" or "Exh." numbers herein refer to that October 15,
26 2019 Appendix (unless otherwise indicated). In order to conserve Court and party resources, Hyatt has not
27 resubmitted the identical 94 Exhibits that he submitted with his October 15, 2019 Brief but instead refers and
28 incorporates by reference his prior Appendix. *See* EDCR 2.27(e) ("Copies of pleadings or other documents filed in
the pending matter . . . shall not be attached as exhibits or made part of an appendix."). In this regard, the Court has
seen all of these exhibits, heard all the parties' arguments regarding the case history as demonstrated by these
exhibits, and ruled upon these arguments. The Court should not be burdened with having to do it all over again. For
that reason, Hyatt moved the Court on March 20, 2020, to strike this motion by the FTB as a tardy and improper
motion for reconsideration.

1 Nevada was based on and consistent with the United States Supreme Court's holding in *Nevada*
2 *v. Hall* that a state could not claim immunity in the Courts of a sister state based on that state's
3 own immunity laws. In *Nevada v. Hall*, the California court refused to limit the liability of a
4 Nevada agency for tortious conduct committed in California, in accord with Nevada law. The
5 California court treated the Nevada agency as if it had no immunity in California. The United
6 States Supreme Court affirmed the California court's award of full damages to the California
7 resident against the Nevada agency.⁷

8 Hyatt's complaint in this case sought full recovery of damages he incurred due to tortious
9 actions of the FTB, which occurred in Nevada or were directed into Nevada while Hyatt was
10 residing in Nevada. He alleged that he moved from California to Nevada in September 1991.
11 Hyatt's complaint further alleged that during 1993 to 1997, the FTB conducted two tax audits of
12 him relating to California state income taxes for the 1991 tax-year and 1992 tax-year and, while
13 doing so, engaged in bad faith conduct and committed intentional torts directed at him, including
14 repeated intentional public disclosures of his social security number, intentional public
15 disclosures that he was under tax audit, and even an overt threat that he settle with the FTB and
16 agree to pay California state taxes for the period he claimed he resided in Nevada or face further
17 investigation from the FTB.⁸ Hyatt's complaint alleged the following torts against the FTB: (i)
18 invasion of privacy (intrusion upon seclusion); (ii) invasion of privacy (publicity of private facts);
19 (iii) invasion of privacy (false light); (iv) intentional and negligent infliction of emotional distress;
20 (v) abuse of process; (vi) fraud, and (vii) breach of confidential relationship. Hyatt's complaint
21 sought damages from the FTB stemming from its bad faith and intentional misconduct.

22 **B. The FTB first tried and failed to remove this case to federal court (1998).**

23 The FTB's initial response to Hyatt's complaint in 1998 was to remove the action to the
24 United States District Court for the District of Nevada.⁹ Hyatt contested this by filing a motion to
25 remand arguing that the United States District Court lacked jurisdiction over the FTB, an agency
26

27 ⁷ 440 U.S. at 420-21.

28 ⁸ Appendix Exh. 1.

⁹ Appendix, Exh. 2.

1 of the State of California, under the Eleventh Amendment to the United States Constitution. The
2 United States District Court granted Hyatt's motion and remanded the case back to this Court.¹⁰
3 Once back before this Court, Hyatt filed a First Amended Complaint which added three causes of
4 action: Sixth Cause of Action-Abuse of Process; Seventh Cause of Action-Fraud; and Eighth
5 Cause of Action-Negligent Misrepresentation.¹¹

6 **C. The FTB then tried and failed to have this Court dismiss the action at the pleading**
7 **stage (1999).**

8 After answering the First Amended Complaint,¹² the FTB moved for judgment on the
9 pleadings arguing the FTB had immunity under California's own immunity laws.¹³ Hyatt
10 opposed, citing *Nevada v. Hall* and Nevada law on comity.¹⁴ In its motion, the FTB tried to
11 create an exception to, but did not challenge the continuing viability of *Nevada v. Hall*. On April
12 7, 1999, this Court, the Honorable Nancy Saitta, District Judge, presiding, denied the FTB's
13 motion as to Hyatt's tort claims, citing *Nevada v. Hall*, while granting the FTB's motion to
14 dismiss Hyatt's claim for declaratory relief.¹⁵

15 **D. The FTB then sought and was denied summary judgment (2000).**

16 After an initial discovery period, the FTB filed a motion for summary judgment, again
17 arguing California's immunity statute barred this Court from hearing the case, as well as other
18 bases, including that Hyatt lacked sufficient facts to establish his claims.¹⁶ Hyatt opposed the
19 motion on all points, again citing *Nevada v. Hall* in opposing the FTB's immunity argument.¹⁷ In
20 its motion for summary judgment, the FTB did not challenge the continuing viability of *Nevada v.*
21 *Hall*. On May 31, 2000, this Court, the Honorable Nancy Saitta, District Judge, presiding, denied
22 the FTB's motion for summary judgment, citing *Nevada v. Hall*.¹⁸

24 ¹⁰ Appendix, Exh. 3.

25 ¹¹ Appendix, Exh. 4.

26 ¹² Appendix, Exh. 5.

27 ¹³ Appendix, Exhs. 6, 8, and 10.

28 ¹⁴ Appendix, Exhs. 7 and 9.

¹⁵ Appendix, Exhs. 11 and 12.

¹⁶ Appendix, Exhs. 13, 14, and 21.

¹⁷ Appendix, Exhs. 16, 17, 18, 19, and 20.

¹⁸ Appendix, Exhs. 22 and 23

1 **E. The FTB then sought and was ultimately denied writ relief by the Nevada Supreme**
2 **Court (2000 to 2002).**

3 Having been denied summary judgment by this Court, and having lost several discovery
4 motions, the FTB filed multiple writ petitions with the Nevada Supreme Court seeking review of
5 both discovery rulings and this Court's denial of the FTB's summary judgment motion.¹⁹ The
6 Nevada Supreme Court accepted review of both petitions.²⁰ The FTB's petition directed at the
7 Court's summary judgment ruling argued that the Nevada courts should recognize the FTB's
8 sovereign immunity granted it by the State of California. The petition did not question or argue
9 the continuing viability of *Nevada v. Hall*.²¹ Nor did the FTB's petition seek review of whether
10 Hyatt had put forth sufficient evidence to establish each of his tort claims. Hyatt filed oppositions
11 to the FTB writ requests,²² again arguing that *Nevada v. Hall* and Nevada's law on comity
12 provided a basis for his case to proceed in this Court.²³

13 The Nevada Supreme Court initially issued a decision on June 13, 2001, granting the
14 FTB's petition for a writ of mandate and ordering this case dismissed on the basis that Hyatt did
15 not put forth sufficient evidence to establish his alleged tort claims.²⁴ On July 2, 2001, Hyatt filed
16 a petition for rehearing on the Nevada Supreme Court's order dismissing the case, arguing that
17 (i) FTB's petition for review had not raised the issue of the sufficiency of the evidence to support
18 Hyatt's tort claims, (ii) the parties had not briefed that issue, and (iii) Hyatt had sufficient
19 evidence to establish each tort claim.²⁵ On July 13 2001, the Nevada Supreme Court ordered
20 additional briefing from both sides on Hyatt's petition for rehearing.²⁶ Both sides submitted the
21 additional briefing.²⁷

22 On April 4, 2002, the Nevada Supreme Court granted Hyatt's petition for rehearing and
23 reversed its prior order dismissing the case after concluding that Hyatt had sufficient evidence for

24 ¹⁹ Appendix, Exhs. 15 and 25.

25 ²⁰ Appendix, Exhs. 24 and 28.

26 ²¹ Appendix, Exh. 25.

27 ²² Appendix, Exhs. 26 and 29.

28 ²³ Appendix, Exh. 29

²⁴ Appendix, Exh. 31.

²⁵ Appendix, Exh. 32.

²⁶ Appendix, Exh. 33.

²⁷ Appendix, Exhs. 34, 35, 36, and 37.

1 his tort claims, that Nevada had jurisdiction to hear Hyatt's intentional tort claims against the
2 FTB under *Nevada v. Hall*, and that Nevada would adjudicate those claims as a matter of comity
3 because the State of Nevada allows its state agencies to be sued in Nevada's courts for intentional
4 torts.²⁸ The Nevada Supreme Court, however, dismissed Hyatt's single negligence claim against
5 the FTB on the ground of comity because the State of Nevada does not allow its state agencies to
6 be sued in Nevada's courts for negligence.

7 **F. The FTB then obtained review, but was denied relief, by the United States Supreme**
8 **Court in a 9-0 decision against the FTB (2002 to 2003).**

9 The United States Supreme Court granted the FTB's petition for writ of certiorari seeking
10 review of the Nevada Supreme Court's April 4, 2002 order.²⁹ The FTB's petition for review and
11 its briefing on the merits did not assert or seek review on the issue of whether *Nevada v. Hall* was
12 wrongly decided and should be reversed. Rather, it argued that an exception to *Nevada v. Hall*
13 should be established, so that certain "sovereign" functions, such as taxing activities, be exempted
14 from the holding in *Nevada v. Hall*.³⁰ Hyatt filed opposition briefing, arguing that *Nevada v. Hall*
15 was controlling and there was no basis for an exception as asserted by the FTB.³¹

16 The United States Supreme Court issued its opinion denying the FTB's appeal in a
17 unanimous 9-0 decision, *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*").³²
18 The decision cited *Nevada v. Hall*, rejected the FTB's asserted exception to *Nevada v. Hall*, and
19 concluded that the Nevada Supreme Court had appropriately applied comity by allowing Hyatt's
20 intentional tort claims to proceed in Nevada state court while dismissing Hyatt's negligence
21 claim.

22 **G. After the United States Supreme Court and Nevada Supreme Court decisions**
23 **favorable to Hyatt, the parties conducted additional discovery including on whether**
24 **the FTB acted in bad faith by delaying and extending the audit and protest process**
25 **in order to put pressure on Hyatt to settle the tax proceeding in California (2003 to**
26 **2007).**

27 While Hyatt's tort action was pending in this Court, Hyatt's administrative tax proceeding
28

26 ²⁸ Appendix, Exh. 38.

27 ²⁹ Appendix, Exh. 42.

28 ³⁰ Appendix, Exhs. 39, 41, 43, and 45.

³¹ Appendix, Exhs. 40 and 44.

³² Appendix, Exhs. 46 and 47.

1 was pending in California in which Hyatt was appealing the FTB's audit conclusions. Although
2 those proceedings were always kept separate as specified in this Court's 1999 order on the FTB's
3 motion for judgment on the pleadings,³³ Hyatt sought and was allowed to take discovery on the
4 extreme delay by the FTB (10 years between 1997 and 2007) in issuing a final decision in the
5 administrative protest phase of the audit.³⁴

6 Regarding the FTB's delay related to the torts alleged in this case, Hyatt asserted the delay
7 was part of the FTB's effort to coerce him into settling the tax proceeding in return for avoiding
8 further lengthy investigations, as set forth by Hyatt in his fraud claim.³⁵ In 2005, the FTB moved
9 for summary adjudication seeking to remove the bad faith delay issue from the case.³⁶ But this
10 Court denied the FTB's motion and ruled that whether the FTB's 10 year delay in issuing a
11 decision in the protest phase of the audits was done in bad faith to pressure Hyatt could be
12 presented to the jury at trial as part of Hyatt's fraud claims.³⁷

13 In 2006, after obtaining leave of court,³⁸ Hyatt filed a Second Amended Complaint that
14 added a single cause of action: Eighth Cause of Action-Breach of Confidentiality.³⁹

15 **H. The FTB made an offer of judgment for \$110,000 (2007).**

16 On November 26, 2007, the FTB made an offer of judgment to Hyatt under NRCP 68 and
17 former NRS 17.115 in the amount of \$110,000 (inclusive of costs).⁴⁰ Hyatt did not respond to the
18 offer within the Rule's 10-day period, so it expired.

19 **I. Hyatt won a jury verdict at trial (2008).**

20 Trial before a jury commenced on April 14, 2008, the Honorable Jessie Walsh, District
21 Judge, presiding, and lasted for four months. The jury returned verdicts on August 6, 2008
22 (liability for and award of compensatory damages), on August 11, 2008 (liability for punitive
23

24
25 ³³ Appendix, Exhs. 11 and 12.

26 ³⁴ Appendix, Exhs. 48 and 50.

27 ³⁵ Appendix, Exh. 51

28 ³⁶ Appendix, Exh. 49.

³⁷ Appendix, Exhs. 52 and 53.

³⁸ Appendix, Exhs. 4, 55, 56, and 58.

³⁹ Appendix, Exh. 57.

⁴⁰ Appendix, Exh. 59.

1 damages), and on August 14, 2008 (award of punitive damages).⁴¹

2 The jury rendered a verdict in favor of Hyatt and against the FTB on all causes of action
3 presented to the jury, specifically Hyatt's second cause of action for invasion of privacy (intrusion
4 upon seclusion), third cause of action for invasion of privacy (publicity of private facts), fourth
5 cause of action for invasion of privacy (false light), fifth cause of action for intentional infliction
6 of emotional distress, sixth cause of action for abuse of process, seventh cause of action for fraud,
7 and eighth cause of action for breach of confidential relationship. The jury awarded Hyatt
8 compensatory damages of \$85 million for emotional distress; compensatory damages of \$52
9 million for invasion of privacy; attorneys' fees as special damages of \$1,085,281.56 on Hyatt's
10 fraud claim; and punitive damages of \$250 million.⁴²

11 On September 8, 2008, Judge Walsh entered a judgment consistent with the jury's
12 verdicts.⁴³

13 **J. Hyatt was awarded statutory costs.**

14 On January 4, 2010, after a lengthy and contentious proceeding, including the
15 appointment of a special master, this Court awarded Hyatt costs in the amount of \$2,539,068.65
16 as the prevailing party in the case.⁴⁴

17 **K. FTB appealed the judgment (2009 to 2014) with no emphasis on seeking reversal of**
18 ***Nevada v. Hall*.**

19 The FTB appealed from the 2008 judgment to the Nevada Supreme Court.⁴⁵ In the FTB's
20 opening 100-plus-page brief filed on August 7, 2009, the FTB made reference to *Nevada v. Hall*,
21 but gave no emphasis to it. The FTB requested in a footnote that the Nevada Supreme Court
22 evaluate the continuing viability of *Nevada v. Hall* saying in footnote 80 that "it is questionable
23 whether there is still validity to" *Nevada v. Hall* and that the Nevada Supreme Court "may
24 evaluate the continuing validity of an old United States Supreme Court opinion."⁴⁶ Hyatt filed a

25 ⁴¹ Appendix, Exhs. 60, 61, and 62.

26 ⁴² *Id.*

27 ⁴³ Appendix, Exh. 63.

28 ⁴⁴ Appendix, Exh. 66.

⁴⁵ Appendix, Exh. 64.

⁴⁶ Appendix, Exh. 65. The FTB's 145-page Reply Brief did not address the validity of *Nevada v. Hall*. Appendix, Exh. 68.

1 responding brief that focused on the issues raised by the FTB,⁴⁷ and therefore did not address the
2 jurisdiction issue and *Nevada v. Hall*, as that issue had been addressed and decided years earlier
3 when the Nevada Supreme Court and the United States Supreme Court each found jurisdiction
4 proper in Nevada and allowed the case to proceed to trial.

5 The Nevada Supreme Court conducted two oral arguments on the FTB's appeal.⁴⁸ The
6 issue of reversing *Nevada v. Hall* was not raised in either argument by the parties or the Nevada
7 Supreme Court.

8 **L. The Nevada Supreme Court affirmed Hyatt's win on his fraud and intentional**
9 **infliction of emotional distress claims (2014).**

10 In 2014, the Nevada Supreme Court affirmed in part and reversed in part the judgment
11 without any reference or discussion of *Nevada v. Hall*. See *Franchise Tax Bd. of Cal. v. Hyatt*,
12 130 Nev. 662 (2014).⁴⁹ The Nevada Supreme Court affirmed the portion of the judgment in favor
13 of Hyatt on his cause of action for fraud and the award of \$1,085,281.56, and issued specific
14 conclusions as to the trial evidence that supported the fraud claim:

15 As to the fraud cause of action, sufficient evidence exists to support
16 the jury's findings that FTB made false representations to Hyatt
17 regarding the audits' processes and that Hyatt relied on those
18 representations to his detriment and damages resulted. (130 Nev. at
19 670)

20 ...

21 FTB represented to Hyatt that it would protect his confidential
22 information and treat him courteously. At trial, Hyatt presented
23 evidence that FTB disclosed his social security number and home
24 address to numerous people and entities and that FTB revealed to
25 third parties that Hyatt was being audited. In addition, FTB sent
26 letters concerning the 1991 audit to several doctors with the same
27 last name, based on its belief that one of those doctors provided
28 Hyatt treatment, but without first determining which doctor actually
treated Hyatt before sending the correspondence. Furthermore,
Hyatt showed that FTB took 11 years to resolve Hyatt's protests of
the two audits. Hyatt alleged that this delay resulted in \$8,000 in
interest per day accruing against him for the outstanding taxes owed
to California. Also at trial, Hyatt presented evidence through
Candace Les, a former FTB auditor and friend of the main auditor
on Hyatt's audit, Sheila Cox, that Cox had made disparaging

⁴⁷ Appendix, Exh. 67.

⁴⁸ Appendix, Exhs. 69 and 70.

⁴⁹ Appendix, Exh. 71.

1 comments about Hyatt and his religion, that Cox essentially was
2 intent on imposing an assessment against Hyatt, and that FTB
3 promoted a culture in which tax assessments were the end goal
4 whenever an audit was undertaken. Hyatt also testified that he
5 would not have hired legal and accounting professionals to assist in
the audits had he known how he would be treated. Moreover, Hyatt
stated that he incurred substantial costs that he would not otherwise
have incurred by paying for professional representatives to assist
him during the audits. (130 Nev. at 691)

6 The evidence presented sufficiently showed FTB's improper
7 motives in conducting Hyatt's audits, and a reasonable mind could
8 conclude that FTB made fraudulent representations, that it knew the
representations were false, and that it intended for Hyatt to rely on
the representations. . . .

9 Based on this evidence, we conclude that substantial evidence
10 supports each of the fraud elements. (130 Nev. at 692)

11 The Nevada Supreme Court also affirmed the portion of the judgment in favor of Hyatt as
12 to liability on his cause of action for intentional infliction of emotional distress ("IIED") while
13 ordering a new trial as to damages for that claim:

14 Hyatt suffered extreme treatment from FTB. As explained above in
15 discussing the fraud claim, FTB disclosed personal information that
16 it promised to keep confidential and delayed resolution of Hyatt's
17 protests for 11 years, resulting in a daily interest charge of \$8,000.
18 Further, Hyatt presented testimony that the auditor who conducted
19 the majority of his two audits made disparaging remarks about
20 Hyatt and his religion, was determined to impose tax assessments
against him, and that FTB fostered an environment in which the
imposition of tax assessments was the objective whenever an audit
was undertaken. These facts support the conclusion that this case is
at the more extreme end of the scale, and therefore less in the way
of proof as to emotional distress suffered by Hyatt is necessary.
(130 Nev. at 697)

21 The Nevada Supreme Court reversed the judgment in favor Hyatt on his other claims for
22 invasion of privacy (intrusion upon seclusion), invasion of privacy (publicity of private facts),
23 invasion of privacy (false light), abuse of process, and breach of confidential relationship,
24 ordering Hyatt take nothing for those claims and ordering that award of costs be re-determined.⁵⁰

25 **M. The United States Supreme Court accepted review of the case a second time but did
not reverse *Nevada v. Hall* (2015 to 2016).**

26 Having exhausted its appeals in Nevada, the FTB sought and received a second review by
27 the United States Supreme Court in 2015. Unlike its positions and arguments in 2003, this time

28 ⁵⁰ *Id.*

1 FTB sought reversal of *Nevada v. Hall*. The FTB also alternatively argued that the award of
2 damages in favor of Hyatt must be limited to \$50,000 per claim in accord with Nevada law
3 limiting damages for claims made against Nevada state agencies.⁵¹ Hyatt opposed the FTB on
4 both grounds.⁵²

5 With only eight members due to Justice Scalia's passing, the United States Supreme Court
6 rendered a 4 to 4 decision (divided along political lines) on the FTB's request to reverse
7 *Nevada v. Hall*. See *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016) ("*Hyatt II*").⁵³
8 Relief was therefore denied as to that issue. A majority of the Court, however, granted the FTB's
9 alternative request that, in accord with *Hyatt I*, the FTB must be treated the same as a Nevada
10 state agency regarding damage limitations. The United States Supreme Court therefore ordered
11 the matter remanded to Nevada state court for proceedings consistent with its ruling.

12 **N. The Nevada Supreme Court applied damage limitations from *Hyatt II* (2017).**

13 The case then returned to the Nevada Supreme Court. At the FTB's request, the Nevada
14 Supreme Court ordered the parties to submit briefs regarding how the damage limitation from
15 *Hyatt II* should be applied in this case.⁵⁴ The FTB argued Hyatt was not entitled to any
16 damages.⁵⁵ Hyatt argued that for each of the two claims on which he prevailed (fraud and IIED)
17 he should be awarded \$50,000 and the case be returned to this Court for entry of judgment and
18 award of costs.⁵⁶ The issue of *Nevada v. Hall* was not addressed.

19 The Nevada Supreme Court ruled in favor of Hyatt and issued an opinion ordering that
20 Hyatt recover \$50,000 each for his fraud claim and for his IIED claim and remanded the case to
21 this Court to decide the issue of costs. See *Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. 826
22 (2017).⁵⁷

23
24
25 ⁵¹ Appendix, Exhs. 72, 74, 75, and 77.

26 ⁵² Appendix, Exhs. 73 and 76.

27 ⁵³ Appendix, Exh. 78.

28 ⁵⁴ Appendix, Exh. 79.

⁵⁵ Appendix, Exh. 80 and 82.

⁵⁶ Appendix, Exh. 81.

⁵⁷ Appendix, Exh. 83.

1 **O. The FTB sought and obtained a third review of the case by the United States**
2 **Supreme Court (2018).**

3 Although the Nevada Supreme Court's decision in 2017 had nothing to do with *Nevada v.*
4 *Hall*, the FTB again petitioned the United States Supreme Court to review this case and reverse
5 *Nevada v. Hall*.⁵⁸ Hyatt opposed the petition.⁵⁹ The United States Supreme Court again granted
6 the FTB's petition for review on the issue of whether the Court should reverse its long-standing
7 *Nevada v. Hall* precedent.⁶⁰

8 **P. The United States Supreme Court reversed its long-standing *Nevada v. Hall***
9 **precedent (2019).**

10 After briefing and arguments by the parties,⁶¹ the United States Supreme Court in a 5-4
11 decision (again along political lines) reversed *Nevada v. Hall* and remanded this case to Nevada
12 state court for proceedings not inconsistent with the Court's opinion. See *Franchise Tax Bd. of*
13 *Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) ("*Hyatt III*").⁶²

14 **Q. The Nevada Supreme Court remanded the case to this Court.**

15 On the case returning to the Nevada Supreme Court, it remanded the case to this Court
16 ordering:

17 This case comes to us on remand from the United States Supreme
18 Court. In *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. —,
19 —, 139 S. Ct. 1485, 1499 (2019), the Court concluded that states
20 retain sovereign immunity from private suits in other courts,
21 overruling *Nevada v. Hall*, 440 U.S. 410 (1979), and reversed our
22 December 26, 2017, opinion affirming in part and reversing in part
23 the district court's judgment in favor of respondent/cross-appellant
24 Gilbert Hyatt. Therefore, we remand this matter to the district court
25 with instructions that the Court vacate its judgment in favor of
26 Hyatt and take any further necessary action consistent with this
27 order and *Hyatt*, 587 U.S. —, 139 S. Ct. 1485. Accordingly, we

28 ORDER this matter REMANDED to the district court for
proceedings consistent with this order.⁶³

29 **R. Judgement vacated.**

30 On September 3, 2019, this Court vacated the prior judgment in favor of Hyatt and

31 ⁵⁸ Appendix, Exhs. 84 and 86.

32 ⁵⁹ Appendix, Exh. 85.

33 ⁶⁰ Appendix, Exh. 87.

34 ⁶¹ Appendix, Exhs. 88, 89, and 90.

35 ⁶² Appendix, Exh. 93.

36 ⁶³ Appendix, Exh. 94.

1 ordered both Hyatt and the FTB to submit briefing by no later than October 15, 2019, to address
2 the form of judgment to be entered in this action and who, if either party, is the prevailing party.

3 **S. Final judgment entered denying attorney's fees.**

4 In accord with the Court's order of September 3, 2019, on October 15, 2019, the parties
5 each submitted briefing in which both argued their respective positions as to the form of judgment
6 to be entered in this action, including as to whether attorney's fees should be awarded under
7 NRCP 68. The FTB repeatedly argued in its brief that it was a prevailing party entitled to recover
8 attorney's fees under NRCP 68. (*See* FTB October 15, 2019 Brief, at 9, 12, 18-20.) Hyatt
9 extensively argued that the FTB was not entitled to attorney's fees under NRCP 68. (*See* Hyatt
10 October 15, 2019, at 18-23.)

11 On February 21, 2020, the Court issued its ruling and final judgment in accord with
12 Hyatt's proposed judgment, and contrary to the FTB's proposed judgment, that found that:

13 (ii) neither party is deemed the prevailing party for the purpose of
14 awarding costs or attorney's fees, and neither party is therefore
awarded costs or attorney's fees in this action

15 Hyatt brought this action in good faith in reliance on the
16 United States Supreme Court precedent Nevada v. Hall. During the
17 last 21 years while relying on Nevada v. Hall, Hyatt prevailed in
18 both the Nevada Supreme Court (2002) and the United States
19 Supreme Court in 2003 (*Hyatt I*) and then obtained a large jury
20 verdict and final judgment against the FTB (2008), which the
Nevada Supreme Court affirmed in part (2014). The United States
Supreme Court's reversal of its long-standing Nevada v. Hall
precedent in Hyatt III in 2019 stripping this Court of jurisdiction
over the FTB could not have been anticipated by Hyatt.

21 Hyatt also had a good faith belief that he would prevail at
22 trial on his claims and recover in excess of the \$110,000 offer of
23 judgment made by the FTB in 2007. Hyatt did obtain a verdict and
24 final judgment well in excess of that amount. The damages
25 limitation to Hyatt's claims was not decided and imposed until 2016
26 in *Hyatt II*. It was therefore not grossly unreasonable or in bad faith
27 for Hyatt to not accept the FTB's offer of judgment of the \$110,000
28 in 2007. The FTB may have believed when it served its offer of
judgment that the offer was reasonable in its amount or timing and
would be accepted by Hyatt, but Hyatt was relying on Nevada v.
Hall, which had been the law since 1979. As of 2007, the FTB had
not asserted any argument or taken any action to reverse the Nevada
v. Hall precedent. Further, as of 2007, this case had been reviewed
by both the Nevada Supreme Court (2002) and the United States
Supreme Court (2003), and the FTB had not argued that Nevada v.
Hall was wrongly decided and should be reversed. The FTB did not

1 assert that argument or seek that relief with the United States
2 Supreme Court until 2015 after ruling by this Court and exhausting
all appeals in the Nevada Supreme Court.

3 Judgment (February 21, 2020), at 8-9.

4
5 **3. Argument.**

6 **A. The FTB's motion for attorney's fees should be denied as an improper, tardy, and**
7 **thinly disguised motion for reconsideration.**

8 The FTB's motion for attorney's fees seeks relief specifically denied by the Court last
9 month. It is a motion for reconsideration of the Court's February 21, 2020 Judgment, regardless
10 of the title the FTB gives it. The FTB's motion, however, does not meet, or even attempt to meet,
11 the procedural requirement or legal standard for a motion for reconsideration. Nor does it have
any substantive merit that warrants reconsideration.

12 A motion for reconsideration must be filed within 10 days of service of the notice of entry
13 of the order it seeks to reargue. *See* Local Rule 2.24. The notice of entry of the Court's judgment
14 was served on February 26, 2020. Thus, the FTB had to file its motion for reconsideration by
15 March 9, 2020. FTB filed its current motion on March 13, 2020. Further, courts will typically
16 only reconsider a ruling if new facts or law warrant reconsideration and a party could not have
17 presented those new facts or law in the prior briefing. *See Masonry and Tile Contractors Ass'n of*
18 *S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741 (1997). The FTB make no attempt to
19 justify its motion for reconsideration, let alone explain its untimeliness. Indeed, in lieu of making
20 any new argument and explaining why it could not have been made these arguments in its
21 October 15, 2019 brief, the FTB simply repeats its arguments from that briefing.

22 The specific issue of whether either party is entitled to attorney's fees was extensively
23 briefed and submitted by the parties on October 15, 2019. The Court answered that question
24 explicitly with no room for interpretation—there was no prevailing party and no party is entitled
25 to an award of costs or attorney's fees. If the FTB wanted to challenge the February 21, 2020
26 Judgment on the issues of costs and attorney's fees, EDCR 2.24 offers that vehicle. Here, it chose
27 not to use that vehicle. If the FTB wants to challenge that Judgment, that's what the appellate
28 process is for. And the FTB has now filed a notice of appeal of the Judgment. (*See* FTB Notice

1 of Appeal filed March 20, 2020.)

2 But for the FTB to seek reconsideration of the Court's February 21, 2020 Judgment, it was
3 required to seek a motion for reconsideration under Local Rule 2.24. The rule has specific
4 requirements including a 10-day time limit. The FTB failed to comply with this procedural
5 component. Nor does the FTB meet the legal standard for a motion to reconsider. The FTB has
6 offered no new facts or law previously unavailable to the FTB that warrant reconsideration of the
7 Court's definitive ruling and judgment from February 21, 2020.

8 The FTB's theory behind this motion must be that every party against whom a judgment is
9 entered is entitled to re-litigate already-decided issues via rogue motions and put the courts and
10 the prevailing party through extensive, time-consuming, and expensive motion practice. Neither
11 the Nevada Rules of Civil Procedure nor the Eighth Judicial District Court Rules authorize this
12 abusive process. The FTB's motion for attorney's fees should be denied as an improper and tardy
13 motion for reconsideration.

14 The FTB's motion for attorney's fees should be denied both for its brazen affront to the
15 Court's Judgment in this action and because it fails to meet the legal procedure and standard
16 governing a motion for reconsideration.

17 **B. The FTB is not entitled to an award of attorneys' fees under NRCP 68.**

18 *1) The Beattie factors weigh heavily in favor of Hyatt and prohibit awarding*
19 *attorneys' fees to the FTB under NRCP 68.*

20 NRCP 68 provides that, "[i]f the offeree rejects an offer and fails to obtain a more
21 favorable judgment . . . the offeree must pay the offeror's post-offer costs and expenses, including
22 . . . reasonable attorney fees, *if any be allowed*, actually incurred by the offeror from the time of
23 the offer."⁶⁴ (emphasis added) But NRCP 68 invests the trial court with significant discretion in
24 deciding whether to award attorney's fees. *See Armstrong v. Riggi*, 92 Nev. 280, 282 (1976). In
25 exercising this discretion, "the trial court must carefully evaluate the following factors: (1)
26 whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of

27 ⁶⁴ Former NRS 17.115, in relevant part, provides: "[I]f a party who rejects an offer of judgment fails to obtain a
28 more favorable judgment, the court ... [s]hall order the party to pay the taxable costs incurred by the party who made
the offer; and [m]ay order the party to pay to the party who made the offer ... [r]easonable attorney's fees"

1 judgment was reasonable and in good faith in both its timing and amount; (3) whether the
2 plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith;
3 and (4) whether the fees sought by the offeror are reasonable and justified in amount." *Beattie v.*
4 *Thomas*, 99 Nev. 579, 588-89 (1983).

5 "Specifically, the district court must determine whether the plaintiff's claims were brought
6 in good faith, whether the defendant's offer was reasonable and in good faith in both timing and
7 amount, and whether the plaintiff's decision to reject the offer and proceed to trial was grossly
8 unreasonable or in bad faith. [Citation omitted.] The connection between the emphases that these
9 three factors place on the parties' good-faith participation in this process and the underlying
10 purposes of NRCP 68 and NRS 17.115 is clear. As the Nevada Supreme Court recognized, '[i]f
11 the good faith of either party in litigating liability and/or damage issues is not taken into account,
12 offers would have the effect of unfairly forcing litigants to forego legitimate claims.'" *Frazier v.*
13 *Drake*, 131 Nev. 632, 642-43 (2015) (quoting *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev.
14 233, 252, 955 P.2d 661, 673 (1998)).

15 The purpose of NRCP 68 is "to save time and money for the court system, the parties and
16 the taxpayers [and to] reward a party who makes a reasonable offer and punish the party who
17 refuses to accept such an offer." *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382 (1999)
18 (citing *John W. Muije, Ltd. v. A North Las Vegas Cab Co., Inc.*, 106 Nev. 664, 667 (1990)).

19 The Nevada Supreme Court has repeatedly approved the denial of attorney's fees under
20 NRCP 68 where the action was brought in good faith, the offer of judgment was not reasonable,
21 and the rejection of the offer of judgment was not grossly unreasonable or in bad faith. *See*
22 *Frazier v. Drake*, 131 Nev. at 642-43 (reversing award of attorneys' fees where first three *Beattie*
23 factors establish good faith of the losing plaintiff); *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556,
24 562 (2009) (affirming district court denial of attorneys' fees based on finding that plaintiff's
25 claims were brought in good faith and that his rejection of \$2,500 offer of judgment was in good
26 faith and not grossly unreasonable); *Sands Expo & Convention Ctr., Inc. v. Bonvouloir*, 385 P.3d
27 62 (Table), 2016 WL 5867493, at *1 (Unpublished Disposition.) (Nev. Oct. 6, 2016)("[T]here is
28 no assertion that [plaintiff's] claim was brought in bad faith, and her decision to reject the

1 \$12,000 all-inclusive offer in the face of extensive anticipated damages and on-going discovery
2 does not appear grossly unreasonable”); *see also Crockett & Myers, Ltd. v. Napier, Fitzgerald &*
3 *Kirby, LLP*, 583 F.3d 1232, 1239 (9th Cir. 2009)(applying Nevada law and affirming denial of
4 attorneys’ fee award where plaintiff recovered less than the offer of judgment citing “complexity
5 of the claims, the novelty of the legal questions presented, and the amount requested”).

6 All of the above cited cases were discussed in Hyatt’s October 15, 2019 Brief. The FTB’s
7 current motion does not address or attempt to distinguish these cases. And they cannot be
8 distinguished as the facts of each cited case did not meet the standard necessary for an award of
9 fees under NRCP 68. Similarly, this case does not meet the standard necessary for an award of
10 fees under NRCP 68.

11 a) *Hyatt filed the action in good faith given the state of the law in 1998 and*
12 *pursued the case in good faith until the United States Supreme Court*
reversed the long-standing precedent on which Hyatt’s action was based.

13 Hyatt filed the case in 1998 and pursued it through trial and appeal on the basis of the
14 United States Supreme Court’s decision in *Nevada v. Hall*. Twenty-one years later, the United
15 States Supreme Court reversed its long-standing precedent. The only reason Hyatt does not have
16 an affirmative judgment in his favor for the intentional misconduct of the FTB, as found by a jury
17 and affirmed by the Nevada Supreme Court as to the fraud and IIED claims, is this recent and
18 unanticipated reversal of prior, long-standing law. There is no argument therefore that Hyatt filed
19 or pursued his winning claims in bad faith.

20 In regard to the FTB, not only did a jury and courts decide that the FTB engaged in bad
21 faith and intentional misconduct directed at Hyatt, it is the FTB in fact that failed to mount a
22 challenge to *Nevada v. Hall* until after it had lost the case and exhausted all appeals in Nevada—
23 17 years after the case had commenced. Most egregiously, the FTB could have asserted this
24 argument in the first review of the case by the United States Supreme Court in 2002 and 2003.
25 But the FTB chose not to do so. The FTB instead sought an exception to *Nevada v. Hall*, which
26 the United States Supreme Court rejected in a 9-0 decision in *Hyatt I*.

27 As a result, the first *Beattie* factor of whether Hyatt filed and pursued this case in good
28 faith weighs heavily in favor of Hyatt. In fact, it weighs so heavily in his favor that it should be

1 dispositive of the issue of whether fees should be awarded to the FTB under NRCP 68 or former
2 NRS 17.115. A party cannot anticipate that the United States Supreme Court will reverse the
3 precedent on which the case is based 21 years after the case is filed.

4 b) *Hyatt's rejection of the FTB offer was not unreasonable or in bad faith in*
5 *light of the strong evidence he developed in discovery and the results he*
6 *obtained at trial.*

7 In 1979 *Nevada v. Hall* established the basis for Hyatt's claim. He filed his complaint in
8 1998 and continuing for 21 years after the filing of Hyatt's case, the law favored Hyatt and
9 supported his basis for rejecting the FTB's offer of judgment. Moreover, the merits of the case
10 strongly support Hyatt's rejection of the FTB's offer and underscores that the rejection was
11 reasonable and not in bad faith. In this regard, not only did Hyatt have a good faith basis for
12 filing the lawsuit, but as the evidence developed, his case grew stronger and stronger. Hyatt's
13 view of the strength of his case in deciding to reject the FTB's offer in November 2007 was
14 vindicated by the large jury verdict he received in 2008 following a four-month jury trial.

15 The strength of Hyatt's case and supporting evidence developed as of 2007, and then
16 presented to the jury during the 2008 trial, is best summarized and annotated to the evidence in
17 Hyatt's briefing filed with the Nevada Supreme Court. Hyatt cites to and incorporates that
18 briefing here,⁶⁵ and briefly lists some of the key evidence contained in that briefing for the
19 purpose of establishing the additional *Beattie* factor that Hyatt's rejection of the FTB's offer in
20 2007 was not unreasonable and not in bad faith. That evidence, gathered in discovery, presented
21 to the jury in 2008 and summarized in his briefing to the Nevada Supreme Court,⁶⁶ included:

- 22 • In 1990 Hyatt won a 20-year contest with the United States Patent Office, securing
23 a patent for the single chip microprocessor that spawned the personal computer.
24 He was called an American hero by some, the 20th Century's Thomas Edison by
25 others.
- 26 • Hyatt moved to Nevada in September 1991.⁶⁷

27 ⁶⁵ Appendix, Exh. 67.

28 ⁶⁶ *Id.*

⁶⁷ The date when Hyatt moved to Nevada was the primary subject of the audits conducted by the FTB and the
subsequent decades-long administrative appeals in California relating to those audits. The FTB dragged out that
process for over 20 years, seeking to collect tens of millions of dollars in taxes, penalties, and interest from Hyatt and
claiming he did not move to Nevada when he said he did and that he therefore owed California state income taxes.
Ultimately, after over 20 years, the California State Board of Equalization agreed with Hyatt, finding Hyatt moved to

- 1 • The FTB commenced an audit of Hyatt in 1993 solely on the basis that an FTB
2 employee read an article estimating how much money Hyatt made from his patent
3 royalties and that he had moved to Nevada.
- 4 • The FTB audited Hyatt between 1993 and 1997, during which time the FTB's lead
5 auditor repeatedly made anti-Semitic remarks against Hyatt; created a "fiction"
6 about him; during the audit she rummaged through his trash and peaked in the
7 windows at his Las Vegas house; after the audit she again visited his house to take
8 picture of her posing in front of it and called Hyatt's ex-wife to brag that Hyatt had
9 been "convicted"; she also expressed to a co-worker that she hoped the audit
10 advanced her career.
- 11 • The FTB promised Hyatt strict confidentiality in regard to his personal and
12 financial information, but then made massive public disclosures of the fact that
13 Hyatt was under audit, of his social security number, and of his private address.
- 14 • The FTB suggested to Hyatt's tax attorney that absent a settlement of the tax
15 issues there would be a further "in-depth investigation and exploration of
16 unresolved fact questions" which Hyatt and his tax attorney understood to be a less
17 than subtle threat; and then when Hyatt did not settle the tax issues at the outset,
18 the FTB delayed the protest phase of the audit for over 10 years before issuing a
19 final decision and letting Hyatt appeal that decision to the more independent
20 California State Board of Equalization.⁶⁸
- 21 • Hyatt and multiple other witnesses provided first hand testimony of the extreme
22 emotional distress and change in personality and physical condition suffered by
23 Hyatt during the 10 plus years that the FTB kept open the protest phase of the
24 audit.
- 25 • FTB auditors were evaluated in a manner that drove them to make assessments
26 without regard to the collectability of the assessments and were rewarded for
27 making high dollar assessments such as Hyatt's case given his extreme income.

28 At the trial in 2008, Hyatt presented this and additional evidence. He won a near half-
billion-dollar judgment as described above. These facts establish that it was not unreasonable or
in bad faith for Hyatt to reject the FTB's offer of judgment in 2007. This *Beattie* factor therefore
also weighs heavily in Hyatt's favor.

c) *The FTB's offer was not reasonable nor could the FTB have had a
reasonable expectation of its offer being accepted in light of the same facts
addressed above.*

Based on the same facts described above, the FTB could not and did not have a reasonable
expectation that Hyatt would accept its \$110,000 offer of judgment when it was served in 2007—

Nevada in 1991 as Hyatt contended all along and thereby reversed the FTB's erroneous audit conclusions on the
residency issue. The FTB challenged the decision, but its request for a rehearing of the SBE's decision was rejected
by the California Office of Tax Appeals. Appendix, Exhs. 91 and 92.

⁶⁸ See above footnote regarding the results of the administrative appeal as decided in Hyatt's favor by the California
State Board of Equalization.

1 nine years after the case was filed in 1998. Not only was *Nevada v. Hall* an unchallenged United
2 States Supreme Court precedent, the United States Supreme Court and Nevada Supreme Court
3 had each reviewed the case and affirmed that it could proceed to trial. The FTB knew that
4 \$110,000 would not even approach out-of-pocket costs incurred through the multiple appeals,
5 extensive motion practice, extensive discovery disputes, and ultimate discovery allowed over
6 FTB's constant objections. The FTB was also well aware of the strong evidence Hyatt had
7 compiled against it through discovery and would present to the jury. The FTB had lost numerous
8 discovery and dispositive motions. The offer was not reasonable in the amount or its timing.
9 This *Beattie* factor therefore also weighs heavily in Hyatt's favor.

10 In sum, the three *Beattie* factors determinative of whether attorneys' fees should be
11 awarded all favor Hyatt and require rejection of any request by the FTB for attorneys' fees under
12 NRCP 68 or former NRS 17.115.⁶⁹

13 **C. The FTB's arguments regarding the *Brunzell* factors are moot and/or premature.**

14 The FTB spends several pages arguing that the unspecified attorney's fees and
15 unsubmitted billing records will satisfy the *Brunzell* factors.⁷⁰ The *Brunzell* factors analyze the
16 reasonableness of the fees requested by a prevailing party. Here, the FTB is not prevailing party
17 and has no right to attorney's fees. Its arguments on the *Brunzell* factors are therefore moot.
18 Further, even if it did have a right to attorney's fees, the *Brunzell* factors cannot be addressed and
19 argued unless or until an actual fee request with supporting billing statements or other supporting
20 evidence is submitted by the moving party. The FTB's arguments as to the *Brunzell* factors are
21 therefore also premature.

22 ///

23 ///

24
25 ⁶⁹ The FTB may argue that even if *Nevada v. Hall* were not overturned in *Hyatt III*, under *Hyatt II* the judgment in
26 favor of Hyatt would have been only \$100,000 and thus less than the \$110,000 offer of judgment made by the FTB in
27 2007. This is false. The Nevada Supreme Court's decision in 2016 awarding Hyatt \$50,000 for each of his two
28 winning claims also would have entitled Hyatt to an award of costs as the prevailing party. These costs easily would
have exceeded \$10,000 and thereby provided Hyatt a total recovery well in excess of the FTB's offer of judgment,
which was inclusive of costs. The cost award in Hyatt's favor in 2010 exceeded \$2 million. Appendix, Exh. 66.

⁷⁰ See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50 (1969).

1 **D. The FTB's public policy arguments are based on easily distinguishable cases that**
2 **vastly contrast with this case in which the Court already decided that the *Beattie***
3 **factors weigh heavily against awarding attorney's fees under NRCP 68.**

4 The FTB makes a public policy argument for awarding attorney's fees under NRCP 68.
5 The cases they cite have no application here. In *Dillard Dep't Stores*, 115 Nev. 372, 382 (1999),
6 the plaintiff made a modest offer for judgment that was rejected. A jury then rendered a verdict
7 for the plaintiff for a substantially greater amount. At no stage of the proceedings did the
8 defendant prevail, nor was there an after-the-judgment change in law that benefited the plaintiff.
9 Plaintiff won on the merits, and for more money than she would have settled for before trial. It is
10 the classic case in which fees should be awarded under NRCP 68. *Dillard Stores* has no
11 application to this case where the facts are contrary in almost every way.

12 The FTB also cites *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235
13 (2018). In this case, the defendant won at all stages of the proceedings and was awarded its
14 attorney's fees after having made an offer of judgment earlier in the case. There was no after-the-
15 judgment change in law that allowed the defendant to avoid liability. This case therefore also has
16 no application here.

17 The final Nevada case cited by the FTB as part of its public policy argument is *LaForge v.*
18 *State, Univ & Comm. College Sys. of Nev.*, 116 Nev. 415 (2000).⁷¹ In this case the defendant won
19 at summary judgment after making an offer of judgment. Defendant was then awarded attorney's
20 fees. Again, there was no after-the-judgment change in law that allowed the defendant to avoid
21 liability. This case therefore also has no application here.

22 The FTB's public policy argument provides no support for the FTB's request for
23 attorney's fees under NRCP 68. The *Beattie* factors, as this Court determined, forbid the FTB
24 from an award of attorney's fees under NRCP 68. The FTB cites no case in which "public
25 policy" overrides a determination that fees should be awarded based on the *Beattie* factors.

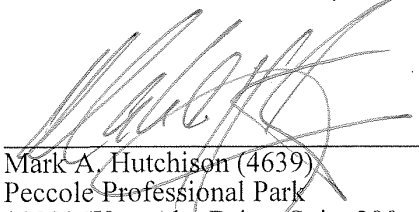
26 ⁷¹ The FTB also cites *Marek v. Chensy*, 473 U.S. 1 (1985) (holding plaintiff was not entitled to an award of attorney's
27 fees in a civil rights case where plaintiff recovered less than that statutory settlement of the government). Although
28 the case contains a lengthy discussion for the federal version of NRCP 68, the facts of the case are not germane to the
present case. The facts are quite the opposite. On the merits of the case *as determined at trial*, the defendant
obtained a better result than the settlement offer it made pretrial. There was no after-the-judgment change in law that
allowed the defendant to avoid liability.

1 **4. Conclusion.**

2 Based on a thorough review of the very long history of this case, the Court has already
3 determined that there was no prevailing party and that the *Beattie* factors weigh heavily against
4 awarding attorney's fees under NRCP 68 because Hyatt relied in good faith from the beginning of
5 the case on the *Nevada v. Hall* precedent. There is no reason for the Court to reconsider this
6 ruling. The United States Supreme Court's reversal of its long-standing precedent in 2019—after
7 having initially reviewed this case in 2003 and after the trial and judgment in this case—could not
8 have been anticipated by Hyatt. The FTB's motion for attorney's fees should therefore again be
9 denied.

10 Dated this 27th day of March, 2020.

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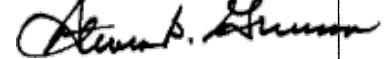
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 27th day of March, 2020, I caused the above and foregoing documents entitled **PLAINTIFF GILBERT P. HYATT'S OPPOSITION TO FTB'S MOTION FOR ATTORNEY'S FEES PURSUANT TO NRCP 68** to be served through the Court's mandatory electronic service system, per EDCR 8.02, upon the following:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Madelyn B. Carnate-Peralta
An employee of Hutchison & Steffen, PLLC



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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

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

Defendants.

Case No. 98A382999

Dept. No. X

**REPLY IN SUPPORT OF PLAINTIFF
GILBERT P. HYATT'S MOTION TO
STRIKE, MOTION TO RETAX AND,
ALTERNATIVELY, MOTION FOR
EXTENSION OF TIME TO PROVIDE
ADDITIONAL BASIS TO RETAX
COSTS**

Plaintiff Gilbert P. Hyatt ("Plaintiff" or "Hyatt") files this reply in support of his Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs.

1. Introduction.

Defendant Franchise Tax Board's (the "FTB") opposition unabashedly confirms that it is belatedly and improperly seeking reconsideration of this Court's February 21, 2020 ruling and final judgment. The FTB repeatedly argues that the Court got it wrong and reargues the FTB's

1 losing position. (*See, e.g.*, FTB Opp., 6:6-7 (“respectfully, the Court procedurally erred . . .”),
2 5:1-2 (“The Court’s analysis in the ‘Judgment’ incorrectly uses the *Beattie* factors to determine
3 which party prevailed, ultimately resulting in the erroneous legal conclusion. . .”), 7:18-19
4 (“Striking FTB’s Memorandum Would Cement The Court’s Prior Procedural Error.”))

5 As addressed below, the Court did not get it wrong. Further, procedurally, the parties had
6 equal opportunity to argue and brief the issues as to the form of judgment, prevailing party status,
7 costs, and whether attorney’s fees should be awarded. The Court conducted a hearing on
8 September 3, 2019 where there was extensive argument. (*See* the hearing transcript attached as
9 Exhibit A to the FTB Opp.) The parties then fully briefed the issues. (*See* Hyatt’s and FTB’s
10 respective October 15, 2019 briefing.) The Court fully considered and decided the issues in its
11 February 21, 2020 ruling and final judgment. The clear intent of the Court’s ruling was to
12 provide finality to this case in the District Court.

13 The FTB then **did not** seek reconsideration of the ruling under Local Rule 2.24 within 10
14 days of service of the notice of the judgment, or at any time. The issues are therefore over, fully
15 decided. The FTB has no procedural basis for seeking reconsideration on issues on which it
16 clearly lost, and on which the Court’s ruling was unambiguous. Yet, the FTB has proceeded with
17 a slew of filings defying this Court’s ruling and final judgment. These filings, including the
18 FTB’s February 26, 2020 memorandum of costs, must be stricken as improper and unauthorized
19 requests for reconsideration.

20 Indeed, arguably this Court has no jurisdiction to again address these same issues. The
21 FTB has recently exercised its appeal rights by filing a notice of appeal of the February 21, 2020
22 ruling and final judgment. (*See* FTB’s March 20, 2020 Notice of Appeal.) For this additional
23 reason the Court must strike the FTB February 26, 2020 memorandum of costs. On the issues of
24 the form of judgment, prevailing party status, costs, and attorney’s fees, further proceeding—if
25 any—must be at the appellate level.

26 On the merits of the FTB’s arguments, it is again wrong. This Court has the authority to
27 strike the FTB’s rogue memorandum of costs and other recent filings attempting to relitigate the
28 issues decided in the February 21, 2020 ruling and final judgment. Further, the FTB received due

1 process with a hearing and briefing of the issues, and the Court had authority to, and did, decide
2 these issues in advance of a formal motion by the FTB.

3 **2. The Nevada Supreme Court has confirmed the Court's broad inherent**
4 **powers, which would include here striking the FTB's rogue filings.**

5 NRCP 12(f) can and should be read broadly enough to encompass the striking of the
6 FTB's rogue filings in disobedience of this Court's ruling and final judgment entered February
7 21, 2020. The FTB's argument in opposition is the definition of pleading set forth in NRCP 7.
8 The FTB cites a 1937 case that is not on point, *Price v. Brimacombe*, 58 Nev. 156, 72 P.2d 1107
9 (1937) (holding that a motion to strike does not constitute an answer sufficient to avoid a default),
10 and an unpublished case that has no binding affect and which does not in any event address the
11 scope and breadth of NRCP 12(f), *Hernandez v. Palmer*, 127 Nev. 1141, 373 P.3d 921 (2013)
12 (unpublished) (holding only that a motion to dismiss, or an opposition thereto, is not a pleading
13 under NRCP 7(a)).¹ The FTB does not cite any authority limiting the Court's authority to strike
14 under NRCP 12(f) to formally defined pleadings under NRCP 7(a).

15 More significantly, the FTB does not address, let alone rebut, Hyatt's citation to the
16 Court's inherent powers as including striking rogue filings that do not conform to, and here even
17 flaunt, the rulings of the Court. (Hyatt Motion, 2:21-23, citing *Blackjack Bonding v. City of Las*
18 *Vegas Municipal Court*, 116 Nev. 1213 (2000).) The Court can and here should strike the FTB's
19 post-judgment filings that ignore the clear rulings of the Court. This includes striking the FTB's
20 memorandum of costs. The Court must have the power to strike party filings that ignore the
21 Court's definitive rulings.

22 **3. NRS 18.110 does not mandate any further process in this case.**

23 The FTB argues that the Court must hear the FTB's memorandum of costs under NRS
24 18.110. But the statute specifically states that it is for a party in whose favor a judgment was
25 entered. Here, the Court determined that neither party prevailed and neither party is entitled to
26 costs. The Court has authority to make this finding. The Court's ruling cuts off any basis for

27 ¹ Indeed, the FTB citing *Hernandez v. Palmer* would not even be permitted in the Nevada Supreme Court or Court of
28 Appeals. See NRAP 36(c)(3) ("A party may cite for its persuasive value, if any, an unpublished disposition issues by
the Supreme Court on or after January 1, 2016.").

1 seeking costs under NRS 18.110.

2 Hyatt addressed at length in his moving papers the language of NRS 18.110 and the
3 FTB's attempt to parse it in a manner not supported by a full reading of that statute. In sum, the
4 statutory language of NRS 18.110 uses interchangeably the description "prevailing party" and
5 "party in whose favor judgment is rendered" in identifying who may be awarded costs. The party
6 "claiming costs" through a memorandum of costs must be the "prevailing party." The Court has
7 decided that the FTB is not a prevailing party, nor is Hyatt.

8 The FTB's attempts to distinguish *Eberle v. State ex rel. Redfield Tr.*, 108 Nev. 587, 836
9 P.2d 67 (1992), are also not persuasive. There are different facts between the two cases, but
10 *Eberle* confirms that a court may find there is no prevailing party, particularly under unique
11 procedural circumstances. As in *Eberle*, here there is no prevailing party and no basis therefore
12 for the FTB to file a memorandum of costs. The Court should consequently strike this rogue
13 filing by the FTB.

14
15 **4. There need not be a formal motion for the Court to determine there is no prevailing party.**

16 The FTB also argues that there must be a "valid pleading or motion being filed" for the
17 Court to determine whether there is a prevailing party. (FTB Opp., 7-8.) The FTB cites NRCP
18 54 as requiring a written motion for attorney's fees. But NRCP 54(d)(2)(b) has explicit language
19 regarding the filing of a motion for fees that provides, "Timing and Contents of the Motion.
20 *Unless a statute or a court order provides otherwise*, the motion must: . . ." Here, the Court has
21 ordered otherwise. The Court ordered how the issue of prevailing party, costs and fees would be
22 determined, and then followed that process. The Court acted entirely within its powers in doing
23 so. Further, the FTB had more than "adequate notice and opportunity to be heard" with the
24 September 3, 2019 hearing and the October 15, 2019 briefing.

25 What the FTB seeks now is nothing short of a backdoor attempt for an untimely and
26 unauthorized reconsideration of the Court's definitive ruling and final judgment from February
27 21, 2020. The FTB did not follow the procedural requirements for reconsideration of the Court's
28 ruling, and in any event presents no new facts or law not otherwise available to it when the FTB

1 originally briefed these issues last October. For these reasons, the FTB's memorandum of costs
2 and other post-judgment filings seeking costs or attorney's fees should be summarily stricken.

3 **5. Conclusion.**

4 Already too much of the Court's and the parties' time and resources have been expended
5 addressing issues definitively decided by the Court. The Court should put an end to this case as it
6 intended in its February 21, 2020 ruling and final judgment, and order that the FTB's
7 memorandum of costs, and its separate motion for attorney's fees, are stricken and will not be
8 further considered.

9 If the Court does not summarily strike the FTB's memorandum of costs, Hyatt requests
10 that the Court summarily grant Hyatt's motion to retax on the basis that the Court has already
11 decided that the FTB is not a prevailing party and not entitled to any costs.

12 Alternatively, in the unlikely event that the Court is inclined to consider or entertain
13 arguments as to the specific costs sought by the FTB, Hyatt requests a 60-day extension from the
14 Court's ruling on this motion to file supplemental papers supporting a detailed motion to retax
15 costs in which he will address the specific costs requested by the FTB.

16 Dated this 1st day of April, 2020.

HUTCHISON & STEFFEN, PLLC

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ALL PARTIES ON THE E-SERVICE LIST

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98A382999

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Civil Conversion Case Type	COURT MINUTES	April 09, 2020
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98A382999	Gilbert Hyatt vs California State Franchise Tax Board
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April 09, 2020 3:00 AM Motion to Strike

HEARD BY: Jones, Tierra **COURTROOM:** RJC Courtroom 14B

COURT CLERK: Teri Berkshire

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Following review of the papers and pleadings on file herein, COURT ORDERED, Plaintiff s Motion is DENIED IN PART as to the Motion to Strike as Defendant s Memorandum of Costs and Appendices are not pleadings and cannot be stricken under NRCP 12(f). COURT FURTHER ORDERED, Plaintiff s Motion to Retax or Alternatively Motion for Extension of Time to Provide Additional Basis to Retax Costs is CONTINUED for oral argument in Department 10 on April 21, 2020 at 9:30 a.m.

04/21/20 9:30 A.M. Plaintiff s Motion to Retax or Alternatively Motion for Extension of Time to Provide Additional Basis to Retax Costs

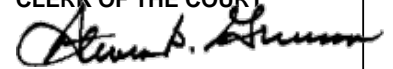
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DISTRICT COURT

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 REPLY IN SUPPORT OF
MOTION FOR ATTORNEY'S FEES
PURSUANT TO NRCP 68**

I. INTRODUCTION

In his Opposition to FTB's Motion for Attorney's Fees Pursuant to NRCP 68 ("Opposition"), plaintiff Gilbert Hyatt agrees with FTB that the Court's line-by-line consideration of FTB's billing records under *Brunzell v. Golden Gate Nat'l Bank* is premature until the Court first determines whether Hyatt is liable for FTB's fees. See Opposition at 22:13-21; see also FTB's Motion for Attorney's Fees Pursuant to NRCP 68 ("Motion") at 15:22-16:5. Thus, Hyatt does not yet challenge the fourth *Beattie* factor on whether FTB's fees are reasonable and justified in amount. See *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983); see Opposition at 22:10-12.

But Hyatt does challenge the first three *Beattie* factors and further suggests that FTB's Motion is procedurally improper. Hyatt's request that the Court deny FTB's Motion boils down to three things: *first*, procedural rules governing the filing of FTB's Motion;

1 second, Hyatt's purported good faith in rejecting FTB's Offer; and *third*, later appeals that
2 reduced Hyatt's judgment to nothing. None of these establish a basis to deny FTB's Motion.

3 ***Procedural Rules Governing Motions for Attorney's Fees.*** While Hyatt argues
4 that FTB's Motion is prohibited under EDCR 2.24 as a "thinly guised motion for
5 reconsideration" of the Court's recent Judgment, Hyatt is factually and legally incorrect.
6 FTB's Motion raises NRCP 68 as the basis for recovering its fees. This was not a subject
7 of the prior supplemental briefing, which the Court requested only on "prevailing party"
8 analysis. Because prevailing party analysis has nothing to do with NRCP 68, FTB is not
9 asking the Court to reconsider anything through the Motion. To the contrary, FTB's Motion
10 is the first time that FTB moved for its fees under NRCP 68 and provided the required
11 analysis under *Beattie*. EDCR 2.24 accordingly has no application to the Motion.

12 ***Hyatt's Purported Good Faith.*** Hyatt argues that, under *Beattie*, he rejected FTB's
13 Offer and had filed his claims in good faith. As Hyatt explains in his Opposition, he based
14 several of his causes of action upon FTB's alleged bad faith in investigating and auditing
15 Hyatt, and he encourages the Court to evaluate his good faith under *Beattie* only by
16 reference to when he filed his Complaint. But there is no finding of bad faith against FTB
17 here, and the Court must comprehensively evaluate the *Beattie* factors when FTB made the
18 Offer rather than narrowly when Hyatt filed his Complaint.

19 Moreover, Hyatt's own witnesses and attorneys contradict his suggestion that he
20 pursued a bad-faith theory against FTB in good faith. Hyatt's own experts testified that they
21 found no evidence of bad faith by FTB when conducting their pretrial analysis. A document
22 from Hyatt's attorneys admitted they had no legitimate basis to dispute discovery that FTB
23 served but that Hyatt would do so to make FTB "work for it" and thereby drive up FTB's
24 litigation expenses. Thus, contrary to acting in good faith in rejecting FTB's Offer, Hyatt
25 singularly committed to driving up FTB's litigation costs and taking the matter to trial to prove
26 FTB's purported bad faith in auditing him despite his own experts' contrary opinions. But
27 Hyatt failed in that pursuit, and he must bear the cost of such unreasonableness.

28 ***Later Appeals That Reduced Hyatt's Judgment To Nothing.*** In evaluating the

Beattie factors, Hyatt urges the Court to focus on the now reversed jury decision in his favor (which was obtained as a result of multiple prejudicial errors committed by the trial judge at Hyatt's urging) while blindfolding itself to later appeals necessary to correct the legal errors that pervaded the jury's decision. But NRCP 68 does not allow for such incomplete analysis of an offer of judgment and the results of a case. To the contrary, NRCP 68's express terms focus on a comparison of the offer of judgment to the final judgment entered in the case. FTB offered Hyatt \$110,000, and the final judgment grants him nothing. The appeals that were required to correct legal errors by the trial judge and the jury, and FTB's meritorious arguments during those appeals, must be part of the NRCP 68 analysis under *Beattie*. FTB raised immunity throughout the case as a defense, and Hyatt was aware of the risk on that issue in rejecting FTB's Offer and proceeding to trial and later appeals.

In the end, the principle guiding FTB's Motion and the required *Beattie* analysis is simple. FTB pursued a winning theory of the case from day 1, Hyatt was aware of that theory when he rejected FTB's Offer and proceeded to trial, and so he must be accountable for the fees and costs incurred after his rejection. This is precisely the purpose of NRCP 68's fee shifting. Thus, FTB requests that the Court grant the Motion and move to the next stage of analyzing FTB's invoices for reasonableness under *Brunzell*.

II. STATEMENT OF ADDITIONAL FACTS

The parties have devoted substantial pages outlining the procedural history of this case for the Court, and so FTB will not rehash the nearly two decades of actions in this Reply.¹ See Motion at 4:2-9:1; see *also* Opposition at 4:19-16:3. Yet because Hyatt mislabels FTB's Motion as one for reconsideration, FTB must correct the record about the supplemental briefing that occurred before the Court entered the recent Judgment. See Opposition at 16:5-17:16.

¹ For ease of reference, along with the statement of facts in the Motion, FTB incorporates the statement of facts found in its previously filed Brief Re The Requirement Of Entry Of Judgment In FTB's Favor And Determination That FTB Is Prevailing Party ("Supplemental Brief").

After the Nevada Supreme Court remanded the matter to the Court, the parties attended a status check on September 3, 2019. See September 3, 2019 Transcript (“Sept. 3 Trans.”), on file with the Court. During that status check, the Court requested supplemental blind briefing on the narrow issue as to whether a judgment must be entered in FTB’s favor and whether there was a prevailing party here, and if so, which party prevailed. See *id.* at 12:8-12. But prevailing party analysis does not apply to NRCP 68 requests, which focuses only on whether an offeree, in this case Hyatt, beat the offer of judgment. Compare NRS 18.010 (fees allowed to “a prevailing party”) with NRCP 68(f) (fees allowed to offeror where offeree “rejects an offer and fails to obtain a more favorable judgment”).

As a result, FTB’s Supplemental Brief did not provide *Beattie* analysis under NRCP 68 because it was irrelevant to the Court’s narrow issue of prevailing party status. See Supplemental Brief at 12:7-12 (explaining NRCP 68 does not include prevailing party analysis). Indeed, FTB’s Supplemental Brief noted this point and omitted *Beattie* analysis on this basis. See *id.* at 18:21-20:7. Hyatt’s inclusion of *Beattie* analysis in his supplemental brief, by comparison, was inappropriate and beyond the scope of the Court’s request for prevailing party analysis. See Plaintiff Gilbert P. Hyatt’s Brief In Support Of Proposed Form Of Judgment That Finds No Prevailing Party In The Litigation And No Award Of Attorney’s Fees Or Costs to Either Party (“Hyatt Brief”) at 18:12-23:2.

III. ARGUMENT

A. FTB’s Motion Is Not One For Reconsideration.

Apparently rewarding himself for jumping the gun on arguing about NRCP 68 in the supplemental briefing, Hyatt contends that FTB’s Motion is an “improper, tardy, and thinly disguised motion for reconsideration” that is prohibited under EDCR 2.24. Opposition at 16:5-11. But Hyatt’s attempt to apply EDCR 2.24 to this motion practice is misguided.

EDCR 2.24 states that “no motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.”

1 EDCR 2.24(a). In those situations, the party seeking reconsideration must move within 10
2 days after service of written notice of the order. EDCR 2.24(b).

3 But FTB does not seek reconsideration of any motion or matter previously heard by
4 the Court. On the contrary, FTB's Motion focuses on NRCP 68, FTB's Offer and Hyatt's
5 rejection under the same rule, and the *Beattie* analysis that is required under NRCP 68.
6 FTB did not previously put such a motion before the Court, nor was the issue of NRCP 68
7 previously before the Court in the supplemental briefing. That supplemental briefing
8 focused only on prevailing party status, a determination that has nothing to do with NRCP
9 68 analysis. FTB's Supplemental Brief did not analyze *Beattie* or NRCP 68, nor would it
10 have been appropriate to include the same given the Court's directive to focus only on
11 prevailing party status.

12 And so Hyatt's claim that FTB's Motion is one for reconsideration gets no traction.
13 Until the Motion, FTB had not briefed the matters under NRCP 68 or provided any *Beattie*
14 analysis relevant to the same, and so the Motion does not ask for reconsideration of any
15 motion "once heard and disposed of." EDCR 2.24 therefore provides no basis for the Court
16 to deny the Motion.

17 B. The *Beattie* Factors On The Parties' Good Faith Litigation Behaviors Favor
18 FTB, Not Hyatt.

19 The parties agree that the *Beattie* factors largely focus on their good-faith actions
20 during the litigation, including a plaintiff's decision to bring and maintain claims through trial,
21 the timing and amount of a defendant's offer of judgment, and the plaintiff's decision to
22 reject the same. See Motion at 10:1-8 and 12:1-14:28; see also Opposition at 17:23-18:4.
23 But they differ on the appropriate time to evaluate such good faith and on their
24 characterization of Hyatt's actions during this litigation.

25 In evaluating FTB's Offer under the *Beattie* factors, Hyatt suggests that the Court
26 should almost exclusively focus on the time when Hyatt filed his Complaint and that he
27 would have won the case but for the "unanticipated reversal of prior, long-standing law" in
28 effect when he filed his Complaint. Opposition at 19:11-20:3. Hyatt admits that the basis

of his Complaint was his contention that FTB “engaged in bad faith conduct” in auditing him for the 1991 and 1992 tax years. Opposition at 5:8-21. Hyatt also contends that a runaway jury verdict in 2008—later vacated almost entirely on appeal by the Nevada Supreme Court due to multiple errors committed by the trial judge at Hyatt’s urging—justified his litigation behavior in pursuing this bad-faith theory. Opposition at 9:19-10:12.

But Hyatt’s theories turn on a misreading of Nevada law about the *Beattie* factors and upon outright ignoring the testimony of his own experts and the words of his attorneys.

1. The *Beattie* factors focus on the time the offer of judgment was made and rejected, not exclusively on when the initial pleading is filed.

Hyatt suggests that he was relying on *Nevada v. Hall* in dragging FTB, a California agency, into a Nevada court to defend itself, and so he was acting in good faith under the first *Beattie* factor when he filed his Complaint in 1998. See Opposition at 19:13-26. In other words, Hyatt invites the Court to look only at the state of the law and the facts known to Hyatt in 1998 in evaluating his actions under *Beattie*.

But Nevada courts have recognized that the first three *Beattie* factors “all relate to the parties’ motives in making or rejecting the offer and continuing the litigation.” *Frazier v. Drake*, 131 Nev. 632, 642, 357 P.3d 365, 372 (Nev. App. 2015).² As a result, the appropriate reference point for the good faith of the parties is when FTB made its Offer in 2007 and Hyatt rejected the same. That was nearly 10 years after Hyatt filed the lawsuit, and it came after the parties had conducted substantial discovery informing them about the strengths and weaknesses of their claims and defenses. See Exh. C to Motion. Information learned during that discovery illuminates Hyatt’s decision to reject FTB’s Offer and proceed to trial, and it also evidences why that decision was not in good faith.

² Hyatt mistakenly cites *Frazier v. Drake* as being a Nevada Supreme Court case, but it is an opinion of the Nevada Court of Appeals. See Opposition at 18:19-23.

2. Hyatt's own experts testified that their pre-trial investigations revealed no bad faith on the part of FTB, but Hyatt continued to trial anyway.

Though Hyatt claims his rejection of FTB's Offer hinged on facts showing FTB's purported bad faith in auditing him and trying to "coerce him into settling the tax proceeding" in California, his experts testified otherwise. See Opposition at 5:20-21 (noting Hyatt's Complaint "sought damages from the FTB stemming from its bad faith" in auditing Hyatt) and 9:6-12 (claiming that FTB delayed Hyatt's audits "in bad faith to pressure Hyatt" into settling his California administrative tax protest). For example, Hyatt's expert Malcolm Jumulet testified at his deposition and again at trial that, based on his pretrial review of Hyatt's audit file, he did not find any evidence that FTB was trying to extort Hyatt into settling his tax dispute. See June 12, 2008 Trial Transcript at 130:2-131:20, attached as **Exhibit I**.

And Jumulet was not the only Hyatt expert to reject Hyatt's suggestion that FTB acted in bad faith while auditing Hyatt. Hyatt retained Kurt Sjoberg, the former California State Auditor General³ and a former member of the U.S. Comptroller General's Advisory Council, to testify for him about FTB's purported bad faith. But Sjoberg testified that in sampling Hyatt's audits, he found "no instances" of artificially inflated assessments, fabricated assessments, or bogus or phony assessments by FTB that increased Hyatt's tax liability. See April 23, 2008 Trial Transcript at 95:22-96:1, attached as **Exhibit J**. Indeed, Sjoberg testified that Hyatt had retained him as an expert in "early 2002," which was five years before FTB served its Offer upon Hyatt. Thus, Hyatt chose to pursue his theory of bad faith for five more years after he hired an expert that told him FTB was not a bad-faith actor in auditing Hyatt.

In the end, despite the evidence from his own experts, Hyatt was hell-bent on proceeding to trial on his theory of bad faith by FTB. He lost on that theory, as there was

³ The California State Auditor's Office audits and investigates public entities in California for violations of statutory law. Thus, if anyone was well positioned to evaluate FTB's actions in auditing Hyatt and whether they complied with traditional practice, it was Sjoberg.

1 no finding of bad faith in this case. This is the definition of a lack of good faith in rejecting
2 an offer of judgment. See *Frazier*, 131 Nev. at 642, 357 P.3d at 372 (*Beattie* factors on
3 good faith “all relate to the parties’ motives in [] rejecting the offer and continuing the
4 litigation.”).

- 5 3. Hyatt’s attorneys indicated their litigation strategy was designed to
6 increase FTB’s defense costs without any legitimate basis to do so.

7 Much of Hyatt’s Opposition distorts the record by painting him as a good-faith litigant
8 who was robbed of a clear victory by “the United States Supreme Court’s thirteenth hour
9 reversal of its long-standing *Nevada v. Hall* precedent.” Opposition at 2:11-13. But as
10 discussed in FTB’s Motion, Hyatt’s litigation strategy was to force “FTB to spend substantial
11 sums defending itself in multiple forums” rather than pursue legitimate claims in good faith.
12 Motion 13:2-4. Internal documents from Hyatt’s attorneys have confirmed as much.

13 When FTB served subpoenas *duces tecum* upon California Federal Bank related to
14 Hyatt’s 1991 and 1992 bank account information, Hyatt’s California counsel noted that there
15 were no “pure tax reasons” to dispute the subpoenas. See March 17, 1998 Fax from
16 Eugene Cowan to Hyatt’s Nevada Counsel, attached as **Exhibit K**. In short, there was no
17 legitimate basis to prevent FTB from obtaining the information it requested in the
18 subpoenas. See *id.* Even so, Hyatt’s California counsel suggested there were “tactical
19 reasons” to oppose the subpoenas, including “making the FTB work” for discovery so that
20 Hyatt could raise FTB’s defense costs. *Id.*

21 Indeed, as discussed in the Motion, increasing FTB’s defense costs across various
22 jurisdictions was the primary litigation strategy that Hyatt employed. As Hyatt confirms in
23 his Opposition, he maintained seven causes of action through trial, though the Nevada
24 Supreme Court later held that only two were viable causes of action under Nevada law.
25 Compare Opposition at 10:2-10 (noting Hyatt presented seven causes of action to the jury)
26 with Opposition at 12:20-24 (conceding the Nevada Supreme Court reversed on five of
27 those causes of action and found them barred by Nevada law). He sought punitive
28 damages and convinced the trial judge to allow the jury to award them (and ultimately

1 obtained them from the jury), though the Nevada Supreme Court again later held that
2 punitive damages were not available against FTB as a government entity. See Motion at
3 14:3-7. In other words, Hyatt pursued illegitimate claims and overinflated theories of
4 damages that he knew were prohibited by Nevada law at the time he rejected FTB's Offer.

5 This is not good faith under *Beattie*. The first and third *Beattie* factors favor FTB, as
6 Hyatt rejected FTB's Offer and pursued his claims at trial in bad faith despite the facts that
7 (a) most were barred by Nevada law; (b) his own experts said they could find no bad faith
8 by FTB; and (c) his own attorneys conceded their strategy was to raise FTB's defense costs
9 without a legitimate basis to do so. Those facts elucidate that Hyatt was carrying out a war
10 of attrition rather than prosecuting legitimate claims, and his litigation style is what the
11 Nevada Supreme Court created NRCP 68 to address. *Dillard Dep't Stores, Inc. v. Beckwith*,
12 115 Nev, 372, 382, 989 P.2d 882, 888 (1999) (NRCP 68 saves "time and money for the
13 court system, the parties, and the taxpayers . . . by rewarding a party who makes a
14 reasonable offer and punishing the party who refuses to accept such an offer.").

15 4. Hyatt's contention that FTB's Offer was not reasonable or in good faith
16 is simply incorrect.

17 As to the second *Beattie* factor, which focuses on whether FTB's Offer was
18 reasonable and in good faith in both its timing and amounts, Hyatt takes no issue with the
19 timing of FTB's Offer. See Opposition at 21:21-22:9. Nor could he, as FTB made the Offer
20 shortly before trial and after the parties had pursued the litigation for several years and
21 through several appeals and writs. They had developed their claims and defenses through
22 discovery, and so FTB's Offer was not premature or unreasonable in its timing.

23 Instead, Hyatt challenges the reasonableness of the amount of FTB's Offer, claiming
24 that it was not in good faith because the \$110,000 offered "would not even approach out-
25 of-pocket costs" that Hyatt had incurred. Opposition at 21:2-6. But Hyatt cites no cases
26 holding that an offer of judgment must exceed the other party's incurred costs to be
27 reasonable in amount. On the contrary, the amount of an offer of judgment is intertwined
28 with the strengths and weaknesses of the merits of the case and the offeror's estimated trial

1 exposure on the claim (not the offeror's exposure for litigation expenses).

2 When FTB made the Offer, it did so based on the following legitimate legal positions:
3 (1) its continuing assertion of immunity in Nevada courts; (2) the NRS 41.035 damages cap
4 of \$50,000 per claim at that time; and (3) its analysis that only two of Hyatt's eight claims
5 had any viability under Nevada law. Perhaps surprising to Hyatt but unsurprising to FTB,
6 FTB won all those issues in this case. See Opposition at 14:7-12 (admitting the United
7 States Supreme Court held that FTB is immune from suits in Nevada courts), Opposition at
8 13:5-11 (admitting the United States Supreme Court held the \$50,000 damages cap applied
9 to FTB), and Opposition at 12:20-24 (admitting the Nevada Supreme Court held five of
10 Hyatt's claims were not viable under Nevada law). From that alone, FTB's Offer was not
11 unreasonable in amount.

12 To the contrary, and based on FTB's analysis of the weaknesses of Hyatt's case,
13 FTB's Offer was greater than what Hyatt recovered and it was more generous than it needed
14 to be under NRCP 68's comparison of the offer to the final amount of judgment. The second
15 *Beattie* factor accordingly favors FTB.

16 C. Contrary to Hyatt's Suggestion, The Court Cannot Ignore Appeals In
17 Analyzing FTB's Offer.

18 Hyatt suggests that his decision to reject FTB's Offer because of "the strength of his
19 case" is "vindicated by the large jury verdict he received in 2008 following a four-month jury
20 trial." Opposition at 20:11-13. Thus, Hyatt claims FTB's win on sovereign immunity related
21 to *Nevada v. Hall* blindsided him and that the jury award shows he would have succeeded
22 but for that reversal. See Opposition at 2:6-14 (claiming Hyatt won "virtually every contested
23 phase of the case" until the United States Supreme Court reversed *Nevada v. Hall*). In
24 short, Hyatt is arguing that the Court should blindfold itself to the error correction in the
25 various appeals and instead focus on an invalid jury verdict that depended on causes of
26 action and damages theories that were barred by Nevada law. Simply put, Hyatt is
27 incorrect, and it would be legal error for the Court to do so.

1. The jury award is a legal nullity because it was the product of pervasive legal error.

The jury award has no value, persuasively or legally, in evaluating FTB's Offer because the Nevada Supreme Court and United States Supreme Court have reversed that jury award as a product of substantial error. Hyatt notes that the jury found in his favor on seven causes of action and awarded him punitive damages, though he later admits that the Nevada Supreme Court reversed the jury award as to five of those claims and the punitive damages award. See Opposition at 10:2-10 and 12:20-24; see also Motion at 14:3-7. Thus, after the Nevada Supreme Court's ruling, it is evident that Hyatt only had viable claims for fraud and intentional infliction of emotional distress. See Opposition at 12:20-24. Hyatt also concedes that the Court did not apply the \$50,000 damages cap to the jury award as required by NRS 41.035, though the United States Supreme Court later found that it applied to FTB. See Opposition at 10:2-10 and 13:5-11.

And so once the appellate courts corrected these errors, and setting aside for now the issue of immunity, Hyatt only had two viable claims for which he could assert money damages when he rejected FTB's Offer, and those claims were limited by the \$50,000 statutory damages cap in NRS 41.035 that had been in place since 1979. In other words, at the time Hyatt rejected FTB's Offer, Hyatt's maximum monetary recovery was \$100,000 while FTB's Offer was for \$110,000.

While Hyatt understandably wants the Court to focus on the large jury verdict infected by substantial legal errors, he provides no case law to the Court suggesting it is appropriate to do so. And he cannot because it would conflict with the purpose of NRCP 68. The good-faith analysis under *Beattie* and NRCP 68 only protects a litigant who asserts "legitimate claims." *Frazier*, 131 Nev. at 642-43, 357 P.3d at 372. A litigant that asserts illegitimate claims, as Hyatt did here, cannot use them for *Beattie* analysis even if a jury finds in its favor on such rogue claims before an appellate court reverses them. Simply put, as the appellate courts found, Hyatt only had two viable claims in his Complaint and each was limited to \$50,000 in damages.

As a result, the Court should review what occurred on appeal to correct the jury's legal errors when evaluating FTB's Offer under *Beattie* and NRCP 68. In doing so, it becomes clear that Hyatt only had two viable claims, capped at \$50,000 each, and FTB's Offer exceeded that amount. Thus, the *Beattie* factors on good faith favor FTB.

2. The United States Supreme Court's reversal of *Nevada v. Hall* is material to the Court's *Beattie* Analysis Under NRCP 68.

Continuing his theme that what happens on appeal is irrelevant to offers of judgment, Hyatt claims that, although the United States Supreme Court reversed *Nevada v. Hall* and so FTB was victorious, Hyatt's "good faith reliance" on that case forecloses the Court from enforcing FTB's Offer under *Beattie*. See Opposition at 24 (arguing the *Beattie* factors weigh heavily against FTB because Hyatt relied on *Nevada v. Hall* as good law). In doing so, Hyatt appears to repeat the Court's mistaken finding that Hyatt could not have anticipated the United States Supreme Court's reversal of *Nevada v. Hall* in considering FTB's Offer. See February 21, 2020 Judgment at 8:21-23.

Hyatt is incorrect in several respects. First, as discussed above, even if FTB had not won on the issue of *Nevada v. Hall*, appeals made clear that Hyatt only had two viable claims and Nevada law capped them at \$50,000 each. From that alone, Hyatt could not exceed FTB's Offer of \$110,000.⁴ Thus, it was in bad faith for him to reject the same and proceed to trial.

Second, Hyatt does not cite a single case holding that the Court should somehow exclude a reversal on appeal from NRCP 68 analysis. Indeed, such a holding is impossible

⁴ In footnote 69 of the Opposition, Hyatt suggests that he was the prevailing party entitled to costs even if the United States Supreme Court did not overturn *Nevada v. Hall* and that such costs "easily would have exceeded" FTB's Offer. But this is not true. Hyatt only succeeded on two claims (fraud and intentional infliction of emotional distress) and lost on six (declaratory relief, intrusion upon seclusion, publicity of private facts, false light, abuse of process, and breach of confidential relationship). Hyatt also lost on his punitive damages request.

And so it was FTB, not Hyatt, who prevailed even if *Nevada v. Hall* survived. Hyatt was not entitled to any of his costs, and he could not have beat FTB's Offer.

because NRCP 68(f) requires the Court to compare an offer of judgment to the final judgment an offeree obtains in the case. As a result, the Court's consideration of appeals that reduce the amount of judgment and even zero out the same, as in this case, is required under *Beattie* analysis. Reversal on appeal is a known risk of proceeding to trial, and Hyatt cannot simply exclude that risk in total from NRCP 68 analysis. On the contrary, the risk of reversal was always present in this case, as the parties had been in front of appellate courts several times before FTB's Offer. Hyatt understood a trial would almost certainly lead to appeals, and so he cannot claim to be blindsided by the same.

Third, in several places in the Opposition, Hyatt incorrectly leads the Court astray by asserting that FTB did not challenge *Nevada v. Hall* before making the Offer and so Hyatt could not evaluate the same in considering the Offer under NRCP 68 and *Beattie*. See, e.g., Opposition at 2:13-14 ("The FTB did not seek to challenge the 40-year *Nevada v. Hall* precedent until it had lost every other stage of the case and had no other appeals."), 6:14-22, 8:7-21, and 10:17-11:7. In essence, Hyatt is claiming that FTB somehow waived the right to assert that *Nevada v. Hall* should be reversed because FTB purportedly did not flag the issue early in the case, and so Hyatt had no idea such an argument was coming down the tracks. See *id.*

But Hyatt raised this argument in the most recent appeal, and the United States Court rejected its deceptiveness. At its core, *Nevada v. Hall* was about sovereign immunity and held that "the Constitution does not bar private suits against a State in the courts of another State." *Franchise Tax Bd. of California v. Hyatt ("Hyatt III")*, 139 S. Ct. 1485, 1492 (2019). When Hyatt tried to argue that FTB had waived any argument about sovereign immunity because it purportedly did not raise *Nevada v. Hall* sooner on appeal, the United States Supreme Court rejected Hyatt's misleading attempt: "We also reject Hyatt's argument that the Board waived its immunity. The Board has raised an immunity-based argument from this suit's inception, though it was initially based on the Full Faith and Credit Clause." *Id.* at 1491, n. 1. The United States Supreme Court was correct. FTB's first pleading asserted a lack of jurisdiction as an affirmative defense, and FTB contended it was immune from suit

1 in Nevada from the beginning of this case. See FTB's Answer to First Amended Complaint
2 at 6:24-26, Exh. 5 to Hyatt's Opposition. Thus, even if FTB did not expressly reference
3 *Nevada v. Hall* early in the lawsuit, it was clear, as the United States Supreme Court
4 confirmed, that FTB had always challenged the case's core holding that one State could be
5 dragged into the courts of another State for a private suit.

6 And so Hyatt's suggestion that he did not know sovereign immunity was at issue
7 when FTB served its Offer is incorrect. Immunity in various forms has been at the heart of
8 this case since it began. In each appeal, FTB attacked the jurisdiction of this Court to hear
9 Hyatt's case and asserted that it was immune from suit in Nevada. Thus, when Hyatt
10 rejected FTB's Offer and instead chose to go to trial, he did so understanding that FTB
11 would raise the jurisdictional defense in any appeal, and knowing that FTB might ultimately
12 prevail. He cannot now claim that, after Hyatt lost the final appeal on the immunity issue,
13 the Court should ignore such a result when evaluating "the parties' motives in making or
14 rejecting the offer and continuing the litigation." *Frazier*, 131 Nev. at 642, 357 P.3d at 372.
15 Hyatt took a risky gamble and lost. He rejected the Offer because he believed FTB could
16 not win on the issue of immunity. Hyatt was wrong, and he bears the responsibility under
17 NRCP 68 for that erroneous assumption.

18 **III. CONCLUSION.**

19 Despite Hyatt's obfuscation, resolution of FTB's Motion is straightforward. NRCP 68
20 saves "time and money for the court system, the parties, and the taxpayers . . . by rewarding
21 a party who makes a reasonable offer and punishing the party who refuses to accept such
22 an offer." *Dillard Dep't Stores*, 115 Nev. at 382, 989 P.2d at 888. Thus, while the rule is
23 not intended to force "litigants to forego legitimate claims," it does punish them for not
24 forgoing illegitimate claims when presented with a reasonable offer to resolve the lawsuit.
25 *Frazier*, 131 Nev. at 642-43.

26 FTB reasonably made the Offer to Hyatt before trial and in an amount greater than
27 he ultimately recovered. Hyatt chose to reject the Offer and proceeded to trial with only
28 two viable causes of action and five others that the Nevada Supreme Court found were

1 illegitimate under Nevada law. He did so despite his experts concluding that his bad-faith
2 theory was unsupported by the evidence from FTB's audit files. And although he at first
3 hoodwinked a trial judge and a runaway jury into accepting his illegitimate claims, the
4 appellate process fixed such errors. So even before the United States Supreme Court
5 embraced FTB's argument on sovereign immunity in *Hyatt III*, Hyatt did not recover more
6 than FTB's Offer. After *Hyatt III*, Hyatt recovered nothing.

7 His actions along the way were unreasonable, as his mere acceptance of FTB's
8 Offer would have saved the Court, the parties, and the taxpayers of Nevada and California
9 substantial sums of money. Instead, they have all spent vast resources to reach a result
10 where Hyatt recovered nothing. NRCP 68 and *Beattie* compel a shifting of FTB's post-
11 Offer fees and costs (if necessary) to Hyatt. FTB thus requests that the Court grant its
12 Motion, at which time FTB will submit supporting invoices as to the amount of fees incurred.

13 Dated this 14th day of April, 2020.

14
15 McDONALD CARANO LLP

16 /s/ Pat Lundvall

17 Pat Lundvall (NSBN 3761)
18 Rory T. Kay (NSBN 12416)
19 McDONALD CARANO LLP
20 2300 West Sahara Avenue, Suite 1200
21 Las Vegas, Nevada 89102
22 Telephone: (702) 873-4100
23 Facsimile: (702) 873-9966
24 lundvall@mcdonaldcarano.com
25 rkay@mcdonaldcarano.com

26 *Attorneys for Defendant*
27 *Franchise Tax Board of the State of California*
28

CERTIFICATE OF SERVICE

I certify that on this 14th day of April, 2020, I caused a true and correct copy of the
**FTB's REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES PURSUANT TO
NRCP 68** to be electronically filed and served to all parties of record via this Court's
electronic filing system to all parties listed on the e-service master list:

/s/ Beau Nelson
An employee of McDonald Carano LLP

EXHIBIT I

Transcript of the Testimony of

Date: June 12, 2008

Case: Hyatt v. FTB

Verbatim Digital Reporting
Phone: 303-798-0890
Fax: 303-385-1281

Page 129

Q All right. And were there any line of demarcation then between the protest file or documents that Mr. Hyatt had produced during the litigation?

MR. HUTCHINSON: Well, Your Honor, again counsel is now trying to once again mix up the question. The witness has already testified that he did not look at litigation documents that Mr. Hyatt produced to the FTB.

Her question then asked him again if there was a demarcation between the protest documents and the Hyatt litigation documents. He's already testified he doesn't know what Mr. Hyatt produced to the Franchise Tax Board during the course of litigation.

MS. LUNDVALL: And I'm simply asking him from the documents that were produced to him was there some type of a line of demarcation between those. If there is, fine. If there's not, that's fine, too.

MR. HUTCHINSON: Well, Your Honor already sustained the objection based on the witness testifying that he did not know what documents were produced in litigation. Counsel keeps going back to that point and asking for a comparison or now a line of demarcation when the witness has already said he hasn't testified -- he testified that he hasn't looked at those. He doesn't know.

THE COURT: Okay. Sustain the objection based on the particular question that was posed.

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protest, I don't know if you call that extortion, but it was something that added to the residency determination.

Q Mr. Jumelet, you've got your deposition still in front of you, do you not?

A Yes, I do.

Q Can I direct your attention to page 62 (sic), please.

MS. LUNDVALL: And, Brian, can you bring up that clip for me, please, page 162, beginning at line 24.

BY MS. LUNDVALL:

Q 162, Mr. Jumelet.

A Oh, 162.

Q Now I'm going to ask you whether or not that these questions -- this question was asked and whether or not this answer was given. Begins on 162, line 24, and your answer is given on line 2.

Question, "From reviewing the audit or protest file did you find evidence of extortion on the part of the Franchise Tax Board?" Answer, "No."

Did I read that correctly, Mr. Jumelet?

A Yes, you did.

MR. HUTCHINSON: Well, Your Honor, that would be inappropriate impeachment because that's exactly what Mr. Jumelet testified to during the course of this trial. He testified that there wasn't. That's consistent with his deposition testimony.

Page 130

BY MS. LUNDVALL:

Q On the disk that was provided to you from Mr. Kern, did -- were there any earmarks on the documents as to whether or not they were a litigation document versus a protest document?

A I believe everything I saw in the protest file had a P Bates stamp on it.

Q Okay. Any other demarcation?

A Not that I recall.

Q Now, did you review the contents of the protest file?

A Yes, I did.

Q And did you review the contents then of the audit file?

A Yes, I did.

Q And from your reviewing the audit file or the protest file, did you find evidence of extortion on behalf of the FTB?

A No, I did not.

Q Now, this morning I asked you a few questions concerning the documents that you had an opportunity to take a look at, and, in particular, I asked you some questions concerning the depositions. Do you recall that line of inquiry?

A I was just thinking about your last question about extortion, and I'm not sure if it's the right answer. What I did see is that when the FTB put a -- added a new issue to the

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THE COURT: Noted for the record.

BY MS. LUNDVALL:

Q Mr. Jumelet, I want to go back then to some additional inquiries that I made regarding the depositions that you had the opportunity to take a look at. Now, you had indicated that someone within Pricewaterhouse had made summaries for you. Do you recall that?

A Yes.

Q And did you give direction to that individual concerning what should be contained within the summaries?

A Frequently, yes.

Q And what direction did you give to them?

A It would just be -- well, it might be particular what I'm looking for in the deposition.

Q And what was it in particular that was found within these summaries or what direction did you give to them?

A It would depend on whose deposition it was.

Q All right. Now, and you had also given me list of the individuals who you had taken a look at those summaries, correct?

A Yes.

Q And you had the opportunity then to go back and to cross-reference then those summaries to determine if in fact that they were accurate; is that right?

A That's correct.

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED
MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL
SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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MICHELE PHELPS, TRANSCRIBER_____
DATE

EXHIBIT J

Transcript of the Testimony of

Date: April 23, 2008

Case: Hyatt v. FTB

Verbatim Digital Reporting
Phone: 303-798-0890
Fax: 303-385-1281

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1 Q. And that concerned a number of positions that were
2 added between 1991/'92 fiscal year and '97/'98 fiscal year?

3 A. That's correct.

4 Q. And that was like 232 positions, something like that?

5 A. I thought it was more like 300 some.

6 Q. Okay. 300. So that's really what -- the CBR of five
7 to one you're talking about the -- those 300-and-some
8 employees, measuring the performance of those 300-and-some new
9 employees, right?

10 A. No. I'm talking about whenever the CBR is used in any
11 of its budget deliberations, whether it's prior to or after
12 that particular audit. That was a snapshot directed by a
13 special request by the legislature.

14 But it described for us the policy of the processes
15 that FTB used. So the correction that we felt was needed would
16 be -- would long transcend other position requests and any
17 position requests in which a CBR was used.

18 Q. Now, the Franchise Tax Board disagreed with you on
19 that, didn't they?

20 A. They agreed in many areas and they disagreed in some.

21 Q. Okay. How about as far as using tax assessments as a
22 measure of performance?

23 A. My recollection is that they did not want to change
24 the methodology they used.

25 Q. And why was that?

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1 A. The promise is what they describe in the CBR. My
2 belief is the legislature was looking for revenue.

3 Q. All right. Now, the concept of CBR should be
4 communicated down the line from top management to lower level
5 employees and the managers, reviewers and supervisors and
6 between, shouldn't it?

7 A. Only if you want them to focus on it when they conduct
8 their audit.

9 Q. Okay. Well, shouldn't tax auditors focus on
10 assessments in conducting their audits?

11 A. I would think they should focus on making sure that
12 the appropriate amount of taxes are being paid.

13 Q. Okay. So the auditor in that pursuit might find that
14 there's a no change, additional assessment, or that the
15 taxpayer was overcharged, right?

16 A. Those are the decisions they can reach.

17 Q. All right. And you've seen that done in your review
18 of samplings of audits, haven't you?

19 A. I have.

20 Q. And that's appropriate, isn't it?

21 A. It is.

22 Q. Now, what you didn't see in samplings of audits was
23 that auditors artificially inflated assessments, fabricated
24 assessments, made bogus or phoney assessments in order to
25 increase their CBR, did you?

Page 94

1 A. They felt they liked that one better.

2 Q. Well, there was a historical basis for it, wasn't
3 there?

4 A. Well, it had been -- if you're asking if that had been
5 what they had used forever, it is.

6 Q. And do you have information on why they began using
7 that?

8 A. I know that they used CBR for several years prior, but
9 prior to '90/'91, I do not know.

10 Q. You've had it explained to you, though, that position
11 explained to you by the FTB, haven't you?

12 A. In their response to our report?

13 Q. Yes.

14 A. They described why they believed that they would --
15 wish to continue to use the CBR with assessments.

16 Q. Now, your next opinion in using tax assessments
17 instead of collections, FTB inflates its success to justify
18 receiving money from the legislature above what a true CBR of
19 its operations would reveal. Inflating its success, what do
20 you mean by that?

21 A. Suggesting to the legislature that for every dollar
22 that they're given for audit positions, that they will receive
23 \$5 in increased revenue.

24 Q. Now, is increased revenue promised or increased
25 assessments?

Page 96

1 A. We found no instances of that.

2 Q. Now, I want to go back to your engagement by Mr. Hyatt
3 and his folks. I think you testified that usually you don't
4 want to get involved in litigation or promoting legislation; is
5 that right?

6 A. That's correct.

7 Q. And in this case you did, and I think Mr. Hutchinson's
8 question to you was, "Just briefly tell us quickly after
9 talking with Mr. Hyatt." Answer, "Mr. Hyatt called and I was
10 convinced that he was interested in an objective, accurate
11 analysis of the Franchise Tax Board's activities, and I agreed
12 to do it."

13 Is that what you recall your reason for getting
14 involved on Mr. Hyatt's behalf was?

15 A. Yes.

16 Q. Okay. You didn't think he had an ax to grind with the
17 FTB and wanted you to help further his cause?

18 A. I understood he was -- he had a case against him by
19 the Franchise Tax Board, but my response to him was I would
20 provide an expert opinion based upon what the facts revealed.

21 Q. Now, when did you first get involved with Mr. Hyatt
22 and his folks?

23 A. I'm trying to recall, but I think it was early 2002.

24 Q. Was it some time in September of 2002, like about
25 Tuesday, September 10th, 2002, when you met with Mr. Hyatt,

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1 **concluded at 3:55 p.m.)**
 2 MR. KULA: Your Honor, that was a good breaking
 3 point.
 4 THE COURT: Okay. Can I see counsel at the bench,
 5 please. Off record.
 6 (Off the record at 3:55 p.m. until 4:00 p.m.)
 7 THE COURT: Ladies and gentlemen, I'm told that
 8 there's probably another two-and-a-half hours of this videotape
 9 for you to see, and I wanted to inquire whether it's your
 10 desire to stay and hear a little more of it before we break for
 11 the evening so that we might finish this videotape testimony
 12 before we break for lunch tomorrow or would you just as soon
 13 come back tomorrow?
 14 THE JURY: Tomorrow.
 15 THE COURT: Tomorrow it is, and can we bring the jury
 16 back at 9:30 rather than 10:00?
 17 MS. LUNDVALL: Fine by us, Your Honor.
 18 (Off-record colloquy)
 19 THE COURT: Let's make it 10:00 o'clock. That way we
 20 won't keep you waiting, ladies and gentlemen.
 21 I advise you of your duty not to discuss this case,
 22 not to form or express any opinion, not to do any research.
 23 See you tomorrow at 10:00 o'clock.
 24 (Court recessed at 3:59 p.m. until Tuesday,
 25 April 24, 2008, at 10:00 a.m.)

1 CERTIFICATION
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 3 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
 4 AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED
 5 MATTER.
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EXHIBIT K

RIORDAN & MCKINZIE
A PROFESSIONAL LAW CORPORATION
Richard J. Riordan, Retired
300 South Grand Avenue
Twenty-Ninth Floor
Los Angeles, California 90071-3155
Telephone: (213) 629-4824
Facsimile: (213) 229-8550

FACSIMILE TRANSMISSION

DATE: March 17, 1998

TO:

NAME	FAX NO.	PHONE NO.
Mark A. Hutchison, Esq.	(702) 385-3059	(702) 385-2500
Mr. Gil Hyatt	(702) 396-2827	
Thomas L. Steffen, Esq.	(801) 375-3724	

FROM: Eugene Cowan

DIRECT DIAL: (213) 229-8515

RE: Hyatt v. F.T.B.

FILE NO.: 8-160-002	USER NUMBER: 223	PAGES, INCLUDING COVER:
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MESSAGE:

Attached is a copy of a Subpoena Duces Tecum to be issued to Cal Fed Bank by the FTB regarding the taxpayer's 1991 & 1992 Cal Fed bank account information. We have until Friday to file a motion to quash if we so desire. While there are no "pure" tax reasons to quash the motion, there may be tactical reasons to do so (such as making the FTB work for its requests for now on or taking this opportunity to file the motion in the Nevada courts or otherwise). Clearly, one argument we may have is that the information sought by the FTB is overbroad. The FTB is seeking account records through the end of 1992; however, the FTB has acknowledged that the taxpayer was a Nevada resident from April 1992. The FTB may not be entitled to request post April 2, 1992 records of the taxpayer.

cc: Don Kula

THE INFORMATION CONTAINED IN THIS FACSIMILE IS CONFIDENTIAL AND MAY ALSO CONTAIN PRIVILEGED ATTORNEY-CLIENT INFORMATION OR WORK PRODUCT. THE INFORMATION IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHOM IT IS ADDRESSED. IF YOU ARE NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY USE, DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THE FACSIMILE IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ADDRESS ABOVE VIA THE U.S. POSTAL SERVICE. THANK YOU.

If you have any problems with this transmission, please call Alonzo Richards at (213) 229-8430. Thank you.

PBTK 00014

2326-0001

AA005821

STATE OF CALIFORNIA

FRANCHISE TAX BOARD

333 N. Glenoaks Blvd. Suite 200
Burbank, CA 91502
TELEPHONE: (818) 556-2912
FAX: (818) 556-2978

May 28, 1998

Mr. Eugene Cowan
Riordan and McKenzie
300 South Grand Avenue Suite 2900
Los Angeles, California 90071

Re: Taxpayer's Name Gilbert P. Hyatt
Account Number: 069-30-9999
Tax Years: 1991, 1992

Dear Mr. Cowan,

Enclosed is a copy of the Subpoena Duces Tecum which will be sent to Cal Fed Bank.
Refer to the enclosed form (FTB 2580).

This subpoena shall direct Cal Fed Bank to make photocopies of all monthly statements, canceled checks (both front & back) and signature cards for any and all accounts in the name of Gilbert P. Hyatt, including account number 322070019, for the period January 1, 1991 through December 31, 1992.

A motion to quash the subpoena duces tecum may be filed with the court within 10 days of this service.

If you have any questions or concerns, please contact me at the telephone number listed below.

Sincerely,

Sheila Cox

Sheila Cox, Associate Tax Auditor
Residency Program
Telephone (818) 556-2912

Enclosure

PBTK 00015

2326-0002

AA005822

Declaration for Subpoena Duces Tecum

I, Sheila Cox declare that I am an Associate Tax Auditor of the Audit Section of the Franchise Tax Board, that I make this declaration in my official capacity, and that this department is currently conducting administrative proceedings resulting from audits performed under the California Revenue and Taxation code to determine the residency status of Gilbert P. Hyatt for tax years 1991 and 1992.

Gilbert P. Hyatt filed a part year resident return for 1991 and no California return after 1991. However, during these tax years, Gilbert P. Hyatt had substantial ties with California. During the audit process, Mr. Hyatt has provided incomplete banking information.

Copies of bank statements and canceled checks as well as signature cards were requested for any and all accounts held open by Mr. Hyatt in 1991 and 1992. Incomplete information has been provided up to this point, and according to Mr. Hyatt's attorney, Mr. Hyatt has provided everything he has regarding his California bank accounts. Information provided during the audit indicated a bank account and banking activity at Cal Fed Bank in Rosemead (Account #322070019).

In order to make the proper audit determination regarding the residency status of Gilbert P. Hyatt I request a Subpoena duces Tecum be issued by the Franchise Tax Board to Custodian of Records, Cal Fed Bank Attention: Legal 058300103 at 830 Stillwater Rd. West Sacramento, California 95605.

This subpoena shall direct Cal Fed Bank to make available photocopies of any and all bank statements, both front and back of canceled checks, and signature cards for the period January 1, 1991 through December 31, 1992.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 24, 1998 at Burbank, California.

Sheila Cox
Declarant

PBTk 00016

2326-0003

STATE OF CALIFORNIA
FRANCHISE TAX BOARDSUBPOENA DUCES TECUM
98-02

In the Matter of

For the Period:
01/01/91 through 12/31/92GILBERT P. HYATT
PO BOX 81230
Las Vegas, NV 89180-1230TO: CAL FED BANK
CUSTODIAN OF RECORDS
ATTN: LEGAL 058300103
830 STILLWATER ROAD
WEST SACRAMENTO, CA 95605

You are hereby commanded to make available to SHEILA COX, TAX AUDITOR, Representative of
the Franchise Tax Board or Designee, at 333 N. Glenoaks Boulevard, Suite 200; Burbank, CA 91502

on the 28th day of May, 19 98, at 4:00 o'clock in the P.m

the originals or true and exact copies of the following records:

Copies of all monthly statements, canceled checks (both front & back) and signature cards for any and all
accounts in the name of Gilbert P. Hyatt, including account number 322070019.

This information should be provided for the period:

January 1, 1991 through December 31, 1992

Issued under authority of Section 19504(c) of the California Revenue and Taxation Code

this 12th day of May, 1998. The statutory purpose of this subpoena is to determine if
Gilbert P. Hyatt has complied with the provisions of the California Personal Income Tax Law.

FRANCHISE TAX BOARD
STATE OF CALIFORNIABy 

CERTIFICATE OF SERVICE - GENERAL

I hereby certify that I served this Subpoena Duces Tecum by showing the original thereof to

Mr. Eugene Cowan, representative of Gilbert P. Nyatt

and delivering a copy thereof with a copy of the declaration in support of said Subpoena Duces Tecum on

the 28th day of May, 19 98. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 28, 19 98, at 4:00 P.M.

Shirley Cox
Representative - Franchise Tax Board

CERTIFICATE OF SERVICE - FINANCIAL INSTITUTION

I hereby certify that I served a copy of this Subpoena Duces Tecum on

_____ on _____
Customer Date

and thereafter served this subpoena by showing the original to

Financial Institution

and delivering a copy thereof with a copy of the declaration in support of said Subpoena Duces Tecum on

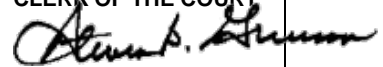
the _____ day of _____, 19 _____. I further certify that on _____
Date

I notified _____ that a motion to quash the Subpoena Duces Tecum may
Customer

be filed with the Court within ten (10) days of this service. I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 19 _____, at _____

Representative - Franchise Tax Board



1 RTRAN

2

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DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

GILBERT HYATT,

8

Plaintiff,

9

vs.

10

CALIFORNIA STATE FRANCHISE
TAX BOARD,

11

12

Defendant.

13

14

BEFORE THE HONORABLE TIERRA JONES
DISTRICT COURT JUDGE
TUESDAY, APRIL 21, 2020

15

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

16

17

APPEARANCES:

18

For the Plaintiff:

19

MARK A. HUTCHISON, ESQ.
PETER C. BERNHARD, ESQ.

20

For the Defendant:

21

PAT LUNDVALL, ESQ.
JAMES W. BRADSHAW, ESQ.

22

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RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Las Vegas, Nevada, Tuesday, April 21, 2020

[Case called at 10:14 a.m.]

THE COURT: And in this particular case there has already been a request made for a transcript of this hearing. It becomes a little bit more difficult for us to do when we're all on the phone, so I'm going to ask that before anyone speaks you absolutely identify yourself, so that we can make an appropriate transcript of what was said and who it was said by. So I just ask that you guys be very, very careful before you speak in identifying yourself, so that we can have a transcript prepared at the end of this hearing.

Okay. Who's here for the Tax Board?

MR. LUNDVALL: Good morning, Your Honor, this is Pat Lundvall calling in on behalf of McDonald Carano for the California State Franchise Tax Board.

THE COURT: Okay. Can we have your bar number, Ms. Lundvall?

MR. LUNDVALL: 3761.

THE COURT: Okay. And who is here for Mr. Hyatt?

MR. HUTCHISON: Your Honor, good morning. This is Mark Hutchison, 4639, on behalf of Mr. Hyatt. There are others on the phone as well who I will defer to for their appearances.

THE COURT: Okay. Who else is here on this case?

MR. BERNHARD: Your Honor, this is Peter Bernhard, bar number 734 on behalf of Mr. Hyatt. Mr. Hyatt and Michael Kern are both

1 on the line as well connected with me. Thank you.

2 MR. KULA: And also Donald Kula for Mr. Hyatt. And I have a
3 pro hac vice application or actually admission, Your Honor, so I don't
4 have a Nevada bar number. I can give you my California number though
5 if you want.

6 THE COURT: Please do.

7 MR. KULA: 144342.

8 THE COURT: Okay. And your pro hac vice paperwork has
9 already been done?

10 MR. KULA: Yes.

11 THE COURT: Okay. Anyone else appearing on this case?

12 MR. BRADSHAW: Your Honor, this is James Bradshaw with
13 the McDonald Carano law firm for the Franchise Tax Board, bar number
14 1638.

15 THE COURT: Okay. Anyone else?

16 MR. KAY: Yes, Your Honor. This is Rory Kay, bar number
17 12416, also of McDonald Carano, on behalf of the Franchise Tax Board.

18 THE COURT: Okay. Anyone else? Okay. Seeing no other
19 response, okay. Well, let's -- and the Plaintiff's motion to re-tax or
20 motion for extension of time to provide an additional basis to re-tax, it
21 did not appear on my calendar page, but I am prepared to go forward
22 with that today as well. Are the parties prepared to go forward with
23 that?

24 MR. HUTCHISON: Your Honor, this is Mark Hutchison on
25 behalf of Mr. Hyatt. Yes, we are.

1 THE COURT: Okay. What about for the Defense?

2 MR. LUNDVALL: Your Honor, this is Pat Lundvall on behalf
3 of the FTB. We are prepared to go forward on Plaintiff's motion to re-tax.

4 THE COURT: Okay. All right. So we do have -- Plaintiff has a
5 motion on to re-tax, as well as the Franchise Tax Board has a motion on
6 for attorney's fees.

7 Let's deal with the attorney's fees motion first, because if the
8 attorney's fees are granted, then we would have to go forward with the
9 motion to re-tax and see how we would proceed with that. So let's start
10 with the motion for attorney's fees. I have read the motion, I've read the
11 opposition, and I've read reply. Does the Tax Board have anything you
12 would like to add?

13 MR. LUNDVALL: Yes, Your Honor, we do.

14 THE COURT: Okay.

15 MR. LUNDVALL: Once again this Pat Lundvall on behalf of
16 the FTB. Under the FTB's motion for attorney's fees there is actually a
17 fair amount of agreement between the parties as to the framework of the
18 Court's analysis and the factors under that court's analysis, and I would
19 like to highlight or articulate those areas of agreement --

20 THE COURT: Okay.

21 MR. LUNDVALL: -- because it will streamline then the areas
22 of dispute and discussion on those areas of dispute.

23 Each one of the points of agreement that I intend to focus
24 upon is one of the factors that the Court is to analyze in ruling on a Rule
25 68 motion. And I think it's important to underscore the fact that this is a

1 Rule 68 motion. It is a motion that is brought pursuant to NRCP 68, that
2 allows the party who has made an offer of judgment to move for
3 attorney's fees and costs in the event that the party who did not accept
4 the offer of judgment did not seek the offer of judgment.

5 So let me start with the first point of agreement. Mr. Hyatt
6 agrees with our overall discussion of the framework for this Court's
7 analysis with one caveat. The area within which he agreed is that the
8 first point that the Court is to analyze is whether or not -- that the offer of
9 judgment was greater than his final judgment. Then the Court is
10 supposed go on and look at the Beattie factors. The Beattie factors
11 which, in essence, analyze the good faith of the parties in litigating this
12 case. And then to go on and look at the Brunzell factors to determine the
13 reasonableness of the amount that has been sought.

14 The one caveat where Mr. Hyatt disagrees with that
15 framework is that he considered this motion to be one for
16 reconsideration. That is the point of disagreement, and I will focus on
17 that in a bit.

18 The second factor though that the parties agree is that the
19 FTB's offer of judgment was a balanced offer of judgment. Mr. Hyatt
20 does not contest the validity of our offer of judgment, which is so often
21 the case in these types of motion. Many of these motions focus on the
22 language of the offer of judgment and look at and dispute whether or not
23 it was a valid Rule 68 offer of judgment. For example, it would have
24 some type of an impermissible condition or it did not resolve all of the
25 claims. There has been no contest by Mr. Hyatt to the validity of our

1 offer of judgment.

2 The next points the parties agree upon is the fact that the
3 final judgment in this case was less than the FTB's offer of judgment.
4 This is a fairly simple point in that the judgment that was received by the
5 FTB was zero, and that the offer of that the FTB made back in 2007 for
6 the \$110,000, Mr. Hyatt does not challenge in that respect.

7 Next, Mr. Hyatt does not challenge or contend that our offer
8 of judgment was unreasonable in its timing. Our offer of judgment was
9 made after full discovery, and it was made nearly on the eve of trial, and
10 Mr. Hyatt does not contest the timing of our offer was reasonable.

11 Next, Mr. Hyatt does not deny that he is a sophisticated
12 litigant. He has massive amounts of money, and he's been represented
13 by the best attorneys that that money can buy. He also has an in-house
14 staff of attorneys that prepare his pleadings and paper. The attorneys
15 that show up to argue and get paid, are not the same attorneys that
16 typically draft. So to draft papers are an in-house staff of attorneys that
17 Mr. Hyatt has at his disposal. As we demonstrated to the Court that he
18 filed at least 37 other cases across California, the federal circuit, New
19 York. He has litigated many appeals to multiple circuits, and he has
20 litigated other appeals to the U.S. Supreme Court.

21 Now Hyatt concedes that he is a sophisticated litigant is a
22 very important concession in looking at a Rule 68 motion. Any student
23 of the Rule 68 Jurisprudence, will tell you that the practical analysis of
24 these types of motions largely churns on the sophistication of the
25 litigant. When the sophistication among the litigants is equal then there

1 is a greater inclination by district courts as well as appellate courts -- and
2 defines the liability when the offeree does not seek the offer of judgment.
3 And in this circumstance, Mr. Hyatt does not deny that he is a
4 sophisticated -- a very sophisticated litigant.

5 Next, Mr. Hyatt did not challenge the FTB's assertion that
6 when he first filed this case, the very first claim that he sought was the
7 declaratory relief claim in which he asked a Nevada Court for a ruling
8 that would help him and to assist him in his tax proceedings in the State
9 of California. The original complaint began with a dec relief claim that
10 asked a Nevada Court to declare him to be a Nevada resident. That
11 declaration was one that was designed to assist him in his past
12 proceedings in California, and Mr. Hyatt did not deny that assertion then
13 from the FTB's motion.

14 Mr. Hyatt did not challenge the facts either: that if the Court
15 denies the FTB's costs under Chapter 18, then the FTB is entitled to seek
16 recovery of post-offer of judgment costs under Rule 68.

17 And the last point of the parties' agreement is that the
18 Brunzell analysis or the Brunzell review of the reasonableness
19 determination as to the amount of fees that were sought is a premature
20 determination as this point in time. In other words, Mr. Hyatt agrees that
21 it is premature to evaluate those Brunzell factors and that a bifurcated
22 approach to this motion, which was suggested by the FTB is a
23 reasonable approach for this Court to employ. In other words, for the
24 Court to first determine if there is liability by Mr. Hyatt for the attorney's
25 fees and costs incurred by the FTB or -- and then only if that liability is

1 found would it be necessary for the FTB to submit then the specific
2 information necessary for the Brunzell factors.

3 So let me turn my argument then to the three points where
4 the parties disagree. The three points where the parties disagree begin
5 with the procedural posture of this case. Mr. Hyatt began by arguing
6 that the FTB's motion is one for reconsideration. He even goes so far in
7 his opposition to make a misrepresentation to this Court in support of his
8 claim that this is a motion for reconsideration.

9 And I'm going to quote from his paper here when he says
10 that, "on October 15th, 2019, the parties each submitted extensive
11 briefing on whether FTB is entitled to attorney's fees under Rule 68." He
12 went on to argue in that same section that the Court had referenced --
13 expressly referenced NRCP 68 in entering the judgment that was entered
14 in February of this year.

15 Most of those statements are false. As the Court may recall
16 we showed up at a status check before you on September 3rd of 2019.
17 At that status check there were squabbles between the parties
18 concerning what the Court needed to do at that point in time, and you
19 requested supplemental briefing on two issues.

20 The first issue was whether or not -- that in vacating the prior
21 judgment that the Court was obligated then to issue a judgment in FTB's
22 favor. The second issue that the Court asked for briefing upon was
23 whether or not either party was a prevailing party. Under a Rule 68
24 analysis, a prevailing party determination has nothing to do with the
25 entitlement to attorney's fees. Rule 68, the only predicate to invoking

1 that rule is whether or not your final judgment exceeded the offer of
2 judgment. The only predicate that the Court has to look at whether or
3 not the offer of judgment is greater than the final judgment to determine
4 whether or not the party has beaten the offer of judgment, nothing
5 further. You can be a prevailing party and not have beaten an offer of
6 judgment and, therefore, be liable under Rule 68 for post-offer attorney's
7 fees.

8 Take a simple example in a classic personal injury case, you
9 could have a plaintiff who goes to trial and ultimately receives a final
10 judgment in the amount of \$100,000. In that circumstance, they would
11 be a prevailing party, but if they had received an offer of judgment
12 before trial in the amount of \$110,000, then in fact their final judgment
13 did not beat the offer of judgment and, therefore, even though they may
14 be a prevailing party, the plaintiff may still be liable for attorney's fees
15 since they did not beat an offer of judgment.

16 When looking at a Rule 68 motion, which is the motion that is
17 before this Court, the Court is not concerned if they are a prevailing
18 party, but the only issue is whether or not the final judgment was less
19 than the offer of judgment so as to entitle the FTB its attorney's fees.

20 So when this Court in October of 2019, asked for a prevailing
21 party briefing, we expressly told the Court in that briefing that we were
22 not briefing entitlement to fees under Rule 68. And if you look at the
23 Court's actual judgment, you made no reference to Rule 68 in your
24 February 21st judgment. Both of Mr. Hyatt's statements to the predicate
25 for this being a motion for reconsideration are therefore false.

1 Finally on this particular point, when you look at the Eighth
2 Judicial District, the Court Rules 2.24, it required reconsideration of a
3 motion. Back in September there were no motions before the Court.
4 The parties only did briefings, and there was no hearing that was held,
5 and so, therefore, that this is not a motion for reconsideration. The Court
6 has not made a determination on whether or not Mr. Hyatt's failure to
7 beat the offer of judgment therefore entitles the FTB recovery then of its
8 attorney's fees.

9 The next point of disagreement between the parties focuses
10 upon the good faith of the parties in bringing the litigation and in
11 deciding whether or not they're going to accept an offer of judgment.
12 The Beattie factors then are what is at issue under this disagreement.
13 Mr. Hyatt encourages the Court to look only and exclusively at his good
14 faith in filing the action and that was his premise upon which he
15 opposed our motion for summary judgment -- our motion for attorney's
16 fees.

17 But there are two timeframes that the Court is required to
18 evaluate Mr. Hyatt's good faith in determining whether or not the FTB
19 may be entitled to attorney's fees. The first is when you file and the
20 second timeframe that is at issue is when you decide to reject the offer of
21 judgment. So I'm going to focus on both of those timeframes to
22 demonstrate that Mr. Hyatt did not have good faith at either one.

23 Let's go to the very first one, whether or not there was good
24 faith in filing of the lawsuit to begin with. And this is where Mr. Hyatt's
25 concession about his lead claims comes into play. I think it's important

1 to note that in his opposition, Mr. Hyatt did not even address this
2 argument. That his very first claim for relief in his original complaint
3 asked for a declaration from a Nevada Court that he was a Nevada
4 resident for use then in his past proceedings that were ongoing in the
5 State of California. His obvious reasons for wanting to use that was to
6 try to defend himself against the California tax proceedings. It is also
7 noticeable about the timing of Mr. Hyatt's lawsuit. It was within days of
8 learning that he had been denied preliminary review of his audit findings
9 in California.

10 It is also noticeable when you look at Exhibit K that we
11 brought to the attention of the Court. Exhibit K is a memo that was
12 authored in 1998 by counsel for Mr. Hyatt. That memo articulates the
13 fact that there were no legitimate legal reasons for objecting to a
14 particular subpoena that had been issued, but that there may be tactical
15 or strategic reasons, and to make the FTB work for any of the documents
16 that it was supposed to obtain from Mr. Hyatt. When you read that
17 memo you get the clear indication that what Mr. Hyatt was trying to do
18 was to increase the cost of this litigation as well as increase the cost of
19 the tax proceedings ongoing in the State of California.

20 So when you put those two goals together, number one, that
21 he was using a Nevada Court to try to help him in California. Moreover
22 in the State of California and therefore in this litigation that he was trying
23 to increase the cost of litigation, what you conclude is that there was bad
24 faith in filing the complaint.

25 But let's look particularly at the second timeframe that the

1 Court has really emphasized that district courts are supposed to evaluate
2 under the Beattie factors, and that is was there good faith by the offeree,
3 Mr. Hyatt in this case, in rejecting the offer of judgment that was made
4 by the FTB. Now recall that that time was after discovery had closed,
5 and we were right on the eve of trial. So let's look at what Mr. Hyatt
6 knew then and let's look at what he described his case as being.

7 Before this Court he described this case as being one for bad
8 faith, and he goes on to describe that bad faith that extortion by the FTB
9 or attempted extortion was the foundation for that bad faith label. He
10 described that extortion as FTB trumping up tax liability against him and
11 then trying to extort a settlement.

12 In other words, there was two points to Mr. Hyatt's allegation
13 of bad faith. Number one, he said that the FTB had trumped up an audit
14 against him; and, number two, is that he had used those audit
15 conclusions as extortion for a settlement.

16 When you review the complaint that Mr. Hyatt -- the
17 amended complaint in particular that Mr. Hyatt had filed and the
18 amended complaint that was at issue at the time that we were set to
19 begin trial, the single common denominator amongst all of Mr. Hyatt's
20 causes of action was his allegation, a trumped up audit plus extortion for
21 settlement.

22 So during discovery, had Mr. Hyatt found evidence of either
23 a trumped up audit or extortion for settlement? No. His own experts
24 testified in deposition and ultimately testified at trial that they had found
25 no evidence of extortion and no evidence of trumped up tax liability.

1 Malcolm Jumelet was one of his key experts that he had presented, and
2 Malcolm Jumelet testified that he found no evidence of extortion that
3 had been practiced by the FTB. Fred Sorberg [phonetic] was another one
4 of Mr. Hyatt's experts and what he also testified to is that he had found
5 no evidence of any trumped tax liability. So that in sum, at the time the
6 offer of judgment was made by the FTB, his own experts had conceded
7 that they had found no evidence of Hyatt's allegations of bad faith.

8 The next thing that Mr. Hyatt tried to use as a defense in
9 denying that the FTB's offer had been made in good faith was his
10 contention that *Nevada v. Hall* somehow exonerates him or his reliance
11 on *Nevada v. Hall* exonerates him from having to have seriously
12 considered the offer of judgment that FTB had made. So let's look at
13 that argument for just a bit.

14 One of the things that Mr. Hyatt does is he plays semantics
15 with this Court. He suggests that somehow that the FTB never had
16 raised the issues that were underscored in *Nevada v. Hall* at any point
17 until after the time of trial and only after it lost on appeal. That's his
18 argument. His argument is defied by the record and his argument has
19 also already been rejected by the U.S. Supreme Court. *Nevada v. Hall*
20 focused upon sovereign immunity. It was a case about sovereign
21 immunity. It was a case that determined whether or not a litigant could
22 sue a state like California in the courts of another state like Nevada. That
23 was the entire issue in *Nevada v. Hall*. And from the very get-go in this
24 case, the State of California had asserted its sovereign immunity as one
25 of its defenses to liability in this case, and that was in the very first

1 response that we ever made to any of the allegations by Mr. Hyatt.

2 He's made this argument before you, but this is not the first
3 time that he made this argument. He made this argument directly before
4 the U.S. Supreme Court and the U.S. Supreme Court rejected Mr. Hyatt's
5 argument for its deceptiveness. The U.S. Supreme Court rightfully
6 acknowledged that *Nevada v. Hall* was a sovereign immunity case and
7 that the FTB has been asserting sovereign immunity from day one.

8 And so now Mr. Hyatt tries to deceive this Court by making
9 the same argument and essentially he suggests that somehow that this
10 Court should reverse the U.S. Supreme Court on this point. But doing so
11 would be illegal error, and it would also violate the mandate that was
12 issued first by the U.S. Supreme Court, and then the mandate that was
13 issued from the Nevada Supreme Court, because both of those mandate
14 compel this Court -- the District Court to enter and to conduct
15 proceedings in accord with and consistent with the decisions that had
16 been made by the U.S. Supreme Court. That was this Court's mandate.

17 And so to suggest that somehow that this Court can
18 overturn, or reject, or to ignore a specific finding that was made by the
19 U.S. Supreme Court, would be nothing but an invitation to commit legal
20 error.

21 The third point of this agreement upon the parties is that Mr.
22 Hyatt contends that this Court should simply ignore or blindfold itself
23 from what had happened on appeal and evaluate the reasonableness of
24 the amount of the FTB's offer of judgment.

25 First, let's look on a couple of things that FTB knew at the

1 time that it had made its offer of judgment. The offer was made in 2007.
2 It was continuing to assert sovereign immunity. It knew that in the State
3 of Nevada that there were a damage cap on each claim -- each legitimate
4 claim that a party may assert against a state entity or a state actor, and
5 that that damage cap was \$50,000. And the FTB had also made an
6 evaluation that there were only two of eight claims that may arguably
7 even be construed as legitimate and under Nevada law.

8 Mr. Hyatt, in his briefing, entirely ignores the damage cap
9 that was put in place and that damage cap had been the law in the State
10 of Nevada since 1979. When you evaluate the worst case scenario that
11 FTB was facing on those two claims, the FTB had crafted its offer of
12 judgment, offering to settle in the maximum amount of its legitimate
13 exposure. When a party offers to settle in the maximum amount of its
14 legitimate exposure, that should be considered reasonable under any
15 rational. But instead, what Mr. Hyatt asked the Court to do is to ignore
16 what happened on appeal, especially in evaluating the jury's verdict.

17 So let's look at whether or not he's given this Court any
18 cogent reason by which to do so. First and foremost, there is not a
19 single case that he brings to the Court's attention that somehow that you
20 can't ignore what happened on appeal in determining the
21 reasonableness of the offer that was made by the FTB. Number two is
22 that he asked this Court decide the very language of Rule 68 by defining
23 that very language the Court is obligated to look at the final judgment,
24 which is zero, and compare that to the offer of judgment.

25 And so the final judgment is the legitimate judgment that is

1 to be evaluated. He goes on to say that -- and he couched the legitimacy
2 of his rejection by saying, well, geez, the jury awarded me almost a half
3 billion dollars. Well, what did the Nevada Supreme Court think of that
4 jury verdict? It identified it as being riddled with legal error, and the jury
5 made legal error as well. The Nevada Supreme Court had reduced then,
6 the first time around, his half billion dollar jury verdict then to around
7 one million dollars.

8 And what happened in that circumstance then? What did the
9 U.S. Supreme Court think about that determination that was being
10 brought up at the Supreme Court? The U.S. Supreme Court in Hyatt II,
11 has said that the Nevada Supreme Court had treated the FTB in a
12 discriminatory fashion and that it was unconstitutional to treat one state
13 more harshly or more negatively than other litigants were in the same
14 state. And so the U.S. Supreme Court then said that the result was that
15 there was a damage cap that was to be in place and applied by the
16 Nevada Supreme Court.

17 So we then go back down to the Nevada Supreme Court.
18 What did Mr. Hyatt argue at that point in time? He argued for a higher
19 damage cap to be applied. He argued that the Court should apply the
20 damage cap that was in place at the time that we were before the Court,
21 rather than the damage cap that was in place when he originated his
22 litigation. The Court rejected his argument and that is the decision that
23 pushed his award then down to \$100,000. Even then, what did the U.S.
24 Supreme Court ultimately say about that petition? It then determined
25 that Nevada lacked jurisdiction over the State of California, and so the

1 final judgment, the judgment that the Court has just looked at was at
2 zero.

3 So at every appellate turn that Hyatt asked this Court to focus
4 upon, contending that somehow -- that he had a win, a higher appellate
5 court has said that Mr. Hyatt was wrong and that he lost on his
6 argument. And, therefore, when you evaluate the reasonableness of the
7 FTB's offer of judgment both in timing as well as in amount, it's hard to
8 contend that it was unreasonable given what the FTB had evaluated at
9 that point in time.

10 From day one the FTB had advanced a winning theory and
11 that winning theory was that there was no jurisdiction over the State of
12 California in Nevada courts. Did it take us a long time to reach that
13 winning theory? Yes, it did. But from day one, in comparison, Mr.
14 Hyatt's goal was to try to use the Nevada courts to [indiscernible] his tax
15 proceedings that were ongoing in the State of California. And early on
16 that goal was being the loser. But, Mr. Hyatt, he gambled, and he
17 continued his lawsuit even though his own expert had testified that there
18 was no evidence of his bad faith theory.

19 Mr. Hyatt, as a sophisticated litigant, he tried to game the
20 system. His gamble didn't pay off, and then the Rule 68 and the public
21 policies underlining that rule, he now has to face the consequences of
22 that gamble. And therefore we would ask the Court to find that Mr. Hyatt
23 is liable his post-offer attorney's fee and cost, if necessary, and for those
24 costs then to be determined in a subsequent proceeding. Not only the
25 costs, but the amount of the attorney's fees to be determined in a

1 subsequent proceeding.

2 THE COURT: Okay. Counsel for Mr. Hyatt, your response?

3 MR. HUTCHISON: Your Honor, this is Mark Hutchison on
4 behalf of Mr. Hyatt. Let me begin by just making a couple of
5 observations.

6 First, counsel's argument and their briefing appears to reflect
7 a complete disregard for what occurred before the Court -- in the
8 hearings before the Court on September 3rd. They also completely
9 disregard what this Court did on February 21st, in entering judgment.
10 You didn't hear one reference, one reference to the Court's judgment of
11 February 21st, and the reason is crystal clear. Your Honor has already
12 heard these arguments, considered these arguments, and rejected these
13 arguments. This is a motion or reconsideration. I'll get to that though in
14 just a minute, Your Honor, but let me start by just making the record
15 crystal clear.

16 First, Mr. Hyatt does not agree with numerous of the
17 propositions that counsel suggested he agrees with. Our briefing speaks
18 for itself. Counsel has attempted to characterize agreements or
19 concessions in a way that is absolutely inconsistent with the briefing.
20 We object to those characterizations, do not agree with them.

21 They aren't, by the way, Your Honor, relevant, many of them,
22 to the analysis that the Court gets there again, which by the way the
23 Court already arrived at the analysis under Beattie in the February 21st
24 judgment. But if the Court gets there again today, most of what counsel
25 suggested were agreements of the parties, don't even relate to the

1 Beattie analysis.

2 And finally, I'll just make note that several of her
3 representations to the Court were flat out wrong. I could go through
4 numerous, but let me just give this example.

5 There's nothing in the record on this. It's completely wrong,
6 it's false, and I don't even know where this is coming from. I've been
7 with this case from the day it was filed and this representation to the
8 Court that somehow Mr. Hyatt has an in-house staff writing all the
9 documents, and drafting all the briefs, and he's got these -- he's just a
10 sophisticated litigant with his giant in-house staff drafting documents
11 and those of us who appear on his behalf never wrote them or haven't
12 seen them, and all we're doing is just sort of parody, whatever his in-
13 house staff says, is completely, one hundred percent flatly false.
14 Completely false. There is nothing in the record. I don't even know
15 where counsel gets that suggestion to the Court. And I'll leave it at a
16 suggestion because certainly it has no basis in fact, Your Honor. And
17 there were numerous of those. So let me just make the record clear on
18 that point.

19 Your Honor, counsel is just flat wrong when the FTB argues
20 that the only thing you need to look at under Rule 68, is whether or not a
21 party beat the offer of judgment that was made. Counsel said that
22 numerous times. I wrote it down. She says that the only thing that is
23 necessary under Rule 68 for the Court's analysis is whether or not there
24 was a final judgment that was less than the offer of judgment. Of course
25 we know that's wrong. Beattie tells us that's wrong. The Nevada

1 Supreme Court tells us that's wrong. You have to go through an
2 analysis beyond that. That's what we did in our briefing. That's what
3 the Court did in its judgment.

4 So this idea that, hey, the FTB wins because there was an
5 offer of judgment made, and they claimed that they beat that, and we're
6 done, and we all can go home is just wrong.

7 Your Honor, let me turn to this idea of reconsideration. The
8 Court can decide whatever the Court would like to decide. I won't spend
9 a ton of time on this, but she came right out of the box and claimed that
10 we made false statements. That we said that at the October 15th, 2019
11 briefing that was in the -- the October 15th, 2019 briefing, that there was
12 in fact briefing and there were statements and arguments made in the
13 briefing about Rule 68. She claimed that was false. Take a look at our
14 briefing on that. We covered that in our briefing.

15 Take a look at the transcript at the September 2nd hearing,
16 where counsel addressed the Court and raises Rule 68. This is on page
17 10 of the transcript, Your Honor, line 12. She raised, pursuant to 68, that
18 they were -- that Mr. Hyatt was attempting to deprive the FTB of their
19 right to attorney's fees under Rule 68. The Court then, two pages later,
20 on page 12, said this to the parties, lines 2 through 7.

21 "So what I'm going to do is I'm going to allow you guys to
22 submit competing orders to the Court, but I'm going to also require that
23 you brief this issue of -- I think the prevailing party is an important issue
24 because if there's ever going to be any sort of determination, if there's
25 fees, if there's costs. If these -- any of these things, that is something

1 that we have to determine before we can even get there."

2 So for counsel to suggest that we were misrepresenting what
3 the Court had ordered to be briefed, or what was addressed at that
4 hearing, or what was addressed in the briefing is flat out wrong.

5 Just to underscore the point, Your Honor, if the Court turns
6 to the Court's own judgment, this is your judgment, page 5, lines 2
7 through 5, the Court references Rules of Civil Procedure 68, it references
8 the FTB's offer of judgment on November 26th, 2007, and it also says
9 that Mr. Hyatt declined to respond to the offer, so it expired in the ten
10 day time period.

11 Now if Rule 68 was off the table, we hadn't discussed it,
12 never came up in the briefing, was never discussed during the course of
13 our hearing, why does the Court reference it in the judgment? And the
14 answer is obvious, Your Honor. However the FTB took the Court's order
15 and how they characterize it is up to them. What we did is we briefed
16 fully the prevailing the party, we briefed Rule 68, and the Court
17 acknowledged that there was an issue under Rule 68, acknowledged that
18 those issues had to be addressed, and in fact that it went on in your
19 judgment, Your Honor, and addressed the Beattie factors. Why address
20 the Beattie factors if Rule 68 doesn't come into play? Why address the
21 Beattie factors if in fact the only thing the Court cared about was the
22 prevailing party.

23 But the Court can make a decision in terms of what the Court
24 intended to be briefed. The issue is counsel is saying there was a
25 misrepresentation by any of the lawyers or Mr. Hyatt concerning them.

1 THE COURT: Okay.

2 MR. HUTCHISON: Your Honor -- well let me just -- Your
3 Honor with a couple of other points. Under the [indiscernible] to
4 underscore that point, Rule 2.24 required that if they were going to bring
5 a motion for reconsideration and, in fact, this idea that this -- you know,
6 the Court did not consider Rule 68 I've already addressed. The Court
7 said twice, made it very clear, what in fact the Court's judgment starting
8 on page 8, lines 15.

9 "Neither party is deemed the prevailing party for purposes of
10 awarding costs or attorney's fees and neither party is therefore awarded
11 costs or attorney's fees in this action."

12 Page 9, concluding sentence, lines 13 through 15.

13 "This Court further concludes that consistent with the orders
14 of the higher courts, as a matter of law and equity, there is no prevailing
15 party in this action, and neither party is entitled to an award of costs or
16 attorney's fees."

17 This is after the Court cited Rule 68. This is after the Court
18 went through the Beattie factors.

19 Your Honor, there was some, I thought, almost threatening
20 arguments that somehow if the Court does not rule in the favor of the
21 FTB that there would be some reversal of the U.S. Supreme Court or that
22 you would be acting in contravention of the Nevada Supreme Court or
23 the U.S. Supreme Court. The Court said, in its judgment, after having
24 gone through all the procedural history, after having gone through the
25 appellate history, everything that counsel claims that we just ignored, of

1 course it was extensively briefed in October, was again extensively
2 briefed before the Court now, that counsel says we -- nevertheless, we
3 just ignored all that. After the court said they didn't consider it, you say
4 at the very beginning of your judgment:

5 "Now, therefore, and based on the foregoing, this Court has
6 reviewed and considered the procedural history of this case, including
7 the decisions and orders in this case issued by the United States
8 Supreme Court and the Nevada Supreme Court," and then you go on to
9 say, "plus the recent briefing by the Court" -- excuse me -- "by the parties
10 to the Court."

11 You then made your ruling and yet counsel completely
12 ignores the fact that you went through an awful lot of hard work
13 reviewing the procedural history including all the appellate decisions in
14 rendering your decision and that somehow not only you, but we are all
15 ignoring that procedural history, and we're all ignoring the appellate
16 history. Judge, that's just flat out wrong. You considered it, you
17 reasoned through it, we briefed you in October, you issued your decision
18 in February, and you specifically said you considered it. It's just flat out
19 wrong to say it wasn't briefed, it's been ignored, or that you didn't
20 consider it.

21 THE COURT: Anything else you want to add, Mr. Hutchison?

22 MR. HUTCHISON: I do, Your Honor. Yes.

23 THE COURT: Okay.

24 MR. HUTCHISON: Yes, I do want to -- Judge, I do want to
25 just make a couple of points.

1 THE COURT: Okay.

2 MR. HUTCHISON: Counsel, has referenced a couple of
3 different exhibits going to this idea of good faith under the Beattie
4 factors, and she references -- and in fact the -- excuse me -- the reply
5 brief references Exhibits I, J, and K. Your Honor, those exhibits should
6 be stricken for two reasons. One is you can't bring up documents in a
7 reply brief that you didn't bring up in your motion to give us an
8 opportunity to respond. Secondly, Your Honor, they are just so
9 deceptive. So deceptive. Let me give you an example.

10 [Indiscernible - static on line, cannot hear Mr. Hutchison]
11 beyond the point with Exhibit K saying that -- going to the good faith
12 nature of whether we even brought the case. The case shows that Mr.
13 Hyatt's own lawyers knew that there was just really no basis for
14 challenging subpoenas and his whole intention was to run up the cost of
15 this litigation, and points to a fax coversheet, which is Exhibit K.
16 [Indiscernible] that Exhibit K has nothing to do with this case, nothing. It
17 has to do with an administrative subpoena in a CAPS proceeding in
18 California. And it also is -- if this is the best evidence that the FTB has,
19 that Mr. Hyatt was trying drive up the costs in this case because a lawyer
20 was to determine whether it was a tactical reason to respond to a
21 subpoena, every case meets that standard, Your Honor. Every case
22 meets that standard.

23 So it's not only disclosed for the first time in a reply brief, it's
24 also deceptive and has nothing to do with the point that counsel is even
25 trying to make, which is this is a subpoena that has something to do with

1 the Hyatt litigation in Nevada. It was an administrative subpoena in the
2 State of California and a lawyer is saying, you know what, do we
3 tactically need to respond to this or not.

4 The other two exhibits that are attached to the reply are little
5 excerpts from the trial transcript, Your Honor, a 17 month [sic] jury trial.
6 Little excerpts from our experts where counsel argues, well, you know,
7 they knew that there wasn't even any basis for a bad faith claim here.
8 And counsel claims that the only thing that Mr. Hyatt really argued to
9 support his case, and it underlined every part of his case, and every one
10 of his claims, was this idea that there was really just a trumped up tax
11 proceeding in an attempt to extort. And that was the basis for
12 everything.

13 And these experts who they brought in, in trial, they
14 themselves concede that there wasn't any such extortion effort or there
15 was no bad faith basis for bringing the tax audit. Judge, if you just think
16 that through it is so non-sensical. First off, we had a 17 week jury trial.
17 We put on our experts who said a whole lot of things. They didn't even
18 say what counsel is suggesting they said. It's completely taken out of
19 context in terms of what was presented and what was said by the
20 experts in the context within which they were saying it.

21 But just think about it. We put on dozens of witnesses, four
22 month jury trial. What does this jury come back with? Do they
23 disbelieve our experts? Do they say, oh, yeah, this is just fundamental,
24 and we got you everything that Hyatt is asserting there? They come
25 back with \$138.1 million verdict. And then, on top of that, they add \$250

1 million punitive damage claim -- or punitive damages on top of those
2 claims. And then after that the Court awards \$2.5 million in costs to Mr.
3 Hyatt. And then after that, in 2014, the Nevada Supreme Court affirms
4 the fraud and the intentional infliction of emotional distress claims with
5 an award -- affirming the award of over 41 million on those claims.

6 And if the Court has any doubt about whether our experts
7 were undercutting our position or whether or not we didn't have a good
8 faith basis to proceed because we should have known that we didn't
9 have a bad faith case, or we didn't have a fraud case, or we didn't have
10 an intentional infliction of emotional distress case, or invasion of privacy
11 case, all the claims that we asserted, Your Honor, all you have to do is
12 just go back to the 2014 Nevada Supreme Court case affirming the jury
13 verdict on fraud and on intentional infliction of emotional distress.

14 I'm not going to read everything, Your Honor, I'll just say
15 this. Here's what the Court said on 335 P.3d at 145, quote,

16 "The evidence presented sufficiently shows the FTB's
17 improper motives in conducting Hyatt's audits and a reasonable mind
18 could conclude that the FTB made fraudulent representations."

19 That they knew the representations were false, and it
20 intended for Hyatt to rely on the representations. Intentional infliction of
21 emotional distress they said that stands, and they said one -- just one
22 sentence will be enough to just undercut everything that counsel has
23 argued in this regard. Quote, "Turning to the facts in the present case,
24 Hyatt suffered extreme treatment from the FTB."

25 Now, counsel wants to suggest that we didn't have a basis to

1 bring the case or to continue the case because our experts or because of
2 the facts before the case was even filed concerning the administrative
3 subpoena in California, Judge, it is so unpersuasive. It should be
4 completely discarded. If it's considered at all, those exhibits should be
5 stricken because they are new exhibits.

6 Your Honor, what I would like to do is just ask if the Court
7 also consider just a couple of other points, which I think the Court
8 already has in its decision, and I think you understand exactly what was
9 going on in *Nevada v. Hall*, exactly what happened. As a matter of fact,
10 Your Honor, I'll just cite what you said. You've already evaluated this.
11 You've already analyzed this. As I said, it is as though the FTB has not
12 even read your judgment or it's just arguing that you just don't know
13 what you're talking about, or after you spent the time on this, you just
14 don't know what you're doing.

15 Because what the Court said on page 9 was, line 4, as of
16 2007, that's the time of the offered judgment, the FTB has not asserted
17 any -- or had not asserted any argument or taken any action to reverse
18 *Nevada v. Hall* precedent. Further, as of 2007, this case has been
19 reviewed by both the Nevada Supreme Court in 2002, and the United
20 States Supreme Court in 2003, and the FTB had not argued that *Nevada*
21 *v. Hall* was wrongly cited or should be reversed.

22 The FTB did not assert that argument or seek that relief with
23 the United States Supreme Court until 2015, after a ruling by this Court
24 and exhausting all appeals in the Nevada Supreme Court. It's exactly
25 what we argued again in our brief and is what is being mischaracterized

1 now, which I don't understand, in the FTB's argument that somehow you
2 didn't get that or grasp that and all counsel has to do now is just make
3 different arguments, and after you've reviewed the record that somehow
4 you didn't come to a different conclusion. You reached the right
5 conclusion because that's what the record shows.

6 It wasn't until May of 2018, that *Nevada v. Hall* became bad
7 law in the State of Nevada. It was good law all the way up until that
8 time, from 1998 all the way up until that time. Even after two trips to the
9 Nevada Supreme -- to the U.S. Supreme Court, even after multiple trips
10 to the Nevada Supreme Court. And did the FTB argue in their brief
11 before the Nevada Supreme Court or the U.S. Supreme Court back in
12 2002 and 2003, that *Nevada v. Hall* should be reversed. The Court's
13 already found that it did not. That the FTB did not. I didn't hear counsel
14 make any reference to any briefing to any of those courts.

15 As a matter of fact, it's interesting because in the U.S.
16 Supreme Court in 2003, the FTB argued for an exception to *Nevada v.*
17 *Hall*, thereby underscoring that it was valid law. We need an exception
18 to it. Find, you know, an essential sovereign function exception to that
19 rule. Counsel just has argued -- from the very beginning to the very end
20 they have always argued for -- *Nevada v. Hall* was somehow granted
21 them immunity. That's absolutely wrong, flat out contrary to what the
22 facts of this case show, Your Honor.

23 Let me just address that -- what counsel had argued about
24 and just a couple of other points, Your Honor, as well. The idea that
25 somehow the FTB was putting forth a good faith basis for an offer of

1 judgment for \$110,000 in 2007, has been rejected by this Court already in
2 evaluating that, you determined that in fact *Nevada v. Hall* was good
3 law, that the Nevada Supreme -- the U.S. Supreme Court had affirmed --
4 as a matter of fact the U.S. Supreme Court in a nine-justice decision,
5 affirmed Hyatt's right to proceed against the State of California in
6 Nevada and that there was good faith and in fact I think what your words
7 were that Mr. Hyatt expected, you know, that could proceed under those
8 circumstances and did so in good faith, Your Honor.

9 And so, the idea that in fact the FTB presented an offer of
10 judgment that was both appropriate in timing and in amount, Your
11 Honor, is undercut by the record -- is undercut by the Court's own
12 evaluation of that question and, in any event, Your Honor, you've made
13 very clear that under Beattie, the first and the second -- or, excuse me,
14 the first and the third elements are not even close to being met. You
15 said that Mr. Hyatt -- this is on page 8 of your order, that Mr. Hyatt
16 brought the action in good faith in reliance of the United States Supreme
17 Court precedent in *Nevada v. Hall*.

18 You then recite the 21 year history in which that was all --
19 that case law was good. Then you said, quote,

20 "The United States' reversal of its longstanding *Nevada v.*
21 *Hall* precedent in Hyatt III in 2019, stripped this Court of the jurisdiction
22 of the FTB could not have been anticipated by Hyatt."

23 That's absolutely contrary to what counsel now is arguing,
24 again that you've gone through the record, and that you're just flat out
25 wrong. It's a motion for reconsideration.

1 You also said, Your Honor, that Hyatt had a good faith belief
2 that he would prevail at trial on his claims and recover in excess of the
3 \$110,000 offer of judgment made by the FTB in 2007. You note that
4 Hyatt did obtain a verdict in excess of that, and then you note that the
5 damage limitation was not decided or imposed until Hyatt II in 2016.

6 Then you said this, Your Honor, quote,

7 "It was therefore not grossly unreasonable or in bad faith for
8 Hyatt to not accept the FTB's offer of judgment for the \$110,00 in 2007."

9 You've already decided, and the record fully supports your
10 conclusion here, Your Honor, that Mr. Hyatt proceeded in good faith with
11 the case, Mr. Hyatt proceeded to reject the offer in good faith in 2007,
12 and in fact Mr. Hyatt was not, in any way, grossly negligent in
13 proceeding to trial or rejecting that -- or grossly unreasonable or in bad
14 faith in rejecting the offer of judgment, Your Honor.

15 And I just want to say one thing for the record. Counsel
16 completely mischaracterizes our point about when Mr. Hyatt was acting
17 in good faith. He was acting in good faith both times the complaint was
18 filed, which is what counsel erroneously said and which is focused in our
19 opposition papers is not. And we make very clear, Your Honor, that in
20 fact the analysis was not only for the time when the lawsuit was filed,
21 but also as the case proceeded with the evidence all the way up until
22 2007. And if the Court has any doubt, I'm not sure that counsel
23 considered page 20 of our brief, but here's what we said in lines 10
24 through 14, quote,

25 "In this regard, not only did Hyatt have a good faith basis for

1 filing the lawsuit, but as the evidence developed his case grew stronger
2 and stronger. Hyatt's view of the strength of his case in deciding to
3 reject the FTB's offer in November of 2007, was vindicated by the large
4 jury verdict he received in 2008, following a four month jury trial. The
5 strength of Hyatt's case and supporting evidence developed as of 2007,
6 and then presented to the jury during the 2008 trial is best summarized
7 and annotated to the evidence in Hyatt's briefing filed in Nevada
8 Supreme Court."

9 Then we lay out all the evidence that had been presented up
10 until that time in 2007. So for counsel to suggest that we were only
11 focused on the good faith view of Mr. Hyatt at the time of the filing is flat
12 out wrong, and we set forth not only at the time of the filing, but also
13 throughout the case through 2007, for the quote on page 20 and 21 of
14 our briefing, Your Honor.

15 Your Honor, I just need to just talk about the caps for just one
16 second. There's already been accounts that somehow we should have
17 seen that back in 2007, the caps would have been imposed on Hyatt and
18 there only would have been two valid claims made and, therefore, the
19 \$110,000 was a reasonable offer and should have been accepted.

20 I'll just say this, that those cap damage questions were
21 argued before the District Court and rejected. The law was clear at the
22 time that there were exceptions to those caps. Those caps applied to
23 Nevada agencies. There's a question about whether or not they would
24 apply to foreign agencies or foreign governments. That was fully
25 litigated. The District Court rejected those caps being applied. Hyatt

1 moved forth in good faith on that basis and, in fact, in 2014, after the
2 case was over, the FTB goes back to the Nevada Supreme Court and
3 says those caps should have been applied. The Nevada Supreme Court
4 agreed with what the District Court said, no they shouldn't have been
5 because of an exception to that statutory requirement.

6 So, Your Honor, again, this is very consistent with what Hyatt
7 has done from the beginning to the end. He asserted the case in good
8 faith, he continued the case in good faith, and at every stage of the
9 appellate process he was upheld. He was upheld. And the decisions
10 that were made were upheld until the very end when after three trips to
11 the U.S. Supreme Court, the U.S. Supreme Court reversed a 40 year
12 precedent that then divested jurisdiction in this case.

13 Your Honor, in light of all of this, and in light of everything
14 the Court has done already with its judgment, having gone through all
15 the procedural history, having made the decision about the Beattie
16 factors, having gone through the analysis about whether anybody was
17 entitled to attorney's fees and costs, or the prevailing party analysis, the
18 Court should -- excuse me, deny the motion for the attorney's fees. The
19 Brunzell factors don't even come into play, Your Honor, as we note.
20 Those are premature -- or excuse me. They're moot or premature, at
21 best, and the Court should continue what it already did in its judgment
22 back in February of 2020, and reject the FTB's arguments.

23 Thank you, Your Honor.

24 THE COURT: Ms. Lundvall, do you have any reply to that?

25 MS. LUNDVALL: Yes, Your Honor. Just a very short reply

1 just to clarify a couple points in response then to the argument made by
2 counsel for Mr. Hyatt.

3 The first clarifying point concerns his contention that
4 somehow our motion for attorney's fees is a motion for reconsideration.

5 Number one, he can see that what the Court asked for in
6 September of 2019, was briefing on whether there was a prevailing
7 party. That was his concession and that is exactly what the Court's
8 transcript asked the parties to do, but looking at a Rule 68 motion for
9 attorney's fees, whether you are a prevailing party is irrelevant.
10 Prevailing party determination only applies to Chapter 18 costs and/or
11 attorney's fees that are allowed under Chapter 18. That's where the
12 prevailing party issue comes into play. It has no applicability to a Rule
13 68 motion. You can be a prevailing party and still be liable under Rule 68
14 for post-offer attorney's fees if you did not beat an offer of judgment.

15 So when the Court asked for prevailing party briefing, it had
16 nothing to do with NRCP 68. We made no motion, we made no request
17 in that briefing, we briefed the issue of whether or not there was a
18 prevailing party, and there are two different analysis.

19 Number two, is that we had no opportunity by which to
20 oppose the briefing and the Court did not hold a hearing. And so,
21 therefore, there was no motion before the Court pursuant to EDCR 2.24
22 or for us to seek reconsideration of. And, therefore, this is not a motion
23 for reconsideration, but the first time that the Court has had the
24 opportunity to pass on these issues.

25 Point number two, counsel contends that our argument is

1 that the Court's only analysis is whether or not -- that Mr. Hyatt beat the
2 offer of judgment. That wasn't our argument at all. Our argument was
3 that whether Mr. Hyatt beat the offer of judgment is the predicate, is the
4 foundation, is the basic premise that the Court has to look at before it
5 goes to the Beattie factors or the Brunzell factors. It is not a predicate for
6 a party to be a prevailing party under a Rule 68 motion.

7 So to the extent that the first hurdle that Mr. Hyatt has to get
8 past is a demonstration that he beat the offer of judgment. He did not
9 beat the offer of judgment when you compare the final judgment against
10 what has been offered to him.

11 The third point I would like point out is this. Counsel goes on
12 about in 2002 and in 2003, what the FTB had argued was an exception to
13 *Nevada v. Hall*. Let me put this in context. In the decision -- *Nevada v.*
14 *Hall* was a decision that reversed over 200 years of precedent in our
15 nation that recognized sovereign immunity by individual states. In other
16 words, the individual states couldn't be sued in the courts of another
17 jurisdiction.

18 *Nevada v. Hall*, reverts that 200 year history. And in the
19 *Nevada v. Hall* decision, there was a footnote that said, our holding in
20 *Nevada v. Hall*, does not -- may not apply to core sovereign function.
21 And it went on to identify that for core sovereign function a state like
22 California may not be sued in the state -- in other states like Nevada.

23 So when we went before the U.S. Supreme Court in 2003, we
24 looked at, and highlighted, and advanced to the Court that particular
25 footnote, and it was only in Hyatt I that the Court said, no, that footnote

1 is no longer, in essence, good law. That we don't -- we're not going to
2 go down the slippery slope of trying to determine what is or is not a core
3 sovereign function. And then it was -- the Court went on to recognize the
4 sovereign immunity issue.

5 Point number four that I wish to make regarding *Nevada v.*
6 *Hall* and the argument that was advanced by counsel. He contends that
7 somehow that we were threatening the Court by suggesting that the
8 Court was doing something that it was not permitted to do so. We're not
9 making any threats to the Court. What we are doing is pointing out that
10 the invitation that Mr. Hyatt has extended to this Court to focus only
11 upon the case about *Nevada v. Hall* and when it was sought to be
12 overturned is an argument that has already been made by Mr. Hyatt, and
13 it was already rejected by the U.S. Supreme Court, and it is part of the
14 U.S. Supreme Court's decision. And that this Court was obligated under
15 the mandate to issue a decision consistent with that prior decision. And
16 if in fact this Court deviates from that prior position that was advanced
17 by the U.S. Supreme Court, then in fact if the Court exceeds its
18 jurisdiction and violates the mandate that was issued both by the U.S.
19 Supreme Court as well as the Nevada Supreme Court.

20 And that is exactly the invitation that Mr. Hyatt made to you
21 and that invitation is reflected in the Court's judgment that was issued in
22 February. And I'm going to quote from that judgment, and it's the same
23 language that Mr. Hutchison quoted to the Court. It's found in page 9. It
24 begins at line 4. The Court stated:

25 "As of 2007, the FTB has not asserted any argument or taken

1 any action to reverse the *Nevada v. Hall* precedent. Further, as of 2007,
2 this case has been reviewed by both the Nevada Supreme Court and the
3 United States Supreme Court, and the FTB has not argued that *Nevada*
4 *v. Hall* was wrongly cited or should be reversed."

5 The Court goes on to say,

6 "The FTB did not assert that argument or seek relief" -- "that
7 relief with the U.S. Supreme Court until 2015, after ruling by this Court in
8 exhausting all appeals in the Nevada Supreme Court."

9 That is the exact argument that Mr. Hyatt had made to the
10 U.S. Supreme Court, but the U.S. Supreme Court saw through that
11 argument, and we are asking this Court to also see through that
12 argument. That from day one the FTB has asserted its sovereign
13 immunity. And from day one, it has advanced the argument that it is
14 immune from suit in the State of Nevada and that argument was
15 embraced, and adopted, and acknowledged by the U.S. Supreme Court.
16 And the U.S. Supreme Court in doing so, expressly in its decision, states
17 specifically what *Nevada v. Hall* was about with sovereign immunity and
18 that from day one FTB had asserted it's sovereign immunity.

19 The last point I wish to make is this. Counsel, in his oral
20 presentation, continues to suggest that the jury verdict indicated Mr.
21 Hyatt's determination to reject the FTB's offer of judgment. So let's
22 examine that argument a bit.

23 What did the U.S. Supreme Court say about that jury verdict?
24 It said that that jury verdict was a product of legal errors that was
25 committed by the District Court, and it was a product of legal errors and

1 factual errors that was committed by the jury. And so, therefore, what
2 Mr. Hyatt is trying to use -- to say to this Court, use this bad decision.
3 This decision that was already found to be bad, to vindicate his
4 determination that somehow that his claims were worth more than
5 ultimately that he received.

6 The Nevada Supreme Court in the third decision that it
7 issued had reduced his claim down to \$100,000. It had recognized that
8 there was only two viable claims and each one of those viable claims
9 was subjected to a \$50,000 damage cap. That's what the third decision
10 from our Nevada Supreme Court had reduced that to. So even before
11 *Nevada v. Hall* was expressly overturned by the U.S. Supreme Court, Mr.
12 Hyatt's claims were worth less than 100,000 -- were worth less than the
13 offer of judgment that had been made by the FTB.

14 And so, therefore, even under that simple analysis of
15 ignoring when the *Nevada v. Hall* decision, which asserted sovereign
16 immunity was overturned, that Mr. Hyatt's claims were worth less than
17 the offer of judgment that was made by the FTB.

18 Mr. Hyatt is a gambler, and he gambled with the Court's legal
19 system. He required not only himself to incur attorney's fees, but
20 attorney's fees to include -- incurred by the State of California. He used
21 taxpayer dollars here in the State of Nevada. He used their resources by
22 which to perpetuate his gamble, and he lost. And, therefore, under the
23 public policy decisions that have been issued by our Nevada Supreme
24 Court in embracing Rule 68, that when you gamble, and you lose, and
25 you're a sophisticated litigant, and a good faith offer as to timing and as

1 to amount is made to you, then you bear the consequences of that
2 gamble.

3 And so, therefore, we would ask the Court then to find that
4 Mr. Hyatt bears the consequences of that gamble and that he is liable for
5 the post-offer fees and possibly the costs then that had been incurred by
6 the FTB. Thank you.

7 THE COURT: Okay. I am, in light of the lengthy procedural
8 history of this case and everything that has happened, I'm going to issue
9 a decision on this on Thursday from chambers. If there is a need to hear
10 the motion to re-tax, I will recalendar the motion at that time.

11 THE CLERK: April 23rd.

12 MR. HUTCHISON: Thank you, Your Honor. We do have -- on
13 the motion to re-tax the one comment that I would make to the Court is
14 this. The motion that was made by Mr. Hyatt's re-tax was a very bare
15 bones motions.

16 THE COURT: Well, that's why I'm going to hear argument on
17 it if that is necessary.

18 MR. HUTCHISON: Thank you.

19 THE COURT: Okay. I will put it -- if it becomes necessary to
20 hear the motion to re-tax, I'm going to put it back on calendar, and you
21 guys will both have an opportunity to argue the motion.

22 /////

23 /////

24 /////

25 /////

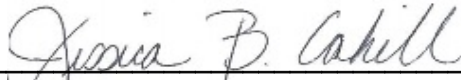
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MR. HUTCHISON: Thank you, Your Honor.

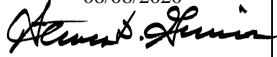
THE COURT: Okay. Thank you very much.

[Proceedings concluded at 11:30 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.



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CLERK OF THE COURT

ODM

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Attorneys for Plaintiff Gilbert P. Hyatt

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

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

Defendants.

Case No. 98A382999

Dept. No. X

**ORDER DENYING FTB'S MOTION
FOR ATTORNEY'S FEES PURSUANT
TO NRCP 68**

Defendant Franchise Tax Board of the State of California's ("Defendant") Motion for Attorney's Fees Pursuant to NRCP 68 came on for hearing before this Court on April 21, 2020, with Mark A. Hutchison appearing and presenting arguments on behalf of Plaintiff Gilbert P. Hyatt, and Pat Lundvall appearing and presenting arguments on behalf of Defendant. The Court, having considered the papers and pleadings on file and the arguments of counsel, the Court issues its decision and order as follows:

The Court previously determined, after thorough consideration and analysis, there was no prevailing party in this case, and therefore neither party is entitled to attorney's fees or costs

1 under Nevada law. The Court considered and applied the factors set forth in *Beattie v. Thomas*,
2 99 Nev. 579 (1983) and hereby finds that the Plaintiff's claims were brought in good faith under
3 the existing and applicable law at the time.

4 The Court further finds that Plaintiff's decision to reject Defendant's offer was not
5 unreasonable or in bad faith in light of the existing law at the time and as illustrated by the verdict
6 and damages awarded by the jury, which the jury deemed reasonable.

7 The attorney's fees Defendant seeks are not justified as the Court was within its discretion
8 in finding that neither party prevailed in this case and that neither party is entitled to attorney's
9 fees or costs accordingly, under NRCP Rule 68 or otherwise.

Dated this 8th day of June, 2020

10 BASED ON THE FOREGOING, AND GOOD CAUSE APPEARING,

11 IT IS HEREBY ORDERED that Defendant's Motion for Attorney's Fees Pursuant to
12 NRCP 68 is DENIED.

13 DATED: _____


DISTRICT COURT JUDGE

14
15 Approved as to form:

9C9 48F 1429 6F54
Tierra Jones

16 /s/ Pat Lundvall

17 Pat Lundvall
18 McDonald Carano LLP
19 2300 W. Sahara Avenue, Suite 1200
20 Las Vegas, NV 89102
21 *Attorney for Defendant*
22 *Franchise Tax Board of the State of California*

23 Submitted by:

24 /s/ Mark A. Hutchison

25 Mark A. Hutchison
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Attorneys for Plaintiff Gilbert P. Hyatt

From: Mark A. Hutchison
Sent: Thursday, May 28, 2020 8:40 PM
To: Teresa Tokumon-Phillips
Cc: Maddy Carnate-Peralta
Subject: Fwd: Hyatt/FTB

Here is Lundvall's email.

Sent from my iPhone

Begin forwarded message:

From: Pat Lundvall <plundvall@mcdonaldcarano.com>
Date: May 28, 2020 at 2:53:45 PM MDT
To: "Mark A. Hutchison" <MHutchison@hutchlegal.com>
Cc: "James W. Bradshaw" <jbradshaw@Mcdonaldcarano.com>, Rory Kay <rkay@mcdonaldcarano.com>
Subject: Re: Hyatt/FTB

Approved as to form. Please edit the approval note accordingly and then you may affix my e-signature for submission. Thanks.

Pat Lundvall | Partner

McDONALD CARANO

2300 West Sahara Avenue <x-apple-data-detectors://0/1> | <x-apple-data-detectors://0/1> Suite 1200<x-apple-data-detectors://0/1>
Las Vegas, NV 89102<x-apple-data-detectors://0/1>

100 West Liberty Street <x-apple-data-detectors://1> | <x-apple-data-detectors://1> Tenth Floor<x-apple-data-detectors://1>
Reno, NV 89501<x-apple-data-detectors://2/0>

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C: 775.772.1822<tel:775.772.1822>

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WEBSITE<<http://www.mcdonaldcarano.com/>> | V-
CARD<<http://www.mcdonaldcarano.com/vcards/plundvall.vcf>> |
LINKEDIN<<https://www.linkedin.com/in/pat-lundvall-a3613b12>>

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On May 27, 2020, at 9:37 AM, Mark A. Hutchison <MHutchison@hutchlegal.com> wrote:

Hi Pat, sorry for delay. Attached is draft of court order for your review. I tracked the minute order issued by the court. Let me know if you approve for submission. Thanks.

Mark

Mark A. Hutchison

Partner

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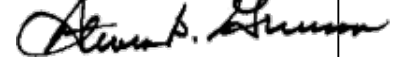
HUTCHISON & STEFFEN, PLLC

(702) 385-2500

hutchlegal.com <<http://www.hutchlegal.com>>

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<2020-05-22 (clean) Order Denying Def_s Mtn for Attorney_s Fees Costs - MAH 5-22-20.DOCX>



NEOJ

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Las Vegas, NV 89135
Tel: (702) 792-7000
Fax: (702) 796-7181
pbernhard@kcnvlaw.com

Attorneys for Plaintiff Gilbert P. Hyatt

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

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

Defendants.

Case No. 98A382999

Dept. No. X

**NOTICE OF ENTRY OF ORDER
DENYING FTB'S MOTION FOR
ATTORNEY'S FEES PURSUANT TO
NRCP 68**

TO: ALL INTERESTED PARTIES

NOTICE IS HEREBY GIVEN that an Order Denying FTB's Motion for Attorney's

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///

///

///

1 Fees Pursuant to NRCP 68 was entered in the above-entitled action on June 8, 2020, a copy of
2 which is attached hereto.

3
4 Dated this 8th day of June, 2020.

HUTCHISON & STEFFEN, PLLC

5
6 /s/ Mark A. Hutchison

7 Mark A. Hutchison (4639)
8 Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

9 Peter C. Bernhard (734)
10 KAEMPFER CROWELL
1980 Festival Plaza Drive, Suite 650
11 Las Vegas, NV 89135

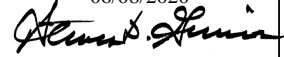
12 *Attorneys for Plaintiff Gilbert P. Hyatt*
13
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC
3
4 and that on this 8th day of June, 2020, I caused the above and foregoing documents entitled
5 **NOTICE OF ENTRY OF ORDER DENYING FTB'S MOTION FOR ATTORNEY'S**
6 **FEES PURSUANT TO NRCP 68** to be served through the Court's mandatory electronic service
7 system, per EDCR 8.02, upon the following:

8
9 **ALL PARTIES ON THE E-SERVICE LIST**

10
11 /s/ Madelyn B. Carnate-Peralta
12 An employee of Hutchison & Steffen, PLLC
13
14
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CLERK OF THE COURT

ODM

Mark A. Hutchison (4639)
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Dept. No. X

**ORDER DENYING FTB'S MOTION
FOR ATTORNEY'S FEES PURSUANT
TO NRCP 68**

Defendant Franchise Tax Board of the State of California's ("Defendant") Motion for Attorney's Fees Pursuant to NRCP 68 came on for hearing before this Court on April 21, 2020, with Mark A. Hutchison appearing and presenting arguments on behalf of Plaintiff Gilbert P. Hyatt, and Pat Lundvall appearing and presenting arguments on behalf of Defendant. The Court, having considered the papers and pleadings on file and the arguments of counsel, the Court issues its decision and order as follows:

The Court previously determined, after thorough consideration and analysis, there was no prevailing party in this case, and therefore neither party is entitled to attorney's fees or costs

1 under Nevada law. The Court considered and applied the factors set forth in *Beattie v. Thomas*,
2 99 Nev. 579 (1983) and hereby finds that the Plaintiff's claims were brought in good faith under
3 the existing and applicable law at the time.

4 The Court further finds that Plaintiff's decision to reject Defendant's offer was not
5 unreasonable or in bad faith in light of the existing law at the time and as illustrated by the verdict
6 and damages awarded by the jury, which the jury deemed reasonable.

7 The attorney's fees Defendant seeks are not justified as the Court was within its discretion
8 in finding that neither party prevailed in this case and that neither party is entitled to attorney's
9 fees or costs accordingly, under NRCP Rule 68 or otherwise.

Dated this 8th day of June, 2020

10 BASED ON THE FOREGOING, AND GOOD CAUSE APPEARING,

11 IT IS HEREBY ORDERED that Defendant's Motion for Attorney's Fees Pursuant to
12 NRCP 68 is DENIED.

13 DATED: _____


DISTRICT COURT JUDGE

14
15 Approved as to form:

9C9 48F 1429 6F54
Tierra Jones

16 /s/ Pat Lundvall

17 Pat Lundvall
18 McDonald Carano LLP
19 2300 W. Sahara Avenue, Suite 1200
20 Las Vegas, NV 89102
21 *Attorney for Defendant*
22 *Franchise Tax Board of the State of California*

23 Submitted by:

24 /s/ Mark A. Hutchison

25 Mark A. Hutchison
26 Hutchison & Steffen, PLLC
27 Peccole Professional Park
28 10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Peter C. Bernhard
Kaempfer Crowell
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135
Attorneys for Plaintiff Gilbert P. Hyatt

From: Mark A. Hutchison
Sent: Thursday, May 28, 2020 8:40 PM
To: Teresa Tokumon-Phillips
Cc: Maddy Carnate-Peralta
Subject: Fwd: Hyatt/FTB

Here is Lundvall's email.

Sent from my iPhone

Begin forwarded message:

From: Pat Lundvall <plundvall@mcdonaldcarano.com>
Date: May 28, 2020 at 2:53:45 PM MDT
To: "Mark A. Hutchison" <MHutchison@hutchlegal.com>
Cc: "James W. Bradshaw" <jbradshaw@Mcdonaldcarano.com>, Rory Kay <rkay@mcdonaldcarano.com>
Subject: Re: Hyatt/FTB

Approved as to form. Please edit the approval note accordingly and then you may affix my e-signature for submission. Thanks.

Pat Lundvall | Partner

McDONALD CARANO

2300 West Sahara Avenue <x-apple-data-detectors://0/1> | <x-apple-data-detectors://0/1> Suite 1200<x-apple-data-detectors://0/1>
Las Vegas, NV 89102<x-apple-data-detectors://0/1>

100 West Liberty Street <x-apple-data-detectors://1> | <x-apple-data-detectors://1> Tenth Floor<x-apple-data-detectors://1>
Reno, NV 89501<x-apple-data-detectors://2/0>

P: 702.873.4100<tel:702.873.4100> | D: 702.257.4591<tel:702.257.4591>
C: 775.772.1822<tel:775.772.1822>

BIO<<http://www.mcdonaldcarano.com/people/pat-lundvall/>> |
WEBSITE<<http://www.mcdonaldcarano.com/>> | V-
CARD<<http://www.mcdonaldcarano.com/vcards/plundvall.vcf>> |
LINKEDIN<<https://www.linkedin.com/in/pat-lundvall-a3613b12>>

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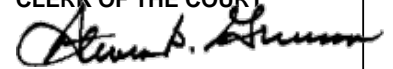
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<2020-05-22 (clean) Order Denying Def_s Mtn for Attorney_s Fees Costs - MAH 5-22-20.DOCX>



NOAS

Pat Lundvall (NSBN 3761)
Rory T. Kay (NSBN 12416)
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2300 West Sahara Avenue, Suite 1200
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Telephone: (702) 873-4100
Facsimile: (702) 873-9966
lundvall@mcdonaldcarano.com
rkay@mcdonaldcarano.com

*Attorneys for Defendant
Franchise Tax Board of the State of California*

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 SUPPLEMENTAL NOTICE
OF APPEAL**

Franchise Tax Board of the State of California ("FTB") hereby gives notice that FTB
appeals to the Supreme Court of Nevada from the following:

- Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68 (the
"Denial Order"), entered on June 8, 2020.

This Notice is intended to supplement the notice of appeal that FTB already filed in
this case on March 20, 2020, which is docketed in the Nevada Supreme Court as case
number 80884.

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1 A true and correct copy of the Denial Order is attached as **Exhibit A**.

2 Dated this 2nd day of July, 2020.

3
4 McDONALD CARANO LLP

5 /s/ Pat Lundvall

6 Pat Lundvall (NSBN 3761)
7 Rory T. Kay (NSBN 12416)
8 McDONALD CARANO LLP
9 2300 West Sahara Avenue, Suite 1200
10 Las Vegas, Nevada 89102
11 Telephone: (702) 873-4100
12 Facsimile: (702) 873-9966
13 lundvall@mcdonaldcarano.com
14 rkay@mcdonaldcarano.com

15 *Attorneys for Defendant*
16 *Franchise Tax Board of the State of California*

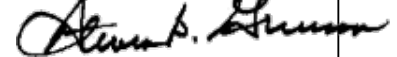
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CERTIFICATE OF SERVICE

19 I certify that on this 2nd day of July, 2020, I caused a true and correct copy of the
20 **FTB's SUPPLEMENTAL NOTICE OF APPEAL** to be electronically filed and served to all
21 parties of record via this Court's electronic filing system to all parties listed on the e-service
22 master list:

23
24
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26
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28
/s/ Beau Nelson

An employee of McDonald Carano LLP

EXHIBIT A



NEOJ

Mark A. Hutchison (4639)
HUTCHISON & STEFFEN, PLLC
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Las Vegas, NV 89135
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pbernhard@kcnvlaw.com

Attorneys for Plaintiff Gilbert P. Hyatt

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HUTCHISON & STEFFEN, PLLC

5
6 /s/ Mark A. Hutchison

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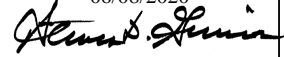
12 *Attorneys for Plaintiff Gilbert P. Hyatt*
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12 An employee of Hutchison & Steffen, PLLC
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CLERK OF THE COURT

ODM

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Attorneys for Plaintiff Gilbert P. Hyatt

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Dated this 8th day of June, 2020

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12 NRCP 68 is DENIED.

13 DATED: _____


DISTRICT COURT JUDGE

14
15 Approved as to form:

9C9 48F 1429 6F54
Tierra Jones

16 /s/ Pat Lundvall

17 Pat Lundvall
18 McDonald Carano LLP
19 2300 W. Sahara Avenue, Suite 1200
20 Las Vegas, NV 89102
21 *Attorney for Defendant*
22 *Franchise Tax Board of the State of California*

23 Submitted by:

24 /s/ Mark A. Hutchison

25 Mark A. Hutchison
26 Hutchison & Steffen, PLLC
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28 10080 West Alta Drive, Suite 200
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Reno, NV 89501<x-apple-data-detectors://2/0>

P: 702.873.4100<tel:702.873.4100> | D: 702.257.4591<tel:702.257.4591>
C: 775.772.1822<tel:775.772.1822>

BIO<<http://www.mcdonaldcarano.com/people/pat-lundvall/>> |
WEBSITE<<http://www.mcdonaldcarano.com/>> | V-
CARD<<http://www.mcdonaldcarano.com/vcards/plundvall.vcf>> |
LINKEDIN<<https://www.linkedin.com/in/pat-lundvall-a3613b12>>

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HUTCHISON & STEFFEN, PLLC

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