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may be taken at any stage of the proceeding, Fed. R. Evid. 201(d), including by an appellate court during the pendency of an appeal, *e.g.*, *In re Icenhaver*, 755 F.3d 1130, 1142 (9th Cir. 2014). Judicial notice may be taken of matters of record in administrative agencies or court proceedings. *E.g.*, *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1186 (9th Cir. 2011); *Transmission Agency of N. Calif. v. Sierra Pac. Power Co.*, 295 F.3d 918, 924 n.3 (9th Cir. 2002).

B. Numerous Judicially Noticeable Documents Show That Hyatt Bears A Substantial Share Of Responsibility For Delays

Attached to this motion are court and administrative filings that support FTB's assertions in its brief and at oral argument that Hyatt bears a substantial share of responsibility for delays in the administrative proceedings. Further evidence to that effect, and a brief narrative description of those proceedings, may be found in the declaration of Robert W. Dunn and the exhibits attached thereto. (SER 1-70).

As documents that were submitted in proceedings before the SBE; the courts of Nevada, California, and New York; and the United States Supreme Court, the exhibits to the Dunn Declaration and the other documents referenced in that declaration and attached to this motion are judicially noticeable matters of public record. The documents that are not court or administrative filings were submitted as evidence in either the Nevada jury trial or the SBE proceedings. Ex. 1, DePeel Decl. ¶5. Additionally, several judicial decisions address Hyatt's attempts to resist

the FTB's statutorily mandated investigation during the protest proceedings. *E.g.*, *Hyatt v. State Franchise Tax Bd.*, 105 A.D.3d 186, 206 (N.Y. App. Div. 2013), *aff'g* 33 Misc. 3d 500 (N.Y. Sup. Ct. 2011); *State Franchise Tax Bd. v. Hyatt*, No. C043627, 2003 WL 23100266 (Cal. Ct. App. Dec. 31, 2003)). 3RJN476-500; 7RJN1234-1246; 8RJN1491-1507. Tables that identify each of the proceedings follow below.

FTB has attempted to cull judicially noticeable documents that specifically shed light on the issue of delay from more than 20 years of administrative and judicial proceedings. Many of these documents were filed in multiple proceedings. Ex. 1, DePeel Decl. ¶5. Where possible, FTB has omitted voluminous exhibits to certain documents but can provide those to the Court if requested. Ex. 1, DePeel Decl. ¶5. Because of the complex procedural history of Hyatt's challenges to FTB's investigation and tax assessments, in multiple forums, FTB's description of these proceedings is not intended to be comprehensive. Rather, FTB simply seeks to inform the Court of the nature of each proceeding to guide its review of the judicially noticeable documents.

FTB has organized the attached documents into the following categories and has included a chronological index that identifies the paragraph of the Dunn declaration that references the document and, through reference to one or more

category numbers, the proceeding or proceedings in which each document was filed or submitted.

Category 1: FTB's Tax Audit Of Hyatt

In June 1993, FTB began an audit of Hyatt's 1989, 1990 and 1991 tax returns. Dunn Decl. ¶10, SER 3; 1RJN1-5. Through the 24 months that followed, FTB's auditors corresponded with Hyatt's representatives and conducted their audit investigation. Dunn Decl. ¶¶10-11, SER 3-4; 1RJN6-48. FTB issued a detailed tentative determination letter in July 1995, concluding that Hyatt remained a California resident through April 2, 1992 and that his 1991 California return was fraudulent. Dunn Decl. ¶12, SER 4; 1RJN21-62.

FTB gave Hyatt the opportunity to respond to the tentative audit conclusions, answer unanswered questions, and provide documents to support his position. Dunn Decl. ¶12, SER 4; 1RJN48. After Hyatt's representatives and FTB corresponded through 1995 and into 1996 regarding the tentative audit conclusions, on April 23, 1996, FTB issued a Notice of Proposed Assessment ("NPA") for the 1991 tax year. Dunn Decl. ¶12, SER 4; 1RJN63-74. FTB issued an NPA for the 1992 tax year on August 14, 1997. Dunn Decl. ¶13, SER 4; 1RJN137-141.

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Category 2: Hyatt's Protest Proceedings Before FTB

Hyatt protested the 1991 NPA in June 1996 and the 1992 NPA in October 1997. Dunn Decl. ¶14, SER 4; 1RJN75-136, 142-144. When Hyatt filed suit in Nevada (described below), the FTB lawyer designated as the protest hearing officer assigned to review Hyatt's protest was assigned to the Nevada litigation. Dunn Decl. ¶14, SER 4; 1RJN145-166. Hyatt sought numerous extensions to respond to FTB's comprehensive Information and Document Request ("IDR") and failed to voluntarily provide FTB with documents that FTB requested, even where Hyatt used those documents to benefit his Nevada litigation. Dunn Decl. ¶¶14-17, SER 4-5; 2RJN258-262, 275-305, 320-322; 3RJN325-425; 4RJN518-521.

During the course of the protest, the Nevada district court issued a protective order that placed limitations on FTB's administrative subpoena process. Dunn Decl. ¶¶16-18, SER 5-6; 2RJN263-274, 316-319. Hyatt designated as "confidential" documents that were relevant to the protest proceedings in order to keep them within the scope of the Nevada protective order. Dunn Decl. ¶¶16-18, SER 5-6; 2RJN263-274, 316-319; 3RJN465-466. Through writ petitions and appeals to the Nevada Supreme Court, FTB challenged the Nevada district court's jurisdiction over FTB and its authority to issue the protective order. Dunn Decl. ¶¶17, 20, SER 5-6; 2RJN306-315, 323-324; 3RJN426-434, 438-464. In mid-2002 the Nevada Supreme Court let the protective order stand. Dunn Decl. ¶17, SER 5;

3RJN448-450. FTB followed the procedures set forth in the protective order and asked Hyatt to release to the protest hearing officer the information he designated as “confidential” for consideration in the California tax matter. Hyatt refused. Dunn Decl. ¶¶17-18, SER 5-6; 2RJN266-267; 3RJN465-466.

FTB issued an administrative subpoena for the information Hyatt had refused to release. Dunn Decl. ¶17, SER 5; 3RJN467-470. Hyatt moved to quash the subpoena in California Superior Court, lost, and appealed. Dunn Decl. ¶17, SER 5; 3RJN471-500. Hyatt lost the appeal, and FTB’s protest hearing officer received the documents in early 2004. Dunn Decl. ¶17, SER 5; 3RJN476-500. The California appellate court held that there was no reason why FTB personnel working on the protest should not have access to evidence produced by Hyatt in his Nevada litigation. Dunn Decl. ¶17, SER 5; 3RJN490-491.

Throughout 2005 and 2006, Hyatt continued to designate documents he produced in the Nevada litigation as “confidential” and subject to the Nevada protective order, so that FTB was forced to engage in the administrative subpoena process. Dunn Decl. ¶¶17-18, SER 5-6; 4RJN605-638. Finally, in mid-2007, the protest hearing officer had received enough information to conclude the protest. Dunn Decl. ¶18, SER 6. In November 2007, FTB issued notices of assessment that upheld the audit assessments and fraud penalties. Dunn Decl. ¶18, SER 6;

4RJN641-690. Hyatt sought a six-month extension to respond. Dunn Decl. ¶19, SER 6, 13; 4RJN691.

Category 3: Nevada Court Proceedings

In January 1998, shortly after filing his administrative protests with FTB, Hyatt filed suit in Nevada state court, alleging that FTB's audit was tortious and seeking a declaratory judgment that, under California law, Hyatt was a Nevada resident during the pertinent time period. Dunn Decl. ¶14, SER 4; 1RJN145-166; 2RJN167-257. FTB filed multiple petitions for writ of mandamus and prohibition and appeals to the Nevada Supreme Court that challenged the Nevada court's jurisdiction over FTB; the protective order issued by the district court that placed limitations on FTB's protest and administrative subpoena process; and, ultimately, the jury verdict. Dunn Decl. ¶¶17-18, SER 5-6; 2RJN306-315, 323-324; 3RJN426-434, 438-464; 4RJN727-730.

Category 4: United States Supreme Court Proceedings

Twice, FTB sought review by the United States Supreme Court, arguing that the Nevada courts could not interfere with California's sovereign tax-collecting function. FTB contended that a Nevada court had no jurisdiction to hear Hyatt's challenge to FTB's tax assessment, could not issue a protective order that altered FTB's investigative and administrative subpoena powers, and had to afford FTB the same protections that the Nevada courts would grant Nevada's administrative

agencies. Twice, the Supreme Court granted the petitions. *Franchise Tax Bd. of Calif. v. Hyatt (Hyatt I)*, 538 U.S. 488 (2003); *Franchise Tax Bd. of Calif. v. Hyatt (Hyatt II)*, 136 S.Ct. 1277 (2016).

Category 5: California State Court Proceedings

Because of the Nevada protective order, FTB's litigation counsel possessed documents that were relevant to Hyatt's protest but that FTB's litigation counsel could not provide to FTB's protest hearing officer. Dunn Decl. ¶¶16-18, SER 5-6; 2RJN266-267, 316-319. The documents were housed in FTB's Sacramento office down the hall from the protest hearing officer, but the Nevada protective order barred FTB's protest hearing officer from reviewing them unless Hyatt consented or, in the absence of such consent, FTB issued an administrative subpoena. Dunn Decl. ¶¶16-18, SER 5-6; 2RJN266-267, 316-319; 3RJN465; 4RJN607. After Hyatt would not allow FTB's Nevada litigation counsel to provide the protest hearing officer with documents that Hyatt produced in discovery but stamped "confidential" and subject to the protective order, FTB issued an administrative subpoena for the documents. Dunn Decl. ¶¶16-18, SER 5-6; 3RJN465-470.

Hyatt challenged the subpoena in California Superior Court. Dunn Decl. ¶17, SER 5; 3RJN471-475. The Superior Court ordered Hyatt to comply with five of six requests. *California Franchise Tax Bd. v. Hyatt*, Case No. 02CS01582, California Superior Court, County of Sacramento. 3RJN471-472. Hyatt appealed,

and the California Court of Appeal affirmed. *State Franchise Tax Board v. Gilbert P. Hyatt*, Case No. C043627 (Cal. Ct. App. December 31, 2003). Dunn Decl. ¶17, SER 5; 3RJN476-500. FTB subsequently had to issue another administrative subpoena to Hyatt, in 2006, to obtain all the documents necessary for the protest hearing officer to conduct her statutorily mandated review. Dunn Decl. ¶¶17-18, SER 5-6; 4RJN605-640.

Category 6: Hyatt's State Board of Equalization Appeal

Hyatt appealed FTB's notices of assessment to SBE in January 2008. Dunn Decl. ¶22, SER 7; 4RJN699-724. Hyatt filed voluminous briefs and supplemental briefs, and added over two hundred new affidavits and declarations that he had not submitted to FTB during its investigation. Dunn Decl. ¶¶23-25, SER 7-8; 5RJN730-924; 7RJN1181-1403; 8RJN1466-1570; 9RJN1571-1683; 11RJN2019-2236; 12RJN2237-2278. FTB sought depositions and documents from some of Hyatt's new witnesses; Hyatt responded by seeking to quash FTB's subpoenas in the courts of California, Nevada and New York. Dunn Decl. ¶¶26-29, SER 8-9; 5RJN929-953; 6RJN954-975; 7RJN1404-1413; 8RJN1427-1570; 9RJN1571-1687, 1689-1705, 1727-1758, 10RJN1850-2000, 2004-2016. Hyatt sought numerous extensions of briefing deadlines and the hearing. Dunn Decl. ¶30, SER 9; 4RJN725-729; 6RJN1162-1180; 9RJN1762-1775, 1779-1780; 10RJN1781-1782,

1848-49, 2001-2003, 2017-2018; 12RJN2279-2282, 2298-2300. Hyatt's appeal hearing before SBE is currently scheduled for May 23, 2017. 12RJN2301-2304.

Category 7: New York State Court Proceedings

Because Hyatt appended multiple new affidavits to his voluminous briefing before SBE, in 2011, FTB issued administrative subpoenas to obtain documents from and depose certain witnesses in New York who were identified in some of Hyatt's new affidavits. Dunn Decl. ¶26, SER 9; 8RJN1427-1429. Hyatt filed a motion to quash the subpoenas in the Supreme Court of New York, Westchester County (Case No. 52961/2011) and then appealed the trial court's decision to the Appellate Division. Dunn Decl. ¶¶26-29, SER 7-9; 8RJN1427-1465; 9RJN1689-1705, 1731-1758; 10RJN1850-2000, 2004-2016. The New York proceedings lasted until September 2015. Dunn Decl. ¶28, SER 9; 10RJN2004-2016.

Tables begin on the following page

TABLES OF JUDICIALLY NOTICEABLE PROCEEDINGS

Nevada Court Cases				
Case Name	Case Number	Court	Date Commenced	Date Ended
<i>Hyatt v. Franchise Tax Bd. of Calif.</i>	A382999	Eighth Judicial District Court of Nevada	January 6, 1998	NSC remanded for new trial (but judgment vacated)
<i>Hyatt v. Franchise Tax Bd. of Calif. v. Eighth Judicial Dist. Ct.</i>	35549 and 36390 (consolidated)	Nevada Supreme Court	January 27, 2000 and July 7, 2000	April 30, 2002 (petition for certiorari granted by U.S. Supreme Court)
<i>Hyatt v. Franchise Tax Bd. of Calif. v. Eighth Judicial Dist. Ct.</i>	39274	Nevada Supreme Court	March 4, 2002	April 30, 2002 (petition for certiorari granted by U.S. Supreme Court)
<i>Franchise Tax Bd. of Calif. v. Hyatt</i>	39312	Nevada Supreme Court	March 8, 2002	April 30, 2002 (petition for certiorari granted by U.S. Supreme Court)
<i>Franchise Tax Bd. of Calif. v. Hyatt</i>	53264	Nevada Supreme Court	February 13, 2009	Ongoing
<i>Franchise Tax Bd. Of Calif. v. Hecht</i> (represented by Hyatt's attorneys)	A-09-593462-C	Eighth Judicial District Court of Nevada (motion for protective order from FTB's administrative subpoenas)	June 26, 2009	August 18, 2011

Nevada Court Cases				
Case Name	Case Number	Court	Date Commenced	Date Ended
<i>Franchise Tax Bd. of Calif. v. Hyatt</i>	A-11-635345-C	Eighth Judicial District Court of Nevada (proceeding on motion to quash FTB's administrative subpoenas)	February 16, 2011	July 12, 2013

California Court Cases (regarding FTB's administrative subpoena to Hyatt)				
Case Name	Case Number	Court	Date Commenced	Date Ended
<i>California Franchise Tax Bd. v. Hyatt</i>	02CS01582	Superior Court of California, County of Sacramento	October 11, 2002	February 28, 2003
<i>California Franchise Tax Bd. v. Hyatt</i>	C043627	Court of Appeal of California, Third Appellate District	March 20, 2003	December 31, 2003
<i>California Franchise Tax Bd. v. Hecht, Hyatt, Real Party in Interest</i>	34-2009-00047634	Superior Court of California, County of Sacramento (Request for Issuance of Out of State Commissions)	June 24, 2009	June 24, 2009
<i>California Franchise Tax Bd. v. Stratton, Hyatt, Real Party in Interest</i>	34-2011-00096505	Superior Court of California, County of Sacramento (Request for Issuance of Out of State Commissions)	February 7, 2011	February 7, 2011

New York Court Cases				
Case Name	Case Number	Court	Date Commenced	Date Ended
<i>In re Out-of State Subpoenas (U.S. Philips Corporation, Jack Haken and Algy Tomashunas)</i>	52961/2011	Supreme Court of New York, County of Westchester	July 20, 2011	July 29, 2011
<i>In re Hyatt's Petition to Suppress Disclosure Improperly Obtained by Franchise Tax Board in Response to Three Out-of-State Subpoenas Previously Modified or Narrowed by New York Court Orders</i>	57751/2013	Supreme Court of New York, County of Westchester	May 14, 2013	March 13, 2014
<i>Hyatt v. California Franchise Tax Bd.</i>	2011-6859	Supreme Court of New York, County of Westchester Appellate Division	August 2, 2011	March 13, 2014
<i>In re Hyatt's Petition for Civil Contempt Order</i>	53655/2015	Supreme Court of New York, County of Westchester	March 11, 2015	September 15, 2015

United States Supreme Court Cases				
Case Name	Case Number	Court	Date Commenced	Date Ended
<i>California Franchise Tax Bd. v. Hyatt</i>	02-42	United States Supreme Court	July 2, 2002	May 23, 2003
<i>California Franchise Tax Bd. v. Hyatt</i>	14-1175	United States Supreme Court	March 25, 2015	May 23, 2016

Proceedings Before the California Board of Equalization			
Matter Name	Case Number	Date Commenced	Date Ended
<i>Appeal of Gilbert P. Hyatt</i>	435770	January 22, 2008	Hearing delayed to May 23-25, 2017 at Hyatt's request
<i>Appeal of Gilbert P. Hyatt</i>	446509	January 23, 2008	Hearing delayed to May 23-25, 2017 at Hyatt's request

III. Conclusion

As stated at the outset, the key issue on appeal is whether California's pay-then-protest procedure, Cal. Rev. & Tax Code § 19382, affords Hyatt a plain, speedy, and efficient remedy for his claims. The materials attached to this motion relate not to that issue, but to whether § 19381 has afforded Hyatt a plain, speedy, and efficient remedy—an issue the district court did not find it necessary to reach. For the assistance of the Court, however, Appellees respectfully submit that the Court may take judicial notice of the attached documents.

Respectfully submitted,

Dated this 17th day of March, 2017

/s/ Debbie Leonard

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

1. The motion contains 2,981 words.
2. The motion has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated this 17th day of March, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/Pamela Miller
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No. 15-15296

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GILBERT P. HYATT

Plaintiff-Appellant,

v.

BETTY T. YEE, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California, No. 2:14-cv-00849-GEB-DAD (Burrell, J.)

**APPELLEE FRANCHISE TAX BOARD'S
REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE
AND OPPOSITION TO HYATT'S
COUNTER REQUEST FOR JUDICIAL NOTICE**

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I. Introduction

In his opposition to FTB's Motion for Judicial Notice, Hyatt does not dispute that the judicially noticeable documents submitted by FTB show that Hyatt sought delay during the administrative proceedings before FTB and SBE. Nor does Hyatt dispute that the documents submitted by FTB are true and accurate copies of documents in the public record. Instead, Hyatt asks the Court to take judicial notice of trial testimony and other documents because, according to Hyatt, there is a "disputed factual question of delay." ECF #64 at 2.

Hyatt misses the point. FTB's judicially noticeable documents depict Hyatt's activities in multiple administrative and judicial proceedings to obstruct or delay the proceedings. While Hyatt might contend that FTB and SBE also contributed to delay, he does not dispute his own contributions, which as a matter of law, cause his constitutional claims to fail even under FTB's *factual* challenge to jurisdiction, which the district court did not resolve and which is not before this Court. At any rate, any factual dispute as to who was responsible for delays in the administrative proceedings is irrelevant to FTB's *facial* challenge to jurisdiction, which was the basis for the district court's dismissal of this action and which should be the basis for this Court's affirmance.

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II. Argument

A. Hyatt's Opposition Underscores That The District Court's Dismissal Under The Tax Injunction Act Should Be Affirmed

Contrary to Hyatt's contention (ECF #65 at 1), the issue of delay is not "inextricably intertwined" with the Tax Injunction Act analysis because, at all times, Hyatt could have availed himself of California's pay-then-sue method afforded by Revenue and Tax Code section 19382. Under section 19385, that process would have afforded Hyatt an absolute right to proceed to court no later than six months after filing a refund claim with FTB. "It has consistently been held, without a single instance of deviation, that the refund action provided by California Personal Income Tax Law is a 'plain, speedy and efficient remedy' such as to invoke the restraints of 28 U.S.C. § 1341." *Aronoff v. Franchise Tax Bd. of Cal.*, 348 F.2d 9, 11 (9th Cir. 1965); *see also Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 338-39 (1990) ("California's refund procedures constitute a plain, speedy, and efficient remedy."); *Jerron West, Inc. v. State Bd. of Equalization*, 129 F.3d 1334, 1339 (9th Cir. 1997) ("[b]ased on a plain reading of the [TIA], the district court does not have jurisdiction over the Taxpayers' action if it seeks district court interference with California's tax assessment and collection process.").

For that reason, while the judicially noticeable documents shed light on Hyatt's substantial role in causing the delay in his administrative proceedings—

and thus on FTB's *factual* challenge to jurisdiction— the availability of the plain, speedy and efficient remedy that section 19382 affords renders the question of delay irrelevant to FTB's *facial* challenge to jurisdiction, which is the one before this Court. At any time, Hyatt could have paid the tax and been able to access California state court to challenge the tax within six months. The fact that Hyatt chose not to pay the assessed taxes (and thereby, in the interim, invest or otherwise benefit from his use of the money he owed to California) does not give him the right to access the federal courts to challenge the state's tax collecting function. Whether or not the Court takes judicial notice of the documents that show Hyatt's role in the delay, therefore, it should affirm the district court's dismissal on jurisdictional grounds.

B. Hyatt Does Not Dispute That Numerous Judicially Noticeable Documents Show That Hyatt Bears A Substantial Share Of Responsibility For Delays

Whether or not Hyatt is correct that the overall cause of delay in the FTB proceedings could reasonably be disputed (ECF #65 at 2), Hyatt does not actually dispute that the documents of which FTB seeks judicial notice satisfy the standard set forth in Fed. R. Evid. 201(b). For example, Hyatt does not contest that:

1. Hyatt designated as “confidential” and subject to the Nevada Protective Order documents he produced in the Nevada litigation such that, absent Hyatt's consent, FTB's protest hearing officer had to go through the

administrative subpoena process in order to get those documents. Hyatt did not voluntarily produce these documents to FTB's protest hearing officer, even though those documents had already been gathered in the Nevada litigation. 2RJN263-274; 3RJN465-500; 4RJN605-618.

2. Hyatt's attorney admitted there were "no 'pure' tax reasons" to move to quash FTB's administrative subpoenas issued during the protest but "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)." 2RJN258.
3. Hyatt mounted unsuccessful legal challenges to FTB's administrative subpoenas and then ultimately Hyatt and third parties whom Hyatt sought to prevent from producing documents were compelled by court order to produce the documents sought by FTB. 3RJN465-500; 7RJN1411-1413; 8RJN1427-1465; 9RJN1684-1687, 1689-1705, 1727-1758; 10RJN2004-2016.
4. Hyatt sought numerous extensions of time in the administrative proceedings to respond to document requests and submit briefs. 4RJN725-729; 6RJN1161-1180; 9RJN1768-1780; 10RJN2001-2003; 11RJN2001-2003, 2017-2018.

5. The hearing on Hyatt's appeals to SBE is scheduled for May 23-25, 2017 after Hyatt requested a continuance from the March 2017 hearing date originally set. 12RJN2300-2304.

Given that Hyatt's opposition presented no "reasonable dispute" as to these facts, they are appropriate for judicial notice. *See* Fed. R. Evid. 201(b). And because Hyatt does not dispute these facts, the Court is not taking on the role of "fact finder" by exercising its power of judicial notice. Rather, it may simply take judicial notice of the documents that show Hyatt's role in causing the delay.¹

C. Hyatt Has No Right To Proceed Beyond The Pleadings Stage Where The Judicially Noticeable Documents Contradict His Allegations

Unable to dispute the documents in the public record, Hyatt falls back on the allegations in his complaint to argue that a remand is warranted for judicial fact finding. (ECF #65 at 6). However, a court need not accept as true allegations in a complaint that are contradicted by facts that may be judicially noticed. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (taking judicial notice in the context of reviewing order granting Fed. R.

¹ Hyatt's contention that a factual dispute exists regarding delay simply regurgitates what he argued in his answering brief to the Nevada Supreme Court. *See* Hyatt Ex. 2. To the extent the Court would like to review FTB's counter position, FTB supplements its motion for judicial notice to include the opening and reply briefs that FTB filed in the Nevada appeal. 13RJN2305-2448; 14RJN2449-2634.

Civ. P. 12(b)(6) motion). “A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment, as long as the facts noticed are not subject to reasonable dispute.” *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (internal quotations omitted). Because the judicially noticeable documents submitted by FTB contradict the allegations in Hyatt’s complaint, Hyatt has no right to proceed past the pleadings.

D. Hyatt’s Role In Causing Delay Bars His Due Process Claims

Hyatt admits that the documents of which he separately seeks judicial notice, at a minimum, lay some responsibility for delay at his feet. ECF #65 at 9. Where a person who claims a due process violation as a result of delay in an administrative proceeding is partially responsible for the delay or fails to avail himself of procedural remedies that could have expedited the process, no due process claim can lie. *See Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1078 (5th Cir. 1973) (in the context of a due process challenge to a delay in holding a *post*-deprivation hearing, declining to find due process violation “considering [the plaintiff’s] part in the delay”); *Irish v. Sec. & Exch. Comm’n*, 367 F.2d 637, 639 (9th Cir. 1966) (finding no due process violation for delay in administrative proceedings where petitioner failed to avail himself of remedies that could have expedited review); *Badgett v. District of Columbia*, 925 F.Supp.2d 23, 32 (D.C.

2013) (granting a motion to dismiss a procedural due process claim because “no ... constitutional violation occurs” where a “plaintiff fails to take advantage of” “procedural safeguards that exist to obviate prejudice from delay” in an administrative proceeding). In light of these authorities, Hyatt’s admission that he played a part in the delay bars his claims.

E. Witness Testimony Is Not A Proper Subject Of Judicial Notice

Without disputing the facts in FTB’s judicially noticeable documents that show his role in the delay, Hyatt asks the Court to separately take judicial notice of witness testimony from the Nevada litigation that, according to Hyatt, shows delay by FTB. A court cannot take judicial notice of testimony from a previous judicial proceeding if it “constitutes ‘adjudicative facts’” that “are in ‘reasonable dispute.’” *United States v. Decker*, 600 F.2d 733, 738 n.9 (9th Cir. 1979) (quoting Fed. R. Evid. 201). Because the testimony of which Hyatt seeks judicial notice consists of opinions that are “not ‘generally known’ or ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,’” judicial notice is prohibited. *Id.*, quoting Fed. R. Evid. 201. As a result, the Court should decline to take judicial notice of the trial testimony offered by Hyatt.

F. Having Been Vacated By The Supreme Court, The Nevada Judgment Has No Preclusive Effect

Finally, faced with the voluminous documents that show his efforts to obstruct and delay the administrative proceedings, Hyatt resorts to a baseless contention that the now-vacated Nevada Supreme Court opinion has preclusive effect on this proceeding as to the issue of delay. ECF #65 at 6 n.2, 8-9. Hyatt is wrong. The Nevada Supreme Court opinion to which Hyatt points, *Franchise Tax Bd. of Calif. v. Hyatt*, 335 P.3d 125 (Nev. 2014) (“2014 Opinion”), has been vacated as unconstitutional by the Supreme Court of the United States because it was based on “a special rule of Nevada law that is hostile to its sister States.” *Franchise Tax Bd. of Calif. v. Hyatt* (“*Hyatt II*”), 136 S.Ct. 1277, 1283 (2016). The law is clear that the Supreme Court’s vacatur of a lower court’s judgment “deprives that court’s opinion of precedential effect, leaving th[e Supreme] Court’s opinion and judgment as the sole law of the case.” *O’Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975); *see also Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (citing *O’Connor* for the proposition that “[a] decision may be *reversed* on other grounds, but a decision that has been *vacated* has no precedential authority whatsoever” (emphasis in the original)). Contrary to Hyatt’s misrepresentation, the Supreme Court vacated (not reversed) the 2014 Opinion.

Hyatt II, 136 S.Ct. at 1283. As a result, Hyatt cannot rely on the now-vacated 2014 Opinion to assert preclusive effect regarding the issue of delay.²

Even were this Court to take everything in the Nevada Supreme Court's vacated opinion at face value (which FTB posits it may not do), there is no collateral estoppel effect on this proceeding because the Nevada jury did not render a special verdict that the FTB caused the protest to take as long as it did. Rather, the jury simply found in Hyatt's favor on various claims, and in determining that the evidence was sufficient to support those verdicts, the Nevada Supreme Court pointed out that the eleven-year delay was among the grounds on which the jury *could have* found FTB liable. 2014 Opinion, 335 P.3d at 148. Delay was not the only potential ground the Nevada Supreme Court listed, so no one actually knows what facts the jury found in support of its ultimate verdict. *See id.* For this reason as well, Hyatt's collateral estoppel argument must be rejected.

III. Conclusion

Nothing presented in Hyatt's opposition disputes the facts shown in the judicially noticeable documents that Hyatt is substantially responsible for the delay in his administrative proceedings. Hyatt admits he bears some responsibility. Moreover, because Hyatt could at any time have availed himself of California's

² The Nevada Supreme Court has entertained post-mandate supplemental briefing and has scheduled oral argument for May 2, 2017.

pay-then-sue procedure, he has at all times had a plain, speedy and efficient remedy to challenge FTB's tax assessment regardless of who bears what proportion of responsibility for the duration of the FTB proceedings. As a result, whether or not the Court takes judicial notice of these documents, FTB respectfully submits that the district court's dismissal order should be affirmed.

Respectfully submitted,

Dated this 14 day of April, 2017

/s/ Debbie Leonard

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C).

1. The reply contains 2,118 words.
2. The reply has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated this 14th day of April, 2017

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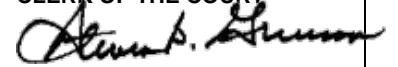
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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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
4 order of the district court granting expert witness fees and costs.

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

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

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

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

28 As discussed above, FTB is sensitive to Hyatt's claim that reviewing FTB's
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

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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

22 /s/ Beau Nelson

23 An employee of McDonald Carano LLP
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EXHIBIT A

EXHIBIT A

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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT HYATT,)	CASE#: 98A382999
Plaintiff,)	DEPT. XVIII
vs.)	
CALIFORNIA STATE FRANCHISE)	
TAX BOARD,)	
Defendant.)	

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

RECORDER’S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES:

For the Plaintiff:	MARK A. HUTCHISON, ESQ.
For the Defendant:	PAT LUNDVALL, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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Las Vegas, Nevada, September 3, 2019

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

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

MR. HUTCHISON: Good morning, Your Honor.

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

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

THE COURT: Okay.

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

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

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

THE COURT: Okay.

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

4 THE COURT: Right.

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

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

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

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

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

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

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

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

1 it's completely wrong, Your Honor.

2 THE COURT: Counsel?

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

9 THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 THE COURT: Sure. Please.

4 MS. LUNDVALL: Thank you.

5 THE COURT: Thank you.

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

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

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

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

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

18 MR. HUTCHISON: Right.

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

21 MR. HUTCHISON: Right.

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

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